SUPPLEMENTAL ENVIRONMENTAL PROJECTS TO SETTLE CITIZEN SUITS UNDER THE CLEAN WATER ACT

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REFERENCE: Proceedings of the 1995 Georgia Water Resources Conference, held April 11 and 12, 1995, at The University of Georgia, Kathryn J. Hatcher, Editor, Carl Vinson Institute of Government, The University of Georgia, Athens, Georgia.

Abstract. In a negotiated settlement of a citizen suit for alleged violations of the Clean Water Act, the parties may agree that the alleged violator can fund a supplemental environmental project (SEP) to improve the environment in the area where the alleged violation occurred. The use of SEPS in negotiated settlements has been validated by the courts and has gained acceptance by the Environmental Protection Agency, provided that the settlement includes a penalty paid to the U.S. Treasury and there is a relationship between the alleged violation and the SEP. A 1994 negotiated settlement of a citizen suit in Georgia included SEPs to restock fisheries, develop pollution prevention measures, and study water quality in the affected river.

INTRODUCTION

If a court finds a party liable for violations of a federal environmental statute such as the Clean Water Act (CWA), 33 U.S.C. §§1251-1387, then any fines assessed against the violator are generally considered penalties and must be paid to the United States Treasury. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49 (1987). However, most lawsuits under the CWA, brought either as an enforcement action by the Department of Justice (DOJ) on behalf of the Environmental Protection Agency (EPA) or by a private plaintiff in a citizen suit, are resolved by negotiation before any judicial decision. When a suit is settled by negotiation, the parties have more flexibility as to the disposition of any payments. Rather than let the money disappear into the "general fund" as "miscellaneous receipts," *see* 31 U.S.C. § 3302, parties can agree that the alleged violator will fund projects related to the violation which triggered the suit. EPA calls these "supplemental environmental projects" (SEPs). EPA, **Policy on the Use of Supplemental Enforcement Projects in EPA Settlements**, (Feb. 12, 1991).

The use of SEPs in negotiated settlements of environmental actions has increased significantly in recent years. This paper will discuss SEPs in the context of suits brought under the CWA. The paper will show how SEPs have grown in acceptance both by parties and the United States; concerns about, and the limits of, their application; and how they are being used today, including one recent Georgia settlement. Properly applied, SEPs can broaden the range of possible responses to environmental violations, so that an alleged violator is not just punished but contributes directly to improving the environment in the area where the violations occurred.

HISTORY

Early Use of SEPs (1972-1987)

Since the CWA was enacted in 1972, it has allowed a citizen to bring a civil action against an alleged violator if EPA or a state regulatory agency failed to do so. 33 U.S.C. § 1365. It does not require a destination for any penalties that may be assessed against a violator. In 1987, the Supreme Court held that if liability were found, the penalties went to the U.S. Treasury. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49. Other courts, however, upheld pre-liability settlements of CWA citizen suits in which the alleged violator made payments not to the Treasury, but to fund environmental projects. For instance, in *Citizens Coordinating Committee on Friendship Heights, Inc. v. Washington Metropolitan Area Transit Authority*, the settlement included $10,000 to a fund to improve the body of water affected by the alleged violations. 568 F. Supp. 825 (D.D.C. 1983), reversed on other grounds, 765 F.2d 1169 (D.C. Cir. 1985).

The Government's position on SEPs at this time was ambiguous. EPA's penalty policies stated that alternatives to penalty payments were acceptable on a limited basis, and only if certain criteria were met. The project could only supplement, not replace, full compliance by the violator; it had to closely address the alleged violation; any mitigation must reflect the project's actual cost; and the deterrent effect of enforcement must not be diminished, meaning that a substantial penalty would have to remain in the settlement. EPA, **Civil Penalty Policy** (Feb. 16, 1984) and **Clean Water Act Penalty Policy for Civil Settlement Negotiations** (Feb. 11, 1986). DOJ, however, flatly opposed SEPs, and maintained that all payments for violations of the CWA were penalties to be deposited into the Treasury. Marcia R. Gelpe & Janis L. Barnes, *Penalties in Settlements of Citizen Suit Enforcement Actions Under the Clean Water Act*, 16 **Wm. Mitchell L. Rev.** 1025, 1029, 1030 (1990).

The 1987 CWA Amendments and Their Effects

Congress addressed DOJ's objections when it amended the CWA in 1987. Now, both EPA and DOJ must be allowed to object to any proposed settlement to a suit to which the United States is not a party. 33 U.S.C. § 1365(c)(3). Furthermore, no citizen suit may be filed if EPA or a state agency has already brought an action or issued a final order with a penalty. 33 U.S.C. § 1319(g)(6).

Even though these changes created additional hurdles for a potential citizen-plaintiff, citizen suits continued, with SEPs included in their settlements. Some settlements also included penalties to the Treasury. In *Atlantic States Legal Found., Inc., v. 3M*, a $158,000 settlement included $85,000 in payments to environmental education and water quality projects, and $50,000 to the U.S. Treasury. 18 BNA Envt. Rep. (Apr. 1, 1988) at 2395 (D. Minn. 1988). Many other settlements, however, did not contain penalty payments. For instance, in *Sierra Club, Inc. v. Port Townshend Paper Corp.*, the company paid $137,500 to purchase wetlands and nothing to the Treasury. 19 BNA Envt. Rep. (Nov. 11, 1988) at 1434 (W.D. Wash. 1987).

The United States frequently exercised its new power to challenge proposed settlements. In *Natural Resources Defense Council, Inc. v. Interstate Paper Corp.*, the Government objected to a settlement that included over $80,000 in SEPs for wetlands mitigation and education, because the additional $15,000 penalty was insufficient and because the SEP was not sufficiently related to the violations. 19 Envtl. L. Rep. 20901 (S.D. Ga. Nov. 22, 1988). In approving the settlement, the court acknowledged that EPA policy was entitled to deference but was unwilling to disturb a settlement properly agreed to by the parties. In *Pennsylvania Environmental Defense Found. v. Bellefonte Borough*, the Government objected to an agreement settling a citizen suit for alleged illegal sewage discharges because it did not include a penalty payment and because the SEP, an escrow account for Trout Unlimited, did not state a use to which the money must be put. 718 F. Supp. 431 (M.D. Pa. 1989). In this case the court agreed ordered that the settlement be redrafted. Although it had been reached before a court found liability, it was not sufficiently related to the alleged violation for which the suit was brought.

Sierra Club v. ECD: An Appeals Court Accepts SEPs

Neither *Interstate Paper* or *Bellefonte* addressed directly whether funding an SEP was an acceptable resolution of a CWA citizen suit. The question was answered in *Sierra Club, Inc. v. Environmental Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990). In this case, the United States objected to a negotiated settlement of a citizen suit for illegal discharges, that included a $45,000 payment to the Sierra Club's legal defense fund to support water quality projects in Oregon. The United States argued that the payment was a penalty for violations of the CWA and must be paid to the Treasury. The trial court agreed but was reversed by the Ninth Circuit, which held that since the payments derived from an out-of-court settlement, they were not penalties and therefore did not have to be paid to the Treasury. The consent decree was valid if it came within the scope of the pleadings (*i.e.*, was sufficiently related to the alleged violations), furthered the objectives of the CWA, and was fair, reasonable, and equitable. The court found that the proposed settlement met these criteria. *ECD* was the first appellate decision to clearly approve of SEPs. Later decisions have affirmed the validity of SEPs but have limited their use. Most courts, as already stated, hold that any payments imposed after liability is found must be paid into the Treasury, and could not be used for SEPs. *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990). Only in one federal circuit, the Ninth, have courts allowed penalty payments for CWA violations to be used for SEPs. *E.g., Hawaii's Thousand Friends v. Honolulu*, 149 F.R.D. 614 (D. Hawaii 1993). Courts in other circuits would approve a SEP after liability is found only if the SEP is part of an injunction, and not a payment. *Powell Duffryn, supra.* Finally, there must be a "nexus", or close relationship, between the SEP and the violation. *Atlantic States Legal Foundation,Inc. v. Simco Leather Corp.*, 755 F. Supp. 59 (N.D.N.Y. 1991).

GOVERNMENT POLICY

EPA: Concerns and Policy

The main legal objection to SEPs, that any money collected for a CWA violation is a penalty payable to the Treasury, appears to have been resolved, at least in relation to cases resolved before a court has found liability. However, EPA, although accepting SEPs as long as they remain truly a "supplement" to federal or state enforcement action, has expressed concerns about the widespread use of SEPs. First, the interests of the plaintiffs, usually environmental groups, does not always coincide with correcting the immediate problem caused by the violation, and the settlement proposed might not address adequately the environmental impact of the alleged violation. Second, widespread use of SEPs could allow violators to avoid liability, and even send the public a message that the violators were "good guys" for funding enviromental projects. Telephone Interview with David Drelich, Counsel, EPA Office of Enforcement and Compliance Monitoring (September 15, 1992).

In part to retain the benefits of SEPs while avoiding these problems, EPA issued a policy in 1991 addressing SEPs in EPA enforcement actions, with the stated purpose of "avoiding the difficulties which occasionally characterized" the past use of SEPs. **EPA 1991 Projects Policy,** *supra.* The policy clearly indicates that deterrence and punishment are as important as corrective action. Although the policy was created to apply to settlements of EPA enforcement actions, settlements of citizen suits requiring EPA comment

would be evaluated by the same criteria. The main points of the policy:

1. Pollution prevention and reduction, environmental restoration and auditing, or enforcement-related public awareness projects are all acceptable types of SEPs, as long as they correct or prevent problems at the facility that caused the alleged violations, address the specific environmental problems caused by the violations, or at least (for public awareness projects) relate to the violations. General educational or environmental awareness, contributions to academic research, or unspecifically "beneficial" projects are not acceptable.
2. There must be a "nexus" between the violation and the SEP. The SEP must affect the same pollutant as was involved in the violation, the same medium that was polluted, or both.
3. A defendant's history of repeated violations makes it less likely that the SEP will be approved. Likewise, a proposed project that is likely to benefit the violator more than the public, is not likely to be approved unless the benefit to the public would be substantial.
4. The settlement must always contain a penalty, which the SEP cannot mitigate by more than the amount spent on the project.
5. EPA must be able to document and oversee the implementation of the SEP.

Clean Water Act Reauthorization

The 1993 proposed reauthorization of the CWA included amendments to both the citizen suit and penalty provisions. S.1114, §503, 103d Cong., 1st Sess. (1993). Courts would have the discretion to allocate all or part of any penalty, even after liability is found, to a "beneficial project to enhance public health or the environment by restoring or otherwise improving, in a manner consistent with [the CWA], the water quality, wildlife or habitat of the waterbody in which the violation occurred." A court could also order a defendant to restore the natural resources destroyed or damaged by the violation. The maximum cost of the restoration could not exceed the maximum allowable civil penalty. A similar provision already exists in the Clean Air Act, that allows the court in a citizen suit to require that penalties be use in "beneficial mitigation projects" consistent with the Clean Air Act, to a maximum of $100,000. 42 U.S.C. § 7604(g)(2) (Supp. III 1991).

The proposed CWA amendments do not address negotiated settlements specifically. However, should Congress enact the amendments, the distinction created by *ECD* and related cases between payments pursuant to a settlement and to a finding of liability would be unimportant, since a court could allocate the whole payment to the SEP. Rather than treating payments under negotiated settlements as civil penalties, the amendments would allow civil penalties to be treated in the same way as payments under negotiated settlements. However, Congress has not yet managed to pass the reauthorization, and its prospects are uncertain. *No CWA Funding Bill This Year, Mineta Says*, 25 **BNA Envt. Rep.** 1134 (Sept. 30, 1994).

SUPPLEMENTAL ENVIRONMENTAL PROJECTS TODAY: A GEORGIA CASE STUDY

Since the 1991 EPA SEP policy was implemented, only one CWA citizen suit resulting in a SEP has been resolved in Georgia. In 1994 the Georgia Environmental Organization, Inc. and the Town of Trion executed a consent order to resolve alleged CWA violations at the town's wastewater treatment plant. *Georgia Environmental Organization, Inc. v. Town of Trion*, No. 4:93 CV 0365 HLM, slip op. (N.D. Ga. June 20, 1994). According to the Georgia Environmental Protection Division (EPD), the plant had long been in noncompliance with its permit to discharge to the Chattooga River, had caused spills of untreated sewage, and had failed to reduce the color in its discharge caused by dye waste entering the plant from a textile mill, turning the river black as far downstream as Lake Weiss, a reservoir and recreational lake formed by the river in Alabama. *Citizen Group and Town of Trion, GA, Settle CWA Lawsuit*, 6 **Ga. Envtl. L. Let.** 11-12 (October 1994). In 1993 a coalition of angry downstream residents and public interest groups, unconvinced that EPD would resolve the problem, sued the Town.

The settlement included requirements that the Town bring the treatment plant into compliance, remove color from its discharge, and more effectively regulate the textile mill. The Town had to pay the plaintiffs' attorneys' fees, another prerogative of the prevailing plaintiff in a CWA citizen suit. 33 U.S.C. § 1365(d). The Town agreed to pay a settlement of $75,000: $25,000 as a fine to the U.S. Treasury, $15,000 to the State of Georgia to operate a fish hatchery and restock fisheries in the affected river, and $35,000 to the chamber of commerce of a downstream Alabama county, to develop pollution prevention measures for Lake Weiss. Finally, the Town agreed to fund a two-year study of water quality in the Chattooga River, to be performed by Jacksonville State University in Alabama.

This agreement typifies a SEP that would satisfy EPA, because it is both environmentally beneficial and containes a strong punishment/deterrent component. The alleged violations affected the water quality of the Chattooga River and Lake Weiss, and all three SEPs will benefit the water bodies in a way directly related to the violations: restocking fisheries restores the system to its earlier state, pollution prevention protects against recurrence, and long-term monitoring verifies that the problems have been corrected. There is clearly a nexus between the violations and the projects: they both involve the same medium, the same pollution problems, and same pollutant source. The alleged violator may indirectly benefit from the river study, but no more than will the public at large; the pollution prevention and fisheries projects are not

typically undertaken by a wastewater treatment plant. Finally, with one-third of the monetary settlement going to the Treasury, the penalty component can be said to be "substantial," and so satisfy EPA's deterrence requirement.

CONCLUSION

The role of the SEP in settling environmental enforcement actions, CWA citizen suits or others, seems secure and well-defined. For parties to such an action, SEPs provide a flexible tool to help resolve the action either before or in lieu of litigation. As long as the settlement is crafted so that the SEPs are adequately related to the alleged violation, and a substantial penalty component is included, creative negotiators can produce a resolution that will penalize a violator and ensure future compliance while working toward improving the quality of the affected area. A fine or penalty, and an order to stop polluting, will at most correct the problem. An SEP could result in a net benefit to the environment.

ACKNOWLEDGMENTS

Portions of this paper first appeared in: Michael P. Stevens, Note, *Limits on Supplemental Environmental Projects in Consent Agreements to Settle Clean Water Act Citizen Suits.* 10 **Ga. St. U. L. Rev.** 757 (1994). They appear by permission of Georgia State University Law Review. The author thanks the following people: James Bross of Georgia State University College of Law, Doug Haines and Eric Huber of the Georgia Center for Law in the Public Interest, and Jean Tolman of Arnall Golden & Gregory.