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I. INTRODUCTION

In March 2020, the head of the Department of Justice's Environmental Natural Resources Division ("DOJ ENRD") issued a decision that fundamentally altered the federal government's ability to address environmental harm. The decision removed a valuable tool from the negotiation toolbox that Department of Justice ("DOJ") attorneys used for decades when negotiating settlements in civil enforcement of federal environmental protection laws. This policy change had the potential to significantly impact resolution of complex environmental disputes. In February 2021, the new Chief of the DOJ ENRD rescinded the 2020 memo in response to an executive order from newly elected President Joe Biden. While the rescinding of the 2020 memo does restore the pre-2020 status quo, both actions show the power that executive leadership has to unilaterally alter the course of environmental dispute resolution. The tool the 2020 memo prohibited is called a Supplemental Environmental Project ("SEP").

As an illustration of the use of SEPs in negotiation, imagine a Missouri corporation that produced horse saddles and other leather goods. One part of the company's process required tanning leather and the tanning process produced wastewater that contained chemicals that are known to harm the reproductive systems of various fish species. In an effort to remain competitive, the company failed to upgrade the technology it used to filter its wastewater before the water was returned to the local municipal water system. As a result, over several years the amount of contaminant that passed into the local system exceeded the standards set by the Environmental Protection Agency ("EPA"). Thus, the city incurred substantial costs to remove the contaminants at its water treatment plant and passed the costs on to taxpayers. Additionally, the wastewater treatment plant was not designed for such contaminants and, despite the additional expenditures, some of the contaminants made their way into a local river. Over years, local children who played in the river were exposed to the chemicals and a population of a protected trout species had far lower than average reproduction rates.

After being alerted by the local college, the EPA notified the company of its violation. Due to the magnitude of the harm caused and the recklessness that the EPA perceived, the EPA requested the DOJ to file a civil action against the

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company. Company representatives met with the EPA over several weeks and it became apparent that the EPA intended to pursue $1.5 million in civil penalties. However, the EPA indicated that the penalty could be lowered if the company were to undergo voluntary projects to address the harm it caused. While the company was fairly confident it would be difficult for the EPA to prove that the company's contaminants caused the harm to the fish population, it was wary of the impact public exposure would have on its business. The company decided it would be more beneficial to help the fish species than challenge the EPA and DOJ in court. The DOJ attorneys agreed to allow the company to fund a fishery project at the local college that bred the fish species in captivity and released the young to the local river in exchange for a $1 million reduction in the civil penalties. Because the EPA and DOJ knew they would not be able obtain a court order to fund the college project and the company knew its image would be partially restored by aiding a famous local fish species, the decision to engage in the project was seen as a win-win.

SEPs are defined as "environmentally beneficial projects which a defendant agrees to undertake in the settlement of an enforcement action, but which the defendant, or any other third party, is not otherwise legally required to perform."[1] The voluntary nature of these projects is an important aspect because they often address harm that is not directly attributable to the defendant's actions.[2] However, the projects are geared towards addressing the harm associated with the defendant's violations. Loosening the requirement for a strict causal link permits the projects to be more expansive than that which a court could order.

This Note examines how the use of SEPs has evolved to improve the resolution of environmental disputes, how challenges to the use of SEPs has intensified in recent years, and how continued use could be appropriately maintained. Part II of this note discusses how SEPs have developed. Next, Part III discusses the problems inherent in SEPs and the various challenges critics have made. Lastly, Part IV concludes by arguing that SEPs are well suited to handle the unique nature of environmental problems, asserting that the value SEPs provide to negotiation of environmental disputes warrants a permanent solution so as to avoid a future prohibition by the executive branch and proposes solutions to address the problems SEPs present, thus making a legislative solution possible.

II. HOW SUPPLEMENTAL ENVIRONMENTAL PROJECTS HAVE DEVELOPED

The EPA developed its use of SEPs over the last four decades and has made several policy changes that have resulted in a more sophisticated approach. The Clean Air Act has been one of the most consequential pieces of legislation for the EPA.[3] Thus, it is perhaps no surprise that the EPA's use of SEP like initiatives

1. Interim Revised EPA Supplemental Environmental Projects Policy Issued, 60 Fed. Reg. 24,856–62 (May 10, 1995).

2. *See* United States v. Glob. Partners LP, No. 2:19-CV-122-DBH, 2019 WL 6954274, at *7 (D. Me. Dec. 19, 2019) (approving an SEP that the court acknowledged did not address the actual harm caused by the violation that was the subject of the action).

3. For an example of the prominent role of the Clean Air Act in the EPA's world, between 1995 and 2010, 59% of cases filed against the EPA were a result of the Clean Air Act. Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENVTL. L. REV. 191, 197 (2015).

began with Clean Air Act violations in the 1980s[4] and underwent significant revisions in the 1990s.

A. EPA Policy Development

In 1991, the EPA issued its first formal policy on agency-wide use of SEPs.[5] This policy replaced three pages of guidance contained in a 1984 General Enforcement Policy that explained when the EPA could reduce civil penalties in exchange for "alternative payments" with ten pages of considerable detail on the same topic.[6] Among the details were the official use of the term "Supplemental Environmental Projects" in place of "Alternative Payments," five categories of projects which the Agency would consider as SEPs, and a number of specific examples of supplemental projects.[7]

In 1995, the EPA issued an interim policy that superseded the 1991 policy.[8] The interim policy stated that its purpose was "to provide greater flexibility to [the] EPA in exercising its enforcement discretion to establish appropriate settlement penalties and to the regulated community in proposing SEPs designed to secure significant environmental or public health protection and improvements."[9] The policy included five broad legal guidelines that must be followed when crafting an SEP: (1) there must be a "sufficient nexus . . . between the violation and the proposed project[;]" (2) the project "must advance at least one of the objectives of the environmental statutes that are the basis of the action[;]" (3) "the EPA may not play any role in managing or controlling funds" related to the SEP; (4) "SEPs may not be agreements to spend a certain amount on a project that will be defined later. . . . [T]he type and scope of each project must be specifically described and defined[;]" and (5) the "project may not be used to satisfy the EPA's statutory obligation . . . to perform a particular activity."[10] The policy provided a non-exhaustive list of

4. Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENVTL. L. REV. 117, 129 (2020) ("The origins of payment for projects in environmental enforcement arose in the 1980s with the issuance of EPA's CAA and Clean Water Act ("CWA") penalty policy.").

5. James M. Strock, *Policy On The Use Of Supplemental Enforcement Projects In EPA Settlements*, OSWER 9832.20-1A (1991), 1991 WL 11255441.

6. *See* U.S. EPA, EC-P-1998-142, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties 24–27 (1998), https://www.epa.gov/sites/production/files/documents/penasm-civpen-mem.pdf; James M. Strock, *Policy On The Use Of Supplemental Enforcement Projects In EPA Settlements*, OSWER 9832.20-1A (1991), 1991 WL 11255441.

7. James M. Strock, *Policy On The Use Of Supplemental Enforcement Projects In EPA Settlements*, OSWER 9832.20-1A (1991), 1991 WL 11255441.

8. Interim Revised EPA Supplemental Environmental Projects Policy Issued, 60 Fed. Reg. 24,856–62 (May 10, 1995). *See also* Memorandum from Steven A. Herman, Assistant Adm'r, U.S. EPA, to Regional Adm'rs, Issuance of the Interim Revised Supplemental Environmental Projects Policy (May 3, 1995), https://bit.ly/3e8ShvI (explaining that the policy was being issued "in an interim version because we may wish to revise it based on public comments and our experience in using it. We are using it as an interim policy, rather than as a draft, because we believe it is superior to the 1991 Policy and thus should go into effect as soon as possible.").

9. Interim Revised EPA Supplemental Environmental Projects Policy Issued, 60 Fed. Reg. 24,856–62 (May 10, 1995).

10. *Id.* at 24,858.

examples of unacceptable projects.[11] It also set forth a list of factors[12] that would increase the value of SEPs and ultimately reduce the assessed civil penalty.[13] Reduction of a civil penalty was capped at eighty percent, but in special circumstances the penalty could be eliminated entirely for certain small entities or if the project produced pollution prevention.[14]

In 1998, the EPA supplemented the 1995 policy[15] and included notable additions like increased detail regarding penalty reduction calculations.[16] In addition to the general factors contained in the 1995 policy, the supplement provided specific steps on how to apply the factors and arrive at a final figure.[17]

In 2015, the EPA released its most recent SEP policy.[18] The memo accompanying the 2015 policy update stated that the purpose of the release was to "enable case teams to more efficiently and effectively include SEPs in settlement of civil enforcement cases."[19] The update made explicit that one of the agency's priorities when considering SEPs was climate change.[20]

B. The Process

The EPA's typical process for enforcement of Clean Air Act violations provides a good example of the general process it follows in all enforcement actions. To start, a statutorily permitted inspection typically prompts an investigation of a regulated party's facility.[21] Next, the EPA collects information by conducting facility inspections or using other data collection methods.[22] If a violation is found,

11. *Id.* at 24,860. ("A. General public educational or public environmental awareness projects (e.g., sponsoring public seminars, conducting tours of environmental controls at a facility, or promoting recycling in a community); B. Contributions to environmental research at a college or university; C. Cash donations to community groups, environmental organizations, state/local/federal entities, or any other third party; D. Projects for which the defendant does not retain full responsibility to ensure satisfactory completion; E. Projects which, though beneficial to a community, are unrelated to environmental protection (e.g., making a contribution to a non-profit, public interest, environmental or other charitable organization, donating playground equipment, etc.); F. Studies or assessments without a requirement to address the problems identified in the study (except as provided for in Section V.E above); G. Projects which the defendant, SEP recipient, or SEP implementer will undertake, in whole or in part, with federal loans, federal contracts, federal grants, or other forms of federal financial assistance or non-financial assistance; H. Projects that are expected to become profitable to the defendant within the first five years of implementation (within the first three years for SEPs implemented by defendants that are small businesses or small communities)[.]").

12. These factors include Benefits to the public or environment at large; Innovativeness; Environmental Justice, Multimedia Impacts, Pollution Prevention. *Id.* at 24,861.

13. *Id.*

14. *Id.*

15. Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24,796–24,804 (May 5, 1998).

16. *Id.* at 24,804.

17. *Id.* at 24,802-04.

18. Memorandum from Cynthia Giles, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. EPA, to Reg'l Adm'rs, Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy (Mar. 10, 2015), https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf.

19. *Id.*

20. *Id.* at 5.

21. Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENVTL. L. REV. 117, 126 (2020).

22. *Id.*

the EPA will typically issue a Notice of Violation,[23] which is required by statute.[24] Finally, a complaint is filed with the court, which allows for formal discovery to further determine the extent of the violation.[25] It is at this point that settlement negotiations between the parties might introduce the prospect of a SEP.

Settlement agreements between violators and the DOJ are enforced under consent decrees. A consent decree can be understood as a settlement agreement subject to continued judicial policing.[26] Once the parties reach a settlement agreement, the proposed agreement is provided to the public for comment.[27] After the comment period, the parties motion a court to enter a consent decree to enforce the settlement.[28] When reviewing the motion, the court assesses the substantive fairness of the agreement by determining if it is adequate, reasonable, and appropriate.[29] Part of that determination involves assessing if the agreement is confined to the dispute between the parties.[30]

C. States and SEPs

In addition to the federal government, states also have a history of using SEPs to resolve environmental enforcement actions. A 2005 study revealed that forty-seven states made use of SEPs in some form.[31] While some states closely mirrored the EPA's policy for restrictions designed to limit inappropriate use, others deviated by allowing the enforcement agency to propose a project instead of requiring the violator to develop the idea.[32] The study also revealed a method in use at the state level that was more novel than the federal method. States often used databases that allowed any party to present the proposal, known as "SEP Idea Banks."[33] Idea Banks addressed the policy concern that an agency might directs funds to its pet projects.[34] Idea Banks are repositories of project proposals that violators can choose from during settlement negotiations in enforcement actions.[35] While some of the ideas were submitted by local government agencies, many came from non-governmental organizations.[36] At the time of the study, Maine, Delaware, and Illinois had SEP Idea Banks.[37] The Illinois system for soliciting ideas was designed to ensure any project that made it to the list had the support of the local community.[38] The study identified two primary benefits from use of Idea Banks: (1) "they ensure that

23. *Id.*
24. *Id.*
25. *Id.*
26. United States v. State of Or., 913 F.2d 576, 580 (9th Cir. 1990).
27. Kakade, *supra* note 22, at 127; *see also Proposed Consent Decrees,* U.S. DEPARTMENT OF JUSTICE, https://www.justice.gov/enrd/consent-decrees (last visited Apr. 15, 2021).
28. Kakade, *supra* note 22, at 127.
29. *Id.*; *see also* United States v. Glob. Partners LP, No. 2:10-CV-122-DBH, 2019 WL 6954274 at *s5 (D. Me. Dec. 19, 2019).
30. United States v. Glob. Partners LP, 2019 WL 6954274, at *5.
31. Steven Bonorris & Chelsea Holloway, Annie Lo, Grace Yang, *Environmental Enforcement in the Fifty States: The Promise and Pitfalls of Supplemental Environmental Projects*, 11 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 185, 210 (2005).
32. *Id.* at 213.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. Bonorris et al., *supra* note 32, at 214.
38. *Id.*

projects actually redound to the benefit of local communities" and (2) "they reduce transaction costs for all parties."[39] Another way that states deviate from the federal policy is that they allocate funds collected from civil penalties for use in SEP like projects.[40] A Delaware statute allowed twenty-five percent of penalties to be used to address degradation in the community associated with the violation the penalty resulted from.[41]

III. CHALLENGES TO USE OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Despite their seeming popularity, SEPs have been challenged on multiple grounds. The political aspect of how the federal government and the public view environmental concerns has caused challenges to come from the conservative side of the political aisle.[42] However, the partisan nature of the dispute over SEPs does not eliminate the substance of the challenges that opponents have made.

A. Comptroller of the Currency

The primary legal challenge to SEPs has been made on statutory grounds. In December 1991, the Chairman of the Subcommittee on Oversight and Investigations requested the Comptroller of the Currency provide an opinion on the validity of the EPA's use of SEPs when settling disputes arising from Clean Air Act violations.[43] At the time, the EPA claimed that the authority Congress had granted the EPA to "compromise, or remit, with or without conditions" civil penalties assessed under a particular section of the Clean Air Act permitted SEPs.[44] Additionally, the EPA stated that its policy furthered Congress's goal when passing the Clean Air Act.[45] The Comptroller unequivocally rejected the EPA's justifications as inadequate and stated that the statutes providing the EPA with the authority to assess fines did not permit SEP activity.[46] Specifically, the EPA and Comptroller took different views on whether a Senate report indicated that the 1990 Clean Air Act amendment had ratified the process the EPA had been using.[47] In 1993, the Chairman again asked the Comptroller to provide an opinion on the EPA's use of SEPs.[48] This request came in response to the EPA continuing to claim that the practice was valid and indicating that the Comptroller's findings would have been different had

39. *Id.*
40. *Id.* at 215.
41. *Id.*
42. Joshua Ozymy, Bryan Menard, & Melissa L. Jarrell, *Persistence or Partisanship: Exploring the Relationship Between Presidential Administrations and Criminal Enforcement by the US Environmental Protection Agency, 1983-2019*, 81 PAR 49, 49-63 (2020) (listing examples of how which political party is associated with Presidents has impacted the EPA).
43. U.S. GOV'T ACCOUNTABILITY OFFICE, B-247155 (July 7, 1992).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* "The Administrator may continue to issue . . . [Notices of Violation] to alleged violators of Title II provisions and to settle such matters to the extent authorized by law . . ." (quoting S. REP. NO. 228-101, at 125-26 (1989)).
48. The Honorable John D. Dingell Chairman, Subcomm. on Oversight & Investigations Comm. on Energy & Com. House of Representatives, B-247155 (Mar. 1, 1993)

the Comptroller considered the EPA's written SEP policy.[49] The Comptroller stated that the EPA's policy had been reviewed and reiterated its earlier opinion.[50] The Comptroller's opinions had little effect on the EPA's behavior—possibly because the EPA gave weight to the Supreme Court's skeptical view of the Comptroller's authority over executive agencies.[51]

B. Courts

Due to the requirement that settlements in DOJ ENRD enforcement actions be enforced under consent decrees, federal courts have had frequent opportunities to weigh in on the use of SEPs. While this Note focuses on SEPs resulting from negotiated settlements, it is helpful to discuss how courts have enforced projects in judgment orders as well as consent decrees. When discussing how the courts have reacted to settlements involving SEPs, it is important to distinguish between citizen suits and actions brought by the government. A citizen suit is a private action brought by a non-government plaintiff who claims that the defendant has violated a federal environmental protection law.[52] Many environmental statutes specifically authorize citizen suits against private violators and the government.[53] In both citizen suits and actions where the government is the plaintiff, courts have been clear that if a payment made by a violator is labeled as a penalty then it must go to the U.S. Treasury.[54]

In 1990, the United States Court of Appeals for the Third Circuit decided *Pub. Interest Research Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, a citizen suit where the lower court ordered that the funds from the civil penalty be paid into a trust fund that would be used to improve the environment in the community where the violations occurred.[55] The lower court's decision was based on the conclusion that depositing the funds into the U.S. Treasury would not serve the purpose of the Clean Air Act but that the trust fund would because the fund would be used directly in the affected community.[56] The Third Circuit acknowledged that it is within a court's power to order a remedial fund in the nature of a trust, but that once a remedy has been labeled as a penalty it is not appropriate for a court to do so.[57] Furthermore, the Third Circuit's decision emphasized such a fund could only be used to address harm that has an adequate nexus with the violator's conduct.[58] As

49. *Id.* (EPA had questioned whether the Comptroller reviewed the EPA's policy when formulating his 1992 opinion).

50. *Id.*

51. 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, 430 (2004).

52. *Id.*

53. A non-exhaustive list includes the Clean Water Act, the Clean Air Act, the ESA, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. McVean & Pidot, *supra* note 4, at 197.

54. Lloyd, *supra* note 52 at 418; Sierra Club, Inc. v. Elec. Controls Design, Inc., 909 F.2d 1350, 1354 (9th Cir. 1990).

55. Pub. Int Rsch Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 70 (3d Cir. 1990).

56. *Id.* at 81.

57. *Id.* at 82.

58. *Id.*

a result of the remedy having been labeled as a civil penalty, the Third Circuit reversed the portion of the order creating the trust fund.[59]

In 1991, in *United States v. Roll Coater, Inc.*, the United States District Court for the Southern District of Indiana addressed the question of whether non-penalty remedies were available to a government plaintiff when a judgment was issued.[60] The court determined that it was a question of first impression.[61] In *Roll Coater*, the defendant was found to have discharged effluents into municipal waters in violation of the Clean Water Act.[62] Although no actual damage was shown, violation of the Clean Water Act creates strict liability and the EPA sought civil enforcement.[63] The defendant requested that the court use its equitable jurisdiction to order diversion of a portion of the assessed penalty to a specific research project, as well as to fund the state's Center for Environmental Responsibility to House the Pollution Prevention Institute.[64] The EPA argued that the assessed penalty must be deposited into the U.S. Treasury,[65] which the EPA contended was in line with the agency's historical and current view that SEPs are not civil penalties.[66] Citing precedent,[67] the court acknowledged that it had the power to order such remedies—although it was not required to decide if it was appropriate in this case because the parties agreed to dismiss the injunctive relief claim.[68]

Courts have acknowledged that silence in an environmental statute as to how penalties are allocated requires adherence to the Miscellaneous Receipt Act's ("MRA") requirement that such funds be deposited into the U.S. Treasury.[69] In addition, courts have determined that SEPs are an appropriate resolution in settlements enforced under consent decrees even if the court would not be able to order such relief.[70] Congress has also taken the opportunity to address SEP use.

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59. *Id.*

60. No. IP 89-828C, 1991 U.S. Dist. LEXIS 8790, at *30 (S.D. Ind. Mar. 22, 1991)

61. *Id.* at *27. ("The issue of whether other remedies are available when the United States brings the action and judgment is rendered is a question of first impression.").

62. *Id.* at *1.

63. *Id.* at *5, *10.

64. *Id.* at *29.

65. *Id.* at *30.

66. *See infra section* II A.

67. Pub. Interest Research Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 81 (3d Cir. 1990).

68. United States v. Roll Coater, Inc., 21 Envtl. L. Rep. 21073, 21077–78, 1991 WL 165771 (S.D. Ind. 1991).

69. United States v. Smithfield Foods, Inc., 982 F. Supp. 373, 374 (E.D. Va. 1997).

70. Bonorris et al., *supra* note 32, at 198-99. ("[I]n *Local No*. 93, *International Association of Firefighters v. City of Cleveland*, the Supreme Court has held that a court may approve a consent decree containing relief that the court itself could not grant after a trial. The Court held that it was unnecessary to examine the precise limits of the underlying statute, because its limits 'are not implicated by voluntary agreements.' However, some provisos remain: the consent decree must itself be legal, within the court's subject matter jurisdiction, within the general scope of the complaint, and must further the objectives of the law upon which the complaint was based. Thus, the Court shifted the inquiry away from the issue of the general legality of SEPs to whether a specific SEP is consistent with and enjoys a nexus to the underlying environmental statute. That these conditions so closely track the core elements of EPA's current SEP Policy is a significant convergence of legal doctrines.").

C. Legislature

A significant legislative attempt to curtail the use of SEPs, the Stop Settlement Slush Funds Act,[71] came not in response to SEPs directly, but to similar settlements between the DOJ and financial institutions in the wake of the late 2000s financial crisis.[72] However, a House report connected to the Clean Air Act that directly discussed SEPs[73] specifically highlighted the Volkswagen settlement.[74] The Volkswagen settlement was connected to its widely publicized Clean Air Act violations that required the company to contribute to an electric car initiative.[75] The Stop Settlement Slush Funds Act bill arose in Congress in 2016.[76] Little action occurred before the Presidential election out of fear that President Obama would veto the bill. That changed after the election of President Trump, at which point the Republican-controlled House quickly passed the bill.[77] The bill prohibited government officials from entering into settlement agreements that directed payments to third parties, except in cases where the payment was for restitution or to directly remedy harm caused by the party making the payment.[78] However, the Senate never took the bill up for consideration.[79] After Congress's failure to enact SEP change, the next attack on SEPs came from the executive branch.

D. Department of Justice

The Trump Administration's DOJ took several steps to curtail SEP use. In June 2017, Attorney General ("AG") Jeff Sessions issued a memo addressing the DOJ's use of payments to third parties in settlement agreements.[80] The memo immediately prohibited such payments in general, although it permitted an exception for otherwise lawful payments that would provide restitution to a victim or directly remedy the relevant harm.[81] The memo specifically provided harm to the environment as an example of "relevant harm."[82]

Seven months later, in January 2018, the Acting Assistant Attorney General, Jeffrey Woods, issued a memo clarifying and expanding upon AG Sessions' memo as it related to settlement agreements entered into specifically by the DOJ ENRD.[83]

71. Thomas O. McGarity, *Supplemental Environmental Projects in Complex Environmental Litigation*, 98 TEX. L. REV. 1405, 1412 (2020).

72. *Id.*

73. *Id.* at 5.

74. *See generally* In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., No. 2672 CRB (JSC), 2016 WL 4010049 (N.D. Cal. July 26, 2016).

75. "DOJ's 2016 settlement with Volkswagen required the company to spend $2 billion on an Administration electric vehicle initiative after Congress twice refused to pay for it." H.R. REP. 115-72 at 3.

76. McGarity, *supra* note 72 at 1412.

77. *Id.*

78. H.R. REP. 115-72 at 3.

79. United States v. Smithfield Foods, Inc., 982 F. Supp. 373, 375 (E.D. Va. 1997).

80. Memorandum from Jeff Sessions, U.S. Att'y Gen., to All Component Heads and U.S. Att'ys, Prohibition on Settlement Payments to Third Parties (June 5, 2017), https://perma.cc/4MS6-AHYK.

81. *Id.*

82. *Id.* ("First, the policy does not apply to an otherwise lawful payment or loan that provides restitution to a victim or that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment or from official corruption.").

83. Memorandum from Jeffrey H. Wood, Acting Assistant Att'y Gen., to ENRD Deputy Assistant Att'ys Gen. and Section Chiefs, Settlement Payments to Third Parties in ENRD Cases (Jan. 9, 2018), https://perma.cc/4PLY-S5L6.

The memo provided several examples of third-party payments that would not be prohibited–focusing on how closely each payment was related to the harm to be redressed.[84] One illuminative example related to wildlife trafficking.[85] The memo stated that payments related to remedying harm caused to a species of protected animal should ideally be constrained to the specific population that was affected by the harm and not simply the species in general.[86] The memo explained that the use of an SEP was not prohibited so long as it complied with the EPA's policy, and implied that the reasoning was because the EPA's policy already prohibited payments to third parties.[87] The memo stated explicitly that any payments to third parties must comply with the MRA and Anti-Deficiency Act ("ADA").[88]

In August 2019, the Assistant Attorney General ("AAG"), Jeffrey Clark, issued a memo specific to the use of SEPs to address violations involving local and state governments.[89] AAG Clark stated that his interpretation of the 2018 memo was that a goal of the policy was to avoid impacting how local governments navigated political constraints when pursuing environmental goals.[90] Specifically, Clark posited that local governments found to be violators would use consent decrees that included SEPs to fund projects the government would otherwise be unable to fund without first obtaining public approval.[91] However, the memo outlined a possible exception if a government defendant certified that the SEP was not being used to avoid a local restriction.[92] The memo further stated that one of the AG's statements in his 2018 memo[93] directly prohibited the use of SEPs.[94] AAG Clark indicated that the AG's statement specifically addressed SEPs because the EPA's 2015 SEP policy explicitly stated SEPs are designed to provide relief beyond that which could be obtained at law.[95]

In March 2020, AAG Clark again issued a memo further restricting the use of SEPs.[96] The memo removed any exceptions for the use of SEPs in consent decrees or settlements with local governments and completely prohibited the use of SEPs outside those related to a specific Clean Air Act provision.[97] Moreover, Clark

84. *Id.*

85. *Id.* at 5.

86. *Id.* ("In a wildlife trafficking case, a third-party payment to directly remedy harm must focus on protection and recovery for the affected species, preferably the affected population of that species where possible.").

87. *Id.* at 8.

88. *Id.*

89. Memorandum from Jeffrey Bossert Clark, U.S. Assistant Att'y Gen., to Chiefs of All Remaining ENRD Sections, Using Supplemental Environmental Projects ("SEPs") in Settlements with State and Local Governments 8 (Aug. 21, 2019), https://perma.cc/XS3U-9BN6.

90. *Id.* ("[A] related goal of the policy was to avoid encouraging state and local governments to use federal consent decrees to circumvent any legal constraints they may face when they engage in new undertakings, such as the need to pass new legislation, issue new municipal ordinances, or obtain requisite funding.").

91. *Id.* at 12. ("If 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.")

92. *Id.* at 13.

93. *Id.* at 8. (Attorney General Sessions provided that consent decrees could not be used to "extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment.").

94. *Id.*

95. Clark, *supra* note 90, at 4.

96. *Id.* at 1, 16.

97. *Id.* at 18.

provided a detailed analysis of the legal and policy landscape as he saw it, which expanded considerably on the earlier DOJ policy change announcements.[98] Clark acknowledged three policy concerns.[99] First, the AAG explained that "SEPs could . . . intrude on state and local accountability, by allowing the Executive Branch to commit state and local taxpayers to funding projects not otherwise required by their laws."[100] Second, SEPs could "give oversight of these voluntary projects to a federal court, and subject SEP violations to the contempt power."[101] Third, SEPs could "allow state and local officials to commit to projects that are contrary to the express or implied will of the state or local legislative branches."[102]

The 2020 memo also contained the AAG's concerns with SEPs from a constitutional perspective. Clark stated that SEPs make the executive branch a "quasi-appropriator" of funds in violation of Taxing and Spending Clause and the Appropriations Clause of the Constitution.[103] Clark went so far as to evoke the "centuries of struggle between the Crown and Parliament" as justification for his constitutional concern.[104] While the legislature can delegate its authority to the executive branch, Clark did not think it had done so.

One of the largest portions of the memo was spent addressing the EPA's policy made in response to the historical concerns regarding violations of the MRA and ADA.[105] Clark acknowledged that the EPA had made changes in the previous decades to reduce "the probability of the most serious violations of the law."[106] However, he characterized the current EPA policy as not addressing the fundamental issue with SEPs.[107] Clark explained that the nexus requirement of the EPA policy, while correct in spirit, was insufficiently direct to absolve the EPA's policy from appropriations issues.[108]

In February 2021, Deputy Assistant Attorney General Jean E. Williams rescinded the 2018, 2019, and 2020 Memos.[109] Her action came in response to an executive order that Williams stated had directed agencies to review and take action to address agency actions that conflicted with certain environmentally focused national objectives.[110] A single sentence contained the full extent of Williams's analysis justifying the rescission: "Because these memoranda are inconsistent with longstanding Division policy and practice and because they may impede the full exercise of enforcement discretion in the Division's cases, I have determined that withdrawal is appropriate pursuant to Executive Order 13,990."[111] While

98. *Id.*
99. *Id.* at 16.
100. *Id.*
101. Clark, *supra* note 90, at 16.
102. *Id.*
103. *Id.* at 16-17.
104. *Id.* at 17.
105. Of the 19 pages, five were spent addressing the most recent EPA SEP policy update from 2015. *Id.* at 11-15.
106. Clark, *supra* note 90, at 12.
107. *Id.*
108. *Id.* at 15 ("Relatedly, while EPA's SEP policy requires SEPs to have a nexus to the underlying offense, the nexus is necessarily indirect.").
109. Memorandum from Jean E. Williams, Deputy Assistant Att'y Gen., to ENRD Section Chiefs and Deputy Section Chiefs, Withdrawal of Memoranda and Policy Documents (Feb. 4, 2021), https://www.justice.gov/enrd/page/file/1364716/download
110. *Id. See also* Executive Order 13,990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021).
111. Williams, *supra* note 110.

Williams's memo restored SEPs to their place as an available tool for DOJ ENRD negotiators, it did not address any of the historical criticism and left SEPs open to future attack.

IV. ANALYSIS

While the Biden Administration has restored the use of SEPs for now, another policy change, similar to the one made by the DOJ ENRD March 2020 Memo, remains possible and would negatively impact resolution of environmental disputes in several key aspects. Since litigation is a more costly and time-consuming method for resolving enforcement of environmental protection laws than negotiated settlements,[112] anything that will lead to more litigation will have a negative impact. SEPs have been shown to be an effective method of addressing the unique challenges presented in environmental enforcement.[113] Without SEPs, settlements would become more difficult to negotiate and the need for fully litigated solutions, or at least greater time spent in court before settlement is reached would result. With more resources spent in resolving each enforcement action, the EPA and DOJ would be forced to pursue fewer enforcement actions. The disputes would persist, but resolution would decrease. As a result, efforts should be made to address the concerns with SEPs and ensure a more stable future.

A. The Nature of Environmental Problems and the Inadequacy of Litigation to Solve Them

Environmental disputes are complex to resolve due to the difficulty in assessing causality and degree of harm, the breadth of aggrieved interested parties, and the complex scientific nature of the violation and remedies. Assessing the amount of harm caused by a violation of an environmental protection statute is inherently difficult.[114] Compounding this, once harm has occurred, the baseline for the pre-violation status quo is no longer available.[115] Also, environmental disputes often involve many parties from multiple organizations.[116] Resolution of environmental conflicts between agencies and those regulated is a continual process.[117] Violations of environmental laws often involve highly technical engineering, chemical, or hydrogeologic aspects.[118] As such, the practice of environmental law in general is "entwined with scientific and engineering disciplines."[119] To effectively resolve

112. *See infra* section IV A.
113. *Id.*
114. *See generally*, Karen Bradshaw, *Settling for Natural Resource Damages,* 40 HARV. ENV'T L. REV. 211, 244 (2016).
115. *Id.* ("Within any single injury, the harm may also be underestimated because the baseline condition of the resource prior to injury must be retroactively determined, a scientifically uncertain task.")
116. E. David Hoard, USAF, *Negotiating with Environmental Regulatory Agencies: Working Towards Harmony*, 31 A.F. L. REV. 201, 201 (1989); Plaintiffs in suits against the EPA between 1995 and 2010 involved trade associations, private companies, local environmental groups and citizens' groups, and national environmental groups. McVean & Pidot, *supra* note 4, at 197.
117. Hoard, *supra* note 117, at 201.
118. *Id.* at 201-02.
119. *Id.* at 201.

environmental disputes and address the inherent complexity, lawyers must constantly consult with experts in the relevant fields.[120]

The private parties, agencies, and the courts involved in resolving environmental disputes have not shown an appetite for fully litigated outcomes. Historically, the overwhelming majority of civil actions aimed at enforcing environmental protection statutes that are brought by the DOJ end in settlement.[121] Courts have suggested that a bad settlement can be superior to a good trial,[122] specifically because "it promotes the interests of litigants by saving them the expense and uncertainties of trial, as well as the interests of the judicial system by making it unnecessary to devote public resources to disputes that the parties themselves can resolve with a mutually agreeable outcome."[123] Additionally, settlement affords parties an opportunity to craft solutions not available to the courts.[124] Outside of negotiated solutions, agencies do not typically have authority to affect pollution prevention measures instituted by companies.[125]

Companies that violate federal environmental laws largely favor the use of SEPs in settlement agreements. For example, one survey of violators whose settlements included SEPs found that nine out of ten supported use of SEPs.[126] AAG Jeffrey Clark himself admitted the popularity of SEPs in his order to eliminate them.[127] One of the clear benefits to violators in crafting a settlement involving a SEP is obtaining goodwill with the community that would not be achieved with a large penalty.[128] Since individuals associated with the violating entity typically reside in the communities near the entity, they benefit directly from SEPs as members of the community.[129] SEPs also allow violators to avoid facing the "cold reality" of large monetary penalties.[130]

The potential for environmental disputes is increasing. Experts across the world say that environmental problems will only become more prevalent in the

120. *Id.* at 202.

121. "Roughly ninety percent of firms cited with noncriminal violations of federal environmental statutes in the United States resolve the matter through a negotiated settlement (rather than through an administrative hearing or court trial)." Charles C. Caldart & Nicholas A. Ashford, *Negotiation As A Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 HARV. ENV'T L. REV. 141, 188 (1999); John C. Cruden, Bruce S. Gelber, *Federal Civil Environmental Enforcement: Process, Actors, and Trends*, Nat. Res. & Env't, Spring 2004, at 10, 15.

122. McVean & Pidot, *supra* note 4, at 206.

123. Hispanics United of DuPage County v. Vill. of Addison, Ill., 988 F. Supp. 1130, 1149 (N.D. Ill. 1997).

124. John C. Cruden, Bruce S. Gelber, *Federal Civil Environmental Enforcement: Process, Actors, and Trends*, NAT. RESOURCES & ENV'T, Spring 2004, at 10, 15; 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, 416–17 (2004).

125. Charles C. Caldart & Nicholas A. Ashford, *Negotiation As A Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 HARV. ENVTL. L. REV. 141, 188 (1999).

126. *Id.* at 190-91.

127. Clark, *supra* note 90, at 16, https://www.justice.gov/enrd/page/file/1257901/download. ("Before discussing those concerns, I must acknowledge that the regulated community (both state and local governments and businesses alike) and many within the Executive Branch remain fond of SEPs.").

128. Caroline D. Makepeace, *With A New Update, EPA's Supplemental Environmental Projects Policy Comes of Age*, ABA TRENDS, September/October 2016, at 10, 11. https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2016-2017/september-october-2016/epas-supplemental-environmental-projects-policy/.

129. *Id.*

130. Clark, *supra* note 90, at 16.

future—largely due to the effects of climate change.[131] The Intergovernmental Panel on Climate Change ("IPCC") predicts that temperatures will rise ten degrees over the next century.[132] In recent decades, glaciers have decreased in size exponentially, leading to rising water levels across the world.[133] Scientists have concluded that changing temperatures will lead to shifts in animal habitats, more severe droughts and heat waves, and more dangerous hurricanes. "Taken as a whole," the IPCC states, "the range of published evidence indicate that net damage costs of climate change are likely to be significant and to increase over time."[134]

Beyond the dangers of climate change, communities throughout the United States also face immediate environmental dangers, many of which are detailed in the EPA's Report on the Environment.[135] In the report, the EPA pinpoints over eighty indicators of immediate environmental danger including air quality, fresh water pollution, chemical contamination of land, and the dangers caused by human exposure to environmental contaminants.[136] The Fourth National Climate Assessment, a 1,656-page assessment by thirteen federal agencies published in 2018, goes even deeper, laying out in detail the grave effects of climate change and pollution.[137] These effects not only directly impact the planet, but also people and the economy. The report states in no uncertain terms that "[o]bservations collected around the world provide significant, clear, and compelling evidence that global average temperature is much higher, and is rising more rapidly, than anything modern civilization has experienced, with widespread and growing impacts."[138] Because SEPs benefit the negotiated solutions that all parties prefer and the fact that environmental difficulties associated with the need for SEPs are on the rise, SEP use must continue.

B. Removing the Threat to SEPs

As the recent prohibition and rescission have shown, executive action can quickly and easily alter the landscape for SEP use. There is an acknowledged general rule that actions cannot bind successors of government actors, so a future prohibition is possible. As a result, executive action simply undoing the actions taken during the Biden Administration could also be undone in a future administration

131. *See, e.g.,* JERRY M. MELILLO, TERESE (T.C.) RICHMOND, AND GARY W. YOHE, CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT. U.S. GLOBAL CHANGE RESEARCH PROGRAM 841 (2014), doi:10.7930/J0Z31WJ2.; Climate Change: The Need to Act Now: hearing before the subcommittee on clean air and nuclear safety of the committee of environment and public works, United States Senate and the Committee and Environmental and Public works, S. Hrg. 113-771, (2014).

132. NASA, GLOBAL CLIMATE CHANGE, https://climate.nasa.gov/effects/, (last visited Apr. 15, 2021).

133. *Id.*

134. Intergovernmental Panel on Climate Change, Summary for Policymakers, in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change,* Cambridge University Press, 17, (2007), https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf.

135. *What is the Report on the Environment?*, (last visited on Apr. 15, 2021), https://www.epa.gov/report-environment.

136. *Id.*

137. U.S. Global Change Research Program, *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States*, 2018, https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf.

138. *Id.* at 36.

and would fail to address the legitimate concerns with the practice. For this reason, any executive action is less desirable than a more permanent, legislative one.

Well-crafted legislation could address the spending and policy challenges to SEPs. Since the primary legal challenge of using SEPs in settling civil enforcement actions is the argument that the reduction in penalties is an unpermitted diversion from the treasury, a statutory action need only acknowledge the ADA and MRA to resolve those complaints. Congress certainly has the power to delegate discretionary spending decisions to agencies.[139] As in Delaware, one potential solution is to allow a percentage of civil penalties to be allocated specifically for SEP-like spending.[140] Regardless of how specifically designed, any formal delegation from Congress would cure any constitutional and statutory complaints.

Any proposed legislation should clearly address the policy concerns raised by detractors so as to provide the best chance of success in Congress. Due to the partisan divide on the issue,[141] the likelihood of legislation depends on what political party controls Congress. If the president at the time any such legislation passes is not friendly to it, then enactment might turn on the ability to override a veto.[142] Considering that neither the 114th nor the 115th Congress were able to pass the Stop Settlement Slush Funds Act,[143] there may be considerable barriers to legislation. Although each major political party has had its turn at controlling both houses of Congress multiple times since SEP use began, neither has directly prohibited or approved of SEPs through legislation.[144] This indicates there has not been a strong enough concern that SEPs should not be allowed—the status quo of continued use has been accepted.

To address the policy concern that agencies are provided too much power in using SEPs to direct resources to pet projects that might be connected to political goals,[145] SEP ideas could be generated outside the agency's and violator's negotiations. State use of SEP libraries, like Idea Banks, provide one mechanism to detach the selection of SEPs from the EPA's discretion.[146] Creating a public website that allows for the submission of ideas by the public, that also allows voting and commentary on submissions would connect the will of the public with the selection of SEPs, without the stagnant pace of legislation. A requirement that the source of ideas be connected to the community wherein the violation occurred would help alleviate the concern that a federal agency's knowledge of the needs of the local citizenry is insufficient to control resource allocation without aid of the legislature.

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139. *See* Pacific Legal Foundation v. Goyan, 664 F.2d 1221, 1226 (4th Cir. 1981) ("[T]he power to spend—constitutionally reserved to the Congress—may be delegated to others.").

140. Bonorris et al., *supra* note 32, at 215.

141. Dingell, *supra* note 49.

142. Elizabeth Rybicki, *Veto Override Procedure in the House and Senate*, CONGRESSIONAL RESEARCH SERVICE, (Mar. 26, 2019) https://www.senate.gov/CRSpubs/2b1325dc-6a6b-42c4-9a08-506c3a59a251.pdf ("A vetoed bill can become law if two -thirds of the Members voting in each chamber agree, by recorded vote, a quorum being present, to repass the bill and thereby override the veto of the President.").

143. Clark, *supra* note 90, at 8.

144. *Party Division,* UNITED STATES SENATE, https://www.senate.gov/history/partydiv.htm; *Majority Changes in the House of Representatives, 1856 to Present*, HISTORY, ART & ARCHIVES, UNITED STATES HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Majority-Changes/Majority-Changes/.

145. *See supra* section II C.

146. *See supra* section II C.

V. CONCLUSION

Environmental disputes that arise from violation of federal environmental laws are complex and it is difficult to achieve adequate resolution in federal courts. Negotiated settlements have been the preferred method of the EPA and DOJ for resolution in enforcement actions against violators of federal laws. To facilitate negotiation and improve outcomes for all who are affected, SEPs were developed as a negotiation tool well suited to address the unique problems presented by environmental harm. While there are legitimate legal and policy concerns regarding their use, the underlying problems that spurred SEP development are still present and are increasing in prevalence.

Rather than allow a situation to persist where administrations eliminate and restore the tool and do harm to the negotiation of settlement in civil enforcement actions in the process, changes should be made to address the concerns. It is just as likely that the next administration will again prohibit SEPs as it is that SEP use will remain untouched for decades. A long-term solution in the form of federal statutory changes or state solutions should be pursued to provide greater certainty.