

Supplemental Environmental Projects: DOJ's March 2020 Policy showed the Downfalls of a Ban

Madeline McKernan

Follow this and additional works at: <https://scholarship.law.missouri.edu/betr>



Part of the [Law Commons](#)

Recommended Citation

Madeline McKernan, *Supplemental Environmental Projects: DOJ's March 2020 Policy showed the Downfalls of a Ban*, 5 BUS. ENTREPRENEURSHIP & TAX L. REV. 94 ().

Available at: <https://scholarship.law.missouri.edu/betr/vol5/iss1/10>

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in The Business, Entrepreneurship & Tax Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Supplemental Environmental Projects: DOJ's March 2020 Policy showed the Downfalls of a Ban

*Madeline McKernan**

ABSTRACT

In March of 2020, the Department of Justice (“DOJ”) adopted a policy that bars the use of supplemental environmental projects (“SEPs”) in settlements of environmental enforcement suits. A ban on SEPs can drastically impact both companies and the environment. The DOJ repeatedly rolled back the use of SEPs during the Trump Administration, but President Biden reversed the ban placed on SEPs in March 2020 under the previous administration. SEPs have long been used in environmental enforcement suits and have been extremely useful in the settlement process by giving companies more options when entering into settlement agreements, making settlements easier for both sides. The DOJ explained the rationale for this ban as a Constitutional issue, but this claim is unfounded. Over the years, the claim has been that SEPs were in violation of the Miscellaneous Receipts Act because Congress has not explicitly authorized SEPs, but Congress has gone as far as encouraging the use of them but has yet to pass a law regarding the use of SEPs. This means that with every change in administration, there could come a change in the policy regarding SEPs. This article explores the rationale behind this Constitutional issue, and why such a claim is unfounded. It also explores the detrimental impacts another ban could have on companies and the environment.

I. INTRODUCTION

The Department of Justice (“DOJ”) announced on March 12, 2020 that supplemental environmental projects (“SEPs”) will no longer be used as a settlement tool for environmental enforcement actions brought by the Environmental Protection Agency (“EPA”).¹ Then, on February 5, 2021, the Biden administration reversed the policy undoing the ban on SEPs.²³ A SEP is a project intended to benefit the environment and is often included in settlement agreements after a company has violated environmental law.⁴ SEPs are not required, but are voluntarily undertaken and developed by the defendant corporation.⁵ Corporations favor the use of SEPs because they can reduce the amount they pay in civil penalty.⁶ A company will propose an SEP to be included in the settlement agreement, and the EPA can approve or deny the project proposal.⁷ Without SEPs there will be a detrimental impact on company negotiations and the environment when trying to settle environmental wrongdoings.

SEPs have been used as a settlement tool in environmental enforcement actions as early as the 1980s.⁸ Throughout the Trump administration, the DOJ has rolled back their policy on the use of SEPs.⁹ Culminating on March 12, 2020 when the Department of Justice’s Environment and Natural Resources Division (“ENRD”) Assistant Attorney General, Jeffrey Bossert Clark, issued a memorandum stating that provisions in settlements agreements including an SEP should not be used moving forward.¹⁰ The EPA has justified the use of SEPs by stating that “SEPs do not trade penalties for projects because there is no penalty owed to the government until the settlement is finalized.”¹¹ The ENRD believed that this rationale does not justify the use of SEPs under the Miscellaneous Receipts Act, and the EPA has not provided good rationale to justify the continuance of SEPs in the future.¹² The broad policy created in this memorandum does not allow for the EPA to amend their SEP

1. *No More SEPs: New DOJ Policy May Mean Higher Penalties and More Complicated Negotiations in Environmental Cases*, VINSON & ELKINS (April 3, 2020), <https://www.velaw.com/insights/no-more-seps-new-doj-policy-may-mean-higher-penalties-and-more-complicated-negotiations-in-environmental-cases/> [hereinafter *No More SEPs*].

2. Memorandum from Jean E. Williams, U.S. DEPT. OF JUSTICE: ENV’T AND NATR’L RES. DIVISION (Feb. 4, 2021), <https://www.justice.gov/enrd/page/file/1364716/download> [hereinafter Memorandum from Jean E. Williams].

3. See generally Steven Bonorris et al., *Environmental Enforcement in Fifty States: The Promise and Pitfalls of Supplemental Environmental Projects*, 11 *Hastings W.-N.W. J. Env. L. & Pol’y* 185, 203 (2005) (describing the benefits of SEP use).

4. *Supplemental Environmental Projects (SEPs)*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/enforcement/supplemental-environmental-projects-seps> (last visited March 12, 2021).

5. *Id.*

6. *No More SEPs*, *supra* note 1.

7. *Supplemental Environmental Projects (SEPs)*, *supra* note 4.

8. Stephen Lee, *Justice Department Ends Use of Environmental Settlements Tools*, BLOOMBERG LAW (March 13, 2020), <https://news.bloomberglaw.com/environment-and-energy/justice-department-ends-use-of-environmental-settlements-tool>.

9.

10. Memorandum from Jeffrey Bossert Clark, ENRD Assistant Attorney General to ENRD Deputy Assistant Attorney Generals and Section Chiefs, U.S. Department of Justice Environment and Natural Resources Division 1-2 (March 12, 2020) (on file with the DOJ) [hereinafter Memorandum from Jeffrey Bossert Clark].

11. *Id.*

12. *Id.*

policy in order to come into compliance with the new guidelines set forth by the DOJ because the memorandum rejects the very basis on which the EPA supports SEPs.¹³ This decision had consequences for companies who could no longer implement these improvement projects as part of their settlement agreements, as well as the environment itself, which benefited from such projects.¹⁴ Future policies similar to this Trump-era policy would be detrimental to the environment.¹⁵

In the past, many notable companies, such as BP and Volkswagen, have taken advantage of SEPs in settling their environmental enforcement actions.¹⁶ However, SEPs have also been subject to criticism over the years, often times involving the location where the SEP is taking place or the inadequacy of the penalty given out to the corporation.¹⁷ Supporters of SEPs believe that the use of SEPs in settlements are a more beneficial allocation of funds than placing the money with the U.S. Treasury because SEPs are intended to make amends for environmental harm caused by companies.¹⁸

This article explores the impact on the environment and corporations caused by the Trump administration's decision to end the use of SEPs in environmental enforcement suits. It serves as a cautionary tale for any future considerations to ban SEPs. Ending the use of SEPs in enforcement suits for environmental violations is not only bad for the environment, but also for businesses wanting to use SEPs in settlement negotiations. Part II of this article examines background information about SEPs and talks about notable examples of SEPs and the controversies surrounding SEPs. Part III examines how the DOJ and the EPA have treated SEPs, which led to the eventual rollback on SEPS and why this decision to end the use of SEPs should not be repeated by another administration in the future. Part IV examines how the environment and corporations are impacted from ending the use of SEPs in settlement negotiations for environmental enforcement actions. Part V looks at current litigation and its potential impact on the future of the recent policy change banning SEPs.

II. BACKGROUND ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

A. Use of Supplemental Environmental Projects

SEPs have been used by the EPA and corporations to settle environmental enforcement suits for nearly thirty years.¹⁹ SEPs are not required by law,²⁰ but

13. John C. Cruden, et al., *So Long to SEPs*, NAT'L LAW REV. (March 16, 2020), <https://www.natlaw-review.com/article/so-long-to-SEPs>.

14. See generally Bonorris, et al., *supra* note 3, at 203 (describing the benefits of SEP use).

15. *Id.*

16. See generally, Eric Schaeffer & Kira Burkhart, *House Bill Bans Future VW-Style Settlements* ENVTL. INTEGRITY PROJECT 1, 3 (June 1, 2017), <https://www.environmentalintegrity.org/wp-content/uploads/2017/06/Environmental-Settlements-Report.pdf>.

17. Lee, *supra* note 8; see also *United States v. Antofina Chems.*, 2002 U.S. Dist. LEXIS 15137* (E.D. Penn Aug. 5, 2002); *United States v. Global Partners LP*, 2019 U.S. Dist. Lexis 218292 (D. Me. Dec. 19, 2019).

18. Cruden, et al., *supra* note 12.

19. See Lee, *supra* note 8.

20. Hana Vizcarra & Laura Bloomer, *DOJ Phases Out Supplemental Environmental Projects in Environmental Enforcement*, HARVARD ENVIRONMENTAL & ENERGY LAW PROGRAM (Aug. 6, 2020),

companies often want to complete community or environmental development projects in order to settle their claims of environmental infractions.²¹ These projects can be completed by companies in exchange for a lessened civil penalty.²² Many companies have taken advantage of SEPs in settlements for environmental enforcement suits.²³ The 2010 explosion of BP's Deep Water Horizon rig and corresponding oil spill caused significant environmental damage in the Gulf of Mexico when 200 million gallons of oil flowed into the Gulf of Mexico over a span of about three months.²⁴ In 2012, the lawsuit involving BP ended with a settlement agreement requiring them to pay \$350 million to help restore the Gulf shore and minimize impacts of future oil spills as an SEP that was included in the settlement agreement.²⁵ The reason BP engaged in so much shore clean up after the oil spill was a result of an SEP included in the settlement.²⁶

In June of 2016, Volkswagen entered into a settlement agreement following an action brought against them for violating the Clean Air Act after the company knowingly installed defeat devices on about 600,000 diesel powered vehicles.²⁷ A defeat device is a device installed in the engine of a car that allows the engines to be programmed to meet emission standards during the testing phase, but when the car is driving normally, the devices shut off, so the cars no longer meet emission standards.²⁸ In order to offset the environmental damage, a SEP required Volkswagen to invest \$4.7 billion in green vehicle technology in addition to the \$10.03 billion paid to compensate consumers for the buyback program for the affected vehicles.²⁹

Another environmental enforcement suit including a SEP in the settlement agreement occurred when Tyson Food violated the Clean Air Act back in 2006.³⁰ The EPA found that Tyson failed to comply with chemical accident prevention provisions under the Clean Air Act.³¹ After Tyson accidentally released anhydrous

<https://eelp.law.harvard.edu/2020/08/doj-phases-out-supplemental-environmental-projects-in-environmental-enforcement/>.

21. Tatiana Schlossberg & Hiroko Tabuchi, *Settlements for Company Sins Can No Longer Aid Other Projects, Sessions Says*, N. Y. TIMES June 10, 2017, at A1.

22. Francis X. Lyons, *DOJ Policy Review of SEPs May Have Big Implications for Company Environmental Settlements*, NAT'L LAW REV. (Oct. 7, 2019), <https://www.natlawreview.com/article/doj-policy-review-SEPs-may-have-big-implications-company-environmental-settlements>.

23. See e.g. Campbell Robertson, et al., *\$18.7 Billion Deal with NP in Gulf Oil Spill*, N. Y. TIMES July 3, 2015, at A1, B7; *Volkswagen to Spend up to \$14.7 Billion to Settle Allegation of Cheating Emissions Tests and Deceiving Customers on 2.1 Liter Diesel Vehicles*, FED TRADE COMM'N (June 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating> [hereinafter *Volkswagen to Spend \$14.7 Billion*]; *Tyson Foods, Inc. Clean Air Act (CAA) Settlement*, U.S. ENVT'L. PROT. AGENCY (April 5, 2013), <https://www.epa.gov/enforcement/tyson-foods-inc>.

24. Campbell Robertson, et al., *supra* note 21.

25. Schaeffer & Burkhart, *supra* note 14, at 3.

26. *Id.*

27. *Id.* at 1.

28. Richard Epstein, *The Role of Defeat Devices in Environmental Protection: Beyond the VW Scandal*, FORBES (Sept. 27, 2012), <https://www.forbes.com/sites/richardepstein/2017/09/27/the-role-of-defeat-devices-in-environmental-protection-beyond-the-vw-scandal/?sh=20841bb252e1>.

29. *Volkswagen to Spend \$14.7 Billion*, *supra* note 21.

30. *Tyson Foods, Inc. Clean Air Act (CAA) Settlement*, *supra* note 21.

31. *Tyson Foods and Ammonia*, ENVT'L. NEWS NETWORK (April 8, 2013), <https://www.enn.com/articles/45831-tyson-foods-and-ammonia>.

Ammonia³² into the air at facilities in Kansas, Missouri, Iowa, and Nebraska that resulted in injuries, property damage, and one death, Tyson's settlement agreement with the EPA included a civil penalty of \$3.95 million and a SEP.³³ The SEP required Tyson to put at least \$300,000 toward the purchase of anhydrous ammonia emergency response equipment for fire departments in eight communities where Tyson operated.³⁴

The EPA is in charge of bringing civil administrative actions against companies without intervention from the courts.³⁵ The EPA reports cases to the DOJ if they want to enforce civil judicial penalties or criminal sanctions against the company.³⁶ In some situations, the EPA is *required* to report cases to the DOJ.³⁷ Even when not required, the EPA will often report cases to the DOJ on their own.³⁸ The EPA does this because when the court approves a settlement agreement, it becomes a consent decree that is enforceable by a motion to the court.³⁹ Civil judicial actions are filed against companies that failed to meet the statutory or regulatory requirements, failed to comply with an administrative order, or did not pay the EPA costs for cleanup.⁴⁰ A company wanting to use a SEP in their settlement has the task of submitting their SEP to the EPA and the EPA has the right to reject it.⁴¹ When determining whether an SEP is appropriate to be included in a settlement, the SEP must have an adequate nexus to the violation of the company, cannot duplicate remedies, and should use community input in determining the project.⁴²

Congress never explicitly authorized the EPA's use of SEPs in environmental enforcement suits, but because Congress did authorize the EPA to enforce federal environmental statutes, the EPA saw itself as implicitly authorized to implement the use of SEPs in civil enforcement actions.⁴³ In 1984, the EPA issued its first policy regarding SEPs, which have been used as a settlement tool in environmental enforcement actions ever since.⁴⁴ The 1984 policy, they had not yet defined SEPs and referred to them as alternative payment projects that are beneficial to the environment in their policy on civil penalties.⁴⁵ Notably, Congress has never

32. *Settlement with Tyson Foods to Address Multiple Releases of Anhydrous Ammonia*, U.S. ENTVL. PROT. AGENCY (April 5, 2013), https://archive.epa.gov/epapages/newsroom_archive/news-releases/bcca021f79474f0885257b44004dee6d.html (Anhydrous ammonia is a poisonous gas that is commonly used in industrial refrigeration systems.).

33. *Tyson Foods, Inc. Clean Air Act (CAA) Settlement*, *supra* note 21; *Settlement with Tyson Foods to Address Multiple Releases of Anhydrous Ammonia*, *supra* note 30.

34. *Tyson Foods, Inc. Clean Air Act (CAA) Settlement*, *supra* note 21; *Settlement with Tyson Foods to Address Multiple Releases of Anhydrous Ammonia*, *supra* note 30.

35. *See No More SEPs*, *supra* note 1.

36. *See id.*

37. *See id.*

38. *See* Justice Manual Title 1-21.100(a).

39. *See* Justice Manual Title 1-21.100(a).

40. *Basic Information on enforcement*, U.S. ENTVL. PROT. AGENCY, <https://www.epa.gov/enforcement/basic-information-enforcement#:~:text=Enforcing%20environmental%20laws%20is%20a,against%20violators%20of%20environmental%20laws> (last updated Jan. 13, 2021).

41. *Id.*

42. *United States v. Atofina Chems.*, 2002 U.S. Dist. LEXIS 15137, *15-16 (E.D. Pa. 2002).

43. Bonorris, et al., *supra* note 3, at 197.

44. Caleb J. Holmes & Bernadette M. Rappold, *New lawsuit Challenges DOJ Policy Prohibiting SEPs*, NAT'L LAW REV. (Oct. 14, 2020), <https://www.natlawreview.com/article/new-lawsuit-challenges-doj-policy-prohibiting-seps>.

45. *Policy on Civil Penalties*, U.S. ENTVL. PROT. AGENCY 24-25 (Feb. 16, 1984), <https://19january2017snapshot.epa.gov/sites/production/files/documents/epapolicy-civilpenalties021684.pdf>.

disapproved of using SEPs as a settlement tool in environmental enforcement suits.⁴⁶ In a 2018 statute, called America's Water Quality Infrastructure Project, Congress even directed the EPA to promote Green Infrastructure projects, which are sometimes included in SEPs.⁴⁷ In 1998, the EPA implemented a policy regarding the use of SEPs in environmental enforcement actions which was later updated in March of 2015.⁴⁸

B. Controversies Surrounding the Use of Supplemental Environmental Projects

SEPs are considered controversial when implemented in environmental enforcement suits.⁴⁹ A recent example of this is a 2019 suit against Global Partner LP ("Global Partners") for violating the Clean Air Act by not obtaining the required licenses for volatile organic compounds ("VOC") amongst other infractions.⁵⁰ Global Partners ultimately entered into a consent decree, the term for a settlement agreement in judicial actions,⁵¹ that required Global Partners to put at least \$150,000 into an SEP to improve the local air quality, as well as pay a \$40,000 civil penalty.⁵² The settlement agreement was controversial because the public thought that a \$40,000 penalty was inadequate compared to the pollution caused.⁵³ Critics thought that such a penalty would not deter companies from committing future environmental violations and the SEP did not address Global Partner's actual emissions violation.⁵⁴ The court ultimately granted the motion to enter the consent decree and indicated SEPs were not intended to address the emission violation of Global Partners but to go beyond what could be legally required for the company to return to compliance, thus the consent decree was consistent with the objectives of the Clean Air Act.⁵⁵

Another example of a controversial SEP is the 2002 case of *United States v. Atofina Chemicals*.⁵⁶ Atofina Chemicals ("Atofina") violated environmental protection laws when it failed to comply with statutes and regulations at multiple chemical processing facilities.⁵⁷ The EPA and Atofina entered into a settlement agreement requiring Atofina to pay a reduced civil penalty of \$1.9 million because Atofina agreed to perform an SEP in Mobile, Alabama at the cost of \$300,000.⁵⁸ None of the plants that committed environmental wrongdoings were located in

46. Joel Mintz, *Abolition of Supplemental Environmental Projects: A Damaging Retreat for Environmental Enforcement*, THE CTR. FOR PROGRESSIVE REFORM (Sept. 16, 2019), <http://progressivereform.org/cpr-blog/abolition-of-supplemental-environmental-projects-a-damaging-retreat-for-environmental-enforcement/>.

47. *Id.*

48. *Supplemental Environmental Projects (SEPs)*, *supra* note 4.

49. Lee, *supra* note 8.

50. *United States v. Global Partners LP*, 2019 U.S. Dist. Lexis 218292, *2-3 (D. Me. Dec. 19, 2019).

51. *Basic Information on Enforcement*, *supra* note 37.

52. *Global Partners LP*, 2019 U.S. Dist. Lexis 218292 at *5-6.

53. *Id.*

54. *Global Partners LP*, 2019 U.S. Dist. Lexis 218292 at *7.

55. *Id.* at *20-21.

56. *Atofina Chemicals*, 2002 U.S. Dist. LEXIS 15137 (E.D. Penn Aug. 5, 2002).

57. *Id.* at *2-6.

58. *Id.* at *7.

Mobile, Alabama.⁵⁹ Since SEPs require community input,⁶⁰ the proposed consent decree was published for public comment.⁶¹ During the comment period, a nonparty community group objected to the SEP because no projects would be performed in their community, which was impacted by Atofina's wrongdoing.⁶² The court held that despite not receiving community input for project design, the consent decree should be entered because it was fair, adequate, and reasonable to resolve the action and the consent decree served the public interest.⁶³

In these two cases, the court allowed the companies to pay a reduced civil penalty in exchange for their commitment to perform an SEP.⁶⁴ Both courts determined that the settlement agreements including SEPs were fair, adequate, and reasonable.⁶⁵ This conclusion by the court in both cases supports the idea that SEPs serve some sort of public interest because of their impact on the environment.

C. Supplemental Environmental Projects are Notable for their Positive Impacts

SEPs were still being used in settlement agreements until the March 2020 ban, despite the controversies surrounding SEPs.⁶⁶ Support for SEPs is widespread throughout the country, and, as of 2005, 30 out of the 50 states have now enacted their own SEP policies at the state level.⁶⁷ SEPs are seen as mutually beneficial when they are implemented correctly, because the citizen or government plaintiff receives the benefits of restoration and prevention, while the defendant company pays a lower penalty.⁶⁸ Also, the environment itself benefits because this money is guaranteed to go toward improving the environment.⁶⁹ SEPs are a preferable alternative to the traditional model of deterrence because they encourage self-reporting of violations, involve the impacted community in remedying the violation, and create solutions to environmental problems.⁷⁰ Due to this, SEPs are popular with environmental groups, community organizations, and defendants.⁷¹

59. *Id.* at *2-6.

60. *Id.* at *15-16.

61. *Id.* at *1.

62. *Id.* at *8-9.

63. *Id.* at *20.

64. *See id.* at *20; *Global Partners LP*, 2019 U.S. Dist. Lexis 218292 at *5-6.

65. *Antofina Chems.*, 2002 U.S. Dist. LEXIS 15137 at *20; *Global Partners LP*, 2019 U.S. Dist. Lexis 218292 at *22.

66. *See e.g.* Campbell Robertson, et al., *supra* note 21; *Volkswagen to Spend \$14.7 Billion*, *supra* note 21; *Tyson Foods, Inc. Clean Air Act (CAA) Settlement*, *supra* note 21.

67. Bonorris, et al., *supra* note 3, at 188.

68. Kenneth T. Kristl, *Making a Good Idea Even Better: Rethinking the Limits on Supplemental Environmental Projects*, 31 VT. L. REV. 217, 218 (2017).

69. *Id.*

70. Bonorris, et al., *supra* note 3, at 187. The traditional model has regulators imposing monetary penalties on violators.

71. Thomas O. McGarity, *Remedies in Complex Litigation: Supplemental Environmental Projects in Complex Environmental Litigation*, 98 TEX. L. REV. 1405, 1413 (June 2020).

III. DOJ AND EPA TREATMENT OF SEPS

Under the Trump administration, the DOJ slowly rolled back the use of SEPs starting in 2017.⁷² The DOJ opposed the use of SEPs in settling environmental enforcement cases.⁷³ In 2017 and 2018, a memorandum was released by the U.S. Attorney General banning the use of SEPs that required payment to non-governmental or third-party organizations.⁷⁴ The November 2018 memorandum generally prohibited the use of consent decrees that allowed for different relief than could be received through enforcement by agencies or litigation ending in a judgment.⁷⁵ The November 2018 memorandum changed the policy regarding the use of SEPs in consent decrees and settlement agreements when it involved state and local governments.⁷⁶ The DOJ indicated that SEPs should not be used in order to further policy goals of granting alternative relief.⁷⁷ Then, in 2019, the policy was expanded, and a new memorandum was issued prohibiting SEPs in settlements at the federal level when cases involved state and local governments.⁷⁸

On March 12, 2020, ENRD Assistant Attorney General Clark released a memorandum creating a new policy prohibiting the use of SEPs in civil judicial settlements with the exception of diesel emissions reduction projects in conjunction with violations of the Clean Air Act.⁷⁹ The memorandum stated that “Civil penalties are money for the government within the meaning of the Miscellaneous Receipts Act.”⁸⁰ The Miscellaneous Receipts Act is important to the discussion of SEPs because it provides that a government official who receives money for the U.S. Government must deposit it into the Treasury without any deductions.⁸¹ The 2020 memorandum further provides that “attempts in consent decrees and settlement agreements to divert cash from the Treasury to third parties have long been deemed improper and inconsistent with the Miscellaneous Receipts Act, absent authorization from Congress.”⁸²

The March 2020 memorandum barred the use of SEPs as a negotiation tool in settlements for EPA cases.⁸³ The government argues that settlement agreements involving the use of SEPs are a violation of the Miscellaneous Receipts Act because they divert money away from the U.S. Treasury to third parties and because civil penalties are intended to be “money for the Government.”⁸⁴ The memorandum

72. *No More SEPs*, *supra* note 1.

73. Mintz, *supra* note 41.

74. Sara Chamberlain & Tim Briscoe, *DOJ curtails use of supplemental environmental projects in environmental settlements*, THOMAS COBURN, LLP (October 24, 2019), <https://www.thompsoncoburn.com/insights/publications/item/2019-10-24/doj-curtails-use-of-supplemental-environmental-projects-in-environmental-settlements>.

75. Mintz, *supra* note 41.

76. Gwendolyn Keyes Fleming, et al., *Legal Challenges to Federal Ban on SEPs May Result in Change in Enforcement Policy*, NAT'L LAW REV. (Oct. 15, 2020), <https://www.natlawreview.com/article/legal-challenge-to-federal-ban-seps-may-result-change-enforcement-policy>.

77. *See id.*

78. Chamberlain and Briscoe, *supra* note 71.

79. *Supplemental Environmental Projects (SEPs)*, *supra* note 4.

80. Memorandum from Jeffrey Bossert Clark, *supra* note 9 at 1.

81. *See Applicability of the Miscellaneous Receipts Act to an Arbitral Award of Legal Costs*, JUSTICE.GOV 1 (March 6, 2018), <https://www.justice.gov/olc/file/1078036/download>.

82. Memorandum from Jeffrey Bossert Clark, *supra* note 9 at 1.

83. *Id.* at 18.

84. *Id.* at 1.

states that “SEPs remain legally suspect and are in serious tensions with important aspects of our constitutional tradition,” confirming the overall disapproval of this practice by the Trump administration⁸⁵

Despite claims to the contrary, SEPs do not violate the Miscellaneous Receipts Act because mitigation, which is the purpose of an SEP, is allowed under the Act.⁸⁶ The EPA requires that an SEP have an adequate nexus to the environmental violation so they do not run into problems involving violations of the Miscellaneous Receipts Act.⁸⁷ The EPA stated in a 2002 memorandum that “an adequate nexus is important because it ensures that the Agency [EPA] complies with the SEP Policy and the requirements of the MRA [Miscellaneous Receipts Act].”⁸⁸ The EPA has taken steps to ensure that the SEP policy does not run into issues with the Miscellaneous Receipts Act.⁸⁹ The EPA does not have the discretion to accept an SEP in a settlement agreement without the nexus requirement being met.⁹⁰

In *Sierra Club v. Electronic Controls Design*, Sierra Club appealed the trial court’s refusal to enter a proposed consent decree after Electronic Controls Design (“Electronic Controls”) allegedly violated the Clean Water Act.⁹¹ The United States objected to the proposed consent decree that required Electronic Controls to pay \$45,000 to private environmental organizations to maintain water quality, and the trial court refused to enter the consent decree after determining that it was a civil penalty, and the Clean Water Act only allows civil penalties if they are paid to the U.S. Treasury.⁹² Importantly, in coming to this decision, the trial court recognized that Congress encourages the use of projects that put money directly to environmental protection; this reinforces the idea that SEPs are a known and accepted practice in settlements for environmental wrongdoings.⁹³ The Ninth Circuit Court of Appeals reversed this decision stating that this was not considered a civil penalty because the organization never admitted liability, nor was liability judicially established for negotiation of the settlement agreement.⁹⁴ This is significant because, when using SEPs, parties attempt to make certain that SEPs are never considered penalties, and therefore do not need to be given directly to the U.S. Treasury as required by the Miscellaneous Receipts Act.⁹⁵ The best way to ensure that an SEP is not considered a penalty is to negotiate the settlement before there is finding of liability.⁹⁶ Advocates for SEPs argue that because the money never actually reaches federal officials, it is not being diverted from the U.S. Treasury, and therefore, does not violate the Miscellaneous Receipts Act.⁹⁷

85. *Id.* at 8.

86. Kristl, *supra* note 65, at 252.

87. *Id.*

88. Memorandum from Walker B. Smith, U.S. ENVTL. PROT. AGENCY 2 (Oct. 31, 2002), <https://www.epa.gov/sites/production/files/documents/SEPnexus-mem.pdf>.

89. *See generally id.*

90. *Id.* at 2.

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

92. *Id.* at 1352.

93. *Id.* at 1353.

94. *Id.* at 1353, 1356.

95. Douglas Rubin, *How Supplemental Environmental Projects Can and Should be Used to Advance Environmental Justice*, 10 U. MD. L.J. RACE RELIG. GENDER & CLASS 179, 190 (2010).

96. *Id.*

97. Rachel Frazin, *Feds sued over no longer allowing polluters to pay for environmental projects*, THE HILL (Oct. 8, 2020, 6:05 PM), <https://thehill.com/policy/energy-environment/520286-feds-sued-over-no-longer-allowing-polluters-to-pay-for>.

The Trump administration's ban on SEPs was not the first time that a change in policy was attempted.⁹⁸ In 2017 the House of Representatives passed the "Stop Settlement Slush Fund Act of 2017," which would have barred SEPs in settlements for environmental enforcement actions.⁹⁹ Had the Senate passed the bill, the ban on SEPs in settlement agreements would have been made permanent, leaving no room for future executives to change the policy.¹⁰⁰ As a result, the ban on SEPs would have been more difficult to overturn in the future.¹⁰¹ Even though the bill ultimately did not pass in the Senate, the ban on SEPs was still a DOJ policy based on the June 2017 memorandum and the following updates leading to the March 2020 memorandum.¹⁰² The March 2020 memorandum extended the ban and made it clear that the DOJ would no longer enforce settlement agreements involving the United States as a party that includes SEPs.¹⁰³ The most recent memorandum issued by Jean E. Williams, ERND Deputy Assistant Attorney General, on February 4, 2021, rescinds the March 2020 Memorandum and reinstates the SEP policy used pre-Trump era.¹⁰⁴ Congress has the power to end this debate, if they once and for all authorize the use of SEPs by statute, ending any argument that SEPs are in violation of the Miscellaneous Receipts Act.¹⁰⁵ Congress has the ability to divert funds that were otherwise intended to go to the U.S. Treasury, but Congress has yet to put forth a statute authorizing the use of SEPs.¹⁰⁶ It does not seem like this will occur anytime soon.¹⁰⁷

IV. DOJ'S BAN ON SEPS IS HARMFUL TO BOTH COMPANIES AND THE ENVIRONMENT

The decision by the federal government to end the use of SEPs impacts both the environment and the companies that wish to use SEPs in settling environmental enforcement actions.¹⁰⁸ For many years, SEPs companies have supported SEPs, nongovernmental organizations, and the federal government because they have environmental benefits and simplify settlement negotiations.¹⁰⁹

98. *Goodlatte Bill to Halt Settlement Slush Funds Passes House*, H.R. JUDICIARY COMM. (Oct. 24, 2017), <https://republicans-judiciary.house.gov/press-release/goodlatte-bill-halt-settlement-slush-funds-passes-house/>.

99. *Id.*; Schaeffer & Burkhart, *supra* note 14, at 2.

100. *See Goodlatte Bill to Halt Settlement Slush Funds Passes House*, *supra* note 95.

101. Schlossberg & Tabuchi, *supra* note 19.

102. *See id.*

103. Caleb J. Holmes, *DOJ's Attack on 'Supplemental Environmental Projects' Extends to Citizen Plaintiffs*, NAT'L LAW REV. (July 16, 2020), <https://www.natlawreview.com/article/doj-s-attack-supplemental-environmental-projects-extends-to-citizen-plaintiffs>.

104. *See* Memorandum from Jean E. Williams, *supra* note 2 at 1-2.

105. Laurie J. Sands, *DOJ Policy Invalidates Special Environmental Projects in Settlements but Private Parties May Have Other Options*, RIKER DANZIG, <https://riker.com/print/publications/doj-policy-invalidates-special-environmental-projects-in-settlements-but-private-parties-may-have-other-options> (last updated December 2020).

106. *Id.*

107. *See* Schaeffer & Burkhart, *supra* note 14, at 2.

108. *See generally* Bonorris, et al., *supra* note 3, at 203 (describing the benefits of SEP use).

109. Cruden, et al., *supra* note 12.

A. The ban on SEPs is harmful to companies and detrimental to the settlement process

SEPs are a popular tool among companies and environmentalists.¹¹⁰ There are many reasons corporations are inclined to take advantage of SEPs when negotiating settlement in environmental enforcement suits.¹¹¹ Companies prefer the use of SEPs because they benefit both the companies and the environment.¹¹² One of the most obvious impacts of a ban on SEPs is that companies would face larger civil penalties for their environmental violations, and companies would like to avoid this in order to save money.¹¹³ This is because companies will no longer be allowed to reduce their civil penalties by including an SEP in their settlement agreement.¹¹⁴ SEPs allow companies to reduce their civil penalties by up to 80 percent.¹¹⁵ Settlements without SEPs can face higher civil penalties as well as increased costs for injunctive relief.¹¹⁶

Another benefit for companies is that SEPs can sometimes result in profit for the company.¹¹⁷ In 2003, the EPA updated their policy to allow profitable SEPs as long as the SEP does not become profitable to the company before 5 years has passed, as long as projects are evaluated to determine that the benefits to the public health or the environment warrant allowing this.¹¹⁸ This could incentivize companies trying to use SEPs in environmental enforcement cases.

Without SEPs, companies will have less flexibility when negotiating settlements.¹¹⁹ SEPs allow companies to focus more on the settlement agreement rather than the potential civil penalties they will have to pay, often decreasing negotiation time and decreasing court costs.¹²⁰ Generally, the EPA's flexibility in negotiation is directly correlated to how favorably the EPA regarded a proposed SEP.¹²¹ By banning the use of SEPs, negotiations will ultimately take more time and end up costing more money.¹²² Additionally, companies will pay larger out-of-pocket costs due to

110. McGarity, *supra* note 68, at 1413.

111. Francis X. Lyons, *Insight: Three Questions Companies Face About SEPs and Environmental Enforcement*, BLOOMBERG LAW (Nov. 21, 2019, 3:00 AM), <https://news.bloomberglaw.com/environment-and-energy/insight-three-questions-companies-face-about-SEPs-and-environmental-enforcement>.

112. *Id.*

113. See *SEParating from Tradition: Justice Department Prohibits Use of Supplemental Environmental Projects to Resolve Civil Enforcement Actions and Eyes Additional Policy Change*, AKIN GUMP 2 (April 2, 2020), <https://www.akingump.com/a/web/55sGwRCjWKQTZDehrPRhvU/cSEHh/environment-alert-separating-from-tradition-justice-department-prohibits-use-of-supplemental-environmental-projects-to-resolve-civil-enforcement-actions-and-eyes-additional-policy-change.pdf>.

114. *No More SEPs*, *supra* note 1.

115. *Id.*

116. *Id.*; David Markel, *EPA Enforcement: A heightened emphasis on mitigation relief*, ABA (March 1, 2014), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2013-14/march-april-2014/epa_enforcement_heightened_emphasis_mitigation_relief/. Injunctive relief for environmental enforcement actions requires companies to perform certain projects to come into compliance with environmental laws after a violation, which is different from performing an SEP.

117. See Bonorris, et al., *supra* note 3, at 194.

118. Memorandum from John Peter Suarez, U.S. ENVTL. PROT. AGENCY 2-3 (Dec. 5, 2003), <https://www.epa.gov/sites/production/files/2018-10/documents/seps-profitableprojectstab10.pdf>.

119. See *No More SEPs*, *supra* note 1.

120. McGarity, *supra* note 68, at 1413.

121. Lyons, *supra* note 108.

122. *Id.*

higher civil penalties.¹²³ The Memorandum promulgated by Attorney General Clark recognized that SEPs simplify settlement negotiations because corporations are more prone to agree on settlements when they believe it will generate goodwill with the public.¹²⁴ This is another reason why SEPs are important to corporations when settling environmental enforcement suits.

Another benefit for companies entering into SEPs during settlement agreements is the positive publicity a company can receive.¹²⁵ Companies can say that they are sponsoring projects that benefit the public and the environment.¹²⁶ Companies favor including SEPs because they can publicize the required projects as a mitigation effort producing concrete environmental benefits.¹²⁷ This helps repair the credibility of the company with the community, which is a better alternative to paying a civil penalty.¹²⁸ In Attorney General Clark's memorandum from March 2020, he acknowledges that SEPs create goodwill between corporations and the communities that were affected by the environmental wrongdoings because these SEPs benefit the impacted communities.¹²⁹ Many companies prefer to include a SEP in the settlement agreement because it will help preserve a positive image in the community after environmental wrongdoing.¹³⁰

Not only can there be future negative implications to any drawback of SEPs by the DOJ, but there were also present negative implications of this updated policy as well. The policy is not retroactive, but it impacted negotiations in the mist of settling when the ban went into place, no matter how close they are to settling because the ban was effective immediately.¹³¹ Companies who were settling environmental cases when the ban went into effect could not include previously negotiated SEPs, so negotiators had to restart the negotiation process to create a new settlement agreement.¹³² *United States v. DTE Energy Corporation* is an example of a settlement agreement where the parties were required to change the terms of the agreement after the new policy went into effect.¹³³

In August 2010, the United States filed a lawsuit on behalf of the EPA alleging that DTE Energy Corporation ("DTE") violated the Clean Air Act because they failed to obtain the necessary permits before starting construction on a major modification to their coal-fired generating unit.¹³⁴ After nearly 10 years of litigation, this

123. *Id.*

124. Memorandum from Jeffrey Bossert Clark, *supra* note 9, at 16.

125. Joel Mintz, *Citizen Suits, Environmental Settlements, and the Constitution: Part I*, THE CTR. FOR PROGRESSIVE REFORM (Sep. 14, 2020), <https://progressivereform.org/cpr-blog/citizen-suits-environmental-settlements-constitution-part-i/>.

126. *Id.*

127. John Mizerak, *DOJ Moves to Eliminate Supplemental Environmental Projects from Settlements*, COVINGTON (March 31, 2020), <https://www.insideenergyandenvironment.com/2020/03/doj-moves-to-eliminate-supplemental-environmental-projects-from-settlements/>.

128. *Id.*

129. Memorandum from Jeffrey Bossert Clark, *supra* note 9, at 16.

130. Mintz, *supra* note 41.

131. Cruden, et al., *supra* note 12.

132. Vizcarra & Bloomer, *supra* note 18.

133. *Id.*

134. *United States v. DTE Energy Co.*, 711 F.3d 643, 746-49 (6th Cir. 2017) (Rogers, J., dissenting); Art Fraas et al., *EPA's New Source Review Program: Time for Reform?*, 47 ELR 1026, 1028 (January 2017) ("The Clean Air Act requires that, before a company can construct a new industrial facility or expand an existing facility in the United States, it must first go through the New Source Review permitting process and obtain that, ensures that the new or expanded facility will employ up-to-date pollution control technology.").

case was almost resolved when the parties entered into a consent decree. However, DTE was not able to proceed with the originally agreed upon settlement terms because the DOJ changed its policy on SEPs on March 12, 2020.¹³⁵ The DOJ then refused to include the consent decree with the SEP agreed upon in the original settlement agreement before the March 2020 ban went into effect.¹³⁶ The consent decree that the parties ultimately agreed on required DTE to pay a civil penalty and required DTE to reduce pollution at its coal-fired power plants as injunctive relief.¹³⁷ The \$2 million community-based environmental project, originally included before the DOJ's new policy was issued, was removed.¹³⁸

The failure to include a SEP in the final agreement caused Sierra Club to intervene and ask the court to enter a separate agreement requiring the aSEP that was agreed upon before the DOJ policy change.¹³⁹ The Sierra Club was able to enter the suit as an intervenor as part of the citizen suit provision in the Clean Air Act.¹⁴⁰ Sierra Club filed a motion in the United States District Court for the Eastern District of Michigan to enter an agreement between Sierra Club and DTE that required DTE to commit to funding a \$2 million community environmental project, and retire power plants, which were not included in the consent decree entered by the court.¹⁴¹ This was similar to the original consent decree before the policy change regarding SEPs.¹⁴² The court rejected the motion stating that private settlement agreements should not be entered by the court.¹⁴³ Ultimately, this meant that the court would not retain jurisdiction to enforce the terms and conditions of the settlement agreement between DTE and Sierra Club requiring the SEP. Should DTE not comply, Sierra Club would have to file a new suit in the appropriate jurisdiction, Wayne County, Michigan, in order for a court to enforce the settlement agreement.¹⁴⁴

B. DOJ's prohibition of SEPs disregards environmental protection in environmental enforcement suits

The EPA uses SEPs in environmental enforcement actions because SEPs increase support for projects aimed at environmental protection.¹⁴⁵ One of the requirements to determine if an SEP is fair, adequate, and reasonable in environmental enforcement suits is that they have an adequate nexus to the environmental violation of the company.¹⁴⁶ Doing away with the use of SEPs by the DOJ is detrimental for the local communities in which the violations occurred because it is less likely that those communities will receive any funding for environmental repair.¹⁴⁷

135. See *DTE Energy Co.*, 711 F.3d at 748 (Rogers, J., dissenting); Vizcarra & Bloomer, *supra* note 18.

136. Vizcarra & Bloomer, *supra* note 18.

137. *Id.*

138. Holmes, *supra* note 100.

139. Mintz, *supra* note 123.

140. *Id.*

141. Motion in Support at 4, *United States v. DTE Energy*, No. 2:10-cv-13101-BAF-RSW.

142. See Vizcarra & Bloomer, *supra* note 18.

143. Motion to Enter Agreement at 2, *United States v. DTE Energy*, No. 2:10-cv-13101-BAF-RSW.

144. Motion in Support, *supra* note 138 at 8.

145. Bonorris, et al., *supra* note 3, at 203 (quoting Final EPA Supplemental Environmental Project Policy Issued, 63 Fed. Reg. 24, 796, 24, 797-98 (May 5, 1998)).

146. *Antofina Chems.*, 2002 U.S. Dist. LEXIS 15137 at *15-16 (E.D. Penn Aug. 5, 2002).

147. Vizcarra & Bloomer, *supra* note 18.

SEPs have been used to improve human health and the environment in communities impacted by violators.¹⁴⁸ There is no guarantee that money going into the U.S. Treasury, as a civil penalty by corporations will be used to fund environmental protection projects.¹⁴⁹ Ultimately, the DOJ policy requiring companies who have committed environmental wrongdoing to pay funds to the U.S. Treasury will likely result in little, if any, relief for the communities that are directly affected.¹⁵⁰ This is why SEPs are favored by communities where these environmental violations occurred.¹⁵¹ Communities can actually see the corporations paying for the harm they have caused to the environment instead of the money going into the U.S. treasury where no real impact can be seen by the local communities.¹⁵²

SEP impact communities beyond what is required for compliance with environmental regulations.¹⁵³ Cases like *Atofina Chemicals* show that SEPs do not always help the communities impacted by environmental violations,¹⁵⁴ but the 2020 policy further decreases the likelihood that these communities will receive funding to fix the wrongdoings of these companies.¹⁵⁵ Money placed in the U.S. Treasury could be used for other purposes, which would prevent the restoration of the environment and ecosystems most affected.¹⁵⁶

Many SEPs promote pollution prevention—not just reduction of pollution—which promotes a healthy environment through renewable energy and energy efficient projects.¹⁵⁷ The EPA encourages using SEPs to promote renewable energy and energy efficient projects because they can achieve environmental benefits that would not be attainable without an SEP.¹⁵⁸ Kevin Minoli, former EPA acting general counsel, said, “there’s a long history of SEPs making a meaningful difference in the environmental space.”¹⁵⁹ SEPs often cause enduring impacts on the environment by creating long lasting environmentally beneficial technologies.¹⁶⁰ These types of technological advances would not occur without SEPs due to lack of funding.¹⁶¹ The new DOJ policy erodes environmental protection efforts by not allowing for third-party payments to fund environmental protection.¹⁶²

The EPA’s data shows a sharp decline in the use of SEPs since the rollbacks began in 2017.¹⁶³ The data seems to prove a causation between the decrease in SEPs in settlements and the rollbacks which began in 2017. From 2014 to 2017, 348

148. Mintz, *supra* note 41.

149. Sands, *supra* note 102.

150. Mintz, *supra* note 41.

151. *See* Lyons, *supra* note 20.

152. *Id.*

153. *See id.*

154. *Antofina Chems.*, 2002 U.S. Dist. LEXIS 15137 (E.D. Penn Aug. 5, 2002).

155. Vizcarra & Bloomer, *supra* note 18.

156. *See* Schlossberg & Tabuchi, *supra* note 19.

157. *A Toolkit for States: Using Supplemental Environmental Projects (SEPs) to Promote Energy Efficiency (EE) and Renewable Energy (RE)*, U.S. ENVTL. PROT. AGENCY 1, 13, 15 (Jan. 2005), https://www.epa.gov/sites/production/files/2016-02/documents/eere_sep_toolkit_final_2005-01-12.pdf [hereinafter *A Toolkit for States*].

158. *Id.* at 13.

159. Lee, *supra* note 8.

160. *A Toolkit for States*, *supra* note 153, at 12-13.

161. *Id.* at 12.

162. *See* Schlossberg & Tabuchi, *supra* note 19.

163. *See generally Enforcement and Compliance History Online: Enforcement Case Search Results*, U.S. ENVTL. PROT. AGENCY, <https://echo.epa.gov/facilities/enforcement-case-search/results> (last visited March 11, 2021) (showing a reduction in the number of SEP projects in each state).

cases were settled using SEPs with corporations spending almost \$130 million on environmental projects.¹⁶⁴ From 2017 to September 2020, only 53 cases were settled with SEPs with less than \$52 million spent on environmental projects by corporations.¹⁶⁵ That is a decrease of 295 cases where corporations used SEPs as an environmental tool since the DOJ started to roll back the use of SEPs back in 2017.

During the rollback on SEPs, a significant amount of money was diverted from projects intended to help the environment.¹⁶⁶ This is a loss for the environment because funds previously used to help the environment may be spent on other projects.¹⁶⁷ The decrease in money spent by companies on SEPs since the DOJ voiced its disapproval of SEPs can be seen from the data.¹⁶⁸

V. LOOKING FORWARD

The President's ability to change the SEP policy is concerning for many reasons, primary among them is the possibility that a future ban on SEPs could have a detrimental impact on the environment.¹⁶⁹ A four-year presidency can substantially impact the environment.¹⁷⁰ When a president has to reinstate old policies, including SEPs, it could take two to four years before such a policy is completely repaired.¹⁷¹ President Biden came into office declaring that the environment was one of his top priorities.¹⁷²

The policy change by the DOJ involving the use of SEPs quickly faced opposition in both the environmental and legal community. On Oct. 8, 2020, the Conservation Law Foundation ("CLF") filed a complaint in the U.S. District Court for the District of Massachusetts, *Conservation Law Foundation v. William Barr et al.*¹⁷³ The complaint challenged the policy barring the DOJ from using SEPs as a settlement tool in enforcement actions because of the real-world benefits achieved through their use.¹⁷⁴ The CLF challenged the policy as being unlawful.¹⁷⁵ The complaint alleged that SEPs are not in violation of the Miscellaneous Receipts Act because the Office of Legal Counsel has consistently said that:

Settlements do not violate the Miscellaneous Receipts Act so long as: (1) the settlement is executed before an admission or finding of liability in favor of the United States; and (2) the United States does not retain post-settlement control over the deposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement.¹⁷⁶

The CLF argued that SEPs are "entirely independent from monies paid to the United States Treasury, such as civil penalties," and "SEPs are independent from

164. *Id.*

165. *Id.*

166. Mintz, *supra* note 41.

167. *See id.*

168. *See id.*

169. Bonorris, et al., *supra* note 3, at 203.

170. Carol Davenport, *Restoring Environmental Rules Rolled Back by Trump Could Take Years*, N.Y. TIMES Jan. 23, 2021, at A18.

171. *Id.*

172. Juliet Eliperin, et al., *Biden's Policies on Climate Change*, THE WASHINGTON POST (Dec. 22, 2020), <https://www.washingtonpost.com/graphics/2020/politics/biden-climate-environment/>.

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

174. Complaint 2-3, *Conservation Law Foundation, Inc. v. Barr*, No. 1:20-cv-11827.

175. *Id.* at 1.

176. *Id.* at 11.

monies already appropriated from the United States Treasury.”¹⁷⁷ The CLF voluntary dismissed this case on February 5, 2021 after the Clark Memo was withdrawn.¹⁷⁸ *CLF v. Barr* shows that any future SEP policy withdrawal will be met with litigation because environmental groups see it is an integral part of settlement agreements for environmental wrongdoings.¹⁷⁹

On January 20, 2021, the Biden Administration took over with a commitment to restore environmental justice.¹⁸⁰ An executive order, issued the same day that President Biden was sworn into office, requested the heads of all agencies conduct an immediate review of all existing regulations, orders, guidance, documents, policies, and any other similar agency actions promulgated, issued or adopted between January 20, 2017, and January 20, 2020.¹⁸¹ Based on this executive order, on February 4, 2021, the ERND Deputy Assistant Attorney General, Jean E. Williams, issued a memorandum withdrawing the August 2019 and March 2020 policies regarding SEPs.¹⁸² This policy change was made effective immediately.¹⁸³

VI. CONCLUSION

A ban on the use of SEPs in environmental enforcement actions is detrimental to both companies and the environment. SEPs are valuable settlement tools for environmental enforcement actions and are a good way to ensure that companies who commit environmental wrongs undertake a project to remedy any damage they caused to the environment.¹⁸⁴ Therefore, it benefits all parties involved to take advantage of SEPs as a settlement tool.¹⁸⁵ SEPs promotes public health and environmental protection efforts,¹⁸⁶ which are the core principles of the EPA's mission.¹⁸⁷

Banning SEPs also causes worry for the future of the environment because, without companies paying for SEPs, it is unclear if money paid to the U.S. Treasury as civil penalties in environmental enforcement actions will ever reach communities directly harmed by companies who failed to follow environmental regulations.¹⁸⁸ It is likely that less money will be put into environmental protection efforts.¹⁸⁹ As discussed above, companies lose a valuable settlement tool when they are not allowed to be implemented in settlement agreements.¹⁹⁰

177. *Id.* at 13-14.

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

179. *See* McGarity, *supra* note 68, at 1413-14.

180. Emily Mallen & Simone Jones, *Environmental Justice to get a Boost in the Biden Administration*, BLOOMBERG LAW (Feb. 3, 2021), <https://news.bloomberglaw.com/environment-and-energy/environmental-justice-to-get-a-boost-in-the-biden-administration>.

181. Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7037-38 (2021).

182. *See* Memorandum from Jean E. Williams, *supra* note 2 at 1-2.

183. *Id.*

184. *See* Schlossberg & Tabuchi, *supra* note 19.

185. *See id.*

186. *See id.*

187. *Our Mission and What We Do*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do#:~:text=The%20mission%20of%20EPA%20is%20to%20protect%20human%20health%20and%20the%20environment> (last visited March 12, 2021).

188. Sands, *supra* note 102.

189. *See* Mintz, *supra* note 41.

190. *See generally* Lyons, *supra* note 108; *See* Frazin, *supra* note 94.

Climate change and environmental action tend to be a highly partisan issues,¹⁹¹ so, as presidents change, environmental policies like the SEP policy could change.¹⁹² It is up to Congress to stop the debate about the lawfulness of the use of SEPs.¹⁹³ If Congress showed its approval of SEPs and made the EPA's ability to use SEPs in settlement agreements a law, it would resolve the regulatory uncertainty, and leave little question about their legitimacy.¹⁹⁴

191. Nadja Popovich, *Climate Change Rises as a Public Priority. But It's More Partisan Than Ever*, N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/interactive/2020/02/20/climate/climate-change-polls.html>.

192. See Schlossberg & Tabuchi, *supra* note 19.

193. See Sands, *supra* note 102.

194. See Nicholas William Targ & Chelsea Maclean, *The Implications of an IRS Decision on Supplemental Environmental Projects*, HOLLAND & KNIGHT (4th Qtr. 2007), <https://www.hklaw.com/en/insights/publications/2007/12/the-implications-of-an-irs-decision-on-supplementa>.