The right side of the slide features several decorative green lines. A thin vertical line is positioned to the right of the main text. A thicker, curved line starts from the top right and sweeps downwards towards the bottom left. Another curved line is positioned below it, also starting from the top right and curving downwards. The background is a light green color with a subtle gradient.

The Role of Injunctive Relief, Restoration Orders, and other Instruments in Addressing Environmental Justice Issues Through Enforcement Actions

ELI/INECE EJ Webinar
September 26, 2022

Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Civil enforcement
injunctive relief

Civil enforcement
SEPs

Criminal
enforcement



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Civil Enforcement: Injunctive Relief

Civil Enforcement: Crafting Injunctive Relief to Address Environmental Justice

Compliance-
related
injunctive relief

Mitigation to
address past
harm

Expedited
relief

Civil Enforcement: Compliance-related Injunctive Relief

EJ Concerns Can Be Addressed Through:

Phased relief

Advanced Monitoring

Audits and Independent Third-Party Verification

Transparency Provisions

Example: Municipal Wastewater Consent Decree

- Required City to post/provide public notification of compliance data
- Required City to take public comment on deliverables under the CD
- Required City to consider areas with potential EJ concerns when developing prioritization of work

Civil Enforcement: Mitigation

Limiting future pollutants emitted or discharged (beyond compliance) to address past excesses

Example: Where company violated the law by selling vehicle engines that did not meet emissions standards, a settlement required the company to implement a program designed to result in at least 10,000 ton reduction of NOx emissions by taking older, heavy-duty trucks and buses off the road permanently, benefitting communities overburdened by air pollution.

Addressing impacts to human health or the environment caused by violative emissions/discharges

Example: Where company's illegal discharges of industrial wastewater overloaded a publicly owned treatment system that discharged to a river, settlement agreement required company to re-stock fish in the river, benefitting tribal members and other communities downstream that use the river for fishing and recreation.

Civil Enforcement: Expedited Relief for Communities

- ▶ EPA can order remedial action when it finds that a situation may pose an **imminent and substantial endangerment** to human health or the environment.
- ▶ Oftentimes, this type of relief is a bridge to a longer-term remedy.
- ▶ In 2021 EPA issued Clean Air Act emergency orders to two facilities, and Safe Drinking Water Act orders to 47 public water systems.
 - ▶ Example: CAA order to refinery required facility to pause all operations and perform environmental compliance audit; Facility also required to install additional monitoring devices to detect harmful emissions
 - ▶ Example: SDWA order required Water Board to identify homes impacted by lead contamination and provide alternate drinking water and/or point-of-use filters

Civil Enforcement: Injunctive Relief

Additional Information

- ▶ Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements (April 2021), <https://www.epa.gov/enforcement/using-all-appropriate-injunctive-relief-tools-civil-enforcement-settlements>
- ▶ Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements (2nd Edition) (Nov. 2012), <https://www.epa.gov/sites/default/files/2013-10/documents/2ndeditionsecuringmitigationmemo.pdf>

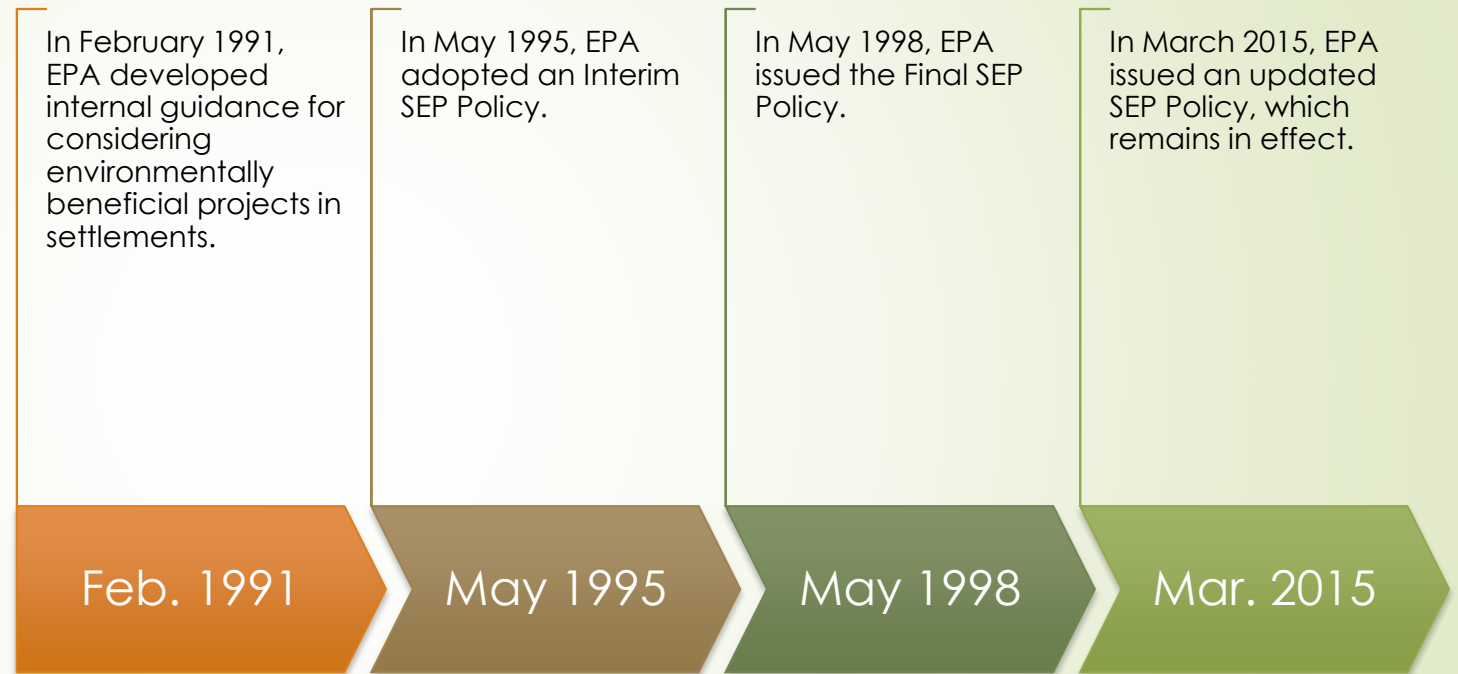
Civil Enforcement: Supplemental Environmental Projects

What are Supplemental Environmental Projects (SEPs)?

SEPs are projects that:

- Are performed as part of the settlement of an enforcement action;
- Provide environmental or public health benefits to the community or environment harmed or potentially harmed as a result of a violation of environmental law;
- Are undertaken voluntarily by the violator;
- Go beyond compliance with federal, state or local environmental law; and
- Are not otherwise legally required.

History of EPA's SEP Policy



Legal Guidelines

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To ensure a proposed SEP is within the EPA's authority and consistent with all statutory and Constitutional requirements, EPA's SEP Policy requires that EPA SEPs, among other things:

- Must have a "nexus," or relationship, to the underlying violation.
- Must be consistent with the underlying statute and advance one of its objectives.
- May not have the effect of augmenting federal appropriations.

Categories of SEPs

Public health

Pollution prevention

Pollution reduction

Environmental restoration and protection

Assessments and audits

Environmental compliance promotion

Emergency planning and preparedness

Other

Examples of Past SEPs

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- ▶ Lead-based Paint Abatement
- ▶ Asthma and Respiratory Health Clinics
- ▶ Septic Tank Close Outs
- ▶ Emergency Response Equipment
- ▶ Diesel Emission Reduction Projects
- ▶ Replacement of School Light Fixtures
- ▶ School Air Filtration Systems

SEP Information

- SEP Policy and other information can be found at <https://www.epa.gov/enforcement/supplemental-environmental-projects-seps>
- Enforcement Compliance History On-Line (ECHO) Database can be easily searched on a variety of fields for SEPs included in completed settlements. ECHO is available at <http://www.epa.gov/echo>

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Criminal Enforcement

Addressing Environmental Justice Issues Through Criminal Enforcement

- ▶ Addressing overburdened communities through creative sentencing outcomes is a priority for EPA's criminal enforcement office.
- ▶ Restitution, community service, and other remedies available as conditions of probation offer means of accomplishing that.
- ▶ Decisions about and advocacy for sentencing outcomes, including restitution and community service, is exclusively the province of the criminal prosecutors at the U.S. Department of Justice (DOJ).
- ▶ Generally speaking, restitution focuses on reimbursing defined losses sustained by specifically identifiable victims of crime...
- ▶ ...while community service and other conditions of probation can be aimed at circumstances, such as general environmental degradation, in which individual victims cannot be identified.
- ▶ Community service/conditions of probation in criminal cases allow a court to order projects or work to be performed that addresses generalized harm resulting from the environmental crime and preventing future violations.

Restitution

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- ▶ Let's take restitution first:
 - ▶ Title 18 and DOJ policy prioritizes the order monetary sanctions in environmental crimes cases as follows: restitution, fine, and community service; prosecutors are instructed to ensure restitution is paid and then seek the payment of fines.
 - ▶ 18 U.S.C. § 3563 establishes the authority of the courts to “make restitution to a victim” of an environmental crime; however, it must be as a condition of probation, and it is discretionary, not mandatory.
 - ▶ Restitution is to be paid to the victim of a crime and 18 U.S.C. § 3663(a)(2) defines a victim as “a person directly and proximately harmed” as a result of the offense.
 - ▶ It is often difficult to identify victims “directly and proximately harmed” by an environmental crime (think exposure versus manifesting disease or harm).
 - ▶ As such, restitution for environmental crime victims located in overburdened communities may be difficult to achieve.

Community Service

- ▶ Community Service can be particularly important in environmental crime cases where specific victims are not identified, yet we know environmental harm has occurred.
- ▶ The statutory authority for community service as part of a criminal sentence is 18 U.S.C. § 3563(b)(12), which allows the discretionary imposition of “work in community service as directed by the court.”
- ▶ DOJ’s policy on community service requires that:
 - ▶ Prosecutors advocate for community service only in addition to and not in lieu of the fundamental criminal sanctions of restitution, fines and incarceration.
 - ▶ Nature and scope of a project is clearly defined
 - ▶ Projects have a clear nexus to the underlying crimes (i.e., nexus to geographic area and environmental medium involved in the criminal violation).
 - ▶ DOJ does not pick the community service funds recipient or beneficiary
 - ▶ Settlement must be executed before admission or finding of liability and the government can’t retain post-settlement control of the project, except to ensure compliance
 - ▶ Project can’t be used to satisfy the government’s statutory obligations or add to the government’s appropriations
- ▶ However, courts are the final authority for fashioning the sentence.

Community Service Examples

- ▶ Funding to train state and local emergency first responders
- ▶ Coastal environmental conservation projects
- ▶ Diesel school bus retrofit or replacement
- ▶ Water quality restoration
- ▶ Bolster fish and wildlife population
- ▶ Polluting woodstove buyback program

Community service can be work the defendant actually performs or projects/work the defendant funds, consistent with DOJ policy.

Other Available Sentencing Remedies as Conditions of Probation

- ▶ Environmental Audits, Compliance Programs, Employee Training
 - ▶ Ensures future compliance, indirectly benefiting community affected by the criminal offense
 - ▶ Can require defendant to pay independent 3rd Party auditor or consultant to ensure implementation of the sentence
- ▶ Pollution Prevention Projects (may extend to other facilities operated by the defendant)
- ▶ Trust Funds
 - ▶ Can address future or expected harm, where damage is widespread, long-lived and persistent
 - ▶ Can include trust fund to conduct medical monitoring for individuals exposed to chemicals or toxins posing long-term risks (e.g., asbestos)
 - ▶ Allows long-term remedy to be funded beyond term of probation

DOJ Guidance

- ▶ Memorandum from Ronald J. Tenpas, DOJ-ENRD Assistant Attorney General, to Environmental Crimes Section Attorneys, Guidance on Restitution, Community Service, and Other Sentencing Measures Imposed in Environmental Crime Cases (January 16, 2009), available at <https://justice.gov/file/1046141/download>
- ▶ Memorandum from Attorney General Merrick Garland to Heads of Department Components and United States Attorneys, Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties (May 5, 2022), available at <https://www.justice.gov/ag/page/file/1499241/download>

Questions?

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