

Environmental Laws and Alternative Dispute Resolution: Tools for Environmental Justice

Supplemental Environmental Projects

What is a Supplemental Environmental Project (SEP)?

A supplemental environmental project (SEP) is an environmentally beneficial project that a violator voluntarily agrees to perform as part of a settlement of an enforcement action. In return, EPA agrees to reduce the monetary penalty that would otherwise apply as a result of the violation(s). Since SEPs are part of a settlement, they must meet the following legal requirements:

- SEPs must improve, protect, or reduce risks to public health or the environment at large. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits public health and/or the environment;
- A relationship between the SEP and the violation must exist. For example, a company that violates the Clean Water Act may propose a SEP that reduces the amount of pollutants it discharges into a river to an amount below what the law requires;
- SEPs must be voluntary. The project cannot be required by any federal, state, or local law or regulation. SEPs may include activities that the violator will become legally obligated to undertake two or more years in the future, as long as the regulation or statute does not benefit the violator for early compliance;
- SEPs cannot have been committed to or started before EPA identifies the violation (e.g., issued a notice of violation, administrative order or complaint). This is because the primary purpose of SEPs is to obtain environmental or public health benefits that may not have occurred “but for” the settlement;
- EPA plays no role in managing funds or controlling performance of a SEP. EPA may perform oversight to ensure that a project is implemented pursuant to the provisions of the settlement, and have legal recourse if the SEP is not adequately performed;
- The type and scope of project must be determined in a signed agreement. In other words, one cannot just agree to pay a certain sum of money on project(s) to be defined later; and
- A SEP must not increase EPA’s or any federal agency’s resources to perform activities that the agency is legally required to perform itself. Similarly, a project cannot provide a federal grantee with additional funds to perform a specific task identified in an assistance agreement.

Categories of SEPs

SEP Projects **CAN** address:

- Public Health;
- Pollution Prevention;
- Pollution Reduction;
- Environmental Restoration and Protection;
- Assessments and Audits;
- Environmental Compliance Promotion; and
- Emergency Planning and Preparedness.

SEP Projects **CANNOT** address:

- General public educational or environmental awareness projects;
- Contributions to environmental research at a local university;
- Conducting a project that benefits the public, but does not enhance environmental protection;
- Studies or assessments undertaken without a requirement to address the problems identified in the study; or
- Projects that already receive financial support, through subsidies, grants, contracts, or other assistance, from the federal government.

Public Involvement

Enforcement settlement negotiations are confidential. This is to ensure that both parties involved in the lawsuit will be open and honest in communication without worrying about repercussions in the case. However, some violators who agree to perform an SEP will also want community input on issues surrounding the SEP. You can get involved in these ways:

- EPA will hold a public meeting to give the community information on the SEP. Attend this meeting and voice your opinions, concerns, and suggestions.
- In certain cases, EPA will publish the proposed settlement in the Federal Register before the settlement becomes legally effective. The proposed settlement will then have a period for comments from the public. EPA gives serious consideration to any comments on proposed settlements and SEPs.
- EPA keeps a list of ideas for SEPs in an “SEP library.” Design your own SEP for your community and send it in as a suggestion for possible use in a future enforcement settlement.

Examples (from EPA's website)

Within Pennsylvania's Chester-Upland Public Schools, children with asthma are receiving treatment and education about this devastating disease. These students were being diagnosed with asthma at an alarming rate, almost twice the national average. When the Crozer Chester Medical Center entered into a SEP agreement with EPA and the Chester-Upland School District to resolve Clean Air Act violations, the medical center agreed to implement a comprehensive asthma detection and treatment program in the Chester-Upland public schools. The primary goal of this program was to reduce the long-term impact of asthmatic conditions in this student population. As a direct result of these initiatives, diagnosed students are linked to medical care programs designed to enhance their asthma management. The students and their families are educated to improve daily asthma management and to reduce exposure to environmental irritants. This SEP responds to a

Examples, continued

community-specific, environmentally related need in this affected area. In addition, it also meets the primary purpose of the SEP policy—encouraging and obtaining environmental and public health protection and improvements.

S.C. Johnson & Son resolved violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) by paying a penalty and agreeing to assist the Asthma and Allergy Foundation of America (AAFA) with the purchase and staffing of a mobile asthma clinic (a Breathmobile®). Staffed by a physician, a nurse, and a respiratory therapist, the Breathmobile® will provide preventative health care as well as specialized asthma treatment to high-risk, inner-city children. The great advantage to this mobile asthma clinic is that it brings consistent state-of-the-art medical care to inner city, underprivileged children right at their elementary school. These children would otherwise not have routine access to effective asthma care. Studies suggest that children who remain in the program for three visits experience improvement in their asthma health. Therefore, the mobile asthma clinic will provide each child with at least three visits. This settlement resolves violations of FIFRA for allegedly selling and distributing an unregistered pesticide, which was marketed to allergy sufferers, and addresses both environmental justice and children's health concerns involving allergies. The settlement supports the mobile asthma clinic for a full year of diagnosis and treatment. After one year of treating children, the S.C. Johnson & Son settlement anticipates that the mobile asthma clinic will be continued through the University of Maryland.

ASARCO's lead refinery in Omaha, Nebraska, began operations during the end of the 19th century. Although this facility is now closed, over a century of operations resulted in contamination of the surrounding area by airborne lead particulates. As part of a settlement agreement for Clean Water Act violations, ASARCO agreed to implement SEPs to: (1) create, restore, or improve the ecosystem of the Missouri River into which the plant discharged; and (2) explore and mitigate potential public health problems related to its past operations. ASARCO's second SEP focused on assessing public health risks due to the long-term airborne lead contamination problem. The Omaha/Douglas County Health Department was selected to measure both current blood lead levels in children and evaluate possible health impacts. The blood level sampling was completed, and the results led to further sampling. The additional sampling included both blood levels in vulnerable children and measures of lead levels in soils, homes, and at daycare facilities. Superfund cleanup actions have been initiated to remove contaminated soils from the yards at some daycare facilities that were particularly impacted.

Penalty Mitigation

The amount of penalty mitigation is based on the cost of the SEP and whether or how effectively the SEP:

- Benefited the public or the environment;
- Was innovative;
- Considered input from the affected community;
- Factored in environmental justice issues;
- Reduced emissions to more than one medium (air, land, water); and
- Implemented pollution prevention techniques and practices.

The actual percentage of penalty mitigation given is within EPA's discretion. However, it cannot exceed 80% of the cost of the SEP unless the violator is a small business, a government entity or a nonprofit organization, or the SEP implements pollution prevention. Further, in all cases the final settlement penalty must equal or exceed: a) the economic benefit of noncompliance plus at least 10% of the gravity component; or b) 25% of the gravity component only, whichever is greater regardless of the cost or environmental value of the SEP.