

# One SEP Forward, Two Steps Back? Supplemental Environmental Projects, Environmental Justice, and Deterrence

DIEGO HUERTA\*

## ABSTRACT

*Supplemental Environmental Projects (SEPs) are settlement conditions that the EPA includes in civil penalty settlements requiring a violator of an environmental law to undertake certain environmentally focused actions. The EPA provides violators who commit to SEPs a discount on their civil penalty in proportion to the cost of the SEP. The EPA's current SEP policy advances environmental justice because SEPs are a significant improvement upon the relief community members usually receive in an enforcement action. However, the EPA's SEP policy also undermines deterrence because violators can use SEPs to effectively subsidize their own actions and receive a civil penalty reduction. While the EPA's SEP policy does harm deterrence, the environmental justice benefits of the policy outweigh the harm to deterrence so long as the EPA remains unable to fulfill the promise of environmental justice. As such, Congress should either affirmatively approve of SEPs, or take other actions that would support environmental justice.*

## TABLE OF CONTENTS

Introduction . . . . .	304
I. Background. . . . .	306
A. How SEPs Function Within the EPA's Civil Penalty Policy. . . . .	306
B. Political History of SEPs . . . . .	307
C. Legal History of SEPs . . . . .	309
D. Role of SEPs in the EPA's Environmental Justice Capacity . . . . .	313
II. The Environmental Justice Benefits of SEPs Outweigh Their Harm to Deterrence. . . . .	315
A. The Detriments of SEPs. . . . .	316
B. The Benefits of SEPs. . . . .	322
III. Recommendations for Congress . . . . .	324

---

\* Georgetown University Law Center J.D. 2024; The University of Arizona, M.S. 2021. © 2024, Diego Huerta. Much thanks to Professor Eloise Pasachoff and my classmates in the Administrative Law and Public Administrative Seminar for their insightful contributions to the editing and development of this Note.

A. Congress Should Approve SEPs, with Some Modifications from Current Policy . . . . .	325
B. Congress Could Instead Better Ensure Environmental Justice . . . . .	326
Conclusion . . . . .	326

## INTRODUCTION

When a business or individual is caught violating environmental laws, they often settle with the U.S. Environmental Protection Agency (EPA).<sup>1</sup> As part of the settlement agreement, a violator can propose a Supplemental Environmental Project (“SEP”), which, pursuant to the EPA’s civil penalty policy, reduces their penalty in proportion to the cost of the project.<sup>2</sup> SEPs are projects aimed at remedying the harm caused by a violation of an environmental law. The EPA has defined seven categories of SEPs,<sup>3</sup> each of which aims to address either the kind of pollution the violator emitted, or the kind of environmental and human health effects caused by that pollution. For example, a company alleged to have polluted groundwater in a tribal nation performed a SEP in which they constructed water delivery systems to protect human health, and restored land in the tribal nation to improve the environment.<sup>4</sup> Importantly, the kinds of projects the EPA will accept as a SEP fall outside of a court’s equitable authority to order as a remedy.<sup>5</sup> SEPs allow EPA enforcement to go beyond traditional legal relief for environmental harm.

Under the Trump administration, the EPA phased out the use of SEPs.<sup>6</sup> But under Biden’s EPA administrator, Michael Regan, SEPs are back.<sup>7</sup> Administrator Regan has highlighted the potential for SEPs as a tool for the EPA to advance environmental justice.<sup>8</sup> However, some conservative legal voices oppose SEPs, arguing that they are illegal as well as bad policy.<sup>9</sup>

---

1. *See infra* Part I.A.

2. *See* U.S. ENV’T PROT. AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY, 2015 UPDATE, 22, <https://perma.cc/55UQ-DELK> (last visited May 10, 2023).

3. These categories are: Public Health, Pollution Prevention, Pollution Reduction, Environmental Restoration and Protection, Assessments and Audits, Environmental Compliance Promotion, and Emergency Planning and Preparedness. *See id.* at 11-16.

4. *See* OFF. OF PUB. AFFS., U.S. DEP’T OF JUST., Sac And Fox Nation Receive First Payment From El Paso Energy Under Environmental Settlement (June 30, 1997), <https://perma.cc/6L24-XZXC>.

5. *See id.* at 6-7.

6. *See* Hannah Perls, *DOJ Revives Supplemental Environmental Projects (SEPs) as Part of EJ Agenda*, HARV. ENV’T AND ENERGY L. PROGRAM (Feb. 1, 2023), <https://perma.cc/5N45-ADTX?type=image>.

7. *See* Zack Budryk & Rachel Frazin, *US Takes Steps on Environmental Justice Enforcement*, THE HILL (May 5, 2022), <https://perma.cc/HB83-QLGT>.

8. *See* Julia Grist, *A New Office of Environmental Justice is Announced*, GOV’T EXEC., (May 7, 2022), <https://perma.cc/8C57-M74X> (noting Administrator Regan’s characterization of SEPs as “a tool to secure tangible public health benefits for communities harmed by environmental violations”).

9. *See* Michael Buschbacher et al., THE FEDERALIST SOC’Y, *The Return of Supplemental Environmental Projects: A Regulatory Transparency Project Webinar* (June 15, 2022, 12:00 PM), <https://perma.cc/R5QU-NW53>.

The fight over SEPs has left no one satisfied. Those who oppose SEPs view any form of SEP as a counterproductive and illegal practice.<sup>10</sup> Those who support SEPs are (or should be) unhappy because certain SEPs that would otherwise advance environmental justice are impermissible under current law.<sup>11</sup> Finally, both sides, as well as the public, should be unhappy with SEPs' ephemeral legality.<sup>12</sup> Because SEP policy can change with each administration, the availability of SEPs for the EPA and for violators is constantly subject to change. Since the beginning of the Trump administration, time and money have been spent arguing over SEPs in the courts and the public sphere, and reversing and re-reversing SEP policy.<sup>13</sup>

Congress has the power to solve this problem. Because SEPs are authorized by the enforcement provisions of statutory law,<sup>14</sup> and because some argue that they violate other statutory provisions,<sup>15</sup> Congress is best positioned to end the debate over SEPs with a clear statement of its intent. Courts could resolve the legality questions, but likely can't require that SEPs be available should an administration disfavor them as a matter of policy.

This Note argues that SEPs are an imperfect but nonetheless useful enforcement tool for advancing environmental justice, and Congress should either sanction their use or obviate their need. First, this Note explains that SEPs advance the EPA's environmental justice agenda better than the EPA is currently able to because the EPA's enforcement capacity is hampered by, among other things, congressional underfunding and a lack of statutory support for environmental justice. This Note further argues that SEPs provide benefits to communities overburdened by environmental violations and support environmental justice by cleaning up these communities. Consequently, this Note argues that SEPs are a necessary part of an enforcement program that remains unable to prevent environmental injustices and Congress should either affirmatively allow SEPs to advance—or provide other support for the EPA's efforts to advance environmental justice.

Part I reviews the role of SEPs in the EPA's civil penalty policy, the political and legal history of SEPs, the current SEP policy under the Biden administration, and the role of SEPs in the EPA's environmental justice capacity, concluding that the EPA lacks capacity to support environmental justice, but that such capacity can be supported by SEPs. Part II reviews the policy arguments for and against the use of SEPs and demonstrates that SEPs provide net benefits by providing the capacity to achieve environmental justice goals that the EPA otherwise lacks. Finally, Part III recommends that Congress either support SEPs or increase support to EPA enforcement efforts thereby obviating the need for SEPs.

---

10. See *infra* Subpart II.A.

11. See *infra* Subpart III.B

12. See *infra* Subpart I.C

13. See, e.g., Perls, *supra* note 6 (discussing the reversal and re-reversal of SEP policy).

14. See *infra* note 47.

15. See discussion *infra* accompanying notes 55-60.

## I. BACKGROUND

SEPs have played an important role in strengthening the EPA's enforcement capacity, particularly around environmental justice, over the last few decades. In recent years, however, SEPs have come under increased scrutiny. This section discusses how SEPs work, where they come from, and how they advance the EPA's environmental justice agenda.

### A. HOW SEPS FUNCTION WITHIN THE EPA'S CIVIL PENALTY POLICY

An EPA civil enforcement action usually results in a violator entering a settlement agreement with the EPA.<sup>16</sup> SEPs, by definition, are limited to those projects that could not be ordered by a court,<sup>17</sup> and are thus available only as a condition of settlement, not judgment. The EPA's SEP policy applies to civil but not criminal claims,<sup>18</sup> and applies to both judicial and administrative enforcement actions.<sup>19</sup> Thus, in civil cases, a violator can propose to perform a SEP as part of a settlement agreement. Like all settlement agreements, a settlement with a SEP must be approved by either the administrative or judicial court,<sup>20</sup> after which point they become enforceable.

Analytically, the EPA's SEP policy is applied after the EPA calculates a civil penalty. When a penalty reduction is given for a SEP, the EPA has already decided how much money it will seek as a penalty based on its civil penalty policy.<sup>21</sup> The EPA's civil penalty policy separates a monetary penalty into two components, the "economic benefit of non-compliance," (i.e. the costs avoided by not complying with the law) and the "gravity" of the violation which reflects the "the environmental and regulatory harm caused by the violation(s)."<sup>22</sup> The combination of these two figures serves to provide deterrence by (1) removing any economic incentive to violate environmental laws and (2) providing a punishment for doing so.<sup>23</sup> In legal terms, these might appropriately be thought of as disgorgement and punitive damages.<sup>24</sup> In setting the gravity component of the penalty, the EPA

---

16. See Robert Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making* 1987 U. CHI. LEGAL F. 327, 327-29 (1987); see generally Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1352 (1994).

17. See U.S. ENV'T PROT. AGENCY, *supra* note 2, at 6-7. See also *infra* note 79 and accompanying discussion.

18. See *id.* at 2.

19. See *id.*

20. 40 C.F.R. § 22.18(b)(3) (2024); Percival, *supra* note 16, at 334 (stating that consent decrees become binding by judicial court order).

21. See generally, U.S. ENV'T PROT. AGENCY, POLICY ON CIVIL PENALTIES: EPA GENERAL ENFORCEMENT POLICY #GM-21 (Feb. 16, 1984), <https://perma.cc/7LXF-HY6T>.

22. U.S. ENV'T PROT. AGENCY, *supra* note 2, at 21.

23. U.S. ENV'T PROT. AGENCY, *supra* note 21, at 3-4.

24. The economic benefit component is akin to disgorgement in that it seeks to remove what the violator has gained through a wrong, and the gravity component is like punitive damages in that it seeks to punish conduct in relation to how egregious it is. See Ernest J. Weinrib, *Punishment and*

considers subjective factors such as the amount of harm caused by the violation, the degree of willfulness, and any history of non-compliance.<sup>25</sup> SEPs are not considered when determining either economic benefit or gravity, but instead qualify a defendant for a reduction in the penalty amount that is applied after the economic benefit and gravity factors have been determined.<sup>26</sup>

#### B. POLITICAL HISTORY OF SEPS

In their early years, SEPs enjoyed a period of bipartisan acceptance. The first SEP policy was promulgated in 1991 under the George H.W. Bush administration and a 1998 SEP policy was promulgated under the Clinton administration.<sup>27</sup> The 1998 Clinton administration SEP policy was not curtailed under the George W. Bush administration, nor was it curtailed by the Obama administration, which issued the 2015 policy and expressed a “continuing strong support for SEPs.”<sup>28</sup> However, beginning with Obama’s administration,<sup>29</sup> and given full force during President Trump’s administration, there has been legal and ideological skepticism from some legal conservatives and Republicans about the merits of SEPs, as well as payments to third parties.<sup>30</sup>

The Stop Settlement Slush Funds Act and the Safeguarding Awards for Victims and Enforcement Settlements Act, both of which would bar the use of SEPs, have been introduced, reintroduced, and cosponsored exclusively by Congressional Republicans, though none have passed.<sup>31</sup> The introduction of these bills has continued into the Biden administration,<sup>32</sup> signaling a continuing polarization of ideology regarding SEPs.

Throughout the Trump administration, the Department of Justice (DOJ) issued guidance documents that constrained and eventually almost entirely prohibited the use of SEPs. Starting in 2017, the Trump administration DOJ issued guidance memoranda that increasingly limited the use of SEPs,<sup>33</sup> culminating in a

Disgorgement as Contract Remedies, 78 CHI. KENT L. REV. 55, 55-56 (2003) <https://perma.cc/NT9Y-6ZWF>.

25. See U.S. ENV’T PROT. AGENCY, *supra* note 21, at 14-21.

26. See U.S. ENV’T PROT. AGENCY, *supra* note 2, at 23; See generally U.S. ENV’T PROT. AGENCY, *supra* note 21, at 4-17.

27. See *infra* Section I.C.

28. U.S. ENV’T PROT. AGENCY, ISSUANCE OF THE 2015 UPDATE TO THE 1998 U.S. ENVIRONMENTAL PROTECTION AGENCY SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY, <https://perma.cc/UV9Z-HDFE>.

29. See Jorden Messmer, *Reviving Supplemental Environmental Projects*, 53 U. TOL. L. REV. 527, 540 (2022).

30. See *id.* at 527; Joel Smith, *Supplemental Environmental Projects’ Wild Ride Is a Call for Legislative Action to Protect a Valuable Negotiation Tool*, 2021 J. DISP. RESOL. 369, 377-80 (2021).

31. H.R. 732, 115th Cong. (2017); S. 4444, 117th Cong. (2022).

32. See, e.g., H.R. 732, 115th Cong. (2017); S. 4444, 117th Cong. (2022).

33. See Jeffrey Clark, *Supplemental Environmental Projects (“SEPs”) in Civil Settlements with Private Defendants*, ENV’T AND NAT. RES. DIV., DEP’T OF JUST. 9 Mar. 12, 2020), <https://perma.cc/Ry8F-XBSZ>.

March 2020 DOJ memorandum banning all SEPs excluding those explicitly authorized by Congress (a category that includes only SEPs relating to diesel emissions reductions).<sup>34</sup> SEP-friendly plaintiffs voluntarily dismissed their challenge to this guidance document following Biden's election,<sup>35</sup> when Biden's Executive Order 13,990 directed department heads to undertake a reconsideration of environmental policy, leading the DOJ to revert to the 2015 SEP policy.<sup>36</sup>

It is unlikely that a case challenging the decision by the DOJ to ban SEPs would have succeeded.<sup>37</sup> Although courts have generally approved of settlements containing SEPs as they are currently practiced,<sup>38</sup> a decision by a court to require the availability of SEPs within settlement discussions would be another matter. Even those arguing that SEPs are legal believe that challenges to executive branch SEP policies banning them will likely fail.<sup>39</sup> The strongest doctrine available to challenge a guidance document reversing SEP policy is arbitrary and capricious review under the Administrative Procedure Act.<sup>40</sup> But a decision to not enter into SEPs likely satisfies the requirement of rationality, even if it is a poor decision.<sup>41</sup> Not only because the Miscellaneous Receipts Act at least raises a question as to the legality of SEPs,<sup>42</sup> but also because SEPs are arguably a counterproductive policy.<sup>43</sup>

Because Congress has not acted one way or the other to ban or allow SEPs, each presidential administration can rewrite SEP policy, and so SEPs "will continue to be subjected to the whims of political change."<sup>44</sup> This contributes to a larger phenomenon of SEP policy oscillation in the executive branch.<sup>45</sup> Though incoming administrations can and should have room to pursue their policy

34. See 42 U.S.C. § 16138 (2008); Clark, *supra* note 33, at 11.

35. See Conservation Law Foundation v. Barr, No. 1:20-cv-11827 (D. Mass. dismissed Feb. 5, 2021).

36. See 86 Fed. Reg. 7037 (Jan. 25, 2021); Smith, *supra* note 30, at 379.

37. See Messmer, *supra* note 29, at 545.

38. While the Supreme Court has not addressed the issue of SEPs' legality directly, the Court has endorsed the approval of settlements containing relief not available through a court's own authority, so long as the consent decree "come[s] within the general scope of the case made by the pleadings" and "further[s] the objectives of the law upon which the complaint was based." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (citations omitted). *Local No. 93* and the sparse jurisprudence on SEPs developed in circuit and district courts are aligned with the EPA's own nexus requirement. See Smith, *supra* note 30, at 375-76; Messmer, *supra* note 29 at 528; Christina Giordanela, Note, *The Recent Federal Withdrawal of Limitations on Supplemental Environmental Projects and Importance to Environmental Justice Initiatives*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 323, 343-45 (2021). Thus, courts seem unlikely to invalidate the practice anytime soon.

39. *C.f.* Messmer, *supra* note 29 at 545.

40. See *id.* at 544-45.

41. See *id.*

42. See *id.* at 545.

43. See *infra* Part II.A for a discussion of SEP's downsides and threats to the deterrent effect of civil penalties.

44. Messmer, *supra* note 29, at 545.

45. See generally Jonathan S. Masur, *Regulatory Oscillation*, 39 YALE J. ON REGUL. 744 (2022) (noting the recent trend towards repeal and reinstatement of regulations by successive presidential administrations).

priorities, the availability of SEPs touches significantly on the statutory authority of the EPA as well as Congress' power of the purse. Thus, approval or disapproval of SEPs is a decision best made by Congress, not the executive branch.

### C. LEGAL HISTORY OF SEPS

The EPA's authority to provide a civil penalty reduction for a SEP rests on the agency's statute-by-statute authorizations to exercise prosecutorial discretion to modify civil penalties.<sup>46</sup> In exercising this discretion, the EPA is obligated to take into consideration various factors, typically including factors "as justice may require."<sup>47</sup> Over time, this authority has been subject to legal scrutiny, which has resulted in the requirements of the EPA's current SEP policy.

The first use of what we today call a Supplemental Environmental Project can be traced back to the 1980s, when the EPA interpreted the Clean Air Act and the Clean Water Act to permit penalty reductions in exchange for payments for environmental projects.<sup>48</sup> The EPA first used the term Supplemental Environmental Projects in a 1991 policy,<sup>49</sup> where it laid out types of projects that would qualify as SEPs.<sup>50</sup> Following the issuance of the EPA's 1991 SEPs memorandum, the Comptroller General of the General Accounting Office, now the Government Accountability Office (GAO), was asked to provide an opinion on the legality of SEPs by Democratic Congressman John Dingell.<sup>51</sup> The GAO evaluated the legality of SEPs under the Miscellaneous Receipts Act, which requires government officials to deposit money received on behalf of the government into the U.S. Treasury.<sup>52</sup>

In two opinions in 1992 and 1993, the GAO found that some SEPs violated or would violate the Miscellaneous Receipts Act.<sup>53</sup> The GAO found that some kinds of SEPs described in the EPA's 1991 memorandum were prohibited by the Miscellaneous Receipts Act because they lacked a significant "nexus" to the underlying environmental harm.<sup>54</sup> Further, the GAO noted that any SEPs which are entered into "in order to carry out other statutory goals of the agency, would permit the agency to improperly augment its appropriations [in violation of the Miscellaneous Receipts Act]."<sup>55</sup> These 1992 and 1993 GAO opinions underlie the EPA's current SEP policy.

---

46. See Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENV'T L. REV. 117, 128-130 (2020).

47. 33 U.S.C. § 1319 (d), (g)(3); *See id.*

48. Kakade, *supra* note 46, at 129-39.

49. See James M. Strock, *Policy on the Use of Supplemental Enforcement Projects in EPA Settlements*, U.S. EPA (1991).

50. See Smith, *supra* note 30, at 371.

51. Kakade, *supra* note 46, at 129.

52. See 31 U.S.C. § 3302(b).

53. See Kakade, *supra* note 46, at 129; U.S. COMPTROLLER GEN., B-247155.2, COMMENTS ON EPA AUTHORITY TO ENTER INTO CLEAN AIR ACT SETTLEMENT AGREEMENTS 1 (1993).

54. U.S. COMPTROLLER GEN., *supra* note 53, at 2.

55. *Id.* at 3.



SEPs are also sometimes accused of violating the Antideficiency Act.<sup>56</sup> The Act requires that government officials not incur obligations or make expenditures in exceedance of appropriations by Congress.<sup>57</sup> Together, the Miscellaneous Receipts Act, the Antideficiency Act, and the Constitution's Appropriations Clause (on which both acts are based), express a strong congressional preference for control of the appropriations process, and against the ability of a government agency to direct money received.<sup>58</sup> This power is fundamental to the nature of American government, and is referred to as Congress's "power of the purse," contrasting with the Executive's power of the "sword" and reflecting the separation of powers.<sup>59</sup> Countervailing this preference is the express congressional authorization for the negotiation of settlement penalties and consideration of a wide set of factors in doing so.<sup>60</sup>

Two basic legal requirements encapsulated in the EPA's 2015 SEP policy stem from the 1992 and 1993 GAO opinions and other legal criticism of SEPs.<sup>61</sup> First, SEPs must have a "nexus" linking them with the underlying environmental harm to remain authorized by statute.<sup>62</sup> Second, SEPs must not "augment" EPA appropriations in order to avoid violations of the Miscellaneous Receipts Act<sup>63</sup> and the Anti-Deficiency Act.<sup>64</sup> Because these limitations are statutory, Congress can exempt agencies from these requirements if it so chooses, and has at least some latitude to permit agencies to take specific action with collected funds under the Constitution's Appropriations Clause.<sup>65</sup>

The current SEP policy is significantly informed by the legal history of SEPs and aims to promote environmental justice without straying from EPA's statutory authority to enter SEPs and without violating the Miscellaneous Receipts Act.<sup>66</sup> These goals are encapsulated in the policy's two main requirements for the acceptability of a SEP: a nexus to the underlying violation and the avoidance of augmentation.<sup>67</sup>

SEPs are required to have a nexus to the underlying violation because a SEP is authorized for the settlement of a specific enforcement action.<sup>68</sup> The SEP must be related to the underlying violation by either decreasing the likelihood of similar violations in the same geographic area or decreasing the impacts or risks to the

---

56. See Messmer, *supra* note 29, at 533.

57. See SEAN STIFF, CONG. RSCH. SERV., R46417, CONGRESS'S POWER OVER APPROPRIATIONS: CONSTITUTIONAL AND STATUTORY PROVISIONS 39 (2020).

58. Messmer, *supra* note 29, at 533.

59. See generally Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1347 (1988).

60. See, e.g., 42 U.S.C. 7413(c)(1) (Clean Air Act enforcement provisions).

61. See *infra* Section I.D.

62. U.S. ENV'T PROT. AGENCY, *supra* note 2, at 7.

63. 31 U.S.C. § 3302.

64. 31 U.S.C. § 1341; see U.S. ENV'T PROT. AGENCY, *supra* note 2, at 8; *c.f.* Smith, *supra* note 30, at 379.

65. See discussion *infra* accompanying note 124.

66. See U.S. ENV'T PROT. AGENCY, *supra* note 2, at 7.

67. See *supra* text accompanying notes 63-66.

68. See U.S. ENV'T PROT. AGENCY, *supra* note 2, at 8.



environment and/or to human health associated with the violation.<sup>69</sup> Finally, the SEP must advance the goals of the statute being violated and must be sufficiently well-defined to ensure it meets the nexus requirement.<sup>70</sup>

The second set of requirements in the 2015 SEP policy are tailored to prevent SEPs from augmenting the EPA's own activities. SEPs must be voluntary and proposed by a violator, not the EPA.<sup>71</sup> However, the EPA can seek out community input on a proposed SEP or community interest in a particular SEP and relay this information to a violator, even if the violator does not seek out such input itself.<sup>72</sup> The EPA cannot direct or otherwise control the SEP, though it may still perform oversight and seek legal recourse for failure to appropriately implement the SEP.<sup>73</sup> Finally, SEPs cannot be used to provide resources for the EPA or other federal agency activities or to satisfy the EPA's or another federal agency's statutory obligations.<sup>74</sup> Both the EPA and the violator proposing a SEP are required to make a reasonable inquiry that the SEP does not augment appropriations in these ways and certify as such.<sup>75</sup>

SEPs cannot be mitigation projects. Mitigation projects are a form of injunctive relief similar to, but separate from, SEPs. Although both SEPs and mitigation aim to help restore the environment or community harmed by a violation, mitigation is limited to restoration of the status quo ante, and has stricter nexus requirements than a SEP, meaning that it is available in fewer cases.<sup>76</sup> Put simply, although mitigation is available to address *the harm* caused by a violation, SEPs can address *the kind of harm* caused by a violation.<sup>77</sup> The line separating the two depends on the context of the specific case, and a project could qualify as a SEP in one case, but not another.<sup>78</sup> For example, cleaning up carcinogen X from a lake would be mitigation if the violator emitted carcinogen X into that lake, but would be a SEP if the violator had instead emitted carcinogen Y because then the target of the cleanup would be *the kind of harm*, i.e. cancer. Because the EPA does not have the discretion to provide the same civil penalty reduction for mitigation as it does for SEPs, SEPs cannot be projects that the EPA could obtain as mitigation.<sup>79</sup>

---

69. *See id.*

70. *Id.*

71. *Id.* at 9.

72. *Id.* at 18.

73. *Id.* at 8-9.

74. *Id.* at 9-10.

75. *Id.* at 10-11.

76. *See* Susan Shinkman, Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements (2nd Edition), OFF. OF ENF'T AND COMPLIANCE ASSURANCE, U.S. EPA 4 (Nov. 14, 2012), [perma.cc/P3E2-36ZD](https://perma.cc/P3E2-36ZD).

77. *See id.*

78. *See id.*

79. *See* U.S. ENV'T PROT. AGENCY, *supra* note 2, at 6; Shinkman, *supra* note 76, at 3-4.

Congress has carved out only one exception to the augmentation requirement: SEPs addressing diesel emissions reduction projects. Starting in 2008, the EPA has received federal funds to perform diesel retrofit projects, but can nevertheless accept these projects as SEPs.<sup>80</sup> The Senate report on the bill indicates that Congress carved out this exception in response to the EPA's decision to no longer accept diesel retrofit projects as SEPs following the 2008 funding of the Diesel Emissions Reduction Act.<sup>81</sup> The Senate report further indicates that it would be "a misunderstanding of Congressional intent to interpret the use of funds to mitigate environmental damage as . . . an augmentation of a Congressionally funded grant program [under the Miscellaneous Receipts Act]."<sup>82</sup> Interestingly, this exception passed as a stand-alone bill through Congress by unanimous consent in the Senate, and by a 406-0 vote on a motion for suspension of the rules in the House.<sup>83</sup> It is difficult to reconcile this legislative history and unanimous support with the lack of any other congressional exception to the Miscellaneous Receipts Act. One explanation is that SEPs and third-party payments generally are now much more controversial than they were in 2008.<sup>84</sup> However, the strong support of SEPs in this context, and the Senate report's indication that the Miscellaneous Receipts Act did not apply in the first place leaves room for further congressional support of augmentation carveouts under appropriate circumstances.

The types of projects that qualify as SEPs are more diverse than just pollution mitigation or public health support projects that address the harm caused by a violation. The EPA's SEP policy recognizes projects focused on improving a company's own compliance with environmental laws or projects supporting compliance efforts of other companies as valid SEPs.<sup>85</sup> SEPs focused on improving a business's own compliance are acceptable for small businesses conducting reviews of their own compliance efforts, but not for larger companies.<sup>86</sup> Larger companies can instead perform SEPs aimed at conducting reviews or supporting the compliance of other regulated entities.<sup>87</sup> These compliance promotion projects are acceptable as SEPs not only when they "go beyond compliance" by reducing pollution below permitted levels, but even if they simply aim to achieve compliance.<sup>88</sup>

In some cases, even SEPs that ultimately become profitable are permitted if profitability is outweighed by public benefit.<sup>89</sup> The EPA's policy recognizes that

---

80. See 42 U.S.C. § 16138.

81. See S. REP. NO. 110-266, at 1-2. (2008).

82. *Id.*

83. See 154 CONG. REC. S1393, S1434 (2008); 154 CONG. REC. H5217, H5294-96 (2008); U.S. HOUSE OF REPRESENTATIVES, OFFICE OF THE CLERK, *Roll Call 413 | Bill Number: S. 2146*, (June 12, 2008), <https://perma.cc/36C7-9WZV>.

84. See *supra* section I.B.

85. See U.S. ENV'T PROT. AGENCY, *supra* note 2, at 14-16.

86. See *id.* at 15.

87. See *id.* at 15-16.

88. *Id.* at 16.

89. See *id.* at 32.

“[c]ertain types of beneficial projects, such as pollution prevention or innovative technology projects, may ultimately be profitable to the defendant, and may well be actions it would have undertaken on its own for economic business reasons.”<sup>90</sup> Though the EPA recognizes this risk, the EPA still accepts profitable SEPs subject to heightened criteria. Profitable SEPs must be highly innovative, develop technology that the violator agrees to share, and ultimately come with a high degree of financial risk,<sup>91</sup> presumably to assure that they would not otherwise be in the violator’s interest. Further, these SEPs qualify for a reduced maximum penalty reduction.<sup>92</sup>

In the standard case, a violator is eligible to receive a civil penalty reduction of up to 80% of the cost of their approved SEP. However, this reduction cannot bring the assessed penalty amount below either (1) the economic benefit of non-compliance plus 10% of the gravity penalty,<sup>93</sup> or (2) 25% of gravity, whichever is greater.<sup>94</sup> Thus, a SEP cannot typically reduce a penalty past the benefit to the violator plus some change, or for a particular egregious violation with a high gravity penalty, one-fourth of the penalty assessed. There are several exceptions to the minimum penalty policy due to some statute-specific policies of the EPA. These include the increased availability of economic benefit penalty reduction for lead abatement SEPs under the Residential Lead-Based Paint Hazard Reduction Act,<sup>95</sup> as well as an exception to allow penalties to remain below statutory maximum penalty limits for cases brought administratively.<sup>96</sup> SEPs that are profitable can receive only 60% of the estimated cost of implementing the SEP as a discount on their penalty, while small businesses or government agencies with SEPs of “outstanding quality” and other violators with a SEP of “outstanding quality” that also “reduces or eliminates the generation of a pollutant at its source” can receive 100% of the cost of the SEP off of their civil penalty.<sup>97</sup>

#### D. ROLE OF SEPS IN THE EPA’S ENVIRONMENTAL JUSTICE CAPACITY

Since at least the Clinton administration’s issuance of Executive Order 12898,<sup>98</sup> the EPA has made efforts to advance environmental justice using, among other things, its enforcement authority.<sup>99</sup> This commitment has been

---

90. *Id.*

91. *See id.* at 32-33.

92. *Id.*, at 24, 33.

93. *See supra* section I.A for an explanation of the gravity factor and civil penalty scheme.

94. U.S. ENV’T PROT. AGENCY, *supra* note 2, at 22.

95. *See* Thomas Skinner, *Supplemental Environmental Projects in Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases*, U.S. EPA 2 (Nov. 23, 2004), [perma.cc/8NEU-7XQZ](https://perma.cc/8NEU-7XQZ).

96. U.S. ENV’T PROT. AGENCY, *supra* note 2, at 22-23. *See, e.g.*, 42 U.S.C. § 7524(c)(1).

97. U.S. ENV’T PROT. AGENCY, *supra* note 2, at 24.

98. Exec. Order No. 12,898, 59 Fed Reg. 7629 (Feb 11, 1994).

99. *See* DAVID M. KONISKY, *The Federal Government’s Response to Environmental Inequality*, in *FAILED PROMISES: EVALUATING THE FEDERAL GOVERNMENT’S RESPONSE TO ENVIRONMENTAL JUSTICE* 29 (2015).

reaffirmed by President Biden by executive order.<sup>100</sup> The EPA has specifically recognized that environmental justice requires the “meaningful involvement” of all people, “regardless of race, color, national origin, or income,” with respect to the enforcement of environmental law.<sup>101</sup> A community that faces a disproportionate share of environmental harms can be called an “overburdened” community,<sup>102</sup> or an “environmental justice community.”<sup>103</sup> These communities tend to be minority and low-income communities.<sup>104</sup> Environmental justice should be prioritized for a number of reasons,<sup>105</sup> but perhaps most simply because it prevents unfairly overburdening any single community with our nation’s environmental problems.

The EPA’s administrative capacity, and thus its capacity to promote environmental justice, has been weakened by many factors. Broadly, the EPA is often hampered by what scholars Jody Freeman and Sharon Jacobs have termed “structural deregulation,” a term encompassing the many ways in which agency capacity can be hampered by attacks on the administrative infrastructure underlying the agency’s legal authority.<sup>106</sup> These attacks can and have come from within the executive branch,<sup>107</sup> but congressional decisions such as funding levels are also critical to agency capacity.

Importantly, the EPA’s capacity to advance environmental justice is limited by a lack of explicit statutory authority to require the achievement of equity within the EPA’s various programs.<sup>108</sup> Although the EPA is correct to note that many of its statutes allow for the consideration of environmental justice, and thus can be used to promote equity,<sup>109</sup> no statutes actually require the achievement of equity between disadvantaged and advantaged communities.<sup>110</sup> Thus, in many contexts the EPA lacks authority to achieve this equity, or is at best left open to overlook environmental justice in deference to other concerns. Enforcement-related

---

100. See Exec. Order No. 14,096, 88 Fed Reg. 25251 (Apr. 26, 2023).

101. U.S. ENV’T PROT. AGENCY, *Learn About Environmental Justice* (last visited May 10, 2023), <https://perma.cc/7J3P-PW63>.

102. U.S. ENV’T PROT. AGENCY, *EJ 2020 Glossary*, <https://perma.cc/6WQD-JFTK> (last visited May 10, 2023).

103. Seema Kakade, *Defining Environmental Justice Communities*, American Bar Association (Mar. 3, 2023), <https://perma.cc/P5TH-RE8H>.

104. See, e.g., Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480, 480 (“For PM of 2.5 micrometers in diameter or less, those in poverty had 1.35 times higher burden than did the overall population, and non-Whites had 1.28 times higher burden”).

105. See, e.g., Exec. Order No. 14,096, *supra* note 100.

106. See generally Jody Freeman and Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021).

107. See Lisa Friedman, *Depleted Under Trump, a ‘Traumatized’ E.P.A. Struggles With Its Mission*, N.Y. TIMES, Jan. 23, 2023.

108. See KONISKY, *supra* note 99, at 39-41.

109. U.S. ENV’T PROT. AGENCY, *supra* note 102.

110. See, David M. Konisky, *Federal Environmental Justice Policy: Lessons Learned in FAILED PROMISES: EVALUATING THE FEDERAL GOVERNMENT’S RESPONSE TO ENVIRONMENTAL JUSTICE*. 241 (2015).

failures have also slowed the delivery of environmental justice by, for example, failure to enforce against repeat offenders.<sup>111</sup>

Although important strides have been made toward environmental justice, the EPA faces significant barriers to protecting communities from inequitable exposure to pollution. These barriers are compounded by the “ever expanding agenda” of the EPA’s enforcement program and the shrinking number of resources it has been provided to support its mission.<sup>112</sup> Although the EPA’s enforcement mission has significantly expanded in the environmental justice realm,<sup>113</sup> their enforcement funding has not kept up. Instead, as of 2022, funding to the EPA’s Office of Enforcement and Compliance Assurance has declined by almost 30% since 2011.<sup>114</sup> This has resulted in reduced staffing and fewer inspections and enforcement cases brought each year.<sup>115</sup> Although the EPA has made serious efforts to advance environmental justice and Congress has recently increased funding levels,<sup>116</sup> the EPA remains unable to provide complete protection from environmental harms to overburdened communities.

To try to address these failures, Biden’s EPA and DOJ have announced commitments to use SEPs to advance environmental justice.<sup>117</sup> Although a SEP is not a cure-all for overburdened communities, SEPs provide an important tool that the EPA can use to advance environmental justice within its enforcement program. This is the case because SEPs result in the direction of resources towards the cleanup of communities that have been harmed by violations of environmental laws and give community members an opportunity to participate in environmental enforcement. These efforts, and the EPA’s SEP policy, have made SEPs a worthwhile tool to advance environmental justice.

## II. THE ENVIRONMENTAL JUSTICE BENEFITS OF SEPs OUTWEIGH THEIR HARM TO DETERRENCE

This section argues that although critics have valid concerns about the effect of SEPs on deterrence, the benefits of SEPs for environmental justice outweigh the

---

111. See David M. Konisky and Christopher Reenock, *Evaluating fairness in Environmental Regulatory Enforcement in FAILED PROMISES: EVALUATING THE FEDERAL GOVERNMENT’S RESPONSE TO ENVIRONMENTAL JUSTICE* 173 (2015). See generally UNITED NATIONS ENV’T PROGRAM, *Environmental Laws Impeded by Lack of Enforcement, First-ever Global Assessment Finds* (Jan. 24, 2019), <https://perma.cc/Y2ZR-RAJG>.

112. JOEL MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 226 (2012).

113. See, e.g., Exec. Order No. 14,008, 86 Fed Reg. 7632-33 (Apr. 26, 2023) (establishing the Justice40 Initiative, a goal that 40% of the overall benefits of certain investments flow to disadvantaged communities); Exec. Order No. 14,096, *supra* note 100.

114. See Julia Grist, *Experts to Congress: Restore EPA Enforcement Staffing and Funding for Environmental Justice*, GOV’T. EXEC. (July 25, 2022), <https://perma.cc/3ALW-VPR6>.

115. See *id.*

116. See David Coursen, *EPA’s 2023 funding takes a baby step toward rebuilding the agency*, THE HILL (Dec. 27, 2022), <https://perma.cc/RN55-CKB2>.

117. See OFF. OF ENF’T AND COMPLIANCE ASSURANCE, U.S. ENV’T PROT. AGENCY, *New Enforcement Strategy Advances President Biden’s Environmental Justice Agenda* (May 5, 2022), <https://perma.cc/9U98-4KSK>.

risks of undermining deterrence. This is not only because environmental justice is an important value within the EPA's enforcement program, but also because the EPA's SEP policy significantly mitigates SEP's negative effect on deterrence. The 2015 SEP policy offers significant guardrails that, although imperfect, make the practice of SEPs much less harmful to the EPA's deterrence framework than they otherwise might be.

#### A. THE DETRIMENTS OF SEPS

Criticism of SEPs centers on the potential for the direction of funds and projects by the EPA, as well as the anti-deterrent effects of allowing SEPs. The simplest objection to SEPs is that they are a potential avenue for corruption.<sup>118</sup> Arguing that in other settlement contexts, donations and third-party funding have been directed to political allies, legal conservatives have raised ethical concerns about the use of third-party payments in any kind of settlement (recall the Stop Settlement Slush Funds Act).<sup>119</sup> However, this criticism ignores the fact that EPA policy requires detailed cost estimates before SEP implementation, and requires the violator to complete the project themselves (though they may hire outside contractors).<sup>120</sup> Although a company might inflate the price paid to a friendly contractor, EPA oversight of the SEP process and approval of the cost of the project militates against this. Further, because the company does not totally recoup the cost of the SEP as a penalty reduction, the company must somehow get back at least 20%, if not more, of the money it pays a contractor to achieve a net gain.<sup>121</sup> This fact mitigates significantly against the potential for fraudulent SEP expenditures by the violator.

Corruption is less likely to occur in the SEP context than in other contexts where the EPA has discretion to direct funds. This is because the EPA cannot direct or control SEP money and cannot themselves propose a SEP,<sup>122</sup> making the violator's cooperation required for corruption to occur. This makes any scheme both more detectable and harder to devise by increasing the number of potential whistleblowers.<sup>123</sup> Further, corruption concerns are not unique to the SEP or even the settlement context and are implicated anytime the EPA is permitted to direct

---

118. Michael Buschbacher, *Re: RIN 1105-AB62: Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties* 18 (July 11, 2022) (opposing the reintroduction of SEPs in letter to Attorney General), <https://perma.cc/KP9R-J2CP>.

119. H.R. 732, 115th Cong. (2017); Buschbacher, *supra* note 118, at 17-18.

120. See U.S. ENV'T PROT. AGENCY, *supra* note 2, at 25-27.

121. Because the maximum offset of a SEP is usually 80%, see *supra* section I.D, spending one hundred dollars at the maximum penalty reduction can usually provide no more than eighty dollars of penalty reduction, and thus a violator must somehow funnel more than twenty dollars back to themselves to make a profit. While this might be feasible, such a large false expense would make such behavior more detectable.

122. See U.S. ENV'T PROT. AGENCY, *supra* note 2, at 8-9.

123. *C.f.* Kristine Arelló & Jay Albanese, *Rising to the Surface: The Detection of Public Corruption*, 21 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 74, 78 (2020) (finding that most public corruption cases are raised to law enforcement by whistleblowers).



or approve of the use of money. Consequently, absent actual evidence of corruption in the SEP context, current policy and standard anti-corruption practice seems likely to result in SEPs being as, or even less, susceptible to corruption than other EPA activities such as the awarding of grants and contracts.

The corruption argument is a window into an overarching critique of SEPs as augmentations of appropriations that violate federal appropriations law. Whether SEPs violate current law is not addressed here because Congress, the institution best situated to address SEPs, does not need to follow its own statutory constraints.<sup>124</sup>

It is still worth considering whether “SEPs violate the spirit . . . [of] Congress’ constitutional power of the purse.”<sup>125</sup> Congress should not permit SEPs if they dramatically subvert its spending power. The use of SEPs increases EPA discretion in selecting environmental justice projects and avoids the need for congressional funding of these projects. Consequently, Congress’ power of the purse is weakened to the extent that such projects subvert or can be used to subvert congressional policy.

But were Congress to explicitly permit SEPs, it could adopt or enhance the current EPA SEP policy, which requires SEPs to support one of the underlying purposes of the environmental statute,<sup>126</sup> thus restricting the EPA’s latitude to direct funds as they see fit. Further, while SEPs are ambitious in their environmental goals, they fit both analytically and practically within other delegations of authority to the EPA. For example, the EPA has similar discretion in deciding whether to seek mitigation projects in litigation.<sup>127</sup> Thus, Congress has no more to worry about from SEPs than from many other programs the EPA operates. Finally, Congress can choose to require the EPA to report on SEPs in annual appropriations requests, which would increase accountability to Congress and support the constitutionality of SEPs under the Appropriations Clause. As such, SEPs do not significantly undermine the appropriations power, and any such effects would be addressable by Congress.

The strongest critique of SEPs is that they are poor enforcement policy. Legal conservatives argue that SEPs undermine deterrence by allowing violators to

---

124. A separate issue remains as to whether SEPs amount to a delegation of the spending power under the Appropriations Clause, and whether such a delegation is permissible. The Supreme Court will issue an opinion addressing that doctrine. See *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, 143 S. Ct. 978 (2023) (granting certiorari for appeal of a Fifth Circuit case concerning constitutional limitations on spending authority). Thus, while the issue is not ripe to address in this paper, Congress will have an opportunity to ensure its SEP policy does not run afoul of constitutional requirements. Furthermore, the Court seems unlikely to make a drastic change to current law. See Nina Totenburg, *The Supreme Court seems skeptical of a challenge to consumer agency*, NAT’L PUB. RADIO (Oct. 3, 2023), <https://perma.cc/9CXM-3Y7M>.

125. Clark, *supra* note 33, at 11.

126. See U.S. ENV’T PROT. AGENCY, *supra* note 2, at 8.

127. See Shinkman, *supra* note 76, at 6–7.

effectively reduce their penalties.<sup>128</sup> This is because SEPs provide both semi-direct penalty reduction as well as intangible goodwill, compliance assurance, or other benefits that are not properly accounted for in determining a violator's penalty reduction.<sup>129</sup> It is apparent even on the face of the SEP policy that SEPs will at least sometimes achieve this result by the generation of goodwill, compliance supporting activities, and the development of talent in a certain field.

Both supporters and detractors of SEPs readily admit that they help reestablish goodwill between communities and violators.<sup>130</sup> SEPs naturally generate goodwill from the positive environmental impacts they have. While the EPA's SEP policy usually requires violators' statements about their SEPs to contain a disclaimer that they are being conducted in settlement of an enforcement action,<sup>131</sup> the prominence of the disclaimer can be quite low or in some cases is not required,<sup>132</sup> and no disclaimer is required when others discuss the SEP. Even given such a disclaimer, those engaging with a business often ignore or give little weight to what is seen as legal fine print.<sup>133</sup> In providing a penalty reduction for these activities, the EPA in effect subsidizes efforts to appear environmentally conscious by companies who have likely violated environmental laws. Thus, SEPs contribute to the phenomenon of greenwashing, wherein environmentally unfriendly companies use environmentally friendly projects to attract consumers and goodwill from the communities in which they are located.<sup>134</sup>

Further, some categories of SEPs are susceptible to use by corporations to subsidize their own compliance efforts. SEPs that reduce a company's own pollution provide a buffer between the level of pollution that a company generates and the standard for compliance. This provides greater certainty to a company that violations will not occur, which benefits a company so long as the stipulated penalties in a SEP are lesser than penalties under an environmental statute. Small businesses and state or local government entities have the option to audit their own compliance status as a SEP,<sup>135</sup> which provides similar certainty that violations will not occur. SEPs requiring compliance promotion activities, such as training

---

128. Thomas McGarity, *Supplemental Environmental Projects in Complex Environmental Litigation*, 98 TEX. L. REV. 1405, 1423-24.

129. See Buschbacher, *supra* note 118, at 16; McGarity, *supra* note 128, at 1425-26.

130. See SUPPLEMENTAL ENVIRONMENTAL PROJECTS: A FIFTY STATE SURVEY WITH MODEL PRACTICES 41-42 (Steven Bonorris 2007) (discussing goodwill and reconciliation generated by SEPs).

131. See U.S. ENV'T PROT. AGENCY, *supra* note 2, at 26.

132. Compare *Volkswagen Clean Air Act Civil Settlement*, U.S. ENV'T PROT. AGENCY (last visited May 11, 2023), <https://perma.cc/8HMG-UASL>, with *About Electrify America*, ELECTRIFY AMERICA (last visited May 11, 2023), <https://perma.cc/9E4Y-7Y6L> (no disclaimer present on "about us" page of electric charging station company implemented as a SEP).

133. See, e.g., Kesten Green & J. Scott Armstrong, *Evidence on the Effects of Mandatory Disclaimers in Advertising With reply to commentators: Should We Put a Price on Free Speech?*, 31 J. PUB. POL'Y & MKTG. 293, 293 (2012).

134. See Courtney Lindwall, *What Is Greenwashing?* NAT. RES. DEF. COUNCIL, <https://perma.cc/H6HB-U9BK>, (Feb. 9, 2023); McGarity, *supra* note 128, at 1423.

135. U.S. ENV'T PROT. AGENCY, *supra* note 2, at 15.

and technical support directed at other regulated entities, do not promote a company's own compliance efforts on their face. However, such activities necessarily require the development or acquisition of knowledge within the company providing such support. Because the EPA's nexus requirement requires that such support be "focused on the same regulatory program requirements" that a company violated,<sup>136</sup> the knowledge is likely quite valuable to the implementing company.

Finally, SEPs subsidize corporations by providing an opportunity to develop internal talent, technology, and experience. Because any SEP requires that a company pay an internal team or outside contractor to engage in projects they may not otherwise have engaged in,<sup>137</sup> a SEP offers a valuable opportunity for the company to gain experience working or contracting in a new field. This benefit is particularly apparent in profitable SEPs. Because these SEPs require risky investments in innovative technologies, not only may these SEPs eventually begin to generate revenue for a company, but they also develop a company's own experience in emerging fields and position it as a leader in that space. For example, Electrify America, which Volkswagen founded as a SEP following their diesel emissions cheating scandal in 2015,<sup>138</sup> is now one of the largest electric vehicle charging networks in the United States.<sup>139</sup> Volkswagen's parent company Daimler is investing in a \$650 million dollar charging network venture.<sup>140</sup>

Allowing profitable SEPs undermines not only deterrence but competition and fairness in clean technology fields as well. A company that otherwise would have a competitive advantage in, for example, electric vehicle charging deployment, must compete with a company like Electrify America that is effectively being subsidized by the government. Due to the non-discretionary nature of the settlement agreement, companies implementing SEPs cannot be forced from the marketplace by more effective firms. They have less incentive to reduce their costs since the costs are partially offset by the settlement. The SEP policy does require companies to share their technologies, which provides other companies some protection from an informational disadvantage.<sup>141</sup> But information sharing alone does not protect companies from market domination or other disadvantageous effects of what are effectively government subsidies.<sup>142</sup>

---

136. *Id.* at 16.

137. *See id.* at 1.

138. *See Compare Volkswagen Clean Air Act Civil Settlement.*, *supra* note 132.

139. *See* Steven Loveday, *A Comprehensive Guide to U.S. EV Charging Networks*, U.S. NEWS AND WORLD REP. (Jan. 4, 2023), <https://perma.cc/GBK6-N4A4>.

140. *See* Mark Segal, *BlackRock, Daimler and NextEra to Launch \$650 Million EV Charging Network for Trucks*, ESG TODAY (May 1, 2023), <https://perma.cc/P5HX-WMUZ>.

141. *See* U.S. ENV'T PROT. AGENCY, *supra* note 2, at 32–33.

142. *See generally* ORG. FOR ECON. CO-OPERATION AND DEV., *Subsidies, Competition, and Trade: OECD Competition Policy Roundtable Background Note 11* (2022).

Arguably, these SEPs help rehabilitate violators.<sup>143</sup> However, the most important environmental violations are committed by non-natural persons,<sup>144</sup> so SEPs cannot rehabilitate organizations in the same way that, for example, requiring community service functions to rehabilitate an individual offender. Instead, punishment of organizations eschews traditional notions of individual punishment because many of the rationales underlying individual punishment, such as expressive retribution for wrongdoing<sup>145</sup> become absurd in the organizational context. This is because a different set of factors drive the behavior of organizations,<sup>146</sup> including corporations, which are driven largely by the pursuit of profit.<sup>147</sup> Allowing a violator to support their own efforts to be environmentally friendly and comply with environmental law has a smaller effect on a corporation than a person and serves mostly to subsidize those efforts and undermine deterrence.

The harms SEPs cause to deterrence are confirmed by what appears to be the only study that has quantitatively assessed the impact of SEPs on deterrence. In their 2007 study, Robert Glicksman and Dietrich Earnhart examined the performance of chemical companies under the Clean Water Act.<sup>148</sup> They found that, although SEPs do not undermine specific deterrence, such as the deterrent effect on the company entering into the SEP, they are counterproductive as a general deterrent.<sup>149</sup> This comports with the understanding of SEPs laid out so far. SEPs produce good environmental results for the company performing them but undermine deterrence because the benefits of entering into a SEP decrease the penalty of being caught.

None of these tangible and intangible benefits to companies are bad things in and of themselves. Violators should receive goodwill when they perform beneficial projects in their communities, maintain a margin of safety between their

---

143. See Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing 89 *Yale L.J.* 353, 360 (1979); Carrie Boyd, *Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work?* 32 *WM. & MARY ENVTL. L. & POL'Y REV.* 483, 501 (2008).

144. See U.S. ENV'T PROT. AGENCY, *Civil Enforcement FY 2022 Annual Results* (last updated Dec. 14, 2022), <https://perma.cc/UBB4-A9SW>.

145. See Albert Alschuler, *Two Ways to Think about the Punishment of Corporations* 3-5 (Nw. Univ. Sch. L., Working Paper No. 192, 2009).

146. See Marie A. McKendall & John A. Wagner, III, *Motive, Opportunity, Choice, and Corporate Illegality*, 8 *ORG. SCI.* 624, 624 (1997).

147. While shareholder primacy and the profit motive generally have recently been challenged in corporate law, see LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 12-14 (2012), the profit motive remains a strong and perhaps predominating force within corporations. See JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 57 (2005); Ian B. Lee, *Corporate Law, Profit Maximization and the "Responsible" Shareholder* 10 *STAN. J.L. BUS. & FIN* 31, 31 (2005). But see BUS. ROUNDTABLE, *Our Commitment*, <https://perma.cc/PM6T-K8FN> (last visited May 11, 2023).

148. See Robert L. Glicksman & Dietrich H. Earnhart, *The Comparative Effectiveness of Government Interventions on Environmental Performance in the Chemical Industry*, 26 *STAN. ENV'T L. J.* 317, 322 (2007).

149. See *id.* at 365.

emissions and the violation of environmental laws, and make investments in emerging clean technologies. In fact, many SEPs are projects companies might undertake within a stakeholder-focused “environmental, social and governance” model of shareholder value.<sup>150</sup> But it is bad for the environment when these projects come at the cost of deterrence. When those who violate environmental laws are given penalty reductions for investments in their communities, compliance, or green technology, violators are allowed to subsidize their engagement in these already beneficial activities.

However, it is important to remember the protections that the EPA’s SEP policy provides against these problems. These protections ensure that deterrence cannot be entirely undermined. Critically, in most cases, the cost of a SEP does not count entirely against a penalty. SEPs may not reduce the penalty below the economic benefit that a company receives for non-compliance and 10% of the assessed gravity component.<sup>151</sup> This means that a violator pays *more* total money in a settlement with a SEP than one without, and typically cannot reduce the fine they must pay below the benefit of violating. By reducing the penalty offset and otherwise engaging in review of SEPs, the EPA’s policy in part accounts for the ancillary benefits that a SEP provides a violator but cannot totally obviate their harms to deterrence, especially for the kinds of SEPs discussed above.

Broadly speaking, critics argue that even if the settlement policy provides as much deterrence as a fine, SEPs are bad policy because they encourage settlement.<sup>152</sup> They contend that settling undermines the deterrence effect of environmental enforcement because it avoids an admission of guilt, fails to develop legal doctrine, and converts environmental enforcement into a “transactional, revolving-door affair.”<sup>153</sup>

This point is well taken to the extent that settlement might avoid the negative press that comes with violation of the environmental laws, but it is important to note that settlements can never truly avoid the strong implication that environmental laws were violated.<sup>154</sup> Moreover, the point is largely moot, because although a lack of SEPs might detract somewhat from the rate of settlement, settlement is the norm generally, with or without the use of SEPs.<sup>155</sup>

The real disagreement here is whether the EPA and violators should have a “cooperative” attitude towards one another, or whether such an attitude undermines deterrence. Critics note that violators often prefer SEPs and argue this

---

150. See, e.g., Witold Henisz et al., *Five ways that ESG creates value*, MCKINSEY Q. 3-8, (Nov. 14, 2019), <https://perma.cc/Q65M-6MB5>.

151. U.S. ENV’T PROT. AGENCY, *supra* note 2, at 22.

152. See Buschbacher, *supra* note 118, at 17.

153. *Id.*

154. See Clifford Atiyeh, *Everything You Need to Know about the VW Diesel-Emissions Scandal*, CAR AND DRIVER (Dec. 4, 2019), <https://perma.cc/S6WM-PYLJ> (noting that Volkswagen “is in major trouble for cheating on diesel-emissions tests.”).

155. See generally Galanter & Cahill, *supra* note 16, at 1354.

should be cause for skepticism, lest violators make use of SEPs to undermine deterrence.<sup>156</sup> Supporters of SEPs counter that a strictly combative approach increases resistance from the regulated community and can lead to recalcitrance among violators.<sup>157</sup> Even though SEP critics are correct that deterrence can be undermined by enforcement policy with too much flexibility, SEP supporters are correct that environmental regulation is not a zero-sum game. Consequently, the EPA's current policy, which imposes requirements on SEPs to avoid undermining deterrence, such as ensuring that not all SEP dollars spent are discounted from a penalty, is a reasonable way to split the difference between the values of deterrence and cooperation.

#### B. THE BENEFITS OF SEPS

The benefits of SEPs are widely acknowledged and seldom contested. SEPs can provide a remedy directly to affected communities, not only for the harm at issue in the current enforcement action, as is required of mitigation, but for harm caused in the past by environmental discrimination.<sup>158</sup> Mitigation and other injunctive relief efforts are aimed at restoring the state of a community prior to the harm caused by the violator and stopping the violator from causing future harm by ensuring compliance.<sup>159</sup> SEPs, particularly pollution-reduction SEPs, are not limited by the requirements of mitigation and can therefore go beyond the goals of mitigation and improve the environment of a community above what it was in the past.<sup>160</sup> Not only does this serve to repair communities impacted by environmental racism,<sup>161</sup> but it reinforces any future mitigation by improving the status quo ante on which mitigation will be based.<sup>162</sup>

Using SEPs to not only restore but also improve communities can help counterbalance underfunded or otherwise imperfectly protective enforcement efforts by providing a mechanism for the overprotection of communities that are impacted by environmental harms. For example, in a 1997 SEP, a violator of the Clean Air Act agreed to the cleanup of a local contaminated site located in a majority African American community.<sup>163</sup> Because air pollution is often ephemeral,<sup>164</sup> the violator likely could not have remediated their own past air pollution,

---

156. See Buschbacher, *supra* note 118, at 16.

157. See SUPPLEMENTAL ENVIRONMENTAL PROJECTS: A FIFTY STATE SURVEY WITH MODEL PRACTICES *supra* note 130, at 40; McGarity, *supra* note 128, at 1419.

158. See, discussion *infra* accompanying notes 155-57.

159. See Shinkman, *supra* note 76, at 2-3.

160. See Giordanella, *supra* note 38, at 333.

161. See generally Reynard Loki, 'Sacrifice zones': How people of color are targets of environmental racism, NATION OF CHANGE (Apr. 7, 2021), <https://perma.cc/HBM6-RPPZ>.

162. See Giordanella, *supra* note 38, at 325.

163. See Meredith Flax & Benjamin Wilson, *Use of Supplemental Environmental Projects to Address Environmental Justice*, BEVERIDGE AND DIAMOND, <https://perma.cc/6PEM-2RBQ> (2002).

164. See Aldo Ferreira, *Public Health and Environmental Pollution: Precautionary Paradigms*, 21 *Revista Brasileira em Promoção da Saúde* 69, 70 (2008).



but the performance of a SEP helped address other environmental harms the community faced moving forward. In this way, overprotection of communities corrects the environmental harms to communities caused by under-detection of violations in the same way as putative damages operate to correct the harms to deterrence caused by under-detection.<sup>165</sup>

SEPs also allow a community negatively impacted by a violator's actions to increase its power in the enforcement process. Even though settlement negotiations with the EPA are typically confidential, the EPA encourages a violator's engagement with the impacted community in the selection of a SEP and can engage the community themselves,<sup>166</sup> which serves to increase community participation in and control over enforcement of environmental laws affecting them. Unfortunately, current SEP policy does not require this community input.<sup>167</sup> However, the EPA does typically publish proposed settlements for public comment.<sup>168</sup> This at least allows communities to be made aware of the settlement. Greater involvement of communities, if pursued, allows communities to tailor relief to their own needs and increases the power of disadvantaged communities.<sup>169</sup>

Another advantage of SEPs over mitigation is that they allow recognition of more attenuated causal chains of harm than courts can currently recognize. Although mitigation is a valuable tool, it is limited to those projects that the EPA believes it could obtain in the courts.<sup>170</sup> SEPs have no such limitation, which allows them to address more attenuated environmental harms than those harms directly redressable through mitigation. Because the environment is complex, the court's power to order mitigation as injunctive relief is often more limited than the extent of the actual harm caused by a violation. The Supreme Court has stated that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages, and is often permanent, or at least of long duration, i.e., irreparable,"<sup>171</sup> and many environmental statutes do not contemplate, or have not been recognized as contemplating complete remedial action.<sup>172</sup>

For example, following the Deepwater Horizon oil spill, waste from the spill was disposed of in minority communities.<sup>173</sup> Two of the violators agreed to SEPs that would improve drinking water systems threatened by pollutants from

---

165. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *Yale L. J.* 347, 366-67 (2003).

166. See U.S. ENV'T PROT. AGENCY, *supra* note 2, at 4.

167. U.S. ENV'T PROT. AGENCY, *supra* note 2, at 18; McGarity, *supra* note 128, at 1423-24.

168. See McGarity, *supra* note 128, at 1424.

169. Roberts E. & Dobbins J., *The Role of the Citizen in Environmental Enforcement*, ENVIRONMENTAL LAW INSTITUTE (1992), <https://perma.cc/D2CB-AH6N>.

170. See Shinkman, *supra* note 76, at 3.

171. *Amoco Production v. Village of Gambell*, 480 U.S. 531, 545 (1987). See generally Sara A. Colangelo, *Forging Complete Justice: Equitable Relief in Environmental Enforcement*, 46 *HARV. ENV'T L. REV.* 315, 322, 339 (2022).

172. See Colangelo, *supra* note 171, at 317-18.

173. See Giordanella, *supra* note 38, at 335.

landfills.<sup>174</sup> Another violator agreed to a SEP that required them to purchase coastal land along the gulf and preserve it in perpetuity using conservation easements.<sup>175</sup> These important projects likely could not or would not have been ordered by a court but are available as SEPs.

In sum, SEPs are a valuable tool for advancing environmental justice because they allow the EPA to account for underenforcement of environmental laws, empower communities impacted by environmental harm, and more completely address the harms of environmental violations.

Like many enforcement tools, SEPs are imperfect. Although the threat some SEPs may pose to deterrence is real, so are their benefits to impacted communities and environmental justice. Thus, whereas SEPs are not the “win-win” they are often touted as,<sup>176</sup> neither are they a “lose-lose.” Like all policies, SEPs come with trade-offs. Given the constraints that the EPA currently faces and the importance of attaining environmental justice, SEPs are, on balance, a beneficial tool to protect the environment.

To an extent, trading deterrence for environmental justice, as SEPs do, requires an apples-to-oranges comparison. Although both ultimately affect human health and the environment, SEPs aim to provide communities relief from past and present environmental harms, whereas deterrence aims to prevent harm in the first place. In a perfect world, deterrence, and the EPA’s enforcement efforts, would be sufficiently protective of overburdened communities, and SEPs would be both unhelpful and unnecessary. However, perfect deterrence has not, and perhaps cannot, be reached.<sup>177</sup> SEPs are useful because they directly address the already existing harms that communities face, which cannot be addressed through deterrence alone. Because the EPA’s SEP policy provides significant protection against undermining deterrence, and because SEPs provide an otherwise unavailable form of environmental relief to overburdened communities, the value of SEPs to these communities outweighs the impacts on deterrence that the current SEP policy has.

Importantly, SEPs are beneficial because the EPA currently lacks sufficient capacity to ensure environmental justice,<sup>178</sup> and SEPs help accomplish their mission. If the EPA could ensure environmental justice and the protection of overburdened communities through other means, SEPs would no longer be necessary.

### III. RECOMMENDATIONS FOR CONGRESS

The most straightforward resolution of the debate over SEPs comes from Congress. Congress should explicitly approve or disapprove the use of SEPs and

---

174. *See id.*

175. *See* U.S. ENV’T PROT. AGENCY, *MOEX Offshore 2007 LLC Settlement* (last visited May 11, 2023), <https://perma.cc/B4K9-RPWB>.

176. McGarity, *supra* note 128, at 1414.

177. *See supra* section 1.E.

178. *See supra* section 1.E.

lay out its expectations of the EPA. No matter what Congress decides, clarity on this topic will provide both the EPA and the regulated community with greater certainty and prevent the oscillation of SEP policy from administration to administration.

A. CONGRESS SHOULD APPROVE SEPS, WITH SOME MODIFICATIONS FROM  
CURRENT POLICY

Congress should approve the use of SEPs because they promote environmental justice. Congressional approval of SEPs would solve the EPA's legal headache and alleviate the concern of those who believe SEPs run afoul of Congress' wishes regarding its spending power. For those who oppose SEPs as bad enforcement policy, congressional action on SEPs could reduce the deterrence downsides of the current SEP policy by restricting certain forms of particularly worrisome SEPs, such as profitable SEPs.

As previously discussed, SEPs are a valuable tool. But their current constraints, based on efforts to maintain their legality, are artificial and often imperfectly related to the goals of promoting environmental justice and protecting deterrence. Although Congress could maintain the EPA's SEP policy as-is, it would be better to tailor SEP policy to better accomplish these goals.

To better promote environmental justice, Congress should permit more SEPs that augment current EPA efforts, especially those efforts that directly target environmental justice concerns. For example, Congress could allow SEPs to augment efforts by cities to improve their stormwater infrastructure. These efforts are often funded by EPA grants,<sup>179</sup> and thus could not be augmented with a SEP.<sup>180</sup> This kind of augmentation would often be good policy because the EPA's efforts are presumably directed at the most efficient means of environmental improvement, and because the EPA already has experience evaluating such project's likelihood of success. Thus, allowing support of existing EPA efforts would allow projects to better contribute to environmental justice.

Congress could also decide to allow the EPA greater control and direction over SEP selection and implementation. This would implicate the power of the purse and should be done carefully to avoid the EPA simply using the funds as it sees fit. However, this issue would be mitigated by requiring the EPA to report to Congress on SEPs. Giving the EPA greater control would allow the EPA to ensure that SEPs are not simply being managed as primarily public relations projects. Congress should also require greater community input, which is optional under the current SEP policy and has been critiqued as too insubstantial.<sup>181</sup>

---

179. See U.S. ENV'T PROT. AGENCY, *Green Streets, Green Jobs, Green Towns (G3) Grant Program*, <https://perma.cc/DFL8-TLK3> (last visited May 11, 2023).

180. See U.S. ENV'T PROT. AGENCY, *supra* note 2, at 9-10.

181. See *id.* at 18; McGarity, *supra* note 128, at 1423-24.

Further, Congress should consider curtailing certain kinds of SEPs, such as profitable SEPs and compliance promotion SEPs, or decreasing the penalty reduction they qualify for. This would help avoid the anticompetitive effects of profitable SEPs, or the undermining of deterrence through the ancillary benefits of compliance promotion. Unfortunately, although plenty of ink has been spilled over SEPs, no scholarship has evaluated the value of profitable or compliance-focused SEPs to violators. Because the value of these SEPs is unclear, there is potential for greater tailoring of the penalty reduction to heighten deterrence while still retaining an incentive for companies to include a SEP in their settlement. Furthermore, given the externalities that seem to be imposed on clean technology companies by profitable SEPs,<sup>182</sup> Congress should take a hard look at whether these kinds of SEPs truly advance clean technology.

#### B. CONGRESS COULD INSTEAD BETTER ENSURE ENVIRONMENTAL JUSTICE

If proponents of SEPs within Congress lose support to arguments based on SEPs undermining deterrence, Congress should instead provide greater funding and support to EPA enforcement efforts and environmental justice initiatives to abrogate the need for the use of SEPs.

Although a complete picture of Congress' impact on the EPA's administrative capacity is outside the scope of this Note, Congress has room to improve environmental justice in the federal legal system. Environmental laws are the creation of Congress and can be improved upon to further environmental justice.<sup>183</sup> Additionally, on a year-to-year basis, Congress' principal role in supporting the EPA's enforcement capacity is through funding. Thus, Congress has the potential to help solve the EPA's capacity problems if it does not want to allow SEPs.

If Congress opposes SEPs because they undermine deterrence, Congress should do something to compensate for the detriment to the EPA's environmental justice capacity that would result from disapproval of SEPs. This could take many forms, such as addressing the decline in the EPA's enforcement funding to allow greater protection of underserved communities, providing funds to programs meant to clean up these communities, or even providing the EPA substantive authority and a requirement to pursue environmental justice ends under certain statutes. Meaningfully addressing environmental justice issues in this way would obviate the need for SEPs but is of course harder than just approving SEPs.

#### CONCLUSION

Although imperfect, SEPs are currently the most effective way that EPA enforcement can provide a true remedy to communities harmed by those who violate environmental laws. To support these communities, Congress should permit

---

182. See discussion *supra* accompanying notes 130-34.

183. See, e.g., S. 872, 117<sup>th</sup> Cong. (2021).

the use of SEPs and modify SEP policy to better achieve the goals of environmental justice and avoid undermining deterrence. Alternatively, Congress should bolster enforcement funding and/or environmental protections for these communities to avoid the necessity of SEPs entirely.