The Untimely SEP Death in Federal Enforcement Cases:
By Nathan E. Vassar

The use of Supplemental Environmental Projects ("SEPs") in the enforcement context has been a widely accepted practice for many years for defendants wishing to fund projects in lieu of a full civil penalty in enforcement actions. At both the state level and federal level, SEPs have been useful tools in pursuing environmental benefit without having to write a check (or a more sizable check) to the state/federal treasury. Both TCEQ and EPA have endorsed the use of SEPs over time, including for municipal and public utilities whose ratepayer funds can be better tailored to improvement projects with a SEP, than to funnel to the treasury coffers in Austin or Washington, D.C.

On August 21, 2019, however, the federal policy changed, as the U.S. Department of Justice ("DOJ") released a memorandum prohibiting the use of SEPs in settlements with state/local governments. Citing the rationale of an earlier DOJ memo from 2018, DOJ is now taking the position that because SEPs go beyond the four corners of applicable environmental laws (by their very name and nature, SEPs are ***supplemental*** to existing requirements), they cannot be used in settlements.

The consequences of the position shift are far-reaching, as it both increases the amounts of civil penalties that would otherwise be reduced by the pursuit of a SEP project, and limits a community's ability to fund projects that can yield important results for infrastructure, receiving streams, and public health and safety. Although the DOJ memo does not impact cases that are state-only (i.e., where TCEQ brings an enforcement action), it does impact settlements on Clean Water Act issues that implicate both the federal government and the State of Texas as Plaintiffs.

Utilities wishing to implement SEPs may still be able to pursue such projects in other contexts, whether that be state enforcement, or outside the confines of an enforcement matter.

The Texas policy includes three types of SEP approaches, including Compliance SEPs, where past expenditures can count toward a penalty amount if one can show a nexus between the investment and permit compliance. Others include pre-approved SEPs for projects the State has already identified, as well as custom SEPs that are tailored to a community's particular project focus.

The recent federal position will have an impact on POTWs facing federal enforcement, and the removal of a tool that some utilities have found critical to support compliance and limit financial exposure to penalties. As the implementation process now begins, utilities should consider how this may impact planning and negotiation positions on current and future enforcement matters.

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