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How Supplemental Environmental Projects Can and Should be Used to Advance Environmental Justice

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HOW SUPPLEMENTAL ENVIRONMENTAL PROJECTS CAN AND SHOULD BE USED TO ADVANCE ENVIRONMENTAL JUSTICE

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I. INTRODUCTION

Families living near coal plants in West Virginia are forced to avoid contact with the tap water that flows into their house.[1] Their water contains high concentrations of arsenic, barium, lead, manganese and other chemicals that burn the skin, erode tooth enamel, and may cause cancer.[2] This is exactly the sort of harm that the Clean Water Act (the "CWA") is intended to prevent, and represents the type of social tragedy that environmental justice ("EJ") advocates seek to confront. For decades, underprivileged communities have fought to resist the placement of power plants, landfills, and other environmental hazards within their communities.[3] However, these efforts have been largely unsuccessful.[4] This Comment provides guidance on how EJ advocates may increase their chances of success by pursuing creative environmental remedies rather than preventive measures. Specifically, this Comment focuses on the use of Supplemental Environmental Projects ("SEPs"), as facilitated by citizen suits brought under the CWA.[5]

Through its citizen suit provision, the CWA empowers community advocates to act on behalf of the United States ("U.S.") in filing lawsuits against water polluters.[6] However, remedies under the CWA are limited to either injunctive relief, or other penalties that go

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1. Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost in Suffering*, N.Y. TIMES, Sept. 12, 2009, *available at* http://www.nytimes.com/2009/09/13/us/13water.html.

2. *Id.*

3. Julie H. Hurwitz & E. Quita Sullivan, *Using Civil Rights Laws to Challenge Environmental Racism: From Bean to Guardians to Chester to Sandoval*, 2 J.L. SOC'Y 5, 10 (2001).

4. *See infra* Part II.B.

5. The CWA is noteworthy because until the mid-1980s it was the only statute that allowed citizen to seek civil penalties. Moreover, a majority of environmental citizen suits have historically been brought under the CWA. Charles S. Abell, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 VA. L. REV. 1957, 1957 (1995).

6. Clean Water Act, 33 U.S.C. § 1365 (2006).

directly to the U.S. Department of the Treasury (the "Treasury").[7] Fortunately, the Environmental Protection Agency (the "EPA") has created the SEP policy, which seeks to "encourage and obtain environmental and public health protection that may not have otherwise occurred."[8] As an example, Merck & Co. agreed to a Consent Decree in 2008 in response to a chemical discharge that caused extensive fish kills in the Wissahickon Creek and disrupted the Philadelphia Water Department's drinking water intake.[9] In addition to paying $1,575,000 in penalties, Merck agreed to extensive SEPs, which include creek restoration, wetland creation, as well as the purchase and installation of comprehensive systems that monitor fish activity as well as oxygen levels in the water.[10] This constituted a significant investment in the sustainability of this damaged community.

To encourage polluters to engage in beneficial SEPs, the EPA has set up an incentive scheme whereby the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP.[11] In fact, if a SEP is properly implemented, "the citizen . . . achieves both prevention [through deterrence] and restoration, the defendant pays a smaller penalty, and the environment benefits [as well]."[12]

However, there is substantial legal uncertainty as to how these SEPs may be implemented. In establishing a SEP, community advocates face numerous challenges on both constitutional[13] and statutory grounds.[14] These challenges perhaps explain why "fewer than 12% of settlements annually in cases involving penalties . . . used SEPs" from 1992 to 2006.[15] While these legal challenges have made SEP implementation a somewhat unpredictable endeavor, the advancement of SEPs would aid an EJ movement that is otherwise struggling to find ways for the courts to help its cause.

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7. *Id.*

8. Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24796, 24796 (May 5, 1998) [hereinafter Final SEP Policy].

9. Press Release, Environmental Protection Agency, Merck Settles Clean Water Act Violations Related to June 2006 Fish Kills in Wissahickon Creek (Dec. 13, 2007), *available at* http://yosemite1.epa.gov/opa/admpress.nsf/6427a6b7538955c585257359003f0230/fcf170d8474c34db852573b0006806a8!OpenDocument&Start=5.4&Count=5&Expand=5.4.

10. *Id.*

11. Final SEP Policy, *supra* note 8, at 24796.

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

13. *See infra* notes 66–67 and accompanying text.

14. *See infra* Part III.B.

15. Kristl, *supra* note 12, at 219.

II. HISTORY AND DEVELOPMENT OF THE ENVIRONMENTAL JUSTICE MOVEMENT

A. Why Environmental Justice is Important

The EJ movement is a response to a collective concern that the burdens of environmental hazards fall disproportionately on poor and minority communities.[16] While this concept predates the establishment of the U.S. as a nation,[17] the contemporary understanding of environmental justice as a civil rights issue developed as a response to the Warren County Protests in 1982.[18] These protests concerned the North Carolina Governor's decision to use Warren County as a "dumping [ground] for more than 6,000 truckloads of soil contaminated with toxic polychlorinated biphenyls."[19] The government's decision garnered particular attention because, at this time, "Warren was the poorest county in the state, and the population was over 65% black."[20] In response to perceived racism and attacks on the health of Warren County neighborhoods, national civil rights and environmental leaders joined forces with the community to launch a massive protest that resulted in over 500 arrests.[21] While these protests were ultimately unsuccessful in changing the site for the landfill, the events that transpired in Warren County are considered "the spark that ignited the [EJ] movement."[22]

These events prompted a spate of studies that confirmed a moral crisis in the way that environmental hazards are managed in the U.S. First, studies have demonstrated that the distribution of environmental hazards is significantly related to racial breakdown. In 1983, a study by the General Accounting Office ("GAO") showed that three out of four off-site landfills examined in southeastern states were located in predominantly minority communities.[23] A 1987 study by the United Church of Christ corroborated these findings, as they identified

16. Jason Pinney, *The Federal Energy Regulatory Commission and Environmental Justice: Do the National Environmental Policy Act and the Clean Air Act Offer a Better Way?*, 30 B.C. ENVTL. AFF. L. REV. 353, 355 (2003).

17. Hurwitz & Sullivan, *supra* note 3, at 10.

18. *Id.* at 11.

19. Pinney, *supra* note 16, at 356.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 357.

that "race was the single most significant factor associated with the location of licensed and abandoned hazardous waste facilities."[24]

Moreover, race has also been shown to influence the manner in which environmental laws are enforced. In 1992, the National Law Journal exposed "glaring inequalities" in the way the EPA addressed hazards and imposed penalties.[25] According to that study, the EPA is less likely to prosecute environmental violations that occur in minority communities.[26] For those violations that are prosecuted within minority communities, they will often result in relatively lenient penalties.[27] With all of this scholarly attention, the notion of EJ has expanded to include not only the unequal distribution of environmental burdens, but also the unequal enforcement of environmental laws.[28]

In the 1990s, EJ advocates received affirmation as the U.S. government began to officially recognize their mission. First, the EPA took initiative and formed the Office of Environmental Equity, which set out to "develop and implement EJ initiatives."[29] Later, while never passed, several EJ bills were introduced in the House of Representatives between 1992 and 1994.[30] Ultimately, this display of government interest culminated in Executive Order No. 12,898, signed by President Clinton in 1994.[31] This order requires that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States."[32] Following this Executive Order, the EPA actually went beyond its obligations and formed the National Environmental Justice Advisory Committee, the Office of Environmental Justice, the Environmental Justice Steering Committee, and the Office of Civil Rights.[33] These government actions surely were great symbolic victories for EJ advocates, but enforcing any EJ claims in court has been a consistent challenge.

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24. *Id.* at 358.
25. *Id.* at 359.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 360.
30. *Id.*
31. *Id.*
32. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).
33. Pinney, *supra* note 16, at 362.

B. Why the Current Tools Being Used for Environmental Justice Are Not Working

While the federal government has acknowledged the EJ movement, neither Congress, the EPA, nor any President has taken action that protected vulnerable communities in a way that could be judicially enforced. This failure is partly explained by the chasm that exists between traditional environmental goals and social justice issues.[34] The environmental movement, both public and private, was founded on a notion of conservation.[35] Conservationists emphasize protecting certain resources and acting for the overall benefit of humankind.[36] As a result, the concept of disproportionate burdens on certain social groups has been viewed as an alien concept.[37] Thus, legal and regulatory schemes have been slow to respond to EJ issues, resulting in what some have called an "antiurban bias."[38]

Since EJ issues have not been fully embraced by the environmental movement, EJ advocates have taken their case to the courts by asserting traditional civil rights actions. Proponents of EJ have pursued litigation under numerous legal theories: through enforcement of Clinton's Executive Order;[39] by bringing claims under the Equal Protection Clause;[40] by bringing a claim under Title VI of the Civil Rights Act;[41] and by bringing claims under 42 U.S.C. § 1983.[42] Unfortunately, since EJ claims usually stem from complaints of disproportionate impact on certain groups, these legal tools have been largely ineffective.

While President Clinton's Executive Order amounts to EJ validation at the highest level of government, Executive Order No. 12,898 merely serves as a guiding document for government agencies. Notably, the order's enforcement potential is restricted by section 609, specifying that it "shall not be construed to create any right to judicial review involving the compliance or noncompliance . . . with this order."[43] As such, EJ advocates have attempted to use existing federal laws to protect their communities from being disproportionately

34. EDWARDO LAO RHODES, ENVIRONMENTAL JUSTICE IN AMERICA 31 (2003).
35. *Id.* at 30.
36. *Id.*
37. *Id.* at 31.
38. *Id.*
39. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).
40. U.S. CONST. amend. XIV, § 1.
41. Civil Rights Act, Pub. L. No. 88-352, Title VII (1964).
42. 42 U.S.C. § 1983 (2006).
43. Exec. Order No. 12,898, 59 Fed. Reg. 7629 § 609 (Feb. 11, 1994).

impacted by environmental harms. However, EJ advocates have faced substantial legal obstacles, as courts have interpreted these federal laws very narrowly.

The first EJ cases were brought under the Equal Protection Clause.[44] Although this is an intuitive strategy for litigating environmental harms that disproportionately impact minorities, the Equal Protection Clause has become "one of the most disfavored theories for [EJ] advocates to employ."[45] The challenges associated with this strategy were exemplified in *Bean v. Southwestern Waste Management*,[46] where despite powerful evidence of a pattern of solid waste facilities being cited in communities of color throughout Houston, Texas, the residents were unsuccessful in their legal claim because they were unable to prove intent to discriminate.[47] Applying the Supreme Court standard in *Washington v. Davis*,[48] this holding demonstrated that an EJ claim brought under the Equal Protection clause will only be successful when the disproportionate impacts are "unexplainable on grounds other than race."[49] This has proven to be a tremendous burden for advocates seeking to protect their communities, as relief can only be granted in the event of overt acts of discrimination.[50]

Litigants have also pursued EJ litigation under Title VI of the 1964 Civil Rights Act.[51] Section 601 of the Act prevents recipients of federal funding from discriminating on the basis of race, color, or national origin.[52] However, like Equal Protection claims, courts will not grant relief unless plaintiffs can prove discriminatory intent, which imposes a "formidable burden for environmental justice plaintiffs."[53] As a result, litigants turned to section 602 of the Act, which mandates that agencies charged with distribution of federal funds abide by section 601's anti-discrimination requirements.[54] This course of action was once promising, as there was a period of time where section 602 claims merely required a showing of disparate impact, not

44. Hurwitz & Sullivan, *supra* note 3, at 18.

45. Pinney, *supra* note 16, at 377.

46. 482 F. Supp. 673 (S. Dist. TX 1979).

47. *Id.* at 677.

48. 426 U.S. 229, 238 (1976) (holding that disparate impact alone does not constitute a constitutional violation unless there was also an intent to discriminate).

49. Hurwitz & Sullivan, *supra* note 3, at 21.

50. Pinney, *supra* note 16, at 378.

51. Civil Rights Act, 42 U.S.C §§ 2000d - 2000d-7 (2006).

52. *Id.* § 2000d. (note: do not use "at" see Rule 3.3)

53. Pinney, *supra* note 16, at 375.

54. Civil Rights Act, *supra* note 38, § 2000d-1.

discriminatory intent.[55] However, the Supreme Court in *Alexander v. Sandoval*[56] retreated from this position, declaring that private parties do not have standing to sue under section 602.[57] As a result, litigants must again rely on section 601 for relief, which eliminates the use of the Civil Rights Act for all but the most egregious cases of intentional discrimination.[58]

Finally, while *Sandoval* clearly barred disparate impact claims under Title VI against private organizations that receive federal funds, the question remained open as to whether a disparate impact claim could be brought against a *public* recipient of federal funds under 42 U.S. § 1983.[59] Six federal courts[60] have determined that "a federal regulation has the force and effect of law," and may therefore implicate section 1983.[61] However, whether or not a regulation is actionable under section 1983 depends on whether there is a private right of action directly under that regulation.[62] Ironically, if federal law or regulation provides a private right of action, the courts have interpreted its existence as evidence of congressional intent to foreclose a remedy under section 1983.[63] As a result, this legal tool has been severely limited by the courts as well.

Undoubtedly, *Washington v. Davis* and its progeny have made it incredibly difficult to assert a claim based on disproportionate impact, or "effect" alone. However, even before *Washington*, disproportionate impact litigation has historically been ineffective.[64] While the "effects test" was rejected for constitutional claims, during the period between 1974 and 2000, the Supreme Court nevertheless adopted the effects test for Title VI of the Civil Rights Act.[65] However, "[d]uring [that] twenty-seven-year . . . period, not a single appellate

55. Pinney, *supra* note 16, at 375.

56. 532 U.S. 275 (2001).

57. *Id.* at 293.

58. Pinney, *supra* note 16, at 376.

59. Adele P. Kimmel, et al. *The Sandoval Decision and its Implications for Future Civil Rights Enforcement*, 76 FLA. B.J. 24, 27 (2002).

60. District of Columbia, Third, Fourth, Sixth, Eleventh, and the Southern District of New York. Hurwitz & Sullivan, *supra* note 3, at 42.

61. *Id.*

62. *Id.* at 44.

63. *Id.*

64. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705–06 (2006).

65. Charles F. Abernathy, *Legal Realism and the Failure of the "Effects" Test for Discrimination*, 94 GEO. L.J. 267, 269 (2006).

decision used the test as an independent source for righting racial wrongs."[66]

Despite the exuberance of advocacy scholars around the "effects doctrine" in the civil rights arena, there have always been underlying implementation concerns that rendered it largely ineffectual.[67] Notably, the courts have necessarily employed a "business necessity prong,"[68] which required that judges make a normative judgment as to whether there was a "sufficient nondiscriminatory justification" to permit a challenged act.[69] Additionally, since courts lacked specific guidelines, "courts have been quick to approve common business practices despite their disparate impact."[70] The notion of proving intent to discriminate has proven perhaps too challenging, and history provides no indication that litigating disproportionate impact could be any more successful even if *Washington v. Davis* were overturned.

III. WHY COMMUNITY ADVOCATES SHOULD EMBRACE SUPPLEMENTAL ENVIRONMENTAL PROJECTS, AND WHAT THEY NEED TO KNOW

The legal framework outlined above demonstrates that communities have little power to prevent the government from making environmental judgments that have a disparate impact on their communities. Since the courts have struck down each strategy that EJ advocates have used to prevent discrimination, political and economic forces will continue to compel decision-makers to reinforce environmental injustice.[71] However, EJ advocates may find greater success by taking a more reactive approach to harm inflicted on their communities. Studies have indicated environmental violations are not satisfactorily addressed in vulnerable communities,[72] so SEPs may be extremely effective in promoting environmental justice. However, if SEPs are to be effectively used going forward, it is important that EJ advocates have a firm understanding of the legal issues involved in SEP implementation. The major issues are: (A) the government may

66. *Id.* at 270.

67. *Id.* at 288.

68. Selmi, *supra* note 64, at 749.

69. Abernathy, *supra* note 65, at 284.

70. Selmi, *supra* note 64, at 753.

71. *See* R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 AM. U. L. REV. 229, 246–47 (1998) (identifying political and economic powerlessness of minority and poor communities as the "central issue" of environmental justice).

72. *See supra* notes 25–28 and accompanying text.

over-file and eliminate a citizen suit; (B) the Miscellaneous Receipts Act has been interpreted to mandate that all penalties go to the Treasury; and (C) the EPA has established and promulgated a SEP policy that has become progressively more restrictive over time.

A. The Government May Over-file and Trump Any Citizen Suit

For historical perspective, it is important to note that prior to 1990, SEPs were used extensively through consent decrees despite the fact that there were no statutory provisions that actually authorized these projects.[73] However, the Reagan White House, as well as the Department of Justice ("DOJ"), expressed concern over the lack of government oversight for these decrees.[74] This led to the amendment of section 505 of the CWA, which now requires that "[n]o consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator."[75] This amendment, which applies to all consent decrees generally, was intended to allow the government "the opportunity to identify, to challenge and to deter, as much as possible," problematic settlements.[76] If during these forty-five days, any state agency commences and "diligently prosecutes" the issue, no citizen suit could be filed.[77]

The government's ability to "over-file" and trump a citizen suit is particularly dangerous for citizen suits that may result in SEPs, as government agencies have viewed these projects with skepticism.[78] Government agencies often choose to over-file in order to negotiate their own settlements. In fact, for some states, "[p]reemption for the sole purpose of removing citizen suits from a state's enforcement

73. 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, 422 (2004).

74. *Id.*

75. Clean Water Act § 505, 33 U.S.C. § 1365 (2006).

76. *Id.*

77. *See* 33 U.S.C. § 1319(g)(6).

78. *See* Elizabeth R. Thagard, *The Rule That Clean Water Act Civil Penalties Must Go to the Treasury and How to Avoid It*, 16 HARV. ENVTL. L. REV. 507, 528–29 (1992) (noting that the Department of Justice has historically taken the stance that pure monetary penalties are better than SEPs from a deterrence standpoint and that SEPs may promote inconsistent treatment among polluters).

arena has become more of a rule than an exception."[79] If states take preemptive action to vigorously enforce environmental laws against polluters, this is not a cause for concern. However, some states will over-file citizen suits at the request of the polluter, and this state action often results in lenient treatment of polluters.[80]

A prime example of this counter-productive state action involves suits brought by the "Natural Resources Defense Council (NRDC), one of the groups that began bringing CWA citizen suits in the early 1980s."[81] Since 1986, NRDC cases have been preempted by states at least fifty times.[82] In many cases, the state enforcement action, whether judicial or administrative, resulted in lenient sanctions and relief to local polluters who sought protection from NRDC's citizen suit.[83] This type of preemption violates the purpose of the laws, fails to protect the environment, and often precludes any opportunity for a SEP to be implemented to aid a harmed community. This presents the first major obstacle for an EJ advocate, and this problem arises even before the citizen suit is filed.

Unfortunately, there is not a compelling strategy to avoid this tactic. If a state is antagonistic towards environmental citizen suits, a plaintiff may be best served by simply avoiding informing authorities of the suit. For instance, an attorney may ask for a proposed order rather than a consent decree that requires government notification.[84] Otherwise, community groups will have to pressure their state through the political process, or by threats to go to the media if the state proceeds to over-file to the benefit of the polluter.

B. Most Courts Have Ruled that All Penalties Must go to the Treasury

The Miscellaneous Receipts Act (the "MRA") states that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."[85] While this may not appear to dictate whether it is appropriate for a

79. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1648 (1995).

80. *Id.*

81. *Id.*

82. *Id.* at 1648–49.

83. *See id.* at 1649.

84. *See* Thagard, *supra* note 78, at 531.

85. Miscellaneous Receipts Act, 31 U.S.C. § 3302(b) (2006).

polluter to implement an environmental project, this act has proven to be a substantial obstacle for the implementation of SEPs. Whether resulting from a citizen or government suit, civil penalties that result from environmental infractions are considered "money for the government" under the MRA.[86] Despite the fact that money may be directed towards an environmental project, these funds are considered constructively "received" by the government for the purposes of the MRA.[87] Once money is directed to the Treasury, the money is likely lost in terms of environmental or community recovery.

In each instance that federal appellate courts have ruled on this issue, they have rigidly interpreted the MRA to require that all civil penalties be directed to the Treasury. The Supreme Court, through dicta, has touched on this issue in two cases, *Gwaltney of Smithfield v. Chesapeake Bay Foundation*[88] and *Middlesex County Sewerage Authority v. National Sea Clammers Association.*[89] In both of these cases, civil penalties are described as "payable to the government."[90] Lower appellate courts have rigidly followed this language; both the Ninth and Third circuits have declared that all civil penalties must be paid into the Treasury, to be used at the government's discretion.[91]

While this requirement may appear arbitrary and overly burdensome, especially when the equitable impact of a SEP is considered, the federal government has framed this as a separation-of-powers issue. The DOJ has stated that a SEP is unlawful "if you had a direct substitution of payments to . . . a third party entity . . . in lieu of payment to the Treasury."[92] For SEPs, this alleged "substitution of

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86. Memorandum from John Peter Suarez, Assistant Administrator, U.S. Environmental Protection Agency on Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds to Regional Counsels, Regional Enforcement Managers, Regional Media Division Directors, Regional Enforcement Coordinators (Dec. 5, 2003), *available at* http://www.epa.gov/compliance/resources/policies/civil/seps/seps-thirdparties.pdf.

87. *Id.*

88. 484 U.S. 49 (1987).

89. 453 U.S. 1 (1981).

90. *See Gwaltney*, 484 U.S. at 53; *see also National Sea Clammers*, 453 U.S. at 14.

91. *See* Sierra Club v. Electronic Controls Design, 909 F.2d 1350, 1355 (9th Cir. 1990) (declaring that a court cannot order a defendant in a citizens' suit to make payments to an organization other than the U.S. Treasury); *see also* Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, 913 F.2d 64, 82 (3rd Cir. 1990) (holding that penalties in citizen suits under the Act must be paid to the Treasury).

92. *Environmental Credit Projects Under Clean Water Act: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment and the Subcomm. on Oceanography of the Comm. on Merchant Marine and Fisheries*, 100th Cong. 25 (1988) (testimony of Raymond Ludwiszewski, Associate Deputy Att'y General, U.S. Dept. of Justice).

payments" occurs when a court issues a civil penalty that is subsequently diverted towards en environmental project rather than going to the Treasury. The contention is that diverting money away from the Treasury infringes on Congress' power to control the federal purse, so this diversion of funds has been declared an improper augmentation of the agency's appropriation.[93]

The constitutional concerns implicated by the MRA may be fatal to a proposed SEP. As such, it is critical that someone seeking to implement a SEP fully understand the considerations of the courts, and how best to proceed. As a preliminary step, the litigator on behalf of the plaintiff communities should push defendants to agree to a SEP prior to any finding of liability. If there is a finding of liability, the community should seek equitable relief rather than any "penalty." Finally, if the court insists on imposing a penalty, plaintiffs should offer equitable and statutory arguments to justify a SEP.

1. The Benefit of Avoiding "Liability"

Given that the aforementioned federal courts have declared that civil penalties must go to the Treasury, proponents of SEPs should seek to ensure that the relevant funds are never designated as a "penalty." The most effective means to achieve this would be to negotiate a consent decree that is settled before there is any finding of liability. Without liability, there can be no penalty. If there is no penalty, the proposed funding for the SEP is never "received" by the government, and therefore the MRA is not implicated. This strategy was encouraged by the Ninth Circuit in *Sierra Club v. Electronic Controls Design*,[94] where the court instructed that a lower court enforce a consent decree that included a SEP on the grounds that it was simply an out-of-court settlement negotiated prior to a finding of liability.[95] This rule provides community advocates with substantial freedom to negotiate settlements that would further EJ goals. However, there will be times when civil or criminal liability is established, and in that case the legal analysis becomes much more complicated.

2. Challenges in Moving Forward with a SEP despite a Finding of Liability

If there is a finding of liability, a SEP proponent should argue that the CWA grants the court substantial discretion when it comes to

93. *Id.*

94. 909 F.2d 1350 (9th Cir. 1990).

95. *Id.* at 1354.

penalty allocation. If the court can be convinced that a civil penalty is not necessary, then SEP advocates can simply propose a SEP through a consent decree that would arguably be enforceable under *Electronic Controls*.[96] At least one court in Hawaii exercised such judicial discretion[97] based on its interpretation of section 1319(d) of the CWA, which states that "any person who violates . . . this title . . . shall be subject to a civil penalty"[98] While this language appears to mandate a civil penalty upon the finding of CWA liability, the District Court of Hawaii, in *Hawaii's Thousand Friends, Life of Land, Inc. v. Honolulu*, declared that this language was ambiguous.[99] While this case did not involve a SEP, *Hawaii's Thousand Friends* provides persuasive authority for the proposition that CWA penalty decisions should be left to the discretion of the court. If the court can be convinced that a penalty is not mandatory, a SEP has a much greater likelihood of success.

However, it is important to note that most jurisdictions will mandate a civil penalty if there is a finding of liability for a CWA violation.[100] The Eleventh Circuit, in *Atlantic States Legal Foundation v. Tyson Foods*,[101] established that "once a violation has been established, some form of penalty is required."[102] This mechanical interpretation of the MRA is the most likely court reaction.[103] So, someone pushing for a SEP must know how to appropriately pursue the issue further.

3. Is There Hope for SEPs After a Penalty is Issued?

If liability is established, and if a civil penalty is subsequently granted, there is substantial legal authority indicating that it is unlawful to use that penalty for a SEP. Notably, two federal appellate courts have taken a very restrictive stance on this issue. The Ninth Circuit, in *Electronic Controls*, asserted that "civil penalties . . . may be paid only to the U.S. treasury."[104] The Third Circuit, in *Public*

96. *See supra* notes 95–96 and accompanying text.

97. *See generally* Hawaii's Thousand Friends, Life of Land, Inc. v. City and County of Honolulu, 149 F.R.D. 614 (D. Haw. 1993).

98. Clean Water Act, 33 U.S.C. § 1319(d) (2006).

99. *Hawaii's Thousand Friends*, 149 F.R.D. at 617 (noting that the statute uses the term "shall be subject to" rather than "shall pay").

100. Thagard, *supra* note 78, at 522.

101. 897 F.2d 1128 (11th Cir. 1990).

102. *Id.* at 1142.

103. Thagard, *supra* note 78, at 522 (referring to the CWA committee report that stated that penalties should go to the Treasury).

104. Sierra Club v. Electronic Controls Design, 909 F.2d 1350, 1354 (9th Cir. 1990).

Interest Research Group v. Powell Duffryn Terminals, echoed the Ninth Circuit's ruling, stating that "once the [trial] court labeled the money as civil penalties it could only be paid into the Treasury."[105]

A majority of courts have adopted this strict interpretation of this rule. For example, in *Atlantic States Legal Foundation v. Universal Tool & Stamping*,[106] the court declared that "once there has been a judicial finding of liability, a court has no choice but to impose a civil penalty and civil penalties must be paid to the Treasury".[107] In *Friends of the Earth v. Archer Daniels Midland Co.*,[108] this rigid rule was applied despite a consent decree that was supported by both parties.[109] Because the consent decree was negotiated after a finding of liability, the court determined that it was required under the CWA to impose a civil penalty that could only be paid to the U. S.[110] Some courts have specifically indicated that using penalty funds for SEPs would be a preferable result, but that they were legally compelled to direct all penalties to the Treasury. This sentiment was evident in *USA v. Smithfield Foods*,[111] where the court had originally directed that some penalty money should go towards a SEP for bay restoration.[112] However, at the prompting of the government, the court regretfully ruled that all penalty money must go to the Treasury.[113]

However, a few select cases provide hope for EJ advocates, as some courts have managed to reserve for themselves more discretion in handling civil penalties. In part, these courts have relied on language in the CWA, which states that:

> [i]n determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on

105. 913 F.2d 64, 82 (3rd Cir. 1990).
106. 786 F. Supp. 743 (N.D. Ind. 1992).
107. *Id.* at 754.
108. 780 F. Supp. 95 (N.D.N.Y. 1992).
109. *Id.* at 100–01.
110. *Id.*
111. 982 F. Supp. 373 (E. Dist. Va. 1997).
112. *Id.* at 376.
113. *Id.*

> the violator, *and such other matters as justice may require.*[114]

One example where the court applied a flexible penalty policy was *United States v. San Diego.*[115] In that case, the court decided to split civil penalties so that some money went to the Treasury, with other funds going towards a SEP.[116] In formulating this compromise, the court considered various "matters as justice may require" in order to fashion what it considered an equitable remedy.[117] In that case, the federal government requested a penalty of $10 million to go to the Treasury.[118] Meanwhile, the City of San Diego requested a mere $1.4 million in penalties, with $1 million being directed toward a SEP.[119] In the end, the court decided on a $3 million penalty, with $2.5 million going towards a SEP, and the other $500,000 going to the Treasury.[120]

Though, the most vigorous defense of the court's discretion came from an Oregon district court in *Northwest Environmental Defense Center v. Unified Sewerage Agency.*[121] In that case, the federal government insisted that all penalty money should be directed to the Treasury.[122] However, the court rejected the government's request, declaring that the "purpose of the Clean Water Act is to improve water quality, not endow the Treasury."[123] Further, the court contended diverting some penalty funds to a SEP was in full conformity with the penalty provisions of the CWA.[124] Not only was the polluter punished through a mandate of costly injunctive relief, an additional $1 million will fund "further enforcement by the state of Oregon and improve water quality in the Tualatin River basin in ways which could not be judicially mandated."[125] Moreover, the court asserted that since none of the penalties went directly to the plaintiffs or any organizations with which they are involved, this was a proper result from a properly executed citizen suit.[126] Though rare, these cases

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114. Clean Water Act, 33 U.S.C. § 1319 (2006)(emphasis added).
115. 1991 U.S. Dist. LEXIS 5459 (S. Dist. Cal. 1991).
116. *Id.* at 18.
117. *Id.* at 11.
118. *Id.*at 7.
119. *Id.*
120. *Id.* at 18.
121. 1990 U.S. Dist. Lexis 13349 (Dist. Ct. Or. 1990).
122. *Id.* at 2.
123. *Id.* at 3.
124. *Id.*
125. *Id.*
126. *Id.* at 2–3.

serve as proof that SEPs can succeed even after a penalty has been issued, despite the government's stance that all civil penalties must go to the Treasury.

C. The Significance of Administrative SEP Policy

In addition to the courts, the EPA has also played a critical role in shaping the use of SEPs. If the EPA brings a federal claim, or if the EPA intervenes in a citizen suit, actions will be guided by the EPA's SEP policy.[127] Most significantly for EJ and SEP advocates, the EPA's SEP policy has dramatically evolved in two key areas: the amount that a penalty may be mitigated by a SEP and the extent to which a SEP must be related to the harm that was caused.

1. Diminishing Scope of the EPA's SEP Policy Over Time

In 1991, the EPA released its first SEP policy, which simply set out to ensure that no one profits from his or her violation of the law.[128] A penalty was to be assessed "at a level which captures the [defendant's] economic benefit of noncompliance plus some appreciable portion of the gravity component of the penalty."[129] Then, as long as there is a relationship between "the nature of the violation and the environmental benefits to be derived,"[130] a violator could use a SEP to mitigate up to one hundred percent of their penalty.[131]

Subsequent iterations of this rule significantly narrowed the scope of allowable SEPs.[132] First, the "nexus" consideration that requires a relationship between the SEP and the environmental harm became much more restrictive in subsequent policy refinements. Unlike the standard in 1991, where the SEP simply had to be related to "the nature of the violation," the 1995 Interim SEP Policy required that the SEP be related to the violation itself.[133] Additionally, the 1995 policy restricted the amount that SEPs could mitigate a penalty.[134] Rather than mitigating up to one hundred percent of the penalty, the

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127. *See generally* Final SEP Policy, *supra* note 8.

128. Envtl. Prot. Agency, Policy on the Use of Supplemental Environmental Projects in EPA Settlements, 25 Envtl. L. Rep. (Envtl. Law Inst.) 35607 (Feb. 12, 1991).

129. *Id.* at 35607.

130. *Id.*

131. *Id.* at 35610.

132. Kristl, *supra* note 12, at 324.

133. Interim Revised EPA Supplemental Environmental Projects Policy Issued, 60 Fed. Reg. 24856, 24858 (May 10, 1995).

134. *Id.* at 24861.

mitigation percentage was now capped at eighty percent.[135] This meant that for every dollar spent on a SEP, the offender's penalty might only be reduced by up to eighty cents. In 1998, the EPA promulgated its final SEP policy,[136] which largely reinforced the restrictions that were introduced in 1995.[137] The Final SEP Policy, published in 1998, affirmed the narrow nexus requirement from the 1995 policy, and further retains the eighty percent cap on penalty mitigation from any SEP.[138]

With these changes, the EPA has gradually limited the effectiveness and the appeal of implementing SEPs. By departing from their 1991 standard and mandating a tighter connection between the SEP and the violation, it follows that "fewer options will be [available] for acceptable SEPs."[139] Additionally, the current cap on mitigation provides a further disincentive for implementing SEPs. Now, in accordance with the Final SEP Policy:

> [A] defendant who spends $1 on a SEP can only get, at best, an 8¢ reduction in its penalty. Thus, official EPA policy requires a defendant who wants to perform a SEP to pay more than the defendant would if it were simply paying a penalty alone. This economic disincentive likely creates a restraint on SEP utilization.[140]

These two EPA-imposed restrictions on SEPs clearly have resulted in reduced implementation of SEPs. This result is regrettable, particularly since this policy is apparently justified by a connection with the MRA (described below) that the EPA has never fully explained.

2. EPA's Justification for SEP Restrictions

The EPA apparently justifies its restrictive SEP policies by claiming that they are bound by the MRA. The EPA sought to explain this connection in a 2002 SEP memo entitled, "Importance of the

135. *Id.*
136. Final SEP Policy, *supra* note 8.
137. Kristl, *supra* note 12, at 220.
138. *Id.* at 236–37.
139. *Id.* at 220.
140. *Id.*

Nexus Requirement in the Supplemental Environmental Projects Policy."[141] The EPA has taken the stance that:

> [a]n adequate nexus is important because it ensures that the Agency complies with the SEP Policy and the requirements of the MRA . . . . If there is a relationship between the alleged violation and the SEP, then it is within the Agency's discretion to take the SEP into account as a mitigating factor when determining the amount of a penalty that the Agency will agree to as part of an overall settlement. If there is no nexus, then the Agency does not have that discretion.[142]

However, despite the EPA's declaration that a nexus requirement "ensures that the agency complies with the . . . requirements of the MRA,"[143] the connection between these two concepts is not altogether clear. In 1987, Raymond Ludwiscewski, then Associate Deputy Attorney General of the DOJ, attempted to explain this connection during a Congressional hearing.[144] In his testimony, Mr. Ludwiscewski stated that a "substitution" of penalties would be unlawful under the MRA, while "mitigation" for an act of repentance would be permissible.[145] He suggested that an unlawful "substitution" occurs when the Executive Branch decides that they will direct penalties to some other action, rather than directing the penalties to the Treasury.[146] On the other hand, a permissible "mitigation" is when the Attorney General reduces a penalty in response to the demonstrated repentance of a violator.[147] So, "repentance" in the form of a SEP would justify some penalty "mitigation," which is

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141. Memorandum from Walker B. Smith, Director , U.S. Environmental Protection Agency on the Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy to Regional Counsel, Regional Enforcement Division Directors, Regional Media Division Directors (Oct. 31, 2002), *available at* http://www.epa.gov/compliance/resources/policies/civil/seps/sepnexus-mem.pdf [hereinafter Smith Memorandum].

142. *Id.*

143. *Id.*

144. *Environmental Credit Projects Under Clean Water Act: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment and the Subcomm. on Oceanography of the Comm. on Merchant Marine and Fisheries H.R.*, 100th Cong. 20-33 (1988) (testimony of Raymond Ludwiszewski, Associate Deputy Att'y General, U.S. Dept. of Justice).

145. *Id.* at 24.

146. *Id.*

147. *Id* at 26.

permissible under the MRA so long as money is not technically being "diverted" from the Treasury.[148] With this ambiguous standard in place, the viability of a SEP ultimately depends on prosecutorial discretion, since the government decides whether a SEP constitutes an unlawful "substitution" or a permissible "mitigation."[149] This legal ambiguity certainly has chilled the use of SEPs.

Moreover, the EPA has provided SEP advocates with little guidance on how to craft an acceptable SEP. In a 2002 memo that describes challenges associated with meeting the "nexus" requirement specifically,[150] the EPA encouraged SEP advocates to call the agency for clarification and guidance on a case-by-case basis.[151] Lacking a sense of predictability, polluters are now more likely to either "play it safe" and elect projects that have been approved before, or simply avoid SEPs altogether.[152] This conservative SEP implementation harms the EJ movement in particular, which demands a more flexible approach to SEPs so that they can be used for creative community-building solutions.

IV. CONCLUSIONS: CURRENT STATUS OF THE LAW, AND SUGGESTIONS

Given the challenges facing the EJ movement, SEPs may provide a valuable tool to encourage polluters to help harmed communities in the wake of a CWA violation.[153] Unfortunately, the courts have interpreted the CWA and the MRA in such a way that SEP implementation can be a real challenge.[154] One important lesson is that SEP advocates are well-served to attempt to settle their citizen suit before there is a finding of liability.[155] Once there is liability, most courts will require a civil penalty.[156] Most courts that require a civil penalty will also require that the entire amount be directed to the Treasury.[157] Thus, in most cases, a finding of liability is a death-knell for a desirable SEP that could help vulnerable communities.

148. *Id.*
149. Kristl, *supra* note 12, at 249–50.
150. Smith Memorandum, *supra* note 141.
151. *See* Smith Memorandum, *supra* note 141, at 2.
152. Kristl, *supra* note 12, at 241.
153. *See supra* Section III.
154. *See supra* Section III.B.
155. *See supra* Section III.B.1.
156. *See supra* Section III.B.2.
157. *See supra* Section III.B.3.

However, there are a few district courts that have enforced SEPs in addition to imposing a penalty.[158] Although scholarly authorities have not come to a consensus on the legal merits of these cases,[159] these cases provide compelling, persuasive authority on which advocates can rely in order to push for a robust EJ agenda through SEPs. These cases serve as proof that the language of the CWA may be interpreted to bestow substantial discretion upon the courts with regards to the allocation of civil penalties.[160] As such, community advocates must echo the judges in these cases in order to convince a court that SEPs are not only legal, but that this remedy meets the purpose of the CWA and satisfies an important equitable purpose.

Meanwhile, the EPA has gradually narrowed its SEP policies, which will deter EJ advocates from pursuing SEPs.[161] A strict nexus requirement has greatly diminished the opportunities for SEPs to be used to advance EJ issues.[162] Additionally, the EPA has adopted a penalty mitigation scheme creating a financial disincentive that effectively penalizes polluters for engaging in SEPs.[163] With these challenges in mind, the EPA should revert back to its 1991 policy,[164] which allowed a more generous mitigation policy, and a more relaxed nexus requirement. This would entice more polluters to participate in SEPs, and to direct the penalties to community projects that may be only tangentially related to their environmental violations. Unlike simple injunctive relief, a properly implemented SEP could actually further EJ goals by making vulnerable communities better off than they were before the violation.

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158. *See supra* notes 116–126 and accompanying text.

159. *Compare* Quan B. Nghiem, *Using Equitable Discretion to Impose SEPs under the CWA*, 24 B.C. ENVTL. AFF. L. REV. 561, 588 (1997) (claiming that "while the intentions of [these] courts may have been admirable, the conclusions they reached were weakened by the fact that the judges diverted the defendants' payments towards mitigation projects despite conceding that such payments constituted civil penalties."), *with* Lloyd, *supra* note 69, at 421 (suggesting that these deviating decisions indicate that "the letter or the rationale of Miscellaneous Receipts Act to environmental enforcement cases has not proved successful."), and Thagard, *supra* note 78, at 518 (claiming that the notion that all civil penalties must be paid to the Treasury is an ill-founded artifact of over-reliance on 1972 legislative history, and relied on mere dictum from Supreme Court cases.").

160. *See supra* note 117 and accompanying text.

161. *See supra* Section III.C.1.

162. *See supra* note 139 and accompanying text.

163. *See supra* note 140 and accompanying text.

164. *See supra* notes 128–131 and accompanying text.