



PUBLIC LAW RESEARCH INSTITUTE
UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

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Supplemental Environmental Projects: A Fifty State Survey with Model Practices (2006)

Background

The United States Environmental Protection Agency (“EPA”) has encouraged the use of Supplemental Environmental Projects (“SEPs”) for more than a decade as part of the agency’s efforts to protect and enhance public health and the environment. On the federal level, SEPs are environmentally beneficial projects that go beyond mere bringing a violator into compliance and that are undertaken voluntarily by violators of environmental laws, in consideration of which EPA may mitigate a portion of the penalty that could have otherwise been imposed.

Based on EPA’s successful use of SEPs, all but a few states have adopted SEP statutes, policies or practices (“SEP authorities”). The EPA Final SEP Policy and associated SEP memoranda (collectively, “EPA SEP guidelines”) are shaped by federal Constitution, as well as some idiosyncratic features of federal procurement law. Some state SEP authorities diverge significantly from the EPA model, in responding to local concerns and politics. But, most state SEP authorities have common features directly drawn from the EPA SEP guidelines, even though many of the principles are not necessary at the state level, as a matter of law. While many features of EPA’s SEP guidelines are highly recommended for the states, unquestioning adherence to their full measure stifles the opportunity for state innovation.

Summary of Findings

Thirty two states have formal, published SEP authorities in the form of legislation, regulations or guidelines. This represents a significant increase in the number of states with formal policies, in contrast to the only prior survey of state SEP policies, finding only nineteen states with formal policies or statutes.¹ Another seventeen rely on informal, unwritten practices in negotiating SEPs. Two states, North Carolina and South Carolina, have rejected the use of SEPs in settlements as a matter of policy or law.

The report’s “Model Practices” section describes how SEPs potentially serve three broad sets of values – a collaborative model of environmental enforcement; state-specific concerns; and the promotion of the public interest that lies at the heart of environmental laws and regulations. SEPs can benefit all stakeholders in the environment, the affected community, industry and regulators. The SEP process holds the promise of a re-invented regulatory model, one of

¹ Association of State and Territorial Solid Waste Management Officials, 1997.

cooperative enforcement, rather than traditional top-down, “command and control” regulation. Each stakeholder can directly benefit from the new model, through projects that benefit the affected community, improve public relations for the violator, and improve support for regulatory operations from industry and the public alike.

That said, there are also pitfalls associated with SEPs. There may be a need for safeguards to ensure that the public actually benefits from the SEP. Leaving the negotiation of SEPs to the unfettered discretion of enforcement personnel is problematic, because of the lack of transparency and equity to both violators and affected communities.

The report outlines a variety of model practices – for example, SEP idea libraries, state SEP funds, incentives for self-reporting, and accountability/metrics requirements – that provide safeguards, without rendering the SEP negotiation effort unworkable and too costly for all concerned. Most of the practices have the common thread of enhancing transparency and accountability in the SEP negotiation process, thus assuring that the open process attending the creation of environmental standards also permeates their enforcement.

Recommendations

Recognizing that states are not bound by the same limitations restricting EPA, the report recommends several model practices for streamlining the SEP negotiation process and relaxing certain EPA requirements. That said, states may benefit from adopting several policy precepts embodied in EPA’s SEP Policy. Among other things, the report recommends that states include in their SEP authorities the following:

1. Nexus Requirement

The federal nexus requirement (or mandatory connection between a violation and the negotiated SEP) – the core of EPA’s SEP Policy – helps ensure that affected communities benefit from SEPs. The report’s authors do not suggest that state nexus policies merely mimic the EPA’s, however. Some states, such as New York, require a more restrictive “geographical nexus,” in order to assure that the community affected by the violation reaps the SEP’s benefits.

2. Preservation of Deterrence

A preponderance of states with published SEP policies already strives to maintain the deterrent effect of the underlying environmental laws by following some of the less restrictive of EPA’s guidelines. The specific measures used also include: a minimum cash penalty to recapture the economic benefit of noncompliance; the SEP is not otherwise required to be performed and had not been previously planned by the violator; the performance of the SEP is voluntary, but once agreed upon becomes an enforceable commitment; and the SEP is not inconsistent with the violated statute.

3. Environmental Justice

SEP policies provide an opportunity to: (1) make a tangible difference in environmentally burdened communities; and (2) foster improved relationships among stakeholders in what is

otherwise a highly adversarial situation. The Center's fifty state SEP survey finds that while the EPA's SEP Policy expressly references environmental justice, only nine states out of the thirty-two states with formal SEP policies include environmental justice as a factor: New Mexico, Colorado, Utah, Virginia, Florida, Oregon, Massachusetts, New York and Connecticut. In view of the strong correlation between environmental violations and environmental justice issues, SEP policies that do not address environmental justice miss a valuable opportunity to redress longstanding environmental inequities.

4. Community Involvement

SEP authorities should provide for community involvement. Many attorneys identified community involvement as a powerful force in negotiating SEPs and promoting enforceability during project implementation. EPA's community input guidelines identify mechanisms for members and representatives of affected communities to provide meaningful input on how their communities could best benefit from SEPs. However, states have the latitude to go beyond EPA's limited guidelines, and could include, for example, mandatory community input into the process, as well as the community oversight of the implementation of the SEPs.