THE RECENT FEDERAL WITHDRAWAL OF LIMITATIONS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS AND IMPORTANCE TO ENVIRONMENTAL JUSTICE INITIATIVES

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I. INTRODUCTION

The Biden administration took a mere two weeks to reverse one of the many rollbacks of environmental regulations under the Trump administration,[1] wherein the United States Department of Justice ("DOJ") limited the discretion of United States Attorneys[2] to include Supplemental Environmental Projects ("SEPs") in settlements. A SEP is an environmentally beneficial project that is funded by defendants in civil judicial settlements and respondents in administrative settlements in exchange for a lower monetary fine.[3] In enforcing environmental laws, the government or a "private attorney general," an individual on behalf of the government, is generally limited to two types of relief: a fine and an injunction to stop the violation. However, parties have historically expanded these possible forms of relief by agreeing to SEPs in settlements. The use of SEPs has been highly successful, but DOJ has been skeptical of the practice, and especially so during the Trump administration.[4] A 2019 DOJ memorandum ("2019 memo") essentially banned the use of SEPs in settlements between DOJ and state and local governments, arguing that the use of SEPs is not authorized by Congress and that the federal government exercises too much power over state and local governments when SEPs are included in settlements.[5] A further DOJ memorandum from March 2020 ("2020 memo") expanded this prohibition by disallowing SEPs in settlements between DOJ and private parties, arguing that funds are

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1 *See* Nadja Popovich et al., *95 Environmental Rules Being Rolled Back Under Trump*, N.Y. TIMES (last updated Jan. 20, 2021), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html. As of the end of the Trump administration on January 20, 2021, this study found 112 rollbacks of environmental regulations when considering those completed and in progress. *See Withdrawal of Memoranda and Policy Documents*, U.S. Dept. of Justice (Feb. 4, 2021), https://www.justice.gov/enrd/page/file/1364716/download. This February 4, 2021 memorandum notes the Biden administration's objectives to protect the environment and mitigate the impacts of climate change.

2 United States Attorneys represent the United States through employment with DOJ.

3 *Supplemental Environmental Projects Policy 2015 Update*, U.S. Envtl. Protection Agency (Mar. 10, 2015), https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf, at n.1. "Defendant" will mean both ". . .defendants in civil judicial settlements and respondents in administrative settlements" in this Note.

4 The number of SEPs agreed to by the federal government decreased during the Trump administration. DOJ accepted an average of 14.2 SEPs per year from 2010 to 2015, but the yearly average went down to 9.3 by 2019. *See* Gregory Henderson & Chuck McCutcheon, BLOOMBERG ENVIRONMENT, *Justice Department Ponders Nixing Environmental Settlements Tool* (Oct. 30, 2019), https://news.bloombergenvironment.com/environment-and-energy/justice-department-ponders-nixing-environmental-settlements-tool.

5 *Using Supplemental Environmental Projects ("SEPs") in Settlements with State and Local Governments*, U.S. Dept. of Justice (Aug. 21, 2019), https://www.justice.gov/enrd/file/1197056/download [hereinafter 2019 memo].

diverted away from the Treasury Department without Congressional approval when SEPs are included.[6]

Limitations on SEPs are most concerning because their prohibition will hamper environmental justice ("EJ") initiatives. Achieving EJ refers to equal treatment and involvement of citizens in the "development, implementation, and enforcement of environmental laws, regulations, and policies," despite race, color, socioeconomic status, or national origin.[7] To improve EJ, it is necessary to improve minority and low-income community access to the decision-making process, and to allow all communities equal access to the enforcement of environmental laws and resulting protection from health hazards.[8] SEPs improve EJ disparities because they are projects that help a local community by directly improving environmental conditions where the violation occurred, and low-income and minority communities are most likely to suffer from poor environmental conditions.

The practice of including SEPs in settlement agreements has worked very well to improve environmental conditions in local communities, and their use should not be limited. Considering the benefits of SEPs, this Note congratulates the Biden administration on its withdrawal of the Trump administration's anti-SEP policies. However, more should be done to secure the future of SEPs by DOJ, the United States Environmental Protection Agency ("EPA"), and Congress. DOJ memoranda are limited to use within the agency, and as internal policy memoranda, they do not have the force of law;[9] the memoranda offer general guidance to be used within DOJ, but do not otherwise have the force of law and may be reversed by future memoranda. Consequently, a future administration can reinstate similar policies, through the issuance of DOJ memoranda, to again limit the use of SEPs. Such an action would dismantle benefits to local communities where underlying violations occur, which in turn would hamper efforts to improve environmental conditions in communities with a high proportion of low-income and minority residents.

Given the importance of SEPs, this Note will focus on their benefits and legal footing, the Trump administration's efforts to curtail their use, and options for future governmental support. In Part II, this Note will describe

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[6] *See generally Supplemental Environmental Projects ("SEPs") in Civil Settlements with Private Defendants*, U.S. Dept. of Justice (Mar. 12, 2020), https://www.justice.gov/enrd/file/1257901/download [hereinafter 2020 memo].

[7] *Environmental Justice*, U.S. Envtl. Protection Agency (last visited Feb. 12, 2021), https://www.epa.gov/environmentaljustice.

[8] *Id.*

[9] *See Memorandum from the Attorney General, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities*, U.S. Dept. of Justice (Nov. 7, 2018), https://www.justice.gov/opa/press-release/file/1109621/download [hereinafter 2018 memo], at 2, n.3.

the history of the use of SEPs, and the benefits impacting low-income and minority areas. Part III will explain the Trump administration's position limiting SEPs, and the historical arguments against their use. Part IV will analyze the weaknesses of the arguments to limit the use of SEPs. Specifically, there is historical legal support for SEPs in the courts, and implicit Congressional support since SEPs comply with the purpose of underlying statutes. Part V will propose that Congress should explicitly authorize SEPs in underlying statutes because this would help to stabilize SEP policy, and that Congress, DOJ and EPA should work together to expand the use of SEPs. Part VI will conclude that SEPs are paramount to improving EJ, and that the United States is in an opportune time to expand their use with the recent change in administration.

II. BACKGROUND

A. Supplemental Environmental Projects

SEPs are projects that provide an environmental or public health benefit and undertaken pursuant to the settlement of an environmental enforcement action.[10] As part of EPA's policy regarding SEPs, an alleged violator of an environmental law agrees to undertake an environmentally beneficial project that is closely related to the violation being resolved.[11] EPA commonly uses SEPs as part of settlements for various environmental law violations as part of its enforcement powers.[12] SEPs may be included in settlements in these actions at the request of either party, and are essentially requirements that the defendant fund the specific projects. The beginnings of SEPs date to the 1980s, but their frequency of use increased in the 1990s.[13] A main reason for the establishment of SEPs was a new emphasis on pollution prevention, rather than the more common practice of cleaning up sites or mitigating the impacts of prior pollution.[14] SEPs can aid pollution prevention since they may be designed to keep an area protected rather than only to remedy past harm.[15] For example, SEPs have been used to address potential future violations through implementation of auditing and training programs beyond the requirements of existing environmental statutes.[16] Therefore, SEPs could not have been compelled

[10] *Supplemental Environmental Projects (SEPs)*, U.S. Envtl. Protection Agency (last visited Feb. 16, 2021), https://www.epa.gov/enforcement/supplemental-environmental-projects-seps.

[11] *Supplemental Environmental Projects Policy 2015 Update*, *supra* note 3.

[12] *Supplemental Environmental Projects (SEPs)*, *supra* note 10.

[13] Laurie Droughton, Note & Comment, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 Pace Envtl. L. Rev. 789, 806 (1995).

[14] *Id.*

[15] *Id.*

[16] *Id.*

by underlying statutes, and are not otherwise legally required (at the federal, state or local level), and provide benefits that go beyond compliance obligations.[17]

Although a civil penalty will generally be lower when a SEP is included in a settlement, EPA has established guidance to make sure that the amount reduced is not completely discretionary or arbitrary.[18] EPA's SEP policy, last updated in 2015, has the stated purpose to signal EPA's "strong support" for the use of SEPs and to facilitate their efficient use.[19] If both parties decide to include a SEP in a settlement, then it must include a separate penalty too.[20] However, this agreement will generally, all other things being equal, include a lower civil penalty than a defendant would otherwise pay if a SEP was not included.[21] Under EPA's policy, the settlement penalty (paid in addition to the cost of completing a SEP) must equal or exceed either "[t]he economic benefit of noncompliance plus ten percent (10%) of the gravity component; or [t]wenty-five percent (25%) of the gravity component only; whichever is greater."[22] The economic benefit of noncompliance is the monetary savings that comes from not complying with the regulation, and the gravity factor considers the "environmental and regulatory harm" attributed to the violation.[23] The civil penalty mitigation exchanged for a SEP should be some percentage of the estimated cost to execute the SEP, which is not specified by EPA but cannot exceed 80 percent of that estimated cost.[24]

There are also other limits on the use of SEPs, based on EPA's practices and guidance, which are meant to prevent the overuse of SEPs.[25] Such misuse would be a SEP that is meant to achieve broad community goals beyond remedying the harm caused by the violation. To prevent this, projects must be linked to the violation itself and related to the particular environmental protection goals of whichever statute authorized the regulation that was violated.[26] These are safeguards to prevent EPA from abusing its discretion.[27] Since Congress wrote the underlying environmental statutes, the requirement of a nexus between the violation

[17] *Supplemental Environmental Projects (SEPs)*, *supra* note 10.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 23.

[23] *Id.* at 21.

[24] *Id.* at 24.

[25] *See generally id.*

[26] *Id.*

[27] *Id.*

and SEP is meant to ensure that it conforms with general Congressional intent.

In addition to the safeguards put in place to prevent overuse, SEPs are limited in that they are never forced on a defendant; in fact, many ask for SEPs of their own initiative, and they freely agree to any SEPs that are contained in a settlement agreement.[28] Generally, regulated entities have been supportive of SEPs for a few reasons.[29] First, the project will sometimes be classified as either a business expense or a charitable donation for tax purposes, whereas fines are not deductible.[30] A project may also be a good investment for a company if it involves changes that will help it comply with future regulations, and may generate good press.[31] A company that performs a SEP can also get favorable treatment from EPA in subsequent enforcement actions, and the opportunity to evaluate possibly inefficient production processes.[32] Companies that perform pollution prevention or environmental auditing SEPs may discover methods to eliminate the use of toxic materials, switch to less toxic alternatives, or recover toxic material from their waste streams.[33] These measures could make the companies more competitive while reducing pollution.[34]

1. Case Studies

DOJ, on behalf of the United States, may initiate litigation when an environmental violation is particularly egregious or when the defendant is a repeat offender. Both EPA and DOJ may be plaintiffs, but DOJ's SEP policy is consequential since it authorizes the settlements and can object to settlements that involve other parties. DOJ has traditionally been supportive of SEPs by entering into settlements that include payments to non-governmental, third-party organizations, but a memorandum written by then-United States Attorney General ("AG") Jeff Sessions in June 2017 ("2017 memo") sought to severely limit this practice, and was the beginning of the Trump administration's limitations on SEPs.[35]

[28] *Id.*

[29] Droughton, *supra* note 12, at 806.

[30] *Id.*

[31] *Id.*

[32] Barnett Lawrence, *Supplemental Environmental Projects: A New Approach for EPA Enforcement*, 26 ELR 10174 (1996).

[33] *Id.*

[34] *Id.*

[35] *Id.* There are, however, exceptions to the policy in the 2017 memo. ("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. Second, the policy does not apply to payments for legal or other professional

Stressing the importance of SEPs, environmental groups say that funds in prior DOJ settlements have gone to critical environmental projects nationwide.[36] Examples of this practice include requirements for British Petroleum ("BP") "to spend billions on coastal restoration projects that were not directly related to spill damage," Volkswagen to finance "electric vehicle charging stations under its settlement of the diesel emissions cheating scandal," and Duke Energy to pay "for soil restoration on federal land as part of its compensation for air pollution violations at some of its power plants in North Carolina."[37] The 2012 settlement with BP included more than $2 billion for projects aimed at environmental restoration in the Gulf of Mexico and research into environmental protection such as spill prevention.[38] Additionally, a 2015 settlement with Duke Energy allocated $4.4 million to stream and river ecosystem restoration in North Carolina.[39] Using settlement money for projects such as these is beneficial because local environmental groups restore or protect the community where the initial environmental violation occurred.[40] If this practice is curtailed, then all settlement money obtained would be deposited into the Treasury Department, not reaching the local community.

In 2016, the United States Department of Justice, Environment and Natural Resources Division ("DOJ ENRD")'s Counsel for Environmental Justice continued to work closely with DOJ ENRD lawyers to improve awareness and understanding of EJ issues. The goal was to resolve cases in ways that provide real, concrete results for low-income and vulnerable communities that have suffered disproportionately from damage to the environment.[41] For example, DOJ/EPA reached a settlement with J.S.B. Industries concerning violations in the handling and release of anhydrous ammonia and the use of sulfuric acid by two wholesale bakeries in the

services rendered in connection with the case. Third, the policy does not apply to payments expressly authorized by statute, including restitution and forfeiture.").

[36] Tatiana Schlossberg & Hiroko Tabuchi, *Settlements for Company Sins Can No Longer Aid Other Projects, Sessions Says*, N.Y. TIMES (June 9, 2017), https://www.nytimes.com/2017/06/09/us/politics/settlements-sessions-attorney-general.html.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *ENRD Summary of Division Accomplishments Fiscal Year 2016*, U.S. Dept. of Justice Envt. & Natural Resources Division (2016), https://www.justice.gov/enrd/page/file/925411/download (DOJ signed a Memorandum of Understanding on Environmental Justice [MOU] in August 2011, which leads the federal government's efforts for environmental justice improvements in all communities. The MOU promotes interagency collaboration and public access to information about agency work on environmental justice, and specifically requires each agency to publish an environmental justice strategy, provide an opportunity for public input on those strategies, and produce annual implementation progress reports.).

Boston neighborhoods of Chelsea and Lawrence in *United States v. J.S.B. Industries, Inc. et al*.[42] The court approved this settlement on August 17, 2016.[43] The violations alleged in the suit included failure to comply with the requirements of the Clean Air Act ("CAA"), under which facilities that use hazardous chemicals must, among other things, take action to prevent accidental releases and take steps to minimize the consequences of any accidental releases that occur.[44] Additional violations included failure to comply with chemical reporting requirements of the Emergency Planning and Community Right-to-Know Act and chemical release notification requirements of the Comprehensive Environmental Response, Compensation, and Liability Act.[45] Under the settlement, the defendants paid a civil penalty of $156,000.[46] The defendants also completed a SEP valued at $119,000.[47] The settlement required the defendants to provide emergency response equipment to fire departments serving Chelsea and Lawrence, both of which are low-income and minority communities with EJ concerns.[48] The equipment aimed to help these communities better protect their residents and workers by improving their emergency preparedness and abilities to effectively respond to the release of hazardous chemicals.[49] Therefore, this is an example of a SEP that directly helps improve EJ that DOJ supported before the Trump administration. This SEP helped to clean up prior chemical damage directly, and through the preparation requirements helped to prevent future chemical accidents in this area.

Another settlement that included a SEP was reached in *United States v. Detroit Diesel Corp*.[50] The settlement, lodged with the court on October 6, 2016, resolved alleged violations of the CAA by Detroit Diesel in selling

[42] *ENRD Summary of Division Accomplishments Fiscal Year 2016*, *supra* note 41, at 47; United States v. J.S.B. Industries, Inc. et al., No. 1:16-cv-11152-DPW (D. Mass. June 20, 2016).

[43] *ENRD Summary of Division Accomplishments Fiscal Year 2016*, *supra* note 41.

[44] *Id.*

[45] *Id.* at 47. "The Chelsea and Lawrence facilities are in densely populated, urban neighborhoods, in close proximity to residences and other businesses. At JSB's Chelsea facility, approximately 2,000 pounds of anhydrous ammonia was accidentally released from a refrigeration system in April 2009. Anhydrous ammonia is an extremely hazardous chemical that is corrosive to skin, eyes, and lungs, can be immediately dangerous to life and health, and, under certain conditions, is flammable and explosive. The release triggered a shelter-in-place order by local authorities and exposed two firefighters to anhydrous ammonia, one of whom was hospitalized for medical treatment."

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *ENRD Summary of Division Accomplishments Fiscal Year 2016*, *supra* note 41; United States v. Detroit Diesel Corp., Civil Action No. 16-1982 (Oct. 6, 2016), https://www.epa.gov/sites/production/files/2016-10/documents/detroil-diesel-caa-cd.pdf.

heavy-duty diesel engines that were not certified by EPA and did not meet applicable emission standards.[51] Under the settlement, Detroit Diesel spent $14.5 million on projects to reduce nitrogen oxide and other pollutants, including replacing high-polluting diesel school buses and locomotive engines with models that meet current emissions standards.[52] Detroit Diesel also paid a $14 million civil penalty.[53] To mitigate the harm posed by the alleged violations, the school bus and locomotive replacement projects required by the settlement will reduce ambient air levels of nitrogen oxide and other pollutants.[54] EPA reserved the right to approve where the projects were to be performed, based on various criteria, including whether the area already does not meet CAA standards and whether the area includes low-income communities.[55] In addition, the school bus program will improve air quality inside school buses by reducing exposure to diesel exhaust. [56] Diesel exhaust poses a lung cancer hazard for humans and can cause non-cancer respiratory effects such as asthma.[57] Therefore, children and low-income populations in the area of the SEP will breathe cleaner air as a result of this settlement.

These case studies demonstrate the importance of SEPs in supporting EJ initiatives, and represent how policy changes can disrupt the environmental and health benefits they provide. The Trump administration sought to drastically reduce the use of SEPs for what seem like purely political motivations, since DOJ had previously included SEPs in settlements. Just as quickly as the Biden administration withdrew the Trump administration's memoranda, a future administration could reinstate the policy disallowing SEPs. This would harm local communities that benefited from the improved environment that SEPs provide.

[51] *ENRD Summary of Division Accomplishments Fiscal Year 2016*, *supra* note 41; *see generally Detroit Diesel Corp.*, Civil Action No. 16-1982, *supra* note 50.

[52] *ENRD Summary of Division Accomplishments Fiscal Year 2016*, *supra* note 41; *see generally Detroit Diesel Corp.*, Civil Action No. 16-1982, *supra* note 50.

[53] *ENRD Summary of Division Accomplishments Fiscal Year 2016*, *supra* note 41; *see generally Detroit Diesel Corp.*, Civil Action No. 16-1982, *supra* note 50.

[54] *ENRD Summary of Division Accomplishments Fiscal Year 2016*, *supra* note 41; *see generally Detroit Diesel Corp.*, Civil Action No. 16-1982, *supra* note 50.

[55] *ENRD Summary of Division Accomplishments Fiscal Year 2016*, *supra* note 41; *see generally Detroit Diesel Corp.*, Civil Action No. 16-1982, *supra* note 50.

[56] *ENRD Summary of Division Accomplishments Fiscal Year 2016*, *supra* note 41.

[57] *Id.*

B. Environmental Justice

Issues related to EJ occur when there is a disproportionate impact of environmental harms on minority and low-income communities.[58] Race also influences the manner in which environmental laws are enforced.[59] In 1992, the National Law Journal exposed "glaring inequalities" in the way EPA addressed hazards and imposed penalties.[60] According to that study, EPA is less likely to prosecute environmental violations that occur in minority communities.[61] To make matters worse, when violations are prosecuted within minority communities they often result in civil penalties that are more lenient than those in wealthier communities.[62] Low-income or minority communities that disproportionately suffer from environmental harm ("EJ communities") have less influence in "land use planning, development, environmental policymaking, and siting decisions, as well as in environmental enforcement" than their wealthy counterparts.[63] As a result, enforcement and policy provide comparatively less environmental benefits to EJ communities.[64] This is because a relative lack of money and political power leads to less vigilant enforcement in these areas. Consequently, EJ communities have disparate air and water pollution, leading to increased rates of asthma and cancer.[65]

Acknowledgement of these EJ issues is not new in the United States. President Clinton recognized that segments of the nation are disproportionately burdened by pollutant exposure in a 1994 executive order.[66] The 1994 executive order requires, to the greatest extent practicable and permitted by law, that federal agencies make achieving EJ part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental impacts

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[58] Douglas Rubin, Comment, *How Supplemental Environmental Projects Can And Should Be Used To Advance Environmental Justice*, 10 RRGC 179, 179 (2010).

[59] *Id.*

[60] *Id.* Additionally, EPA has more recently acknowledged inconsistencies in enforcement in different states and regions. *See generally EPA Must Improve Oversight of State Enforcement*, U.S. Envtl. Protection Agency (Dec. 9, 2011), https://www.epa.gov/sites/production/files/2015-10/documents/20111209-12-p-0113.pdf.

[61] *Id.*

[62] *Id.*

[63] Patrice L. Simms, *Leveraging Supplemental Environmental Projects: Toward an Integrated Strategy for Empowering Environmental Justice Communities*, 47 ELR 10511 (2017).

[64] *Id.*

[65] *Id.*

[66] Exec. Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

of its programs, policies, and activities on minority and low income populations in the United States and its territories.[67]

SEPs are useful in supporting EJ objectives because the projects are related to the specific environmental violation, and aim to provide benefits to the specific community harmed. This goes beyond a simple injunction to stop the activity. Although injunctions have value since, if properly enforced, the targeted pollution will be stopped, SEPs are a much better tool to improve EJ discrepancies, as the conditions in communities that suffer from the environmental harm will improve rather than just not get worse. EPA specifically addresses the relation between SEPs and EJ in its SEP policies, and has an Office of Environmental Justice ("OEJ").[68] The OEJ "coordinates [EPA] efforts to address the needs of vulnerable populations by decreasing environmental burdens, increasing environmental benefits, and working collaboratively to build healthy, sustainable communities."[69] Additionally, OEJ "provides financial and technical assistance to communities working constructively and collaboratively to address environmental justice issues."[70] Considering the importance of EJ issues, EPA's SEP policy was most recently updated in 2015.[71] Defendants are encouraged to propose SEPs in communities where there are EJ concerns.[72] EPA noted that SEPs can help ensure that residents who spend significant portions of their time in, or depend on food and water sources located in the areas affected by violations will be protected.[73] Furthermore, during the public comment period required for many judicial settlements and certain administrative settlements, community members are afforded an opportunity to review and comment on any of the settlement's terms, including any SEPs that may be part of the resolution.[74]

Though it is limited, on paper the most effective legal tool for advancing environmental justice is Title VI of the Civil Rights Act of 1964.[75] President Clinton's memo regarding his 1994 executive order states

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[67] *Id.*; *Supplemental Environmental Projects Policy 2015 Update*, *supra* note 3.

[68] *Factsheet on EPA's Office of Environmental Justice*, U.S. Envtl. Protection Agency (2017), https://www.epa.gov/sites/production/files/2017-09/documents/epa_office_of_environmental_justice_factsheet.pdf.

[69] *Id.*

[70] *Id.*

[71] *Supplemental Environmental Projects Policy 2015 Update*, *supra* note 3. I was unable to find data regarding EPA use of SEPs under the Trump administration. It seems reasonable to assume that the number of SEPs decreased due to EPA anticipation of DOJ's aversion, but it is important to note that EPA's SEP policy did not change under the Trump administration, so it was in conflict with DOJ policy.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Memorandum for The Heads of All Departments and Agencies, Subject: Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income*

that, "[i]n accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin."[76] Title VI prevents any recipient of federal funds from "discriminating based on race, color, or national origin in any program or activity."[77] However, rather than ignoring demographics, the 1994 executive order directs federal agencies to identify and remedy "disproportionally high adverse human health and environmental effects of their programs, policies, and activities on minority populations and low-income populations."[78] Therefore, a Title VI civil rights complaint can raise EJ issues when challenging the activity of a recipient of federal funds.[79] If a state agency receives funds from EPA to use in implementing a clean air program, the state cannot discriminate on the basis of race, color or national origin under Title VI as related to clean air enforcement (e.g., discrimination based on disparate funding for enforcement in minority areas or in allocating funds for projects to improve air quality).[80]

In practice, Title VI has been disappointingly ineffective. First, by its terms it applies only to discrimination on the basis of race, religion, and national origin; it is irrelevant to EJ claims on behalf of poor communities.[81] Second, virtually every EJ claim will involve disparate (incidental) impact rather than intentional discrimination.[82] But Title VI doesn't extend to disparate impact.[83] Therefore, the private right of action is not helpful. Individual agency regulations, including those of EPA,

Populations (Feb. 11, 1994), https://www.epa.gov/sites/production/files/2015-02/documents/clinton_memo_12898.pdf.

[76] *Id.*

[77] *Title VI and Environmental Justice*, U.S. Envtl. Protection Agency (Jan. 27, 2017), https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *See generally Civil Rights in Environmental Law: The Case for Ex Ante Title VI Regulation and Enforcement*, Article, 41 N.Y.U. REV. L. & SOC. CHANGE 45 (2017).

[82] This is why EJ claims resting on the equal protection clause always fail. *See generally* Claire Glenn, *Upholding Civil Rights in Environmental Law: The Case for Ex Ante Title VI Regulation and Enforcement*, Article, 41 N.Y.U. REV. L. & SOC. CHANGE 45 (2017). In the courts, Title VI enforcement has been severely limited by precedent constraining private civil rights litigation. In Regents of the University of California v. Bakke, 438 U.S. 265, the Supreme Court stated that Title VI's antidiscrimination provisions were coextensive with the Equal Protection Clause, effectively limiting the substantive reach of the statute. During the same period, the D.C. Circuit established precedent limiting opportunities for judicial appeal when agencies fail to effectively enforce Title VI. *See* Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

[83] *See generally* Alexander v. Sandoval, 532 U.S. 275 (2001).

implementing Title VI can and do prohibit actions with a disparate impact. In *Alexander v. Sandoval*, the Court recognized the validity of agency regulations prohibiting disparate impact discrimination, but held that these regulations do not provide a private cause of action.[84] *Sandoval* caused federal courts to be hostile to EJ claims that in earlier times were cognizable under the disparate impact framework.[85]

Therefore, there are virtually no direct legal protections that advance EJ. The only way to make progress through enforcement of the existing legal regime is in selection of where and when to bring enforcement actions and in being creative with the selection of remedies (e.g., SEPs). As an example, there have been many SEPs used in the aftermath of the 2010 Deep Horizon oil spill. This spill added insult to injury in an area with already degraded environmental conditions; two of the five states that border the Gulf are among the nation's poorest.[86] While people of color make up just 26 percent of the coastal counties in Alabama, Florida, Mississippi, and Louisiana, 55.4 percent of the BP Deepwater Horizon Oil Spill waste was dumped in communities comprised predominantly of people of color.[87] In addition, over 80 percent of the oil waste was disposed in communities where the percent of people of color is higher than the national average.[88] Two landfills received close to half of the waste, both of which had more people of color living nearby than the percentages of people of color in the region as a whole.[89] The defendants, Camwest and BP, agreed to SEPs to provide significant improvements to the drinking water systems of the Shoshone and Northern Arapaho tribes.[90] Thus, this is an example of how a SEP can benefit EJ communities and be narrowly tailored to the violation. The drinking water systems of the area were compromised due to an oil spill, and improving drinking water systems was a direct remedy in the minority communities hardest hit.

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[84] Glenn, *supra* note 82.

[85] Glenn, *supra* note 82; *see Sandoval*, 532 U.S. 275. For an example of a case that would have come out differently before *Sandoval*, *see* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., Civil Action No. 01-702 (FLW), 2006 U.S. Dist. LEXIS 45765 (D.N.J. Mar. 31, 2006) (the court dismissed the claims because plaintiffs couldn't prove that the issuance of a permit was *because of* harmful impacts on the minority area) (Glenn, *supra* note 84, at n.75).

[86] Daniel A. Farber, Article, *The BP Blowout and the Social and Environmental Erosion of the Louisiana Coast*, 13 MINN. J.L. SCI. & TECH. 37 (2012).

[87] Hari M. Osofsky et al., *Environmental Justice and The BP Deepwater Horizon Oil Spill*, 20 N.Y.U. ENVTL. L.J. 99 (2012).

[88] *Id.*

[89] *Id.*

[90] Robin Kundis Craig, *The Public Health Aspects of Environmental Enforcement*, 4 PITT. J. ENVTL. PUB. HEALTH L. 1 (2010).

III. ARGUMENTS AGAINST THE USE OF SEPS

A. 2018 Memo

In November 2018, the United States Attorney General[91] addressed a memorandum to leaders within DOJ titled *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities*.[92] The main purpose of the 2018 memo was to limit consent decrees and settlements with state and local governments.[93] The 2018 memo defined "consent decree" as "a negotiated agreement that is entered as a court order and is enforceable through a motion for contempt."[94] Furthermore, "settlement agreement" was defined as "an out-of-court resolution that requires performance by the defendant, including a memorandum of agreement ('MOA') or memorandum of understanding ('MOU'), enforcement of which requires filing a lawsuit for breach of contract."[95]

The 2018 memo explained that, while consent decrees are occasionally needed and proper to procure compliance with federal law, "sensitive federalism concerns"—concerns that the federal government may overpower state and local governments—are raised by federal court decrees with extreme remedies, such as requiring broad and long-lasting responsibilities, or necessitating continuous judicial observation of state or local governments.[96] These concerns are most severe when a federal judge, directly or through a court-appointed monitor, effectively oversees the ongoing operations of the governmental entity subject to the decree.[97] As a result, this kind of supervision may limit the ability of the constituents of the impacted state or local government to control their own area.[98] Consent decrees may also impact state or local budget priorities—when these decisions are essentially divested from the elected representatives, so is the accountability for these decisions.[99]

In addition to federalism concerns, another argument against including SEPs in settlement agreements or consent decrees is that the practice allows federal collection of civil penalty money to be reduced in a way that

[91] Interestingly, this was signed on Jeff Sessions's last day as Attorney General. *See generally* Peter Baker et al., *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html.

[92] 2018 memo, *supra* note 9.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Horne v. Flores, 557 U.S. 433, 448 (2009); 2018 memo, *supra* note 9, at 2.

[97] *Id.*

[98] *Id.*

[99] *Id.*

Congress has not authorized. Civil penalties must be deposited into the Treasury Department according to the Miscellaneous Receipts Act ("MRA"), unless Congress authorizes another method.[100] This has been used as an argument against the use of SEPs since, by definition, SEPs allow a reduced civil penalty and the amount of money deposited into the Treasury Department is reduced. Therefore, it must be determined whether the SEP at issue is part of a civil penalty.

Thus, the 2018 memo directs that settlement decrees "should be employed carefully and only after review and approval of senior leadership of the [DOJ]" even though they may be "appropriate settlement vehicles in limited circumstances."[101] The 2018 memo also claims that many of the same concerns as to consent decrees also apply to settlement agreements.[102] Therefore, some of the reasoning of the 2018 memo may have application to other kinds of settlements. The 2018 memo specifically addresses state and local governments, and explains that SEPs should be limited since they usurp the power of the state or local governments.[103] That rationale would not apply to settlements that do not have a state or local government as a party. However, arguments that SEPs are in violation of the MRA would apply to any SEP approved by DOJ, since the MRA applies to all civil penalties.[104]

In order to support the MRA, the United States House of Representatives passed the Stop Settlement Slush Funds Act in 2017.[105] While the bill did not become law, it is a representation of the argument that SEPs are improper because of improper diversion of funds. The act would have prohibited government officials from entering into settlements that provide for payments or loans to persons other than the United States, except for payments that directly remedy the harm caused by the violation at issue (e.g., restitution in the form of payment for calculable harm from pollution, as opposed to a beneficial project).[106]

The dissenting views in the legislative history of the MRA note that "[m]oney served to the Treasury does little to make the environment whole again."[107] However, proponents of the MRA mentioned a prior Government Accountability Office ("GAO") opinion which stated that

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[100] *See generally* Droughton, *supra* note 12. No similar bill passed the United States Senate. *See* H.R. 732, 115th Cong., 1st Sess. (2017).

[101] 2018 memo, *supra* note 9, at 3.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *See* H.R. 732, 115th Cong., 1st Sess. (2017). No similar bill passed the United States Senate. *See* 2019 memo, *supra* note 5.

[106] *See* 2019 memo, *supra* note 5.

[107] H.R. 732, 115th Cong., 1st Sess. (2017) (internal quotation marks omitted).

SEPs do not follow the proper appropriations process that the MRA requires.[108] When GAO determined that SEPs violated the MRA, EPA objected.[109] GAO reevaluated its stance, but reaffirmed that an enforcement scheme involving supplemental projects that go beyond remedying the violation would allow the agency to improperly use its appropriations for other agency purposes and sidestep the Congressional appropriations procedure.[110] It was agreed that this analysis did not apply to all SEPs and that EPA would issue guidelines to avoid violations of the MRA; thus, the use of SEPs continued.[111]

B. The 2019 Memo's Limitation on SEPs

On August 21, 2019, Assistant Attorney General Jeffrey Clark[112] issued a memo to DOJ ENRD attorneys regarding the use of SEPs, titled *Using Supplemental Environmental Projects ("SEPs") in Settlements with State and Local Governments*.[113] As its title suggests, this memo only applies to state and local governments, and it is meant to prevent the use of SEPs in civil consent decrees and settlement agreements between state and local governments and the federal government except in very narrow circumstances.[114] However, the change in policy applied only to settlements involving DOJ, and EPA did not remove its SEP policy that applies to its administrative settlements.[115] This means that settlements and hearings that are handled by EPA administratively but do not get to the legislative process are not impacted by DOJ memoranda. Administrative settlements occur when a defendant settles directly with EPA after a violation is found. If, due to egregious conduct on the part of the defendant or repeat violations, DOJ initiates litigation, then any resulting settlement must be approved by a court.

The 2019 memo's main issue with SEPs is that they allow DOJ to require more than would otherwise be authorized by law, and are above and

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[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* Guidelines were released in 1998 to prevent the overuse of SEPs, which are detailed when mentioning EPA policy in the earlier section introducing SEPs.

[112] It is interesting to note that Clark supported President Trump's legal battles regarding claims of election fraud. *See generally* Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html.

[113] *See* 2019 memo, *supra* note 5.

[114] *Id.*

[115] Sara Chamberlain and Tim Briscoe, *DOJ curtails use of supplemental environmental projects in environmental settlements*, THOMPSON COBURN, LLP (Oct. 24, 2019), https://www.thompsoncoburn.com/insights/publications/item/2019-10-24/doj-curtails-use-of-supplemental-environmental-projects-in-environmental-settlements.

beyond what Congress's environmental statutes directly authorize.[116] The 2019 memo also refutes a counterargument that SEPs categorically should be exempted from the new policy limiting civil consent decrees and settlement agreements with state and local governments because "Congress allegedly (and implicitly) approved of their use in America's Water Infrastructure Act of 2018 . . . which amended the Clean Water Act ["(CWA")] to authorize municipalities operating sewer and stormwater systems to undertake an integrated-planning process to streamline [CWA] compliance obligations."[117] The 2019 memo also addresses a counterargument that the 2018 memo's policy excludes SEPs from its substantive requirements because EPA will agree to them in its non-judicial administrative settlements."[118] The 2019 memo refutes both these arguments by taking the position that Congress has not authorized SEPs.[119] Specifically, Congress would need to give clear and unmistakable support for SEPs due to its "exclusive constitutional power of the purse."[120]

Having concluded that SEPs fall within the prohibitions in the 2018 memo's policy, Assistant Attorney General Jeffrey Clark—the author of the 2019 memo—wrote that he would conduct a broader review of the availability of SEPs in civil enforcement actions.[121] In the interim, the 2019 memo immediately required that SEPs with state and local entities comply with the following limitations, in addition to those set out in existing policies: "The SEPs must be discrete projects representing a small component of the overall settlement in terms of duration, dollars, and scope of work," and SEPs should only be part of a settlement "as a matter of last resort."[122] If a SEP was negotiated before the 2018 memo, a request for settlement authorization must demonstrate that if the SEP is removed it would jeopardize the agreement or hurt the interests of the United States.[123] If a SEP was negotiated after the 2018 memo's policy, a request for settlement authorization "must demonstrate that the settlement would

[116] 2019 memo, *supra* note 5.

[117] *See id.*

[118] 2018 memo, *supra* note 9, at 2. Non-judicial administrative settlements occur once EPA has discovered a violation and initiates an enforcement action, and it is a settlement with the agency to resolve the matter before going to court. Generally, legislation ensues, and DOJ takes over, with repeat offenders or when either agency determines the violation is egregious enough.

[119] 2019 memo, *supra* note 5, at 2.

[120] *Id.*

[121] *New DOJ Policy Diminishes Use of SEPs in Federal Settlements with State and Local Governments*, Beveridge & Diamond PC (Sep. 5, 2019), https://www.natlawreview.com/article/new-doj-policy-diminishes-use-seps-federal-settlements-state-and-local-governments; *see* 2019 memo, *supra* note 5.

[122] *New DOJ Policy Diminishes Use of SEPs*, *supra* note 122; *see* 2019 memo, *supra* note 5.

[123] *New DOJ Policy Diminishes Use of SEPs*, *supra* note 122.

not be possible without the inclusion of SEPs."[124] Furthermore, "[t]he SEPs should provide broad benefits to the community, and not individuals," and "[t]he [state or local] governmental defendant should certify that the SEPs do not violate any direct or implied restriction imposed by local, state or federal law."[125] Even if a SEP meets all of these conditions, Clark cautioned that exceptions "are meant to be rare."[126] Thus, the 2019 memo and its associated policy change was clearly meant to dramatically reduce the number of SEPs in settlement with state and local governments.[127]

In analyzing future impacts of the 2019 memo shortly after it was written (before the 2020 memo was written, and before the reversal of both), Francis X. Lyons, a former DOJ environmental enforcement attorney, stated that "possible outcomes could range from a ban on SEPs for all defendants, including private businesses, to a limit on how much fines could be reduced through their use."[128] As SEPs become more limited, the power of citizen suits to enforce environmental laws is also reduced. The CWA allows members of the community to act on behalf of the United States in filing lawsuits against water polluters through a citizen suit provision.[129] Therefore, disallowing SEPs in settlements between the federal government and state and local governments can prevent these citizen suits where the state or local government was the cause of the environmental harm and would be the ideal defendant.[130] However, the use of citizen suits in practice is actually severely limited already.[131] For example, section 505 of the CWA requires that "no 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."[132] If during these forty-five days, any state agency commences and "diligently prosecutes" the issue, no citizen suit could be filed.[133] Therefore, because of the limitations on citizen suits, citizen suits would not be a viable option to replace DOJ inclusion of SEPs in settlement agreements.

Most crucial when considering potential future impacts of the 2019 memo is that DOJ fulfilled its promise to investigate the SEP policy more

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[124] *Id.*

[125] *Id.*

[126] *New DOJ Policy Diminishes Use of SEPs*, *supra* note 122; *see* 2019 memo, *supra* note 5.

[127] Henderson & McCutcheon, *Justice Department Ponders Nixing Environmental Settlements Tool*, *supra* note 4.

[128] *Id.*

[129] Rubin, *supra* note 58.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

broadly,[134] and banned SEPs in settlements with private defendants in the 2020 memo before it was withdrawn.[135] The reasoning in the 2020 memo was essentially the same as the 2019 memo. It emphasized that Congress did not authorize civil penalty money to be diverted from the Treasury Department to SEPs, and thus the MRA is violated.[136] It argued that EPA's requirement of a nexus to the violation does not remedy the main problem of diversion of funds, and that this persists whether the defendant is a private entity or a state or local government.[137] Therefore, if the 2020 memo was still in effect, whatever benefit that citizen suits provide would also be eliminated.

IV. LEGAL SUPPORT FOR THE DEPARTMENT OF JUSTICE AND THE ENVIRONMENTAL PROTECTION AGENCY'S USE OF SEPS

The DOJ memoranda under the Trump administration are a solution in search of a problem, responding to nonexistent legal concerns. Congress has implicitly authorized the use of SEPs in underlying environmental statutes, and neither DOJ nor EPA have exceeded their authority in including SEPs in settlements. Since SEPs already must be narrowly tailored to the violation and to the purpose of the underlying statute, federal funds are not being mismanaged. This Part will demonstrate that SEPs are on sound legal footing.

A. Congressional Support of SEPs

A common argument in favor of the use of SEPs is that Congress has given the necessary authorization for EPA to use SEPs through language in the CWA and CAA, as well as legislative history of various environmental statutes and proposed bills.[138] For example, the broad language of the Toxic Substances Control Act allows settlement "with or without conditions."[139] The CAA gives the Administrator of the EPA—the head of the agency, appointed by the president—the authority to "compromise, modify, or remit, with or without conditions, any administrative penalty" imposed.[140] Additionally, EPA relies on the more general language in Emergency Planning and Community Right-to-Know Act ("EPCRA"), which allows the Administrator to take into account "such other matters as

[134] Henderson & McCutcheon, *Justice Department Ponders Nixing Environmental Settlements Tool*, *supra* note 4.

[135] *See generally* 2020 memo, *supra* note 7.

[136] *Id.*

[137] *Id.*

[138] *See generally* Droughton, *supra* note 12.

[139] TSCA 16(a)(2)(C), 15 U.S.C. 2615(a)(2)(C) (1988 & Supp. V 1993).

[140] CAA 113(d)(2)(B), 42 U.S.C. 7413(d)(2)(B) (1988 & Supp. V 1993).

justice may require" in determining appropriate administrative penalties.[141] Analogous language appears in the civil penalty provisions of the CWA and the CAA.[142] Similarly, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") provides that the Administrator "shall consider the appropriateness of such penalty given the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation."[143] EPA points to these general mitigation provisions as bases for inclusion of SEPs in enforcement settlements.[144]

Therefore, Congress has given EPA broad enough discretion in determining settlement amounts as to not preclude the consideration of SEPs in determining the civil penalty.[145] The flexibility given to EPA in determining the appropriate civil penalty amount is reinforced by the statutory wording, allowing the inclusion of SEPs in settlements.[146] EPA's discretion is an important tool since generally the cooperation of the defendant can save EPA resources in the long run, and as a factor mitigating the fine, it will be encouraged. Therefore, when the federal government (either EPA, DOJ, or both) enters into a settlement with a defendant, it is proper to lower the civil penalty amount in consideration of a SEP, since it is a legitimately considered factor. Congress has authorized the use of such broad factors as "nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, [and] economic benefit or savings (if any) resulting from the violation."[147] Specifically, "self-disclosure, cooperation, or good faith efforts to comply" can be considered by EPA to reduce a civil penalty.[148] Since the SEP must be closely related to the violation, willingness to complete a SEP can be considered cooperation and a good faith effort to settle, stop the violation, and prevent the violation from occurring again. Considering this, then, the penalties are not *improperly* reduced, and so the underlying environmental statute as well as the MRA is not being violated.

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[141] EPCRA 325(b)(1)(C), 42 U.S.C. 11045(b)(1)(C) (1988 & Supp. V 1993).

[142] CWA 309(d), (g)(3), 33 U.S.C. 1319(d), (g)(3) (1988 & Supp. V 1993); CAA 113(e)(1), 42 U.S.C. 7413(e)(1) (1988 & Supp. V 1993).

[143] FIFRA 14(a)(4), 7 U.S.C. 136l(a)(4) (1988 & Supp. V 1993).

[144] *See* Droughton, *supra* note 12.

[145] *See* Droughton, *supra* note 12.

[146] *Id.*

[147] *See* Droughton, *supra* note 12.

[148] *Supplemental Environmental Projects (SEPs)*, *supra* note 10.

B. Support in the Courts

Issues regarding SEPs reach the courts as provisions in consent decrees submitted to the court for approval and entry of the decree.[149] As stated by Professor Edward Lloyd from Columbia School of Law, "[j]udicial support for the use of SEPs in citizen suits, both as provisions in consent decrees proposed to settle these cases, and by courts in final judgments so long as they are crafted as part of injunctive relief, is quite apparent."[150] The United States Supreme Court has held that the trial court must establish whether the consent decree is "further[ing] the objectives of the law upon which the complaint was based" when considering whether to enter a consent decree.[151]

The Court of Appeals for the Ninth Circuit was the first federal appellate court to make a determination regarding the validity of SEPs.[152] The Sierra Club filed suit against Electronic Controls Design, Inc., under section 505 of the CAA, for discharging pollutants into waters of the United States in violation of its discharge permit.[153] As part of a proposed settlement, the defendant agreed, *inter alia*, to pay $45,000 to private environmental organizations "for their efforts to maintain and protect water quality in Oregon" and to pay additional money to these organizations if it violated its permit within a ten month period.[154] Thus, this is an example of a citizen suit where a defendant paid settlement money to an environmental organization who acted as a private attorney general.[155] However, DOJ objected because there was no civil penalty paid to the Treasury Department.[156] The district court refused to enter the decree containing the $45,000 payment.[157] The appellate court overturned the district court's refusal to enter the decree.[158] It ruled the payments provided for in the SEP

[149] 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 (2004).

[150] *Id.*

[151] Lloyd, *supra* note 50; Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (holding that section 706(g) of Title VII of the Civil Rights Act of 1964 did not preclude the entry of a consent decree that would provide relief potentially benefiting individuals who were not actual victims of the defendant's discriminatory practices).

[152] Sierra Club, Inc. v. Elec. Controls Design, Inc., 909 F.2d 1350 (9th Cir. 1990).

[153] *Id.* at 1352.

[154] Lloyd, *supra* note 50; Sierra Club, Inc. v. Elec. Controls Design, Inc., 909 F.2d 1350 (9th Cir. 1990).

[155] *See Sierra Club*, 909 F.2d 1350 at 1352.

[156] *See id.* at 1352, n.2.

[157] *Id.* at 1352.

[158] *Id.* at 1356.

were not "civil penalties" under the CWA, because "[n]o violation of the Act was found or determined by the proposed settlement judgment."[159]

Thus, the court in *Sierra Club v. Electronic Controls Design, Inc*. distinguished "civil penalties" assessed after a judicial finding of liability under CWA from "payments" made to environmental organizations as part of a consent decree when no liability had been established under the CWA and the defendant agrees to make payments to environmental organizations without admitting liability.[160] Therefore, liability must be established for a payment to be considered a "civil penalty," and thus before funds are required to go to the Treasury Department.[161] The court also found that the proposed consent decree furthered the purpose of the CWA and did not violate its terms or policy, and, therefore, "[t]he district court abused its discretion in failing to enter the proposed consent judgment."[162] In direct contrast to the 2020 memo, the court reached its conclusion by holding that Congress did not require private parties to pay a civil penalty to the Treasury Department when entering into such a settlement.[163]

As held by the court in *Sierra Club*, the use of SEPs is proper in citizen suits since funds are not diverted from the Treasury Department.[164] However, there is also a strong argument the will of Congress is being followed since these forms of settlement payments better serve the purposes of the underlying statute than merely directing funds to the Treasury Department.[165] The Oregon District Court noted that:

> *The purpose of the Clean Water Act is to improve water quality, not endow the Treasury*. What better use of the penalty type payments in an action like this than to facilitate water quality improvements to the affected watershed in ways which could not be required under law. These additional enhancements to water quality, the payment for which also serves as a hefty sanction to defendant, fully meet congressional intent that

[159] Lloyd, *supra* note 50; *See Sierra Club*, 909 F.2d 1350 at 1352.

[160] *See Sierra Club*, 909 F.2d 1350 at 1352.

[161] *Id.*

[162] *Id.* at 1356. *See also* Orange Cty. Coastkeeper v. City of San Juan Capistrano, No. 8:17-cv-00956-JLS-DFM, 2018 U.S. Dist. LEXIS 193373 (C.D. Cal. Nov. 13, 2018) for a more recent example of a court upholding a consent decree between a defendant and DOJ that included a SEP.

[163] *Sierra Club*, 909 F.2d 1350 at 1356.

[164] *Supplemental Environmental Projects (SEPs)*, *supra* note 10 ("SEPs are not a diversion of penalty funds…The SEP Policy provides for such consideration of a defendant/respondent's willingness to implement a SEP. Settlements with SEPs always include a final settlement penalty that retains the deterrent value of the settlement. The penalty includes a component that addresses the gravity of the violation, and a component that recoups the economic benefit that the violator realized from its non-compliance, to maintain a level playing field with competitors who remained in compliance.").

[165] H.R. 732, 115th Cong., 1st Sess. (2017). *See* Nw. Envtl. Def. Ctr. v. Unified Sewerage Agency, Civil No. 88-1128-HO, 1990 U.S. Dist. LEXIS 13349, 13349 (D. Or. July 26, 1990).

> there be penalty aspects of Clean Water Act consent decrees to discourage other polluters. . . . . It allows rehabilitation of the resource to begin immediately, rather than suffer possible future pollutant insult and/or exacerbation during months or years more of litigation. This is one of the important reasons that courts should encourage settlement of these actions. Settlements, like that proposed here, fully meet the intent of Congress in providing the CWA as a friend and protector of our precious natural water resources. The litigants will now become cooperative partners in protecting water quality rather than merely remaining opposing litigants in a court battle, which, without more, offers little utility.[166]

The court in *Unified Sewerage* made the point that the purpose of fines for violations of environmental statutes should not be to add to the Treasury Department at the expense of the local communities. Deterrence of violations is an important reason for civil penalties, but this benefit is not eliminated by SEPs. Even though fines are reduced, large amounts of funds go into the projects, and resources must be expunged for court battles. Therefore, the *Unified Sewerage* court offers support for the public policy benefits of SEPs, and also notes that SEPs are on strong legal footing because they support Congress's goal in the CWA to protect water from pollution.

V. PROPOSAL TO EXPAND THE USE OF SEPS AND SECURE THEIR FUTURE

A. Congress and DOJ Should Explicitly Authorize SEPs

To support the use of SEPs, the DOJ under the Biden administration must now update its regulations. A DOJ regulation under the Trump administration codified the prohibition on the use of SEPs in December 2020. A settlement is prohibited if it "directs or provides for a payment or loan, in cash or in kind, to any non-governmental person or entity that is not a party to the dispute,"[167] with narrow exceptions to compensate victims when it is not in lieu of payments to the Treasury Department.[168] Therefore, DOJ now should withdraw this regulation and issue a regulation directly supporting SEPs in settlements between DOJ and any party. Although the process of codifying regulations takes longer than issuing memoranda, agency regulations can also be altered to support or prohibit SEPs from one administration to the next. Therefore, Congress should ultimately amend the CAA and CWA to explicitly allow SEPs in any settlement with the

[166] *Unified Sewerage*, Civil No. 88-1128-HO, 1990 U.S. Dist. LEXIS 13349, 13349 (D. Or. July 26, 1990) (emphasis added).

[167] 28 C.F.R. § 50.28(b).

[168] 28 C.F.R. § 50.28(c)(1).

federal government if it is relevant to the environmental violation and in the area impacted by the environmental harm.

Amendments to environmental statutes such as the CWA and CAA are supported by the history of Congressional support for SEPs. Since the enactment of the CAA, courts have directed funds to beneficial mitigation projects in the final judgment of a citizen suit, and Congress has generally deferred to the courts and to agencies in their enforcement.[169] The argument that an express authorization is required by Congress to allow SEPs is very weak due to this long history of DOJ and EPA approval without any Congressional signal, and courts generally give agencies wide discretion in their enforcement of regulations pursuant to statutes. However, express authorization by Congress would create a much more stable climate for SEPs. A future administration can change the SEP policy back quickly and drastically. New memoranda may be issued with a complete reversal in prior policy (either supporting or limiting SEPs) or prior memoranda can be revoked, as in the recent case of the Biden administration. This could happen just as quickly and drastically in the future, since a future administration could reuse the Trump administration's memoranda.

In addition to preventing confusion that comes with a continual change in policy, the Trump administration's memoranda should be prevented from being easily reinstated since SEPs are on sound legal footing and the legal reasoning for prohibiting them is faulty. There are safeguards to make sure that SEPs are only used to further the purpose of the underlying statute. Thus, these safeguards significantly weaken the reasoning of the 2019 and 2020 memos more than they acknowledge, since SEPs in settlements must conform with Congressional intent. In practice, these requirements entail that SEPs "are generally carried out at the site where the violation occurred, at a different site within the same ecosystem, or within the same immediate geographic area."[170] EPA has also clarified that they cannot include cash donations to community groups, environmental organizations, or other third parties.[171] This demonstrates that fears about DOJ or EPA abusing the powers delegated by Congress are unfounded.

B. Use of SEPs for Federal Settlements Should Be Expanded

Use of SEPs in settlement decrees with the federal government and state or local governments should be expanded; withdrawing the Trump

[169] H.R. 732, 115th Cong., 1st Sess. (2017).

[170] *Id.*

[171] *Id.*

administration memoranda was a vital first step, but use of SEPs should be furthered. Just as SEPs should be authorized in statutory amendments and in new DOJ regulations, their use can also be expanded through these same methods. Congress, EPA and DOJ should expand the use of SEPs since the Trump administration's legal reasoning is flawed, and public policy considerations strongly support the use of SEPs. A way to expand the use of SEPs in Congressional statutes would be to lessen the strict nexus requirement. It is important for the SEP to be related to the underlying statute, but language to lessen this requirement would be beneficial. The strict nexus requirement in EPA's policy has made it more difficult for SEPs to be used to support EJ. SEPs' flexibility to local needs supports EJ initiatives since the communities that suffered harm are more likely to benefit from a SEP.[172] If the nexus requirement is interpreted too narrowly, then it may be too easy to find that the project is not tailored to the specific violation.[173] Furthermore, if the nexus requirement is interpreted too stringently, it may prevent EPA from tailoring the projects to the needs of the local communities.

Congress, DOJ and EPA should also be on the same footing to conform with specified EJ policies. It should be noted that the goals of DOJ under the Trump administration directly contradicted EPA's EJ action agenda during the same time period. Specifically, EPA's 2020 action agenda stated that EPA would: "Improve on-the-ground results for overburdened communities through reduced impacts and enhanced benefits; Institutionalize environmental justice integration in EPA decision-making; Build robust partnerships with states, tribes and local governments; Strengthen our ability to take action on environmental justice and cumulative impacts; Better address complex national environmental justice issues."[174] Local governments that find themselves subjected to enforcement action, if forced to pay a higher fine without the option of SEPs, will be in an even worse EJ and financial position, going against these stated EPA goals. Therefore, considering the importance of EJ issues and the strong relation to EPA's goals, the use of SEPs should be expanded through EPA regulations for its administrative actions, and DOJ regulations for judicial actions, once Congress has given explicit support.

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[172] Rubin, *supra* note 58.

[173] *Id.*

[174] *About EJ 2020*, U.S. Envl. Protection Agency (Aug. 2, 2019), https://www.epa.gov/environmentaljustice/about-ej-2020#goals.

VI. CONCLUSION

The Biden administration should be lauded for eliminating hinderances imposed on SEPs by the Trump administration since SEPs are legally valid tools to support EJ. Despite legitimate fears that SEPs undermine Congress's authority by allowing for civil penalty funds in environmental enforcement actions to be partially diverted from the Treasury Department, SEPs support the objectives of Congress's environmental statutes such as the CWA and CAA by protecting and purifying local areas. Further, SEPs have been in use since the 1980s and Congress has not prevented their use.

SEPs are an effective way to support EJ initiatives since they can be tailored to alleviate the environmental harms that are unequally bestowed on poor and minority communities. Just as the Biden administration withdrew the Trump administration's memoranda that sought to significantly curtail the use of SEPs, a future administration can revert this action and once again eliminate the use of SEPs. Therefore, to ensure that use of SEPs increases, more must be done than simply withdrawing the old memoranda, and a change in presidential administration with a supportive Congress as has come with the 2020 election is an ideal opportunity to change course and expand their use.