



Charles R. Driggars

ADEM's "Bank" To Assist Enforcement Action Negotiations

To state the obvious, it is unpleasant for anyone subject to the environmental regulations of the Alabama Department of Environmental Management (ADEM) to become the object of an enforcement action by that agency. Depending upon the circumstances, the process can be lengthy, expensive and frustrating for all involved.

Suppose you are the Compliance Manager at an industrial facility in Alabama. You are in charge of ensuring compliance with a variety of air and water permits, as well as the upkeep of a host of environmental records and documents, training employees, and numerous other duties, the failure to do any one of which will result in a violation of environmental regulations. Your company tries hard to be a good corporate citizen, which includes, of course, compliance with all environmental laws and regulations. You know that industrial activities are not perfect: machines fail, humans make mistakes, etc. One day, despite your best efforts, you are confronted with a large and serious violation (or series of violations). ADEM begins an enforcement

action. It looks as if your company is facing paying a hefty financial penalty.

Your CEO is unsurprisingly unsympathetic to your explanation of how the violation was an accident, was reported quickly, and remediated as soon and as well as possible. The hefty penalty looms large in his or her eyes as you perspire, trying to think of some way—any way—to have something good come from this mess.

Then you think: hey, what if, instead of paying that hefty penalty, we were able to put the money into some needed cleanup project that would directly benefit the state's environment? Ok, we would still be spending money, but it would do some visible, quantifiable good, reduce concretely some pollution in the state, and perhaps even garner some good will for the company; after all, we do try and are trying to do the right thing. Wouldn't doing this kind of project be a way of creating some good from this otherwise completely negative situation?

So you explore and find out that,

indeed, there is a component of the ADEM enforcement program called "Supplemental Environmental Projects" or SEP(s) which, in some instances, accomplish exactly what you have in mind. And there must be many opportunities around the state for such projects, right? Now, if we only had an easy way to find and evaluate them.

ADEM has recently added a new dimension to its SEP Program to enable you to do just that: a SEP Bank. In creating this Bank, ADEM is attempting to improve upon what has been one of the best and most commonsensical environmental enforcement tools in both federal and state law. It is, or at least can be, the all-too-rare "win-win" for both ADEM, regulated entities, and the Alabama environment. While "win-win" is probably a bit too cheerful a description for the ultimate outcome, it can at least be good for the environment of the state and mitigate, to some extent, the negative light in which a company paying a large penalty often finds itself.

One type of SEP can be, and often is,

focused upon an abandoned, contaminated site, area, or facility, past use of which has left it contaminated, with no existing responsible private parties to pay for any kind of cleanup. In ADEM environmental enforcement actions, it is (depending upon the circumstances) routine for penalties or fines to be levied against violating parties. The SEP program, at its best, is a part of the negotiating process providing a measure of flexibility between ADEM and the violator in which the violating party agrees to conduct cleanup activities at the designated SEP site to mitigate or in lieu of paying a financial penalty to ADEM.

The benefit to Alabama citizens is clear: instead of simply paying a penalty, the violator provides the direct, clear benefit of environmental cleanup at Alabama sites that otherwise might well go without remediation. The benefit to the violator is threefold: first, conducting a SEP is letting the community know that your company is concerned about environmental matters and lets you know that the money being spent is doing some measurable good for human health and the environment; second, while the cost of the SEP will likely be roughly equivalent to the amount of penalties, that cost may be spread out over a longer period of time as the cleanup work on the site progresses and, finally, the actual long-term value to the state of the cleanup may greatly exceed the cost of the penalty. The benefit to ADEM is its ability to have more flexibility in its negotiations with violating parties. Further, ADEM lacks the funds to address every contaminated site within its jurisdiction; private parties will be remediating sites that might otherwise go untouched. Thus, utilization of the SEP option in


enforcement ensures that the money spent goes directly into environmentally beneficial projects in Alabama.

There is something that just makes sense in using environmental penalties to directly benefit the Alabama environment. Penalties paid to ADEM, after recovery by ADEM of the costs of enforcement, go into the Alabama General Fund; consequently, those funds do not directly go to state environmental protection.

ADEM's development of a "bank," or list of approved SEP sites which will be made available to the public on the official ADEM website, should lead to an increase in application for, and approval of, SEP(s). It will provide both ADEM and targets of environmental enforcement a list of already-approved SEP projects, as well as a beginning level of information to help in the determination of whether a particular SEP is appropriate for a particular party in an enforcement action. Under the new program, citizens of Alabama are encouraged to file applications for particular contaminated areas that are not the subject of any cleanup activity and are unlikely to become so. The Bank will provide a ready resource of already approved SEP(s) for private parties who deter-

mine that it is in their interests to offer to conduct a SEP in lieu of, or mitigation of, environmental penalties.

Sites must be accepted by ADEM through an application process, which can be accessed at ADEM's website, (<http://www.adem.state.al.us/>). Also located on the website are documents containing guidance and further information about the ADEM SEP program.

EPA issued its own SEP Policy in April 10, 1998 and, since that time, hundreds of supplemental environmental projects have been done across the nation. The concept of putting companies that have run afoul of the regulations to work directly benefiting the environment, as opposed to simply paying fines, is smart, often cost-effective, and a welcome element of flexibility in the enforcement process. ADEM wants to encourage citizens to submit as many applications as possible for consideration, in the hopes that these sites will then be easy to locate by private parties as a part of general enforcement procedures. From the standpoint of the regulated community, the SEP Bank and the SEP Program, may well offer significant financial, environmental, and other benefits in an otherwise generally non-flexible enforcement situation. 



Charles R. Driggars

Charlie practices in the areas of Litigation, Civil Trial Practice, Appellate Practice, Environmental Litigation Counseling and Toxic Torts. He received his J.D. from The University of Alabama School of Law in 1981 and his B.S. from Troy State University in 1978 where he graduated magna cum laude.