Supplemental Environmental Projects in Complex Environmental Litigation

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Introduction

After an anonymous source tipped the Environmental Protection Agency (EPA) off to a site operated by the Massachusetts Highway Department (MHD) containing unlabeled barrels, corroded drums, and stained soil, EPA found similar conditions at several MHD disposal sites that violated state and federal environmental laws.[1] An EPA enforcement official informally told MHD's general counsel that MHD had "a real problem," and the general counsel quickly agreed to enter into settlement negotiations. EPA also brought the Massachusetts Department of Environmental Protection (MDEP) into the negotiations because it would be heavily involved in overseeing any remediation work. EPA's civil penalty formula would have assessed a fine of several million dollars, but some of the issues would have been technologically complex and costly to litigate. The litigation would have involved multiple sites and difficult factual and legal issues involving the identity and toxicity of the chemicals at the sites, the rate at which they were moving in the environment, the technologies available for remediating the sites, the "acceptable" level of residual contamination at the sites, and the responsibility for maintaining adequate containment for decades into the future. At the same time, MHD was facing large litigation expenses of its own and the predictable adverse publicity of a trial focusing on its environmental mischief.

MHD quickly agreed to a settlement in which it paid a civil penalty of $100,000, spent between $20 and $40 million on investigating and remediating the sites, and spent $5 million on "supplemental environmental projects" (SEPs) devoted mostly to existing environmental justice initiatives. Under one initiative, MHD agreed to develop an environmental education program to inform state and municipal highway and public works departments of the environmental requirements applicable to their activities. The program was specifically aimed at low-income and minority areas that are often disproportionally impacted by environmental contamination. Another initiative involved donations of computers, software, and training to

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1. The description of EPA's settlement with the Massachusetts Highway Department is drawn from Jeff Ganguly's account. *See* Jeff Ganguly, *Environmental Remediation Through Supplemental Environmental Projects and Creative Negotiation: Renewed Community Involvement in Federal Enforcement*, 26 B.C. ENVTL. AFF. L. REV. 189, 199–203, 214–18 (1998).

more than eighty Massachusetts Priority Planning Areas to help them develop risk management and emergency response strategies to address potential releases of highly toxic substances. Still another initiative devoted up to $750,000 to investigate and remediate two contaminated sites unrelated to MHD's operations in Holyoke, Massachusetts, which has a high proportion of minority and low-income residents. MHD also agreed to remediate other industrial sites along the Neponset River in an inner-city Boston area and along the Merrimack River in the City of Lawrence.

In addition to achieving significant environmental cleanup at MHD sites years ahead of any potential remediation action resulting from litigating the case to conclusion, the settlement achieved environmental justice by bringing about the cleanup of orphan sites in low-income and minority communities. On the other hand, the settlement, which was accomplished before any enforcement action was filed, sent only $100,000 out of a potential multimillion-dollar civil penalty to the United States Treasury. This aspect of the settlement raised serious legal and policy questions that have continued to plague EPA's use of SEPs to resolve complex environmental-enforcement litigation.

EPA's statutes typically empower it to levy civil penalties from violators in specified amounts.[2] The agency often has the option of bringing an administrative enforcement action in which the penalties are assessed in an administrative proceeding before an administrative law judge or filing (with the assistance of the Department of Justice (DOJ)) a civil-enforcement action seeking damages in a federal court.[3] The vast majority of the hundreds of enforcement actions that EPA initiates each year are settled, often before a formal lawsuit or administrative action is filed.[4] The primary purpose of civil penalties is to give potential violators an incentive to comply with the law.[5] They also have the modest advantage of adding comparatively tiny amounts to the United States Treasury.

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2. *E.g.*, Clean Water Act, 33 U.S.C. § 1319(d) (2012) (imposing civil penalties); Clean Air Act, 42 U.S.C. § 7413(b) (2012) (imposing civil penalties).

3. *E.g.*, Clean Water Act, 33 U.S.C. § 1319(g) (2012) (imposing administrative penalties); Clean Air Act, 42 U.S.C. § 7413(a)(3) (2012) (imposing administrative penalties).

4. U.S. ENVTL. PROT. AGENCY, FISCAL YEAR 2018 EPA ENF'T & COMPLIANCE ANN. RESULTS, at 10 (Feb. 8, 2019), https://archive.epa.gov/epa/sites/production/files/2019-02/documents/fy18-enforcement-annual-results-data-graphs.pdf [https://perma.cc/MPV7-85B7] (stating that more than 1,800 civil, judicial, and administrative actions were filed in the 2018 fiscal year); Patrice L. Simms, *Leveraging Supplemental Environmental Projects: Toward an Integrated Strategy for Empowering Environmental Justice Communities*, 47 ENVTL. L. REP. 10511, 10521 (2017).

5. David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 10 (2000). To take away any incentive to save money by violating the law, the Clean Air Act provides for setting the amount of the civil penalty at a level just above the amount that the defendant saved by failing to comply with applicable regulatory requirements. *See* 42 U.S.C. § 7420(a) (2012).

Because SEPs invariably cost money, they likewise provide a disincentive to potential violators, but they have advantages going beyond deterrence and increasing the Treasury. EPA defines SEPs as "environmentally beneficial projects which a defendant agrees to undertake in settlement of an enforcement action, but which the defendant, or any other third party, is not otherwise legally required to perform."[6] SEPs are projects or activities that "secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws."[7] They are nearly always accompanied by a reduction in the civil penalty that the defendant is obliged to pay as part of the settlement.[8] Consequently, SEPs have proven popular with violators seeking reconciliation with the victims of their unlawful actions or, more likely, to restore tarnished public images.[9] SEPs are also popular with local communities that benefit from projects and groups seeking environmental improvement.[10] EPA enforcement officials favor SEPs because they offer more options in negotiations, thereby facilitating settlements.[11]

Despite their overall popularity, the Trump Administration has recently imposed severe limits on the use of SEPs in ongoing environmental litigation. In five memoranda issued over the past three years, DOJ has taken the position that SEPs are of dubious legality under general statutes limiting agency use of funds received outside the formal congressional appropriations process and may even encroach on Congress's constitutional appropriations power. Had those memoranda been in effect in the early 1990s when EPA was negotiating with MHD, they would almost certainly have prevented the settlement. Although many EPA officials do not share those concerns, the future of SEPs is clearly in doubt.

This Article will describe how EPA and DOJ have employed SEPs in complex environmental litigation, detail the advantages and disadvantages of SEPs, and explain why the recent DOJ memos are likely to be counterproductive. Part I will briefly set out the history of SEPs, EPA's

6. U.S. ENVTL. PROT. AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 2015 UPDATE, at 6 (Mar. 15, 2015) [hereinafter EPA 2015 SEP POLICY UPDATE].

7. *Id.* at 1. Because SEPs are meant to go beyond legal requirements, a SEP is generally not allowed when it "could reasonably comprise part of the injunctive relief portion" of a settlement. *Id.*

8. *Id.* at 30.

9. Laurie Droughton, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 PACE ENVTL. L. REV. 789, 809 (1995) ("Industry generally has been supportive of SEPs.").

10. Ganguly, *supra* note 1, at 212.

11. Memorandum from Cynthia Giles, Assistant Adm'r., Office of Enf't & Compliance Assurance, to Reg'l Adm'rs. (Mar. 10, 2015) [hereinafter Giles Memo] (noting "the Agency's continuing strong support for SEPs"); Ellen M. Gilmer, *Top EPA Official Praises Enforcement Tool in DOJ's Crosshairs*, BLOOMBERG L. ENV'T & ENERGY REP. (Nov. 12, 2019, 11:28 AM), https://news.bloombergenvironment.com/environment-and-energy/top-epa-official-praises-enforcement-tool-in-dojs-crosshairs [https://perma.cc/VX67-RPLS] (quoting EPA Office of Civil Enforcement Director Rosemarie Kelley).

evolving policies for employing SEPs in settlements, and attempts in Congress to limit EPA's use of SEPs. Part II will highlight the virtues of SEPs. In addition to facilitating settlements and achieving a more rapid implementation of corrective action, SEPs are a vehicle for achieving restorative justice because the process of negotiating a SEP provides an opportunity for members of affected communities to engage in conversations with violators and the government and perhaps achieve some degree of reconciliation between victim and violator. Part III will analyze prominent criticisms of SEPs, including their possible inconsistency with the Constitution's Appropriations Clause, the Antideficiency Act, and the Miscellaneous Receipts Act, and it will detail EPA's responses to those criticisms in its most recent SEPs policy. Part IV will provide an overall assessment of the value of SEPs. Part V will describe the Trump Administration's limitations on SEPs. Part VI will critique the Trump Administration's limitations on SEPs. Part VII will offer suggestions for improving SEPs to increase their capacity to achieve restorative justice and expand their availability in a future administration that is less hostile to this innovative tool for settling complex environmental enforcement actions.

I. EPA's Past Practices

EPA first began employing SEPs in complex environmental litigation in the early 1980s.[12] It issued a precursor policy for SEPs in 1984 and formalized the policy in 1991.[13] The Agency revised the 1991 policy substantially in 1995[14] and again in 1998.[15] The 1998 policy remained in place through the remainder of the Clinton Administration, the George W. Bush Administration, and the first term of the Obama Administration.[16] EPA revised the policy most recently in 2015.[17] The SEP policies are applicable to both administrative enforcement actions brought by EPA and judicial actions brought by DOJ.[18] SEPs are also available in citizen enforcement actions against violators,[19] a use that is not explicitly governed by EPA and DOJ policies and therefore beyond the scope of this Article.

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12. Kenneth T. Kristl, *Making a Good Idea Even Better: Rethinking the Limits on Supplemental Environmental Projects*, 31 VT. L. REV. 217, 218, 222 (2007).

13. *Id.* at 223–30.

14. *Id.* at 230.

15. *Id.* at 236.

16. Memorandum from Jeffrey Bossert Clark, Assistant Att'y Gen., U.S. Dep't of Just. Env't & Nat. Res. Div., to ENRD Deputy Assistant Att'ys Gens. and Chiefs of the Envtl. Enf't, Envtl. Def., Envtl. Crimes, Nat. Res., and Wildlife & Marine Res. Sections 2 n.2 (Aug. 21, 2019) [hereinafter August 2019 Clark Memo].

17. EPA 2015 SEP POLICY UPDATE, *supra* note 6.

18. Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations as Well as to Achieve Significant Additional Environmental Benefits*, 10 WIDENER L. REV. 413, 432 (2004).

19. Sierra Club v. Elec. Controls Design, Inc., 909 F.2d 1350, 1352, 1356 (9th Cir. 1990).

A. The 2015 SEP Policy

The 2015 installment of EPA's SEP policy (2015 SEP policy) "underscore[s] the Agency's continuing strong support for SEPs, which can be powerful tools to secure significant environmental and public health benefits beyond those achieved by compliance, and to help address the needs of communities impacted by violations of environmental laws."[20] SEPs must be environmentally beneficial by improving, protecting, or reducing risks to public health or the environment. A SEP can benefit the defendant, but the primary beneficiary should be the public or the environment.[21] At the same time, a SEP must go beyond the defendant's existing environmental requirements under state and federal law.[22] Projects that reflect standard industry practices are generally not acceptable as SEPs.[23]

Projects that provide diagnoses, prevention, or treatment of the harm caused by the violation, and projects that reduce the quantity or toxicity of pollutants entering a waste stream, are appropriate SEPs so long as they are not otherwise legally required.[24] Likewise, projects to restore or enhance "the condition of the ecosystem or immediate geographical area adversely affected by the violation" are appropriate, as are assessments, monitoring, and audits that EPA is otherwise powerless to require.[25] EPA will also approve projects that provide training or technical support to other members of the regulated community to achieve or maintain compliance with environmental requirements as well as projects that provide training or other assistance to state and local first responders related to emergency planning and preparedness.[26] Projects that do not qualify as SEPs include, inter alia, general public educational and environmental awareness projects, contributions to colleges and universities for environmental research, cash donations to third parties (including state and local governmental entities), projects unrelated to environmental protection, projects already receiving federal assistance, and projects that are "expected to become profitable to the defendant within the first five years of implementation."[27]

The SEP policy encourages input on proposed SEPs from "the local community that may have been adversely impacted by the violations."[28] Ideally, EPA and the defendant would collaborate in seeking public input,

20. Giles Memo, *supra* note 11. It is by no means clear that the policies advanced by the 2015 update reflect the policy preferences of the Trump Administration, but EPA has thus far not attempted to revise the 2015 document.

21. EPA 2015 SEP POLICY UPDATE, *supra* note 6.

22. *Id.*

23. *Id.* at 7.

24. *Id.* at 12.

25. *Id.* at 13.

26. *Id.* at 16.

27. *Id.* at 17–18.

28. *Id.* at 18.

but the policy urges EPA enforcers to consider eliciting community input even if the defendant balks at the prospect of giving the public a role in defining the project. At the same time, it is important not to "undermin[e] the non-public nature of settlement negotiations."[29] Since some of the information exchanged during settlement negotiations may be privileged, members of the community are only allowed to participate directly in settlement negotiations in "extraordinary circumstances and with the agreement of the parties."[30]

EPA recognizes that the primary inducement for a defendant to propose a SEP is the prospect of mitigating a civil penalty, but it also understands that civil penalties serve an important deterrent function.[31] SEPs are not penalties, and EPA may not accept them in lieu of penalties.[32] But a defendant's willingness to undertake a SEP is "a relevant factor for the EPA to consider in establishing an appropriate settlement penalty."[33] Consequently, settlements that include SEPs "must always include a settlement penalty that recoups the economic benefit that the [defendant] gained from noncompliance" along with an appropriate penalty reflecting the gravity of the harm that the violations caused.[34] With two narrow exceptions, the final civil penalty must equal or exceed the economic benefit of noncompliance plus 10% of an additional gravity component or 25% of the gravity component alone, whichever is higher.[35] In general, the amount of the penalty mitigation attributable to a SEP may not exceed 80% of the estimated cost of implementing the SEP.[36] SEPs that provide significant benefits to communities with environmental justice concerns may exceed 80%, and mitigation of up to 100% is available to defendants that are small businesses, government entities, or nonprofit organizations.[37]

B. SEPs in Power Plant Litigation

EPA and DOJ have relied heavily on SEPs in their decades-long litigation against dozens of fossil fuel-fired power plants for failing to comply with regulations governing new source review (NSR) of major modifications of existing power plants.[38] One of their first victories came in 2003 when a

29. *Id.* at 19.

30. *Id.* at 19–20.

31. *Id.* at 21.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 22. The exceptions involved the Clean Water Act and the Toxic Substances Control Act. *Id.* at 22–23.

36. *Id.* at 24.

37. *Id.*

38. For a more detailed description of the Clean Air Act's NSR program, see THOMAS O. MCGARITY, POLLUTION, POLITICS, AND POWER: THE STRUGGLE FOR SUSTAINABLE ELECTRICITY 116–20 (2019).

federal district court held that the Ohio Edison Company had violated the NSR regulations by spending $136.4 million on eleven upgrade projects at its W.H. Sammis plant in Jefferson County, Ohio, without undergoing the required review.[39] The company then entered into a 2005 consent decree in which it agreed: (1) to spend more than $1 billion on pollution control technology at the Sammis plant and three of its other plants in Ohio and Pennsylvania, (2) to pay an $8.5 million fine, and (3) to spend $25 million on SEPs.[40] The projects included $14.4 million in alternative energy projects (mostly new wind turbines), $400,000 for solar power projects in Allegheny County municipal buildings, $215,000 for environmentally beneficial projects related to air pollution in national parks downwind of the plant, and $10 million to the downwind states of New York, New Jersey, and Connecticut for other environmentally beneficial projects related to mitigating the effects of air pollution.[41]

Over the course of the George W. Bush Administration, EPA entered into settlements with fourteen other electric power companies in which they agreed to pay $50.5 million in fines, spend $202 million on SEPs, and spend over $10 billion to install pollution control equipment or repower coal-fired plants with natural gas.[42] Between January 2009 and December 2011, EPA settled seven more cases in which electric power companies agreed to pay $21.5 million in fines, spend $394.8 million on SEPs, spend $5.6 billion on pollution control equipment, and retire or repower eighty-six coal-fired units.[43] One empirical study of all of the NSR settlements involving power

39. Eric Pianin, *Clean-Air Ruling Puts Blame on Ohio Utility*, WASH. POST (Aug. 8, 2003), https://www.washingtonpost.com/archive/business/2003/08/08/clean-air-ruling-puts-blame-on-ohio-utility/eb712784-9799-418f-a81d-ed3895c1ab50/ [https://perma.cc/D42R-JGPR]; Susan Bruninga, *Ohio Edison Co. Agrees to Pay $1.1 Billion to Cut Emissions 212,000 Tons from Plants*, ENV'T REP. (BNA) (Mar. 25, 2005); Bebe Raupe, *Modifications at Ohio Edison Plant Violated Clean Air Act Provisions, Federal Court Says*, ENV'T REP. (BNA) (Aug. 8, 2003).

40. Bruninga, *supra* note 39.

41. U.S. ENVTL. PROT. AGENCY, *Ohio Edison Company, W.H. Sammis Power Station, Clean Air Act – 2005 Settlement and 2009 Modified Settlement* (Aug. 11, 2009), https://www.epa.gov/enforcement/ohio-edison-company-wh-sammis-power-station-clean-air-act-2005-settlement-and-2009#projects [https://perma.cc/4NDG-NENM].

42. U.S. GOV'T ACCOUNTABILITY OFFICE., GAO-12-590, AIR POLLUTION: EPA NEEDS BETTER INFORMATION ON NEW SOURCE REVIEW PERMITS 30 (2012).

43. *Id.*; *e.g.*, U.S. DEP'T OF JUST., Press Release, No. 13-457, Clean Air Act Settlement with Wisconsin Utilities to Reduce Emissions by More Than 50,000 Tons Annually (Apr. 22, 2013), https://www.justice.gov/opa/pr/clean-air-act-settlement-wisconsin-utilities-reduce-emissions-more-50000-tons-annually [https://perma.cc/R5JZ-69SW]; Matthew Bandyk, *Dominion, EPA Reach Settlement on Coal Plant Emissions*, SNL GENERATION MKT. WK. (Apr. 9, 2013), *available at* Factiva, Doc. No. GMW0000020130412e9490000m; Matthew Bandyk, *Minnesota Power*, *EPA Reach Wide-Ranging Settlement on Coal Plant Emissions*, SNL GENERATION MKT. WK. (July 22, 2014), *available at* Factiva, Doc. No. GMW0000020140725ea7m00006; Housley Carr, *NRG Latest IPP to Plan for Compliance with EPA's MATS Rule*, ELECTRIC POWER DAILY (Nov. 26, 2012), *available at* Factiva, Doc. No. EPD0000020121210e8bq00006; Cathy Cash, *Kentucky Utilities to Spend $57 Million in Clean Air Settlement*, PLATTS COAL OUTLOOK (Jan. 7, 2013), *available at*

plants between 2000 and 2011 found that the average value of SEPs was almost eight times larger than the average value of civil penalties.[44] At the same time, the estimated cost of complying with injunctions in the settlements was twenty-six times the estimated value of the SEPs.[45] Thus, the deterrence value of these lawsuits was considerable, even assuming some reduction in deterrence attributable to the SEPs.

C. Activity in Congress

Despite the voluntary nature of SEPs, not everyone was convinced that they were legitimate tools for use in settlement negotiations. DOJ's use of SEP-like provisions in settlements in the litigation against the banks that brought about the financial meltdown of 2009 attracted the attention of Republican members of Congress who worried that the Obama Administration was using "controversial settlements" to "funnel money to activist groups instead of consumers."[46] In 2016, Congress considered a bill called the Stop Settlement Slush Funds Act (SSSFA), but it had no chance of surviving President Obama's certain veto. After the 2016 elections placed both houses of Congress and the White House in the hands of the Republican Party, however, the House Judiciary Committee held hearings on and reported out the Bill within three months of President Trump's inauguration.[47] The House committee report accused the Obama Administration of "subvert[ing] Congress'[s] spending power by requiring

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Factiva, Doc. No. COW0000020130122e9170000q; Christine Cordner, *WPS Agrees to Retire or Repower Coal-Fired Units as Part of EPA Air Settlement*, SNL ENERGY DAILY COAL REP. (Jan. 7, 2013), *available at* Factiva, Doc. No. SEUR000020130117e91e00018; DAIRYLAND POWER COOPERATIVE, *Press Release, Dairyland Power Cooperative Reaches Settlement with EPA and Sierra Club*, PR NEWSWIRE (June 29, 2012, 10:15 PM), https://www.prnewswire.com/news-releases/dairyland-power-reaches-settlement-with-epa-and-sierra-club-160825585.html [https://perma.cc/PV8E-QST5]; Annalee Grant, *CMS Subsidiary to Pay $2.75M in EPA Settlement, Proceed with Coal Fleet Update*, SNL ELECTRIC UTIL. REP. (Sept. 22, 2014), *available at* Factiva, Doc. No. GMW0000020140926ea9n0000i; Erin Jordan, *Alliant Energy to Upgrade Iowa Coal Plants, Pay Fine as Part of Clean Air Settlement*, CEDAR RAPIDS GAZETTE (July 15, 2015), https://www.thegazette.com/subject/news/alliant-energy-to-upgrade-iowa-coal-plants-pay-fine-as-part-of-clean-air-settlement-20150715 [https://perma.cc/FTT6-D7MA]; Darren Sweeney, *Duke Must Reduce Emissions, Close NC Coal Units as Part of Federal Settlement*, SNL GENERATION MKT. WK. (Sept. 10, 2015, 3:46 PM), https://www.snl.com/InteractiveX/article.aspx?CDID=A-33821985-11053&KPLT=4%202/4 [https://perma.cc/9UHU-8TBV]; Dan Testa, *Alabama Power, EPA Reach Settlement Ending Years Long Pollution Dispute*, SNL GENERATION MKT. WK. (June 30, 2015), *available at* Factiva, Doc. No GMW0000020150703eb6u00006.

44. Michael L. Rustad, Thomas H. Koenig & Erica R. Ferreira, *Restorative Justice to Supplement Deterrence-Based Punishment: An Empirical Study and Theoretical Reconceptualization of the EPA's Power Plant Enforcement Initiative, 2000–2011*, 65 OKLA. L. REV. 427, 449 (2013).

45. *Id.* at 451.

46. Press Release, House Comm. on the Judiciary, Regulatory Reform Subcomm. Holds Hearing on the Justice Dep't's Controversial Mortgage-Lending Settlements (Feb. 5, 2015), *quoted in* H.R. REP. NO. 115-72, at 28 (2017) (dissenting views).

47. H.R. REP. NO. 115-72, at 2.

settling defendants to donate money to non-victim third-parties."[48] In some cases, "the DOJ-required mandatory donations restored funding that Congress specifically cut."[49] To prevent this from happening in the future, the bill provided that no federal government official could

> enter into or enforce any settlement agreement on behalf of the United States, directing or providing for a payment or loan to any person or entity other than the United States, other than a payment or loan that provides restitution for or otherwise directly remedies actual harm (including to the environment) directly and proximately caused by the party making the payment or loan.[50]

The Bill passed the House in October 2017 but was not taken up in the Senate.[51] As we shall see, the Trump Administration has effectively adopted this proscription administratively.

II. The Virtues of SEPs

Supporters of SEPs strongly contest the assertion that SEPs are "slush funds" that are designed to avoid congressional oversight.[52] While there may have been some abuses in the context of banking regulation, SEPs in environmental enforcement litigation have been popular with environmental groups, community organizations, and industry and governmental defendants for decades.[53] That is because SEPs have many attractive advantages, several of which are described below.

A. Facilitate Settlements

Because they offer alternatives other than arguments over the amount of civil penalties, SEPs facilitate settlements.[54] Settlements usually reduce litigation costs, which is a benefit to both violators and the government.[55]

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48. *Id.*

49. *Id.* at 3.

50. *Id.* at 2.

51. Michael Macagnone, *House OKs Bill to Restrict Donations in DOJ Settlements*, LAW360 (Oct. 24, 2017, 8:58 PM), https://www.law360.com/articles/977643/-house-oks-bill-to-restrict-donations-in-doj-settlements [https://perma.cc/NEZ2-EPPS].

52. H.R. REP. NO. 115-72, at 22 (dissenting views).

53. Francis X. Lyons, *DOJ Policy Review of SEPs May Have Big Implications for Company Environmental Settlements*, NAT'L L. REV. (Oct. 7, 2019), https://www.natlawreview.com/article/doj-policy-review-seps-may-have-big-implications-company-environmental-settlements [https://perma.cc/433F-L5ZX].

54. H.R. REP. NO. 115-72, at 22 (dissenting views); Robert L. Glicksman & Dietrich H. Earnhart, *The Comparative Effectiveness of Government Interventions on Environmental Performance in the Chemical Industry*, 26 STAN. ENVTL. L.J. 317, 364 (2017).

55. Steven Bonorris et al., *Environmental Enforcement in the Fifty States: The Promise and Pitfalls of Supplemental Environmental Projects*, 11 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 185, 203 (2005) ("SEPs can obviate litigation costs."); Quan B. Nghiem, *Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act*, 24 B.C. ENVTL. AFF. L. REV. 561, 566 (1997).

Proponent of SEPs argue that a properly structured SEP creates a "win-win" situation because "the citizen or governmental plaintiff achieves both prevention and restoration (and the putative public relations/political benefits that flow from them), the defendant pays a smaller [civil] penalty, and the environment benefits from the expenditure of dollars on environmental improvements."[56] For these reasons, EPA, corporate defendants, environmental groups, and affected communities have generally supported SEPs.[57]

B. Rapid Implementation of Corrective Action

To the extent that SEPs contribute to the expeditious settlement of complex litigation, the agreed injunctive remedies other than SEPs will be implemented much sooner than they would in the absence of a settlement.[58] As the Massachusetts Highway Department settlement illustrates, these remedies can come at considerable cost and bring about sizable environmental improvements. While that agreement devoted $5 million to SEPs, the department agreed to spend $20 to $40 million on investigation and remediation of the offending sites. In the power plant litigation, the cost of injunctive relief vastly exceeded the monies devoted to SEPs.[59] The sooner the agreed-upon injunctive remedies are implemented, the better for the environment.[60]

C. Environmental Improvement

SEPs are designed to improve the environment and public health.[61] They are aimed at such desirable goals as "protecting children's health, preventing pollution, securing the development of innovative pollution control technologies, and ensuring environmental justice."[62] SEPs that focus on

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56. Kristl, *supra* note 12, at 218; *see also Stop Settlement Slush Funds Act of 2016*: *Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the House Comm. on the Judiciary*, 114th Cong. 77 (2016) [hereinafter *Slush Fund Hearings*] (testimony of Joel A. Mintz, Professor of Law, Nova Southeastern University College of Law) ("[SEPs] are limited and prudent exercises of enforcement discretion that benefit the Agency, regulated parties, and local communities alike.").

57. Droughton, *supra* note 9, at 809 ("Industry generally has been supportive of SEPs."); Ganguly, *supra* note 1, at 212.

58. Ganguly, *supra* note 1, at 222.

59. *Id.* at 203; Bruninga, *supra* note 39.

60. It does not appear that Professor Dana factors this considerable advantage of SEPs into his deterrence analysis.

61. Bonorris et al., *supra* note 55, at 203; Leslie A. Kaschak, *Supplemental Environmental Projects: Evolution of a Policy*, 2 ENVTL. LAW. 465, 466 (1996) ("[SEPs] allow mitigation projects to put money back into the affected environments rather than the general treasury."); Nghiem, *supra* note 55, at 566.

62. *Slush Fund Hearings*, *supra* note 56, at 77 (testimony of Joel A. Mintz, Professor of Law, Nova Southeastern University College of Law); *see also* 2015 EPA SEP POLICY UPDATE, *supra*

pollution reduction accomplish environmental improvement by reducing future emissions or other environmentally risky conduct.[63] SEPs can be projects that require pollution reduction in ways that EPA is otherwise powerless to require.[64] Over the years, SEPs have "prevented significant amounts of pollution and restored contaminated water, wetlands, land, and air."[65]

D. Technological Innovation

SEPs can give the EPA and violators an opportunity to experiment with new pollution reduction techniques and technologies.[66] One of the criteria for evaluating a SEP in the 2015 SEP policy is its potential to "further the development, implementation, or dissemination of innovative processes, technologies, and/or methods which more effectively: reduce the generation, release, or disposal of pollutants; conserve natural resources; restore and protect ecosystems; protect endangered species; promote compliance; or improve climate change preparedness and resilience."[67] In particular, EPA is interested in "technology-forcing techniques which may establish new regulatory benchmarks."[68] SEPs that establish new regulatory benchmarks can provide the basis for additional technology-based requirements with resulting improvement across the entire industry.[69]

E. Restorative Justice for Victims and the Environment

SEPs can achieve restorative justice for the victims of the pollution, the polluter, and the environment.[70] With origins in criminal law, "restorative justice" is a process under which wrongdoers attempt to repair the harm they have caused through dialogue with the victims, with the government serving

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note 6, at 3 (SEPs can advance EPA's overall mission, which include "protecting children's health, ensuring environmental justice, promoting pollution prevention, encouraging the development of innovative technologies that protect human health and the environment, and addressing climate change").

63. David L. Tanenholz, *Supplemental Environmental Projects: EPA's Efforts to Transform the Invisible Hand into a Green Thumb*, 5 ENVTL. LAW. 633, 646 (1998).

64. Bonorris et al., *supra* note 55, at 203 ("SEPs can benefit communities through promoting environmental and health improvements beyond regulatory minimums."); Droughton, *supra* note 9, at 809 (SEPs may be "designed to address environmental restoration from past operations that is beyond that which may be obtained through an enforcement action").

65. Kristl, *supra* note 12, at 218 & n.6 (citing studies on amounts of pollutants removed pursuant to SEPs); *see also* Droughton, *supra* note 9, at 807–10 (providing examples of successful SEPs).

66. Bonorris et al., *supra* note 55, at 204; Nghiem, *supra* note 55, at 566.

67. EPA 2015 SEP POLICY UPDATE, *supra* note 6, at 20.

68. *Id.*

69. Bonorris et al., *supra* note 55, at 204.

70. *See* JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 11 (2002) (defining restorative justice as "a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future").

as a mediator and implementer.[71] Restorative justice treats punishment "not as an end but a means to achieving positive, constructive change for both offenders and victims."[72] It is "reparative, not retributive."[73] At the same time, restorative justice processes can provide both specific deterrence because the wrongdoer is persuaded by the knowledge of the full extent of the harm it has done to change its ways and general deterrence as other potential offenders learn that violations of the law will entail more than a simple fine.[74] The restorative justice process must, however, be backed up by sanctions should the process fail and the wrongdoer remain unrepentant.[75]

Restorative justice is similar to corrective justice, a fundamental tenet of tort law, in that it seeks moral accountability by the wrongdoer toward the victim.[76] It differs from corrective justice in that it requires more than mere monetary compensation.[77] It demands that the offender play an active role in restoring victims to their positions prior to the wrongful conduct.[78] At the same time, the victims must play a significant role in determining the appropriate remedy.[79] Allowing victims to play a prominent role not only facilitates the selection of an appropriate restorative remedy, but it also can lead to some degree of reconciliation and operate as a hedge against capture of the regulatory enforcement process by powerful and persuasive violators.[80]

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71. *Id.* ("[R]estorative justice is about restoring victims, restoring offenders, and restoring communities."); Rustad et al., *supra* note 44, at 469; Eric Anthony DeBellis, *Implementing Supplemental Environmental Project Policies to Promote Restorative Justice*, ECOLOGY L. CURRENTS (Mar. 11, 2016), https://elq.typepad.com/currents/2016/03/implementing-supplemental-environmental-project-policies-to-promote-restorative-justice.html [https://perma.cc/AM4B-2UUH].

72. DeBellis, *supra* note 71.

73. Rustad et al., *supra* note 44, at 469.

74. BRAITHWAITE, *supra* note 70, at 116–17.

75. *See id.* at 118–19, 230 (describing that it is necessary to have the threat of sanctions in the background).

76. Rustad et al., *supra* note 44, at 474.

77. Corrective justice seeks "to redress unjust gains and losses by means of a financial adjustment." Catherine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2355 (1990). Professor Christopher Schroeder suggests that in order to achieve corrective justice, the common law of torts must meet three conditions: "(1) individual liability must be assessed consistently with moral norms of responsibility for one's actions; (2) victims must be made whole (compensated); and (3) the resources for satisfying (2) must come exclusively from the liability payments required by (1)." Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 450 (1990).

78. *About*, UNIV. OF TEX. SCH. OF SOC. WORK: INST. FOR RESTORATIVE JUSTICE & RESTORATIVE DIALOGUE, https://sites.utexas.edu/irjrd/about/ [https://perma.cc/WB82-6KBY] (describing the goals of restorative justice as "to hear and put right the wrongs through engaging victims, offenders and community members in restorative dialogue and the creation of mutually beneficial solutions").

79. BRAITHWAITE, *supra* note 70, at 46 ("Empowerment of victims to define the restoration that matters to them is a keystone of a restorative justice philosophy.").

80. *Id.* at 161 (emphasizing "the importance of having third parties present during regulatory negotiation to protect against corporate capture"); DeBellis, *supra* note 71 ("[R]estorative justice

Victim participation also provides an opportunity for the violator to come to a better understanding of the full impact of its wrongdoing and to play a role in taking responsibility for remedying the damage.[81]

In the context of environmental regulation, SEPs are all about restorative justice.[82] They are designed "to improve or repair relationships among all stakeholders . . . following an environmental violation."[83] At the same time, SEPs can lead the violator to "internalize the norms of good environmental citizenship."[84] SEPs can perform this restorative function if defendants are allowed to undertake restorative actions in return for penalty mitigation and victims are permitted to play a meaningful role in determining the content of those actions.[85]

F. Securing Environmental Justice

Restorative justice should be available to all victims of environmental violations—rich or poor. But the fact that the burden of many environmental violations fall more heavily on low-income and minority communities means that bringing restorative justice into the penalty stage of environmental enforcement actions will also advance environmental justice goals.[86] Recognizing that some especially vulnerable populations are disproportionately burdened by pollution, President Clinton in February 1994 signed Executive Order 12,898, which requires federal agencies to make environmental justice a part of their missions to the extent allowed by law.[87] EPA "defines 'environmental justice' . . . as the fair treatment and meaningful involvement of all people, regardless of race, color, national

demands more than correction. It also calls for stakeholder participation."); Tanenholz, *supra* note 63, at 647 (recognizing that community involvement "can enhance relations between its citizens and its corporate residents").

81. Rustad et al., *supra* note 44, at 475.

82. Bonorris et al., *supra* note 55, at 211 ("[T]he concept of restorative justice dovetails with the use of SEPs . . . .").

83. Rustad et al., *supra* note 44, at 469 (quoting HASTINGS COLLEGE OF LAW & PUBLIC LAW RESEARCH INSTITUTE, SUPPLEMENTAL ENVIRONMENTAL PROJECTS: A FIFTY STATE SURVEY WITH MODEL PRACTICES (Steven Bonorris ed., 2007)); *see also* Nicholas Targ, Steven Bonorris & Chelsea Holloway, *The Possibility of SEP Legislation and Lessons to Learn from the Fifty States*, TRENDS, July/Aug. 2007, at 4 ("[T]he process of negotiating a SEP can help restore frayed relationships that can result from a violation.").

84. David A. Dana, *The Uncertain Merits of Environmental Enforcement Reform: The Case of Supplemental Environmental Projects*, 1998 WIS. L. REV. 1181, 1211 (citing Christopher D. Carey, *Negotiating Environmental Penalties: Guidance on the Use of Supplemental Environmental Projects*, 44 A.F. L. REV. 1, 3 (1998)).

85. *See* Rustad et al., *supra* note 44, at 475 (describing the "purest form" of restorative justice).

86. Deborah Behles, *From Dirty to Green: Increasing Energy Efficiency and Renewable Energy in Environmental Justice Communities*, 58 VILL. L. REV. 25, 51 (2013); Bonorris et al., *supra* note 55, at 211 (explaining that "[e]nvironmental justice . . . represents a subcategory of restorative justice"); Rustad et al., *supra* note 44, at 476; Simms, *supra* note 4, at 10511–12.

87. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations and policies."[88]

SEPs can advance environmental justice by sending resources in the direction of people who suffer the greatest harm from environmental violations.[89] For example, projects that increase energy efficiency and distributed energy generation in low-income and minority communities are often appropriate components of SEPs in enforcement litigation addressing emissions from power plants or other facilities that burn fossil fuels.[90] Because such projects are designed to lower fossil fuel emissions, which adversely affect nearby communities as well as contribute to global warming, the nexus between the violation and the projects seems clear.[91] Past EPA-approved SEPs include wind turbines at local schools, solar panels on public buildings, and energy audits in low-income communities.[92]

G. Acknowledgement of Wrongdoing

Even though the defendant does not typically admit to a violation of the law in a settlement, its agreement to remedy health, safety, or environmental harm attributable to its activities shows a "certain degree of understanding that an action that has been taken is unlawful, incorrect."[93] At the same time, it signals the violator's desire to be a "good neighbor" in the future.[94] For its part, the government acknowledges that the monetary penalty that it demands need not be as steep when the violator agrees to take corrective action.

H. Extra-Statutory Benefits

SEPs have benefits that go beyond the environmental improvements that EPA is empowered by its statutes to demand.[95] SEPs have a unique ability to respond to the individual circumstances of affected individuals and

88. EPA 2015 SEP POLICY UPDATE, *supra* note 6, at 3.

89. Kathleen Boergers, *The EPA's Supplemental Environmental Projects Policy*, 26 ECOLOGY L.Q. 777, 793–94 (1999) (explaining how "[b]y focusing the SEP on remedying harms to those most impacted by the environmental violation, environmental justice goals will be promoted"); Bonorris et al., *supra* note 55, at 205 ("Judicious use of geographically tied SEPs helps ensure that the communities bearing the burden of environmental degradation will have the opportunity to directly benefit from sanctions against violators.").

90. *See* Behles, *supra* note 86, at 51 (addressing how "SEPs can help fund environmental improvements in communities impacted by the alleged violation").

91. *Id.* at 53.

92. *Id.* at 54.

93. *Environmental Credit Projects Under Clean Water Act: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and Env't and the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 100th Cong. 25–26 (1987) (testimony of Raymond Ludwiszewski, Associate Deputy Attorney General, Department of Justice).

94. Bonorris et al., *supra* note 55, at 203.

95. *Id.* at 205 (describing SEPs as good for all parties involved, including the violator); Simms, *supra* note 4, at 10512 (describing the public health, environmental, and economic benefits of SEPs).

communities.[96] They can benefit violators through "improved community relations and community integration, positive publicity, and more constructive relationships with environmental enforcement officials."[97] SEPs that clearly benefit adversely affected communities can benefit EPA and DOJ by increasing popular support for their environmental enforcement programs.[98] Both violators and government enforcement officials can benefit if the flexibility that the government shows during negotiations over SEPs render their relationship less contentious.[99]

III. Criticisms of SEPs

Although SEPs are generally favored by EPA enforcers, regulated industries, and environmental groups, they are not without critics. Like any enforcement tool, SEPs are subject to abuse. But some critics argue that they violate long-established limitations on Executive Branch spending and even the Constitution. Beyond that, critics worry about the ability of scofflaw companies to use SEPs to "greenwash" their public images, the modest role that affected communities play in negotiating SEPs, the failure of violators to execute agreed-upon SEPs, and the potential for SEPs to achieve suboptimal deterrence. The EPA's 2015 SEP policy addresses each of these objections, but apparently not to the satisfaction of the critics.

A. Constitutional and Statutory Proscriptions

The primary institutional concern with SEPs is that EPA and DOJ will use them to circumvent Congress's constitutional power of the purse.[100] Article I, Section Nine of the Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[101] Funds that find their way into the Treasury through whatever route may only be spent with express congressional authorization.[102] At the same time, Article II of the Constitution requires the President to take care that the

96. Ganguly, *supra* note 1, at 223.

97. *See* Simms, *supra* note 4, at 10512 (describing the public health, environmental, and economic benefits of SEPs); *see also* Bonorris et al., *supra* note 55, at 205 ("SEPs benefits violators themselves, by repairing corporate images harmed by negative environmental publicity."); Nghiem, *supra* note 55, at 566 ("[B]usinesses may be motivated by the goodwill which they stand to gain from consumers and government enforcement officials who appreciate sincere, albeit coerced, efforts to improve environmental conditions.").

98. Bonorris et al., *supra* note 55, at 203 (SEPs can "increase 'popular support for the environmental regulatory endeavor.'").

99. *Id.*

100. H.R. REP. NO. 115-72, at 3 (2017); *see also* Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 B.Y.U. L. REV. 327, 329–30 (describing how DOJ's power over litigation allows it to circumvent congressional appropriations authority).

101. U.S. CONST. art. I, § 9.

102. *See* Peterson, *supra* note 100, at 334 (explaining that "Congress [has] the exclusive power to appropriate funds").

laws be faithfully executed.[103] Although the federal environmental statutes do not specifically authorize SEPs,[104] the Faithful Execution Clause vests the Executive Branch with broad authority to craft settlement agreements with violators.[105] And a substantial body of case law stands for the proposition that a settlement can achieve relief beyond that which the government could have secured under its statute in the absence of the settlement.[106]

Most critics recognize the authority of the Justice Department to mitigate penalties when violators voluntarily undertake projects aimed at correcting harm to people who have been "directly and proximately harmed" by their violations.[107] They further understand that environmental harm "may be diffuse," and they would allow SEPs that remediate environmental harm directly caused by the violations.[108] But once victims have been compensated and direct environmental harm remediated, "deciding what to do with additional funds extracted from defendants becomes a policy question properly decided by elected representatives in Congress, not agency bureaucrats or prosecutors."[109]

Convinced that the Department of the Treasury was circumventing the power of Congress to determine how federal dollars are spent, Congress in 1820 passed the Antideficiency Act providing that "no contract shall hereafter be made . . . except under law authorizing the same, or under appropriation adequate to its fulfillment."[110] It later expanded the Statute's coverage to include all federal agencies and backed up its prohibition with criminal sanctions.[111] When federal agencies began to divert fines collected from violators of federal laws to agency purposes before they reached the Treasury, Congress in 1849 enacted the Miscellaneous Receipts Act (MRA),

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103. U.S. CONST. art. II, § 3.

104. Dana, *supra* note 84, at 1183. The Clean Air Act has a special provision that allows up to $100,000 of any assessed penalty to "be used in beneficial mitigation projects which are consistent with [the Act] and enhance the public health or the environment." 42 U.S.C. § 7604(g)(2). The Toxic Substances Control Act has a similar provision that allows EPA to enter into settlements with conditions. 15 U.S.C. § 2615(a)(2)(C).

105. H.R. REP. NO. 115-72, at 30 (dissenting views).

106. Dana, *supra* note 84, at 1183.

107. *Slush Fund Hearings*, *supra* note 56, at 6 (statement of Bob Goodlatte) (recognizing DOJ's authority to obtain redress for victims in enforcement settlements so long as they are "directly and proximately harmed"); H.R. REP. NO. 115-72, at 3, 10.

108. *Slush Fund Hearings*, *supra* note 56, at 47 (testimony of David M. Uhlman, University of Michigan School of Law) (explaining that SEPs can "[a]ddress [g]eneralized [h]arm [c]aused by [v]iolations and [h]elp [c]ommunities [r]ecover from [c]orporate [m]isconduct"); H.R. REP. NO. 115-72, at 3.

109. H.R. REP. NO. 115-72, at 3.

110. *Id.* at 4 (citing the Antideficiency Act); Peterson, *supra* note 100, at 339 (same).

111. H.R. REP. NO. 115-72, at 4; Peterson, *supra* note 100, at 330–31.

providing that officials "receiving money for the Government from any source shall deposit the money in the Treasury."[112]

EPA's SEP policies have avoided these statutes by ensuring that monies spent to implement SEPs never reach federal officials in the first place.[113] Critics argue that there may still be a "constructive receipt" of funds that circumvents Congress's power of the purse by "augmenting the agency's budget."[114] The Comptroller General of the United States, in an early challenge to the lawfulness of SEPs, concluded that SEPs that "go beyond remedying the violation in order to carry out other statutory goals of the agency, would permit the agency to improperly augment its appropriations for those other purposes, in circumvention of the congressional appropriations process."[115] According to an opinion by the DOJ's Office of Legal Counsel, however, federal officials can avoid this "augmentation" problem by ensuring that the settlement is executed prior to any admission or finding of liability and that no federal official retains post-settlement control over the disposition and management of the funds beyond oversight to ensure that the defendant complies with the settlement's terms.[116] Thus, EPA's 2015 SEP policy provides that EPA "may not play any role" in managing or controlling funds set aside for implementing a SEP beyond oversight to ensure that the SEP is being implemented by the defendant or a third party.[117] In particular, EPA "may not direct, recommend or propose a specific organization to be the recipient of a SEP," but it can veto contractors proposed by the defendant on the basis of objective criteria for assessing their qualifications.[118]

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112. 31 U.S.C. § 3302 (2012); *see* Peterson, *supra* note 100, at 340 (describing the aggregation problem in a similar context). The Clean Air Act contains a special provision governing the distribution of funds assessed in actions brought by private citizens under its citizen enforcement authorization. Civil penalties in such actions must be deposited in a special fund in the United States Treasury to be used by EPA "to finance air compliance and enforcement activities," except that the court may allow up to $100,000 of any assessed penalty to "be used in beneficial mitigation projects which are consistent with [the Act] and enhance the public health or the environment." 42 U.S.C. § 7604(g) (2012).

113. Peterson, *supra* note 100, at 347–48 ("[T]he Department of Justice has the power to short circuit the Miscellaneous Receipts Act requirement by agreeing to settlement terms that require the violator of a federal statute to undertake certain responsibilities or actions that might inure to the benefit of the executive branch.").

114. *Id.* at 331.

115. U.S. Gov't Accountability Office, Opinion Letter to Congressman John D. Dingell, Chairman of the House Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce, B-247155.2 (1993), 1993 WL 798227, at *2; *see* Kaschak, *supra* note 61, at 471–73 (relating history of Comptroller General's opinion on SEPs). The decisions of the Comptroller General are not binding on Executive Branch agencies; they are merely advisory. Peterson, *supra* note 100, at 371.

116. H.R. REP. NO. 115-72, at 34 (dissenting views) (citing *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B Op. O.L.C. 684, 688 (1980)).

117. EPA 2015 SEP POLICY UPDATE, *supra* note 6, at 8.

118. *Id.* at 9.

EPA's 2015 SEP policy further provides that SEPs may not provide the Agency "with additional resources to perform a particular activity for which it has received a specific appropriation, meet a statutory obligation, or circumvent a statutory prohibition."[119] In addition, a SEP may not provide "additional support for a project managed by the EPA or another federal agency," provide additional resources to perform work on federally owned property, or augment "an 'open federal financial assistance transaction' between the EPA and the defendant, any third-party SEP recipient, or any third-party SEP implementer that is funding or could fund 'the same activity as the SEP.'"[120]

Nevertheless, critics worry that DOJ and EPA use the considerable leverage that they wield in settlement negotiations to force defendants to undertake projects that advance agency policies and programs beyond compensating victims of violations.[121] In particular, they are concerned that agencies have been "systematically subverting Congress'[s] spending power by requiring settling parties to donate money to activist groups."[122] The solution to this problem is a requirement, not explicitly mandated by statute, that there be an adequate "nexus" between the SEP and the violation that gave rise to the enforcement action.[123] The 2015 SEP policy fulfills this requirement by stressing the critical need for a "sufficient nexus" between the violation and the SEP.[124] SEPs must address environmental conditions at the location of the violation or "the condition of the ecosystem or immediate geographical area adversely affected by the violation."[125] A SEP that fails to advance the goals of at least one of the statutes that forms the basis for the enforcement action lacks such a nexus.[126] The proponent of a SEP must design it to reduce the likelihood of similar violations in the future, the adverse impact of the violation on public health or the environment, or the

119. *Id.* at 39.

120. *Id.* A lengthy appendix provides definitions, specific criteria, and checklists for ensuring that SEPs do not circumvent the MRA. *Id.* at 39–47.

121. *See* H.R. REP. NO. 115-72, at 5 (describing the augmentation problem); Peterson, *supra* note 100, at 357 (same).

122. *Slush Fund Hearings*, *supra* note 56, at 6 (statement of Rep. Bob Goodlatte, Chairman H. Judiciary Comm.); *id.* at 16 (testimony of Dan Lungren, U.S. Chamber of Commerce) (asserting that "executive branch agencies now use settlements of enforcement actions to fund private parties whose activities further the policy (or in some instances, the personal) goals of agency officials"); *id.* at 39 (testimony of Paul F. Figley, American University School of Law) (expressing concern that "settlement payments will be directed to political allies or to further political or personal ends"). A former DOJ official strongly denied that SEPs were being used as "slush funds" to support activist groups and the like. *Id.* at 59 (testimony of David M. Uhlman, University of Michigan School of Law).

123. Bonorris et al., *supra* note 55, at 200; Peterson, *supra* note 100, at 354–55.

124. EPA 2015 SEP POLICY UPDATE, *supra* note 6, at 7.

125. *Id.* at 13.

126. *Id.* at 8.

overall risk to the public or the environment affected by the violation.[127] While it is always possible that enforcement officials will enter into settlements that violate these prescriptions, SEPs that comply with the policy should avoid the circumvention of the appropriations process that worried the Comptroller General.

B. Greenwashing

One attraction of SEPs to violators is their potential to burnish a company's public image in the wake of bad publicity focusing on its violations.[128] Some critics of SEPs, however, worry that companies that are guilty of reprehensible environmental conduct will use SEPs to avoid the stigma that they richly deserve.[129] EPA's SEP policy attempts to mitigate that concern by requiring that any publicity about a SEP be accompanied with a prominent statement that the project "is being undertaken as part of the settlement of an enforcement action."[130] Depending on the prominence of this disclaimer, it may go some distance toward solving the "greenwashing" problem. At the same time, some degree of image burnishing may be the price that the government has to pay to obtain the considerable environmental advantages that SEPs can provide.

C. Failure to Include Affected Communities

We have seen how both restorative justice and environmental justice require participants in the settlement process to reach out to members of the affected communities and allow them to play a role in shaping the remedy. There are, however, several practical impediments to community participation in SEP formulation. Community representatives often find out about the negotiations too late in the process to participate effectively in crafting the SEP.[131] Moreover, local community groups may lack the resources or technical skills to participate effectively in crafting restorative SEPs.[132] And the "intricacies of the federal SEP requirements" make it difficult for community groups to come up with proper SEPs.[133]

Government enforcers and violators may not be anxious to include "outsiders" in their negotiations for several reasons. Both enforcers and

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127. *Id.*

128. Droughton, *supra* note 9 (explaining that a violator "may also receive good press"); Patrick Johnson, *Dam Removal as Climate Change Policy: How Supplemental Environmental Projects Could Be Used to Reduce Methane Emissions*, 53 IDAHO L. REV. 179, 197 (2017).

129. Nghiem, *supra* note 55, at 569 ("[P]ermitting polluters to maintain control of 'voluntary' projects [may] allow them to reap the public relations benefits of being perceived as benevolent sponsors of environmental improvement projects.").

130. EPA 2015 SEP POLICY UPDATE, *supra* note 6, at 26.

131. Bonorris et al., *supra* note 55, at 207; Simms, *supra* note 4, at 10525.

132. Bonorris et al., *supra* note 55, at 207; Simms, *supra* note 4, at 10525.

133. Bonorris et al., *supra* note 55, at 207.

violators tend to insist on confidentiality in negotiating settlements for fear that an ill-timed public disclosure of a negotiating position will reveal a weakness in their positions or generate public pressure to refrain from compromise on one or more issues.[134] Similarly, they may fear that representatives of the public will take hardline positions that make it difficult or impossible to come to agreement.[135] Violators may worry that negotiations over technological improvements will reveal valuable trade secrets.[136] And when the situation presents the possibility of civil litigation seeking damages from a violator, the violator may be especially reluctant to share information with community representatives.

Consequently, government enforcement officials do not ordinarily reach out to community groups early in the process while they are negotiating SEPs with violators.[137] EPA's 2015 SEP policy states that "representatives of community groups will not participate directly in the settlement negotiations" except in "extraordinary circumstances and with the agreement of the parties."[138] EPA's standard practice is to publish a notice in the *Federal Register* when the violator and the agency have agreed to a settlement and to provide a period of time to allow public comment on its terms and conditions.[139] At the same time, the 2015 settlement policy "strongly encourages defendants to reach out to the community for SEP ideas," and it expresses a preference for "SEP proposals that have been developed with input from the impacted community."[140]

D. Failure to Execute SEPs

Having agreed to undertake a SEP and having received a penalty mitigation, it is always possible that a defendant will not perform in accordance with the SEP's requirements.[141] Critics point out that federal grant programs "come with a litany of rules and procedures designed to ensure that funds are used as intended."[142] This system of oversight is lacking, however, when EPA and DOJ agree to a SEP to fund a third-party project.[143] The 2015 SEP policy attempts to avoid this problem by ensuring that the defendant has the ability to complete the SEP during the settlement

134. Simms, *supra* note 4, at 10524.

135. *Id.* at 10524, n.132 (citing John Rosenthal et al., *Supplemental Projects as Tools for Environmental Justice and Economic Development in Small Towns*, 30 HUM. RTS. 13, 14 (2003)).

136. *Id.* The risk of revealing trade secrets should not be a concern in settlements with governmental entities like state agencies and cities.

137. *Id.* at 10525.

138. EPA 2015 SEP POLICY UPDATE, *supra* note 6, at 20.

139. Bonorris et al., *supra* note 55, at 220.

140. EPA 2015 SEP POLICY UPDATE, *supra* note 6, at 4.

141. Nghiem, *supra* note 55, at 569 (reporting DOJ's concern that "EPA would not be able to monitor SEPs effectively to ensure that they were being performed properly").

142. H.R. REP NO. 115-72, at 11.

143. *Id.* at 11–12.

negotiations and by monitoring the SEP's progress.[144] In addition, SEPs have to "include a reliable and objective means to verify that the defendant has completed the project on time and in a satisfactory manner."[145] Finally, SEPs should clearly define satisfactory completion, specify a deadline for completion with interim milestones, include a stipulated penalty for failure to perform, and provide for dispute resolution.[146]

E. Lost Incentives

The primary purpose of civil penalties is to deter noncompliance with laws and regulations.[147] They achieve "specific" deterrence by discouraging future violations by the defendant in a particular case, and they achieve "general" deterrence by sending a message to other potential violators that failure to comply with the law, if detected, will have serious negative consequences.[148] In theory, neither form of deterrence will be successful if the penalty does not exceed the amount of money that the defendant saved by not complying plus an additional amount to reflect the probability of nondetection and the gravity of the offense.[149]

Some observers of SEPs worry that they may not achieve this deterrence goal because they often lower the overall cost of noncompliance to violators.[150] Based on an extensive economic analysis of a hypothetical negotiating process involving the government and a violator,[151] Professor David Dana concludes that "SEP programs may result in underdeterrence of regulatory violations where there previously was none and worsen underdeterrence where there previously was some."[152] A primary driver to this conclusion is Professor Dana's assumption that violators will recoup some or all of the cost of a SEP and that some or all of this savings will not enter into the government's calculations.[153] There is some empirical basis for this concern in the case of SEPs in which the violator agrees to reduce its pollution to levels below those otherwise required by law.[154] The concern also has some theoretical plausibility. Expenditures on such a SEP may

144. *See* EPA 2015 SEP POLICY UPDATE, *supra* note 6, at 2–3 (discussing EPA's oversight and considerations as to the likelihood defendant can complete the SEP).

145. *Id.* at 25.

146. *Id.* at 28–30.

147. Glicksman & Earnhart, *supra* note 54, at 320 ("EPA and state environmental agencies typically proceed on the assumption that rigorous enforcement will deter noncompliance by regulated entities.").

148. *Id.* at 335–36; Rustad et al., *supra* note 44, at 464–65.

149. Glicksman & Earnhart, *supra* note 54, at 345–46; Rustad et al., *supra* note 44, at 466–67.

150. Dana, *supra* note 84, at 1184.

151. *Id.* at 1201–05.

152. *Id.* at 1184.

153. *Id.* at 1194.

154. *Id.* (citing U.S. ENVTL. PROT. AGENCY, RECENT EXPERIENCE IN ENCOURAGING THE USE OF POLLUTION PREVENTION IN ENFORCEMENT SETTLEMENTS: FINAL REPORT (1995)).

reduce the cost of compliance with more stringent regulations in the future and may result in energy savings in ways that do not enter into the government's calculations.[155] A SEP may also allow the violator to reap some goodwill that may have economic value if it can hide from customers the fact that the expenditure resulted from a settlement of litigation involving past illegal conduct.[156] Many SEPs, however, do not involve expenditures that have the potential to lower future compliance costs, and the goodwill value of a particular project may or may not be large.[157]

It is always possible, even probable, that there will be uncertainties in calculating *ex ante* the cost of complying with a SEP.[158] Since the violator is the one who crafts the SEP and estimates its costs in the first instance, it may have an informational advantage that allows it to persuade EPA and DOJ that the costs are higher and/or the benefits to the violator lower than they will prove to be in the future.[159] Unless EPA and DOJ are vigilant in overseeing cost and benefits estimates, violators may successfully game the system, and the deterrent value of the civil penalties that would otherwise have been assessed will be lost. Even in the absence of gaming the system, uncertainties in cost estimates can result in inconsistencies across SEPs that may appear unfair and discourage future violators to come to the settlement table.[160]

Professor Dana is also skeptical of the suggestion that SEPs lead violators to internalize norms of good behavior, finding no evidence that offenders that have implemented SEPs in the past are better environmental citizens than those that have paid fines.[161] Proponents of restorative justice respond that SEPs can yield specific deterrence because the company must acknowledge wrongdoing and seek to change its ways, and they can provide some degree of general deterrence as potential violators learn that violations of the law will entail sitting down with victims and taking actions beyond paying a fine.[162] Professor Dana is probably correct, however, in suggesting that this aspect of SEPs is not likely to achieve greater general deterrence

155. Dana, *supra* note 84, at 1194.

156. *Id.*; Nghiem, *supra* note 55, at 566; Tanenholz, *supra* note 63, at 648.

157. Lloyd, *supra* note 18, at 441; *see* Benne C. Hutson & Amanda K. Short, *The Nexus Requirement for Supplemental Environmental Projects: The Emperor's New Clothes of Environmental Enforcement*, 3 CHARLOTTE L. REV. 67, 74 (2011) (explaining that the courts have generally held that expenditures on SEPs are not deductible expenses for tax purposes).

158. *See* Tanenholz, *supra* note 63, at 647 (discussing different ways EPA may miscalculate the cost of compliance with the SEP); Brooke E. Robertson, Note, *Expanding the Use of Supplemental Environmental Projects*, 86 WASH. U. L. REV. 1025, 1039 (2009) (same).

159. Bonorris et al., *supra* note 55, at 206.

160. *Id.*; *see* Nghiem, *supra* note 55, at 569 (reporting concern that "frequent use of SEPs would make it more difficult to preserve consistency and predictability in enforcement decisions for similar violations").

161. Dana, *supra* note 84, at 1211.

162. *See* BRAITHWAITE, *supra* note 70, at 121–122 (explaining the deterrent effects of restorative justice).

than civil penalties.[163] At the same time, Professor Dana recognizes that to the extent that SEPs facilitate settlements and add to the regulator's reputation for vigorous enforcement, they may inspire the Agency to pursue investigations and enforcement more vigorously, thereby increasing general deterrence.[164]

An empirical assessment of the deterrent effect of SEPs under EPA's 1998 SEP policy undertaken by Professors Glicksman and Earnhart found that SEPs improved environmental performance by violators and thus achieved specific deterrence but were counterproductive from the perspective of general deterrence.[165] They concluded that SEPs and fines were equally effective as specific deterrents, but fines were more effective than SEPs as general deterrence.[166]

EPA's 2015 SEP policy recognizes that "[p]enalties promote environmental compliance and help protect public health by deterring future violations by the same violator and other members of the regulated community."[167] The policy addresses the issue of underdeterrence by insisting that violators pay a civil penalty that recoups the economic benefit that the defendant gained from noncompliance along with an appropriate sum reflecting the gravity of the harm that the violations caused.[168] With two narrow exceptions, the final penalty must equal or exceed the economic benefit of noncompliance plus 10% of the gravity component or 25% of the gravity component alone, whichever is higher.[169] In addition, the amount of the penalty mitigation attributable to a SEP may not normally exceed 80% of the estimated cost of implementing the SEP.[170]

SEPs that could benefit defendants are inherently suspect because any benefits offset the deterrent value of foregone civil penalties. At the same time, EPA and environmental advocates would like to encourage innovative pollution prevention technologies that might be profitable for a company if they prove effective and catch on. EPA's 2015 SEP policy addresses this tradeoff by specifying criteria for approving SEPs that could become profitable and providing that SEPs with defendants that are small businesses or small communities can become profitable after three years and SEPs with other defendants may become profitable after five years.[171] As mentioned

163. Dana, *supra* note 84, at 1211–12.

164. *Id.* at 1210. Dana, however, finds little empirical support for this suggestion. *Id.*

165. Glicksman & Earnhart, *supra* note 54, at 365.

166. *Id.* at 365–66.

167. EPA 2015 SEP POLICY UPDATE, *supra* note 6, at 21.

168. *Id.*

169. *Id.* at 22.

170. *Id.* at 24. The policy makes exceptions for projects that provide significant benefits to communities with environmental justice concerns or violators that are small businesses, government entities, or nonprofit organizations. *Id.*

171. *Id.* at 32–33.

above, EPA's 2015 SEP policy attempts to modulate the goodwill factor by requiring that any publicity about a SEP be accompanied with a prominent statement that the project "is being undertaken as part of the settlement of an enforcement action."[172] In deciding whether to approve a SEP, EPA is careful to ensure that the benefits of the SEP outweigh any lost deterrent value of a higher penalty.[173] If EPA is concerned about the effect of enhanced goodwill on the deterrent value of SEPs, it can always subtract an estimate of the goodwill value of the SEP during negotiations.[174]

IV. Overall Assessment

The above analysis demonstrates that properly designed SEPs can provide substantial benefits to people who are adversely affected by violations of environmental laws and to the environment. To the extent that they substitute for civil penalties, SEPs aimed at achieving restorative justice may result in less general deterrence, but the benefits of rapid implementation of corrective action, environmental improvement, technological innovation, restorative justice, and environmental justice may well exceed the loss of general deterrence in many cases.

Given the overall desirability of SEPs, it is somewhat surprising that they are not more frequently used to settle complex environmental litigation. According to an empirical study undertaken by Professor Kenneth Kristl in 2007, only around 12% of settlements in government-initiated environmental-enforcement cases rely on SEPs. This is no doubt due in part to the fact that violators may only deduct 80% of the estimated cost of implementing the SEP from EPA's suggested penalty.[175] On the other hand, the 80% cap goes a long way toward minimizing underdeterrence as discussed above.

V. The Trump Administration Limitations on SEPs

On June 5, 2017, Attorney General Jeff Sessions signed a one-page memorandum (the June 2017 Sessions Memo) expressing concern that settlement agreements between federal agencies and private entities in previous administrations had included payments to "non-governmental, third-party organizations."[176] The memo announced flatly that the Justice Department would "no longer engage in this practice."[177] In particular, "[d]epartmental attorneys may not enter into any agreement on behalf of the

172. *Id.* at 26.

173. *Id.* at 2–3.

174. Tanenholz, *supra* note 63, at 648.

175. Kristl, *supra* note 12, at 219; Robertson, *supra* note 158, at 1037.

176. Memorandum from Office of the U.S. Att'y Gen., to All Component Heads and U.S. Att'ys Regarding Prohibition on Settlement Payments to Third Parties (June 5, 2017).

177. *Id.*

United States in settlement of federal claims or charges . . . that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute."[178] The memo, however, allowed three exceptions for restitution to victims that otherwise directly remedies the harm (including harm to the environment) caused by the violation, payments for legal or other professional services, and payments expressly authorized by statute.[179] In effect, the memo implemented the House-passed SSSFA even though that Bill never passed the Senate.[180]

Acting Assistant Attorney General Jeffrey H. Wood then issued a memorandum in January 2018 (the Wood Memo) elaborating on the implications of the June 2017 Sessions Memo for DOJ attorneys in the Environment and Natural Resources Division.[181] Recognizing that the June 2017 Sessions Memo allowed for "limited use" of certain types of third-party payments in some environmental cases, the Wood Memo stated that they would not be routine, and it directed that all such payments receive the approval of the Assistant Attorney General.[182] Payments to third parties in settlements to "fund political activities, lobbying, litigation, or other activities that do not remedy environmental harm" were "absolutely prohibited."[183] And the memo went on to specify that "[i]n no event should a third-party payment be included as an offset or otherwise to allow for a reduction in the imposition of civil or criminal . . . penalties."[184] Technically, this would appear to eliminate most SEPs because settlements including SEPs typically provide for reduced civil penalties in return for the violator arranging with nongovernmental third parties to carry out the projects. Yet the Wood Memo clarified that it did not "prohibit, as part of a settlement, a defendant from agreeing to undertake a supplemental environmental project related to the violation, so long as it is consistent with EPA's Supplemental Environmental Projects Policy," which, the memo opined, "already expressly prohibits all

178. *Id.*

179. *Id.*

180. August 2019 Clark Memo, *supra* note 16, at 5 n.9; John D. Lazzaretti, *Traditional SEPs and Mitigation Projects May Still Pass Muster Under U.S. DOJ's New Settlement Policy*, NAT'L L. REV. (July 6, 2017), https://www.natlawreview.com/article/traditional-seps-and-mitigation-projects-may-still-pass-muster-under-us-doj-s-new [https://perma.cc/7L6C-8YWS] (while the SSSFA "is not mentioned in the Attorney General's memorandum, the operative language is nearly identical.").

181. Memorandum from Jeffrey H. Wood, Acting Assistant Att'y Gen., to ENRD Deputy Assistant Att'ys Gen. and Section Chiefs re: Settlement Payments to Third Parties in ENRD Cases (Jan. 9, 2018) [hereinafter Wood Memo].

182. *Id.* Although the June 2017 Sessions Memo did not address payments or loans to third-party governmental entities, the Wood Memo concluded that such payments and loans were not expressly within the scope of the June 2017 Sessions Memo. Nevertheless, the Wood Memo concluded that such payments "must have a clear nexus to the environmental harm that is sought to be remedied," and they have to be "reasonably designed to repair the harm to the environment that is sought to be redressed." *Id.* at 5.

183. *Id.* at 2.

184. *Id.*

third-party payments."[185] Significantly, neither the June 2017 Sessions Memo nor the Wood Memo applied to "administrative enforcement actions taken by federal agencies prior to referral of a matter to the [Justice] Department."[186]

According to the Wood Memo, the exception in the June 2017 Sessions Memo for a third-party payment that "directly remedies" the harm caused by the violation referred to "pollution, land disturbance, human health effects, injuries to natural resources, or other environmental impacts caused by unlawful activity that is the subject of the civil or criminal action."[187] In "limited circumstances," a settlement could include "a study performed by a non-governmental third party of environmental impacts caused by the violations at issue."[188] The Wood Memo provided many examples of acceptable and unacceptable SEPs in environmental cases.[189] For example, a SEP in litigation involving an oil spill could provide for a third-party payment "to support cleanup of pollution from the water body or to preserve aquatic life in the relative geographic vicinity of the unlawful activity," but "a payment to clean up unrelated water bodies or to preserve aquatic life that was not harmed by the unlawful activity would not suffice to meet the 'directly remedy' standard."[190] The memo cautioned that "[c]are should be taken to ensure that the project does not mitigate harm out of proportion with the harm that resulted from the unlawful conduct."[191]

On November 7, 2018, his last day in office, Attorney General Sessions signed a lengthier memorandum (the November 2018 Sessions Memo) setting out principles and procedures for civil settlements with state and local governmental entities.[192] The memo required Justice Department attorneys in civil litigation to exercise "special caution" before using a consent decree to resolve disputes with state or local governmental entities, provided "guidance on the limited circumstances in which such a consent decree may be appropriate," and limited "the terms for consent decrees and settlement agreements with state and local governmental entities."[193] Expressing

185. *Id.* at 8.

186. *Id.*

187. *Id.* at 2. The Wood Memo also specified factors governing the selection of third parties. *Id.*

188. *Id.*

189. *Id.* at 3–5.

190. *Id.* at 3.

191. *Id.*

192. Memorandum from Office of the U.S. Att'y Gen., to Heads of Civil Litigating Components, U.S. Att'ys, from the Att'y Gen. re: Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities (Nov. 7, 2018) [hereinafter November 2018 Sessions Memo]; *see also* Devlin Barrett, Matt Zapotosky & Josh Dawsey, *Jeff Sessions Forced Out as Attorney General*, WASH. POST (Nov. 7, 2018), https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html [https://perma.cc/FBU9-WFQX] (detailing Sessions' formal resignation).

193. November 2018 Sessions Memo, *supra* note 192, at 1.

concern for the impact of consent decrees on federalism and the potential for consent decrees to "subject defendants to ongoing judicial supervision long after it is no longer necessary," the memo provided for review of all consent decrees with state and local entities by senior Justice Department officials.[194]

The November 2018 Sessions Memo specified factors for determining situations in which consent decrees with state or local governmental entities would be appropriate.[195] All such consent decrees had to "be narrowly tailored to remedy the injury caused by the alleged legal violation," include a "sunset" provision terminating the consent decree once the defendant had come into "durable compliance with the federal law that gave rise to the decree," and "be structured to ensure that responsibility for discharging the duties of the institution is returned to the relevant officials as soon as the injuries caused by the legal violations alleged have been remedied."[196] At the same time, such consent decrees "must not be used to achieve general policy goals or to extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment."[197]

Although the November 2018 Sessions Memo did not directly address SEPs, Assistant Attorney General Jeffrey B. Clark issued a memorandum in August 2019 (the August 2019 Clark Memo) prohibiting SEPs in consent decrees and settlement agreements with state and local entities without his explicit approval until he had an opportunity to undertake a "broader review" of the Department's SEP policy.[198] Because SEPs with state and local governments "exceed what is required by law," the August 2019 Clark Memo concluded that proposed settlements containing SEPs were "precluded" by the November 2018 Sessions Memo.[199] In language that was not limited to SEPs with state and local governments, the memo further concluded that "EPA lacks the enforcement authority to extract a SEP from a defendant in any setting . . . whether that setting is an administrative or a judicial one."[200]

The Memo maintained that its conclusions represented sound public policy because they "promot[ed] respect for local democratic processes" by "ensuring that local officials are held accountable for using local taxpayer funds on otherwise unrequired projects, without clear authorization in state

194. *Id.* at 3.

195. *Id.* at 4.

196. *Id.* at 5.

197. *Id.*

198. August 2019 Clark Memo, *supra* note 16, at 12.

199. *Id.* at 2. The memo rejected arguments that SEPs were categorically exempted from the November 2018 Sessions Memo because Congress had arguably approved their use in 2018 amendments to the Clean Water Act by authorizing municipalities operating sewer and stormwater systems to undertake integrated planning processes as part of their compliance obligations under that statute. *Id.* at 6–11.

200. *Id.* at 11.

or municipal law to do so."[201] Any exceptions would be limited to "discrete projects" representing a "small component of any overall settlement" that provided "broad benefits to the community, and not individuals."[202] SEPs could be included in settlements "only as a matter of last resort," and defendants would have to certify that they did not violate any direct or implied restriction imposed by local, state, or federal law.[203]

Assistant Attorney General Clark completed the promised "broader review" with another memorandum dated March 12, 2020 (the March 2020 Clark Memo). This lengthy memorandum withdrew and superseded the Wood Memo and declared that henceforth the Environment and Natural Resources Division attorneys could no longer include SEPs in consent decrees or settlements in EPA cases.[204] The memo allowed for no exceptions but did suggest that Department attorneys could attempt to remedy past harm through injunctive relief.[205]

VI. Critique of Trump Administration Limits

The Trump Administration's elimination of SEPs from the Justice Department's arsenal was not generally sought by regulated industries or state and local entities that might be subject to future enforcement actions.[206] It will no doubt have a chilling effect on settlement negotiations with a likely reduction in the percentage of enforcement cases that are settled.[207] The overall impact, however, may be moderated by the fact that the Trump Administration is bringing fewer enforcement actions than previous administrations to begin with.[208]

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201. *Id.* at 12.

202. *Id.* at 12–13.

203. *Id.*

204. Memorandum from Jeffrey Bossert Clark, Assistant Att'y Gen., U.S. Dep't of Just. Env't & Nat. Res. Div., to ENRD Deputy Assistant Att'ys Gen. and Section Chiefs, 18 (Mar. 12, 2020) [hereinafter March 2020 Clark Memo].

205. *Id.*

206. Dawn Reeves, *DOJ Weighs 'Broader' SEP Limits as New Policy Forces Renegotiations*, INSIDE EPA (Sept. 19, 2019), https://insideepa.com/weekly-focus/doj-weighs-'broader'-sep-limits-new-policy-forces-renegotiations [https://perma.cc/PP2B-RNQU] (quoting Zach Miller, American College of Environmental Lawyers).

207. *Id.*; Juan Carlos Rodriguez, *Feds' New Settlement Policy May Imperil Restoration Projects*, LAW360 (June 15, 2017, 10:00 PM), https://www.law360.com/articles/934525/feds-new-settlement-policy-may-imperil-restoration-projects [https://perma.cc/8KC6-EP87] (quoting Tom Boer, Hunton & Williams LLP that DOJ memo will "severely curtail options for SEPs environmental settlements"). *But see Facing Broad Concern, DOJ Plans New Guidance to Address SEP Policy*, WATER POL'Y REP. (June 26, 2017) (reporting that Arnold Porter Kay Scholer attorney Joel Gross does not think the memo should affect SEPs at all).

208. Joel Mintz, *Abolition of Supplemental Environmental Projects: A Damaging Retreat for Environmental Enforcement*, CPR BLOG (Sept. 18, 2019), http://progressivereform.org/CPRBlog.cfm?idBlog=54AD8362-0C3A-721B-41A5C4CF6772E7A9 [https://perma.cc/W2SF-EX6M] (observing that EPA's overall penalty assessments "have dropped off dramatically since January 2017"); Reeves, *supra* note 206 (relying on unnamed sources).

On its face, the June 2017 Sessions Memo prohibits Justice Department lawyers from acceding to settlements in which the violator agrees to fund mitigation efforts by entities other than the violator.[209] Prior to that memo, SEPs involving payments to neutral or congressionally sanctioned organizations were not at all uncommon.[210] For example, as part of EPA's Deepwater Horizon settlement with BP PLC, a SEP arranged for BP to pay $2.554 billion to the National Fish and Wildlife Foundation, a national conservation organization created by Congress in 1984 that specializes, among other things, in protecting and restoring oceans and estuaries.[211] Types of projects that may no longer be allowed under the Trump DOJ policy include purchases of mitigation credits for protecting wetlands, purchasing property for restoration, and paying for health and environmental monitoring in affected communities and environments.[212]

The Memo's exceptions apparently apply only to projects directly funded by violators to remediate damage caused by the violations.[213] The Wood Memo explicitly recognized an exception for SEPs consistent with EPA's SEPs policy, but this did not reassure industry attorneys who began to advise their clients "to look carefully at what their exposure is before committing to any discussion" about SEPs.[214] In negotiations over a major settlement with Exxon Mobil Corporation concerning violations at eight facilities in Texas and Louisiana, several SEPs were dropped for fear that

209. Dawn Reeves & Stuart Parker, *Sessions' Ban on Third-Party Monetary Deals Could 'Cripple' SEPs, EIP Says*, INSIDE EPA (June 7, 2017), https://insideepa.com/daily-news/sessions-ban-third-party-monetary-deals-could-cripple-seps-eip-says [https://perma.cc/VC5W-R5A9] (quoting Eric Schaeffer, Environmental Integrity Project); Renee Schoof, *Sessions Raises Possibility of Reopening Pollution Settlements*, BLOOMBERG L. ENV'T & ENERGY REP. (Aug. 8, 2017, 2:50 PM), https://news.bloombergenvironment.com/environment-and-energy/sessions-raises-possibility-of-reopening-pollution-settlements-1 [https://perma.cc/HMX6-5A78].

210. Raymond Ludwiszewski, *EPA in the Trump Era: The DOJ's 3rd-Party Payment Policy*, LAW360 (Feb. 23, 2018, 1:55 PM), https://www.law360.com/articles/1013148/epa-in-the-trump-era-the-doj-s-3rd-party-payment-policy [https://perma.cc/T6BW-XLHN] ("[T]hird-party payment provisions became very common practice in Obama administration pleas and settlements."); Rodriguez, *supra* note 207 (quoting Gregory Goldberg, Holland & Hart LLP) (finding payments to third parties in SEPs to be "very commonly used"); Amena H. Saiyid, *Who Will Justice Let Cash in on Environmental Settlements?* BLOOMBERG L. ENV'T & ENERGY REP. (June 9, 2017, 6:01 AM), https://news.bloomberglaw.com/bloomberg-law-news/who-will-justice-let-cash-in-on-environmental-settlements [https://perma.cc/S9HB-9YTV].

211. Saiyid, *supra* note 210; *About the National Fish and Wildlife Foundation*, NWFW, https://www.nfwf.org/what-we-do [https://perma.cc/K959-XVHD]. The National Park Foundation is another nongovernmental conservation organization created by Congress. Saiyid, *supra* note 210.

212. Rodriguez, *supra* note 207.

213. *See* Reeves & Parker, *supra* note 209 (discussing how the funds could only be used to remediate damages caused directly by the violation).

214. Dawn Reeves, *DOJ, EPA Revising Pending Deals to Comply with Sessions' Funding Ban*, INSIDE EPA (Aug. 2, 2017), https://insideepa.com/daily-news/doj-epa-revising-pending-deals-comply-sessions-funding-ban [https://perma.cc/PW54-YRPX].

they could clash with the June 2017 Sessions Memo.[215] The industry attorneys provided sound advice. As noted above, the March 2020 Clark Memo took away the Justice Department's authority to employ SEPs in settlements.

In the interim between the Wood and the March 2020 Clark Memos, it appeared that DOJ attorneys were reducing the overall deterrent value of settlements by eliminating prohibited SEPs, rather than replacing them with equivalent civil penalties. Relying on the June 2017 Sessions Memo, DOJ in July 2017 deleted a proposed provision in a consent decree in which Harley-Davidson, Inc. had agreed to spend $3 million on a project administered by the American Lung Association to upgrade wood-burning stoves in low-income areas to make them more efficient and less polluting.[216] The deleted mitigation project would have offset the increased emissions attributable to 340,000 "Screamin' Eagle" aftermarket devices that the company had unlawfully sold to enhance performance of its motorcycles.[217] Notably, the modification of the proposed consent decree did not replace the deleted project with an addition of $3 million to the company's $12 million civil penalty.[218]

Justice Department attorneys immediately began to implement the August 2019 Clark Memo by refusing to consider SEPs in settlement negotiations with state and municipal violators.[219] Although the memorandum acknowledged the possibility of exceptions, a high-level DOJ official announced that in agreements with state and local governments, EPA "generally should not seek relief that a court cannot order."[220] In any event,

215. *See* Reeves & Parker, *supra* note 209 (discussing the effect of the memo on new settlements). EPA and DOJ continue to enter into settlements that involve SEPs under which the violator provides direct support to governmental entities. For example, a settlement in a major case in which the Chevron Corporation was charged with violating EPA's risk management regulations at its Richmond, California refinery contained an SEP under which Chevron would provide emergency response equipment to communities near that refinery and three other refineries in different cities. Lauren Hernandez, *Chevron to Pay $150 Million in Settlement with EPA for Violating Clean Air Act*, S.F. CHRON. (Oct. 25, 2018, 3:22 PM), https://www.sfchronicle.com/bayarea/article/Chevron-agrees-to-150M-settlement-with-EPA-for-13334740.php [https://perma.cc/BQ6N-7TRF].

216. Camille von Kaenel, *DOJ Yanks $3M Enviro Project from Harley-Davidson Settlement*, E&E NEWS (July 20, 2017), https://www.eenews.net/stories/1060057685 [https://perma.cc/C9MA-ZL64]; Hiroko Tabuchi, *U.S. Reopens Harley Settlement, Cutting Funds for Pollution Reduction Plan*, N.Y. TIMES (July 20, 2017), https://www.nytimes.com/2017/07/20/business/us-reduces-harleys-fine-meant-to-cut-air-pollution.html [https://perma.cc/SJZ8-5AFD].

217. Tabuchi, *supra* note 216.

218. *Id.* It is possible that the Harley-Davidson consent decree modification is unique. The company is a favorite of President Trump, who praised it for doing a "fantastic job" and thanked it for "all of the votes you gave me in Wisconsin." *Id.*

219. Dawn Reeves & Lee Logan, *DOJ Begins Rejecting SEPs in Municipal Settlements, Undercutting Policy*, INSIDE EPA (Aug. 8, 2019), https://insideepa.com/weekly-focus/doj-begins-rejecting-seps-municipal-settlements-undercutting-policy [https://perma.cc/AJB6-SF2W].

220. Reeves, *supra* note 206 (quoting Jonathan Brightbill).

the March 2020 Clark Memo, which contains no exceptions, controls to the extent that it conflicts with the August 2019 Clark Memo.[221]

The August 2019 Clark Memo paternalistically suggests that "[i]f state or local officials want certain projects undertaken in their communities, they should seek authorization through local democratic processes rather than by acquiescing in a consent decree with a federal agency that is supervised by a federal court."[222] That may reflect the policies of the Trump Administration, but it does not necessarily represent the position of the elected and appointed officials in the states and municipalities that would prefer to see their taxpayer dollars go to local environmental remediation than to reducing the federal deficit.[223] In practice, SEPs have proven especially attractive to municipal officials concerned with projecting a green image to their constituents.[224] Responding to the August 2019 Clark Memo, the National Association of Clean Water Agencies, an association of municipal water utilities, noted that "SEPs are an important way for a clean water agency to use funds locally that would otherwise go to the Federal Treasury."[225] The new policy on SEPs with state and local entities will undoubtedly have a chilling effect on settlements with such entities.[226]

The core conclusion of the March 2020 Clark Memo is that all SEPs violate the Miscellaneous Receipts Act.[227] As discussed above, that conclusion is erroneous under the literal interpretation of the statute, which requires federal officials who "receiv[e] money for the Government from any source . . . [to] deposit the money in the Treasury."[228] In a settlement involving a SEP under EPA's 2015 settlement policy, no federal official receives any money for the government. Defendants either perform some agreed-upon task or pay money to a contractor to perform that task.

The Memo thus concludes that "SEPs violate the spirit, if not the letter, of the Miscellaneous Receipts Act" because they constitute a constructive receipt of money for the government by augmenting EPA's budget.[229] To the extent that money spent on a SEP (or, one takes it, effort devoted to a SEP

221. March 2020 Clark Memo, *supra* note 204.

222. August 2019 Clark Memo, *supra* note 16, at 12.

223. *See* Ellen Gilmer, *DOJ Sidelines Popular Enforcement Tool*, E&E NEWS (Aug. 21, 2019), https://www.eenews.net/stories/1061022641 [https://perma.cc/V6A9-8LZT] (quoting John Crunden, Beveridge & Diamond PC) (discussing how SEPs potentially redirect money from federal accounts to local environmental projects).

224. Mintz, *supra* note 208.

225. Doug Obey, *DOJ Narrows Use of SEPs in Municipal Settlements*, INSIDE EPA (Aug. 22, 2019), https://insideepa.com/daily-news/doj-narrows-use-seps-municipal-settlements-eyes-further-limits [https://perma.cc/3UQM-4Q2C].

226. Gilmer, *supra* note 223 (stating that the August 2019 Clark Memo "may hamstring enforcement officials in settlement negotiations").

227. March 2020 Clark Memo, *supra* note 204, at 11–15.

228. *See supra* note 112.

229. March 2020 Clark Memo, *supra* note 204, at 11.

by a defendant who does not hire a third party to complete the SEP) brings about a reduction in a civil penalty, it is, in the memo's view, money received by a federal official and devoted to a use other than being deposited in the Treasury for use by Congress as it pleases. Since EPA's 2015 settlement policy recognizes that a possible civil penalty may be reduced by up to 80% of the cost of implementing a SEP, SEPs therefore violate the spirit of the Miscellaneous Receipts Act. It remains true, however, that SEPs do not violate the letter of that statute.

The March 2020 Clark Memo rejects the conclusion of the Justice Department's Office of Legal Counsel that no government official has constructively received monies if the settlement is executed before an admission or finding of liability and the federal government does not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement.[230] The Memo concludes that "[t]hese in-kind payments in exchange for a reduction of a penalty are as problematic as direct cash payments to third parties" as demonstrated by the fact that EPA's SEP policy recognized that a SEP could result in a penalty reduction of up to 80%.[231] That "mathematical relationship between the cost of a SEP and diminution of a penalty" belied the 2015 settlement policy's attempt to avoid violating the Miscellaneous Receipts Act by prohibiting EPA from playing any role in managing or controlling the SEP.[232] The Office of Legal Counsel's opinion was, in any event, merely "providing advice to minimize litigation risk" and not "an affirmative determination that in-kind exchanges of benefits for a reduction in monetary penalties is either legally permissible or good public policy."[233]

The 2015 settlement policy's requirement that there be an adequate nexus between the SEP and the violation that gave rise to the enforcement action does not save SEPs in the view of Assistant Attorney General Clark. That requirement "may alleviate the most obvious and egregious difficulties that SEPs present," but it "does not resolve the problem" because "money otherwise destined for the Treasury finds its way to another destination, not at the insistence of Congress, where the Constitution puts that authority, but at the insistence of an administrative agency, or a non-federal entity, or some combination thereof."[234] The Memo does not reject the long-standing principle, discussed above, that the Justice Department may mitigate penalties when violators voluntarily undertake projects aimed at correcting harm to people who have been "directly and proximately harmed" by their violations even though that arrangement clearly constitutes a situation in which "money otherwise destined for the Treasury finds its way to another

230. *Id.* at 1–2, 2 n.2.
231. *Id.*
232. *Id.* at 7–8.
233. *Id.* at 15.
234. *Id.* at 12.

destination." The Sessions Memo, which remains in effect, provides an exception from its prohibition on payments to third parties as part of settlements for restitution to victims that otherwise directly remedies the harm, "including harm to the environment," caused by the violation.[235] The nexus requirement was intended to implement that principle by requiring that SEPs address environmental conditions at the location of the violation, the condition of the ecosystem, or the immediate geographical area adversely affected by the violation.[236] The directly and proximately harmed victims of a violation of an environmental requirement are the people living in the vicinity of the violation and the surrounding environment itself. The nexus requirement ensures that SEPs are aimed at correcting harm to these victims.

Without citing any authority or examples, the Memo argues that the remedies included in SEPs are "necessarily indirect" because they cannot "be seen as ameliorating in some way the consequences of the underlying offense."[237] But SEPs that adhere to EPA's 2015 settlement policy do exactly that. The Memo claims that SEPs that did directly ameliorate the consequences of the underlying offense "would be authorized by law as forms of restitution or injunctive relief."[238] Many, if not most, SEPs may well be substitutes for restitution or injunctive relief that the government could seek after prevailing at trial. But the whole point of SEPs is to avoid a trial, which the government may or may not win, with a settlement that is mutually agreeable to the parties. They are legally authorized by the inherent power of the Executive Branch of government to settle litigation. The courts have long recognized the right of the Justice Department to obtain relief in settlements that it could not have sought in court.[239] And as noted above, they do not violate the Miscellaneous Receipts Act or any other federal statute.

At the end of the day, the March 2020 Clark Memo expresses a change in policy, and its author in fact recognizes that by including a section at the end arguing that sound public policy does not support the Justice Department's use of SEPs.[240] That section simply rehearses a few of the pro and con arguments that are set out above and concludes that SEPs are a bad idea. That has certainly been the view of some members of Congress who have not been successful in persuading their colleagues to eliminate SEPs by passing bills like the Stop Settlement Slush Funds Act. But potential defendants in both the private and public sectors continue to support SEPs in

235. Office of the U.S. Att'y Gen., *supra* note 176.

236. *See* March 2020 Clark Memo, *supra* note 204, at 12 (explaining that the nexus requirement "ensures that SEPs have at least some conceptual connection to the violations at issue"); EPA 2015 SEP POLICY UPDATE, *supra* note 6, at 7–8, 8 nn.9–10 (providing various ways to establish a nexus).

237. March 2020 Clark Memo, *supra* note 204, at 15.

238. *Id.*

239. Dana, *supra* note 84, at 1183.

240. March 2020 Clark Memo, *supra* note 204, at 16–18.

environmental litigation.[241] Now that SEPs are no longer available in litigation brought by the Justice Department, more money will go to the Treasury to make miniscule contributions to reducing the nation's soaring deficit, and less money will be spent on improving affected neighborhoods and the environment.[242]

One of the four strategies listed in the Obama EPA's environmental justice "action agenda" was to "[i]ncrease the number of supplemental environmental projects and mitigation projects affecting overburdened communities."[243] The March 2020 Clark Memo reverses the Obama Administration policy, but it is fully consistent with the low priority that the Trump Administration has assigned to environmental justice. [244]

The August 2019 Clark Memo suggested that EPA lacks the authority to extract a SEP from a defendant in an administrative or judicial setting.[245] The March 2020 Clark Memo is silent on EPA's authority to employ SEPs in settling administrative enforcement cases. Indeed, it is not clear that an assistant attorney general has the authority to bind EPA officials in administrative enforcement actions.[246] And there are indications that career enforcement officials in EPA may be pushing back against the DOJ position.[247] At a conference that preceded the March 2020 Clark Memo, the head of EPA's Office of Civil Enforcement expressed the "agency's view"

241. Stephen Lee & Ellen M. Gilmer, *Justice Department Ponders Nixing Environmental Settlements Tool*, BLOOMBERG L. ENV'T & ENERGY REP. (Oct. 30, 2019, 5:00 AM), https://news.bloombergenvironment.com/environment-and-energy/justice-department-ponders-nixing-environmental-settlements-tool [https://perma.cc/H8TX-9NHQ]; *see also* Francis X. Lyons, *INSIGHT: Three Questions Companies Face About SEPs and Environmental Enforcement*, BLOOMBERG L. ENV'T. & ENERGY REP. (Nov. 21, 2019, 3:00 AM), https://news.bloombergenvironment.com/environment-and-energy/insight-three-questions-companies-face-about-seps-and-environmental-enforcement [https://perma.cc/C8Q5-2GEQ] (reporting that "the regulated community prefers SEPs to simply paying a civil penalty, because both the community and environment see benefits from SEPs").

242. Reeves & Parker, *supra* note 209 (quoting Eric Schaeffer, Environmental Integrity Project) (noting that the Sessions Memo will "deprive poor and under-represented communities of environmental improvements paid for by polluters who violate our laws").

243. U.S. EPA, EJ 2020 ACTION AGENDA 3 (Oct. 2016), https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf [https://perma.cc/442B-G3KB].

244. Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393, 395–96 (2019).

245. Obey, *supra* note 225.

246. *See* Lyons, *supra* note 241 (concluding that the DOJ SEPs policy "is limited to the DOJ" and not applicable to EPA administrative enforcement actions).

247. *See As Defendants Brace for SEP Ban, Water Agencies Eye Legislative Fix*, INSIDE EPA (Nov. 7, 2019), https://insideepa.com/daily-news/defendants-brace-sep-ban-water-agencies-eye-legislative-fix [https://perma.cc/DS6T-XPRR] ("EPA enforcement officials have strongly pushed back against the DOJ policy without success.").

that "SEPs are a great tool" that represent "a lawful exercise of our enforcement discretion, and we definitely support them."[248]

VII. Restoring SEPs in Another Administration

The Trump Administration's limitations on SEPs have needlessly taken away the flexibility of both EPA and defendants in the settlement negotiations that resolve the vast majority of EPA enforcement actions.[249] Fortunately, the Sessions, Wood, and Clark Memos represent the policies of a single administration; their conclusions are by no means required by law. Future attorneys general can easily reverse the Trump Administration's policies on SEPs by writing new memoranda, and they should do so. Congress could, of course, end the debate over SEPs by enacting legislation authorizing EPA and DOJ to employ SEPs in settlement negotiations with whatever constraints by way of a nexus between a SEP and the underlying violation that Congress deems desirable. The National Association of Clean Water Agencies has already reached out to congressional committees to discuss amending the Clean Water Act to permit SEPs.[250] In this highly polarized era in which congressional gridlock prevents the enactment of controversial legislation, however, this may not be possible.

A. Obtaining Greater Community Input

To achieve restorative justice, EPA must encourage greater participation by affected communities in negotiating SEPs.[251] Appropriate representatives for victims and the environment can be environmental groups, homeowners associations, small business groups, and in relevant cases, minority, low-income, and indigenous rights groups.[252] Allowing affected communities to participate in the formation of SEPs will give them an opportunity to clarify their losses and give the defendant an opportunity to understand the full extent of the pain and environmental harm caused by its violations.[253] In addition, putting representatives of affected communities in the same room with representatives of corporate defendants will provide an opportunity for them to own up to their environmental responsibilities and make amends for

248. Ellen M. Gilmer, *Top EPA Official Praises Enforcement Tool in DOJ's Crosshairs*, BLOOMBERG L. ENV'T & ENERGY REP. (Nov. 12, 2019, 11:28 AM), https://news.bloomberglaw.com/environment-and-energy/top-epa-official-praises-enforcement-tool-in-dojs-crosshairs [https://perma.cc/9URF-P8X6] (quoting Rosemarie Kelley).

249. Rodriguez, *supra* note 207.

250. *As Defendants Brace for SEP Ban, Water Agencies Eye Legislative Fix*, *supra* note 247.

251. Behles, *supra* note 86, at 54; DeBellis, *supra* note 71 ("[A] SEP policy should enable members of the affected community to directly participate in the SEP."); Simms, *supra* note 4, at 10521 (urging EPA to develop a "policy architecture to provide communities with access to the settlement process"); Targ, Bonorris & Holloway, *supra* note 83, at 4–5 (recommending greater community group participation in SEP formation).

252. *See* Rustad et al., *supra* note 44, at 474–75 (describing community input).

253. *Id.* at 475.

their transgressions. And it can help ensure that the projects benefit the victims of the violations in a meaningful way.[254] Recognizing these advantages, the Colorado Department of Public Health and Environment considers both the extent of community input and the extent to which a proposed SEP achieves environmental justice goals in deciding whether to approve SEPs.[255]

EPA's 2015 SEP policy recognizes that "[s]oliciting community input during the SEP development process can: result in SEPs that better address the needs of the impacted community; promote environmental justice; produce better community understanding of EPA enforcement; and improve relations between the community and the violating facility."[256] It encourages "appropriate outreach to affected communities (especially those with environmental justice concerns) regarding SEPs" to "better inform settlement negotiations."[257] But the Agency does not generally allow members of the public to participate at the stage where EPA, DOJ, and the defendant negotiate the particular terms and conditions of the SEPs.[258] Any "outreach" is a "one-way line of communication" that does not ensure that community representatives have a seat at the negotiating table.[259]

EPA should instead be engaged in conversations with victims of violations as soon as EPA investigators are confident that they have detected a serious violation. The victim may have brought the violation to the attention of EPA enforcement officials, in which case it behooves EPA officials to initiate a conversation about the nature of the remedy that will address the harm. When EPA has initiated the investigation and detected the violations, it should be consulting with community representatives as it thinks about bringing an enforcement action to gauge the level of community knowledge of the risks involved and community interest in correcting those violations and to begin thinking about effective corrective action. Even better, EPA should make it clear that it will be unwilling to enter into settlement negotiations involving SEPs if representatives of affected community groups are not part of the negotiations. Violators that are really interested in SEPs will find a way to ensure that affected communities will be represented in the negotiations.

If EPA is unwilling to provide representatives of affected communities a seat at the table when it is negotiating settlements with violators, it can at least facilitate their participation in remedy formulation by running possibilities by those representatives as they come up in the negotiations and

254. Tanenholz, *supra* note 63, at 646–47.

255. Bonorris et al., *supra* note 55, at 221.

256. EPA 2015 SEP POLICY UPDATE, *supra* note 6, at 18.

257. *Id.* at 20.

258. *Id.* ("Except in extraordinary circumstances and with the agreement of the parties, representatives of community groups will not participate directly in the settlement negotiations.").

259. DeBellis, *supra* note 71.

making it clear to violators that the Agency is not likely to accept a remedy that is unacceptable to affected communities. This approach would avoid the risk of revealing trade secrets or potential strategies in any future tort litigation. It is less desirable from a restorative justice perspective because it is less likely to bring about the reconciliation that is one of the goals of that policy.

Because the organizations that serve low-income and minority communities are chronically underfunded, those communities often do not have the resources to participate in SEP negotiations.[260] EPA has a fairly robust environmental justice program that makes small grants of up to $100,000 to "community-based capacity-building" and other environmental justice projects.[261] The program, however, does not currently fund advocacy projects of the sort that would provide resources to community groups to participate in SEP negotiations.[262] To achieve restorative justice and environmental justice simultaneously, EPA should facilitate participation by representatives of low-income and minority groups in SEP formulation by funding them through its environmental justice grants program. The funding should focus on facilitating access to "the technical, scientific, and legal expertise required to assess viable SEP options and develop detailed and discrete SEP proposals that respond to community needs and reflect community priorities."[263] To avoid conflict with the Miscellaneous Receipts Act, the funds should not come from monies collected as civil penalties from violators. EPA can also assist local community groups in dealing with the technical details of formulating SEPs by maintaining an online SEP library containing the details of previous SEPs, model SEPs, and additional information on how to craft acceptable SEPs.[264] Mainstream environmental groups have in recent years become strongly committed to environmental justice.[265] When their litigators become involved in settlement negotiations in environmental enforcement actions, they should use their environmental justice resources to work with affected low-income and minority

260. Simms, *supra* note 4, at 10516.

261. *Id.* at 10516–17.

262. *See* U.S. ENVTL. PROT. AGENCY, 2019 ENVIRONMENTAL JUSTICE SMALL GRANTS PROGRAM PROJECT SUMMARIES BY EPA REGION 1 (2019), https://www.epa.gov/sites/production/files/2019-11/documents/final_project_summaries_ejsg2019_11.6.2019.pdf [https://perma.cc/EXQ5-KCMN] (describing environmental justice small grants for 2019). Perhaps the closest the 2019 round of grants comes to funding advocacy is the #GetMAD project, which "aims to increase awareness regarding litter and dumping in Vailsburg and Newark and share information about the effects that toxic materials in solid waste have on the community." *Id.* at 8. Another project, called "Connecting Science and Citizens" will "create innovative platforms for public participation and education to improve environmental and economic outcomes associated with investments in public water infrastructure in vulnerable, rural, Appalachian counties." *Id.* at 14.

263. Simms, *supra* note 4, at 10526.

264. *See* DeBellis, *supra* note 71 (suggesting that EPA establish SEP libraries).

265. Simms, *supra* note 4, at 10520.

communities to come up with SEPs that will be most useful in correcting harms to those communities.

Public outreach and community group participation does run the risk of making settlements harder to achieve. Among other things, it introduces a potentially disruptive wild card into the process, and it opens up opportunities for political posturing by community group leaders who are more interested in media exposure than in reaching closure. In my view, however, the potential for achieving restorative justice in a way that leaves both violators and victims with a sense that the enforcement process is operating fairly outweighs those risks. At the very least, that potential is high enough to give community participation a try in pilot settlement negotiations. And settlement negotiations with governmental violators that should be responsive to public input in any event may be a good place to begin. Unfortunately, EPA and DOJ are currently heading in the opposite direction.

B. Broad Application of the Nexus Requirement

Although at least one scholar has plausibly questioned the need for a nexus in SEPs,[266] a nexus is probably required to ensure consistency with the Miscellaneous Receipts Act.[267] Beyond that, the restorative justice policy favoring SEPs is less compelling in the absence of a nexus between the violation and the SEP.[268] In reality, most SEPs are "carried out at the site where the violation occurred, at a different site within the same ecosystem, or within the same immediate geographic area."[269] But EPA's strict interpretation of the nexus requirement has undoubtedly discouraged violators from suggesting SEPs to EPA in settlement negotiations.[270] It has also reduced the capacity of SEPs to achieve environmental justice.[271]

EPA could better ensure that SEPs increase restorative justice by relaxing the nexus requirement somewhat so as not to discourage innovative proposals that do not directly address the precise pollutants for which the violator was responsible or the precise place where the violation occurred.[272] EPA and DOJ should consider projects with a more tenuous link to violations, including community service channeled toward improving the environment, projects aimed at repairing "probabilistic civil wrongs that

266. Kristl, *supra* note 12, at 255–56; Robertson, *supra* note 158, at 1044–45.

267. *See id.* at 249–54 (discussing the federal government's position on the nexus requirement).

268. Bonorris et al., *supra* note 55, at 204–05, 205 n.156; *see also* DeBellis, *supra* note 71 ("Stricter nexus requirements better comport with restorative justice by ensuring SEPs more directly address the violation and victims themselves.").

269. *Slush Fund Hearings*, *supra* note 56, at 77 (testimony of Joel A. Mintz, Nova Southeastern University College of Law).

270. Douglas Rubin, Comment, *How Supplemental Environmental Projects Can and Should Be Used to Advance Environmental Justice*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 179, 198 (2010).

271. *Id.*

272. Bonorris et al., *supra* note 55, at 212.

affect diffuse victims," electrification of municipal and school fleets, and installing solar panels on the roofs of low-income housing.[273] When the violation involves ubiquitous pollutants like ozone precursors or greenhouse gases, a project that brings about reductions in emissions of ozone precursors anywhere within a broad nonattainment area or emissions of greenhouse gases anywhere in the world will provide restorative justice.

C. Retaining Incentives

It is possible that a violator will game the system by offering up as a SEP a project that it was planning to implement with or without the settlement for efficiency, market, or goodwill-enhancing reasons, or because it anticipates future regulation requiring the project.[274] To the extent that this substitution of an already planned project substitutes for civil penalties, the environment has not improved, and the deterrence value of the civil penalty will be reduced. EPA's 2015 SEP policy does not address this disadvantage. It would make sense to amend the policy to require the violator to certify that the project was not already in the works. At the margin, it may be difficult for the Agency to second-guess the source on the question whether the project was likely to be implemented anyway,[275] but the certification should at the very least make violators think twice about offering up projects for SEPs that were already going to be implemented.

Conclusion

The supplemental environmental project is a desirable tool for bringing complex environmental enforcement litigation to a conclusion in a manner that is acceptable to the alleged violator, the government, the victims of the violations, and the environment. Like any tool, it is subject to abuse. But EPA's written policies governing its administration of SEPs have evolved over the years to provide a sophisticated process for careful application and oversight that should minimize that potential. To the extent that SEPs replace civil penalties, the process may lose some degree of general deterrence, but their potential for accelerating corrective action and for bringing about restorative justice outweighs that loss. The Trump Administration Justice Department's elimination of SEPs in litigation that it brings therefore moves radically in the wrong direction. Instead of prohibiting SEPs, EPA and DOJ

273. Rustad et al., *supra* note 44, at 477.

274. Dana, *supra* note 84, at 1216 & n.98; Droughton, *supra* note 9, at 809 (observing that SEPs may represent "a prudent business decision when a company anticipates future regulations that would demand the project expense at a later date"); Tanenholz, *supra* note 63, at 647–48.

275. Bonorris et al., *supra* note 55, at 207 ("The danger of a violator benefiting from implementing pre-enforcement plans for an environmentally beneficial project as a SEP seems difficult to guard against completely.").

should be expanding the opportunities for achieving restorative justice by allowing representatives of affected communities and the environment to play a greater role in SEP development and by relaxing the nexus requirement to encourage defendants to come up with innovative projects for different pollutants and different locations than those involved in the violations. SEPs have a bright future if the government will allow them to flourish.