



CLIENT ALERT
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EPA Is Prohibited from Using Supplemental Environmental Projects in All Settlements, But Environmental Benefit Projects Remain Alive and Well in New York State

On March 12, 2020, the United States Department of Justice (DOJ) issued a memorandum prohibiting the United States Environmental Protection Agency (EPA) from using Supplemental Environmental Projects (“SEPs”) in civil settlements with state and local governments, as well as with private parties. SEPs had been used by EPA in settlements since about 1980. SEPs consisted of environmentally beneficial projects or activities that were not required by law but that a defendant agreed to undertake as part of the settlement of an enforcement action. If a defendant agreed to undertake a SEP, EPA could impose a lesser penalty. The SEP needed to have a sufficient nexus to the legal violations at issue and could not be used to fund activities performed by federal agencies or on federally owned properties. In its March 12 memo, the DOJ expanded upon a prior memo dated August 21, 2019 addressing settlements with state and local governments and concluded that SEPs are not permitted in any civil settlements. The DOJ reasoned that SEPs constitute an improper diversion of money from the United States Treasury, which is not authorized by Congress.

Similar to EPA, the New York State Department of Environmental Conservation (DEC) utilizes Environmental Benefit Projects in the settlement of civil enforcement actions. DEC’s current Environmental Benefit Projects (EBP) Policy ([Commissioner Policy 37](#)) defines EBPs as projects that an administrative respondent or judicial defendant agrees to undertake as part of the settlement of an enforcement matter. EBPs must improve, restore, protect or reduce risks to public health or the environment beyond that achieved by a respondent’s full compliance with applicable laws and regulations. Any EBP must be in addition to actions correcting the violations that are the subject of the enforcement, and in addition to the restoration of any natural resources injured by the violations.



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It is within DEC's discretion to suspend the obligation to pay a portion of a penalty where a respondent agrees to undertake an EBP, although "reduction of assessed penalties by use of an EBP should not detract significantly from the general deterrent effect of the settlement as a whole." Accordingly, "every settlement involving an EBP should include a material payable penalty."

The DOJ's memo prohibiting EPA's use of SEPs assumes that the use of SEPs in settlements necessarily resulted in a loss of funds to the United States Treasury. This assumption fails to consider the wide variety of factors that can move parties to settle enforcement actions. In the appropriate situation, the inclusion of a SEP or EBP can be the difference between reaching a settlement or having a case drag on for years, without receipt of any penalties and requiring the use of scarce government resources that could be spent prosecuting other cases that result in the collection of monetary penalties. SEPs and EBPs provide both an important lever to facilitate settlements and an opportunity to improve, restore, protect or reduce risks to public health or the environment. While EPA has lost the ability to utilize SEPs in settlements, as of now EBPs remain part of DEC's settlement toolbox.

Mintzer Mauch PLLC's attorneys have settled a number of DEC enforcement actions utilizing EBPs. While serving as Regional Attorney-General Counsel for DEC Region 2, Karen Mintzer was instrumental in establishing the [EBP Idea Bank](#). The EBP Idea Bank makes it easier to identify potential EBPs that may be included in settlements as appropriate.