

**Use of Supplemental Environmental Projects to
Address Environmental Justice**

By Meredith L. Flax and Benjamin F. Wilson¹

Supplemental Environmental Projects (“SEPs”) are an underutilized mechanism that governments, corporations, and developers (“defendants”) can use to right environmental injustice in the course of settling a penalty action by the United States Environmental Protection Agency (“EPA”). Although in other circumstances EPA, defendants, and local communities may be on opposite sides of the bargaining table, in certain circumstances, SEPs provide these groups a win-win opportunity to benefit the health and environment of minority and low income communities. This article presents a basic overview of the relationship between SEPs and environmental justice, provides some examples of SEPs used to foster environmental justice, and ends with some practical suggestions on what EPA, defendants, and local communities can do to better utilize the SEP mechanism.

A SEP is an environmentally beneficial project that a defendant agrees to undertake in settlement of a civil penalty action by EPA. In return, the SEPs cost is considered as a factor in establishing the amount of a final cash penalty. EPA has developed a policy that promotes the incorporation of SEPs into settlement discussions, and outlines a method for selecting appropriate SEPs.² Although environmental justice is not listed as a particular SEP category,

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² See U.S. Environmental Protection Agency, Supplemental Environmental Projects Policy, May 1, 1998 (“*SEP Policy*”). Of note in this context, EPA cannot approve a SEP unless
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EPA's SEP Policy encourages SEPs in communities where environmental justice issues are present.³

Case Examples

- In December 1996, the Tenneco Oil company agreed to perform a SEP for the Sac and Fox Nation in Okalahoma as part of a \$3.5 million settlement resolving allegations that the company polluted groundwater of the Nation. Tenneco agreed to construct water supply wells and delivery systems on more than 120 acres of land to be purchased by Tenneco and deeded to the Nations. The company also agreed to restore an area of tribal land damaged by years of oil and gas retrieval.⁴
- As part of a 1997 consent decree to resolve violations of the Clean Air Act, the Sherwin-Williams resin and paint facility in southeast Chicago agreed to perform a SEP to clean up a Brownfields site located about a mile from the facility. The neighborhoods surrounding the site are primarily African-American. The SEP aims to improve the quality of life of those people that have been and will be affected by any pollution generated by the Sherwin-Williams facility.⁵
- In September, 1998, the City of Atlanta, Georgia agreed to perform two SEPs as part of a settlement resolving violations of the Clean Water Act and Georgia Water Quality Control Act. For one SEP, the City acquired and maintains protected areas along selected

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there is a sufficient nexus between the SEP and the type of resource or geographical area affected by the violation. *Id.*

³ *Id.*

⁴ See *Innovative Enforcement Settlements Advance Environmental Justice*, OECA Echo, EPA Office of Enforcement and Compliance Assurance, April-July 1997.

⁵ See *Beyond Compliance: Supplemental Environmental Projects*, EPA Office of Enforcement and Compliance Assurance, January 2001.

portions of streams originating in or flowing through the City of Atlanta. For the other SEP, the City cleaned-up trash and debris from the banks of selected streams affected by the violations. Both SEPs include an environmental justice component which provides for the establishment of a SEP Advisory Committee to give advice and recommendations to the City regarding suggestions from minority communities -- mainly African-American and Hispanic American -- affected by the violations in the development, management, and implementation of both SEPs.⁶

Practical Suggestions

There is much that EPA, defendants, and minority and low income communities could do to increase the number of environmental justice SEPs that are performed each year. While there are many barriers to participation in SEPs generally, including lack of interest, inconsistency with EPA's SEP Policy, and lack of resources, many more SEPs could be performed if the parties are educated about the potential rewards of SEP participation and how to successfully negotiate the SEP process. EPA has provided a number of suggestions for improving the chances that an environmental justice SEP will be implemented.⁷ In addition, we have included some of our own suggestions:

EPA

- *Education.* EPA should better educate all parties on the value of SEPs and educate communities about EPA databases that have information about SEPs.⁸ Communities that

⁶ *Id.*

⁷ Draft EPA Guidance for Community Involvement in Supplemental Environmental Projects, 65 Fed. Reg. 40639 (June 30, 2000) ("*SEP Guidance*").

⁸ *SEP Guidance* at 40643.

are aware that EPA has brought an enforcement action for a violation in their community can capitalize on opportunities to participate in SEPs.

- *Improve monitoring and enforcement.* Through more vigilant monitoring and enforcement, EPA can ensure that minority and low income communities are not disproportionately harmed by pollution without being compensated in some way.
- *Serve as a go-between and manager.* If a defendant is interested in performing a SEP, but the defendant is reluctant to involve itself in the community because of the resources it will have to expend and the potential for raising unrealistic expectations, EPA could serve as a go between and manager for the SEP project or could engage a liaison to perform the same task. In such a scenario, EPA/Liaison would: (1) provide the community with information about the SEP process; (2) provide the community with information on the requirements of the SEP policy, emphasizing that EPA cannot unilaterally impose SEPs and that EPA is the final decision-maker on SEPs; (3) solicit the level of interest of the community and community leaders; (4) identify problem areas and solicit suggestions of desirable and acceptable projects; (5) create a timeline of milestones to keep the SEP process from impeding the progress of the settlement process; and (6) ensure the community does not have unrealistic expectations.⁹
- *Develop SEP Banks.* SEP Banks are “[r]egional inventories of potential SEPs that can be consulted in individual cases where the defendant requests assistance in identifying appropriate SEPs.”¹⁰ Development of SEP Banks would help eliminate defendants’ reluctance to participate in the SEP process by reducing the amount of resources

⁹ *SEP Guidance* at 40643.

¹⁰ *SEP Guidance* at 40641.

defendants would have to spend on outreach efforts and by giving defendants an idea of a potential SEP project without involving the community and thus potentially raising expectations.¹¹

- *Extra credit for environmental justice SEPs.* EPA should give strong consideration to amending its SEP Policy to give defendants more credit for environmental justice SEPs than other SEPs, thereby providing defendants an additional incentive to perform SEPs in minority and low income communities.¹²
- *Other amendments to the SEP Policy.* In addition to giving defendants more credit for environmental justice SEPs, EPA could amend its SEP Policy so that more environmental justice projects are eligible for consideration as SEPs.¹³ One way EPA could do so is to relax the nexus requirement for environmental justice SEPs.¹⁴ EPA could then approve environmental justice SEPs which have little or no connection between the violation and the proposed project but still advance the SEP goals of protecting and enhancing public health and the environment.¹⁵

¹¹ *Id.*

¹² *Opportunities for Advancing Environmental Justice: An Analysis of U.S. EPA Statutory Authorities*, Environmental Law Institute Research Report, November 2001.

¹³ *Id.*

¹⁴ *See fn 2, infra.*

¹⁵ We recognize that there might be some concern that a SEP which has little or no connection to the violation is not a proper remedy for that violation. However, there are advantages to such an approach. First, instead of animosity between the community and the defendant because of the violation, there is likely to be only goodwill. Second, although the nexus between this particular violation and the SEP is absent, there is still an environmental problem that is being remedied. Moreover, the SEP in such a case could be limited in dollar amount so that the bulk of the penalty goes to addressing the violation.

- *Encourage states to adopt environmental justice SEP policies/statutes.* EPA should encourage states to enact a SEP policy or statute similar to EPA's SEP Policy.¹⁶ This would give both defendants and minority and low income communities additional opportunities to participate in SEPs.

Defendants

- *Pre-enforcement outreach.* Defendants should be involved in the communities surrounding their facilities or projects. By doing so, defendants can develop relationships with community leaders that will serve them if any need for a SEP arises. Additionally, defendants could perform SEP-type projects on their own outside the context of a settlement as part of their way to give back to the community and promote goodwill for the company in the community.
- *Active participation in SEPs.* Defendant's have much to gain from active participation in SEPs. A defendant's active participation and inclusion of public input into a SEP is one of the factors EPA uses to determine the penalty mitigation for a SEP.¹⁷ Moreover, active participation can provides a defendant with an opportunity to improve its image and goodwill with the community where the violation occurred.
- *Encourage EPA to develop SEP Banks and to amend the SEP Policy.* Since defendants are ultimately responsible for performing SEPs,¹⁸ EPA is likely to be responsive to making changes in the SEP Policy that defendants want.

¹⁶ One state has already done so. *See* Code of Virginia § 10.1-1186.2.

¹⁷ *SEP Policy.*

¹⁸ *Id.* A defendant that agrees to a SEP is responsible for implementation of the SEP and so cannot, for example, give money directly to the community for a project. *Id.*

Communities

- *Education.* Communities should educate themselves about SEPs and what they can do to bring a successful SEP to their community.
- *United front.* Competing groups within the community groups should work to resolve their differences before meeting with EPA or defendants. Otherwise, there is a good chance that EPA and defendants will be reluctant to work with the community for fear that to do so will require too much time, money and effort and that any resulting SEP would have a poor chance for success. In addition, approval of a SEP by one group would not assure approval by a second. Therefore, defendants will be less willing to seek to agree to a SEP absent assurance there is “buy in” from all community groups. Moreover, the community should elect an individual or group of individuals to represent the community in any discussions with EPA or defendants.
- *Assess priorities early.* The community should organize to create an ongoing list of environmental and health projects, in order of priority. That way the community will be prepared if an opportunity to participate in a SEP arises or could be used for other purposes, such as obtaining grants to address problems, etc. Similarly, communities could offer projects to and encourage EPA to develop SEP Banks.
- *Monitoring.* Community leaders should work with local public health and environmental authorities to quickly identify the adverse impacts to the health and environment affecting minority and low income residents attributable to pollution.

Conclusion

The potential for SEPs to remedy environmental injustice is great. As EPA itself has said:

Emphasizing SEPs in communities where environmental justice concerns are present helps ensure that persons who spend significant portions of their time in

areas, or depend on food and water sources located near, where the violations occur would be protected.¹⁹

EPA, defendants, and minority and low income communities have much to gain and little to lose by participating in SEPs and thus should more seriously consider ways to promote SEPs in the environmental justice context.

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¹⁹ *SEP Policy*.