

July 11, 2022

The Honorable Merrick Garland
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530

RE: Docket No. OAG 177 – Comments on Interim Final Rule – Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties

Dear Attorney General Garland,

Our coalition appreciates the Department of Justice (“Department”) restoring Supplemental Environmental Projects (“SEPs”) as an enforcement mechanism available to the Department and U.S. Environmental Protection Agency (“EPA”).¹ The reestablishment of a critical enforcement remedy demonstrates the Biden Administration’s ongoing commitment to environmental justice, offering needed solutions to communities directly harmed by environmental violations. We see and appreciate the same intention in the Department’s launch of the Office of Environmental Justice and its early work on Title VI.²

This Interim Final Rule (“rule”) heeds President Biden’s direction to “hold polluters accountable, including those who disproportionately harm communities of color and low-income communities”³ and ensure that those who break environmental laws do all possible to repair the harm to the affected communities. This change also serves the Biden Administration’s goals to “develop a comprehensive environmental justice strategy” and to “provide timely remedies for systemic environmental violations,”⁴ including seeking restitution for those harmed.

As noted below, we fully support revoking the Department’s 2020 regulations at 28 C.F.R. § 50.28, which were based on an erroneous understanding of the relevant law and promulgated without any respect for the wide support this nimble enforcement mechanism has drawn for decades, including from corporate defendants. Accordingly, we support the new rule and guidance memorandum dated May 5, 2022.

To advance our shared goals, our coalition urges the Department and EPA to act to (1) affirm that EPA’s 2015 SEP Policy⁵ remains in effect, or adopt it anew, and (2) codify best practices and expectations for community engagement in SEP development and implementation.

¹ Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties, 87 Fed. Reg. 27936 (May 10, 2022); 28 C.F.R. § 50.

² U.S. DOJ, “Comprehensive Environmental Justice Enforcement Strategy” (May 5, 2022).

³ Executive Order 13,990 Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, 83 Fed. Reg. 7037, 7037 (Jan. 20, 2021) [hereinafter “Executive Order 13,990”].

⁴ Executive Order 14,008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Jan. 27, 2021) [hereinafter “Executive Order 14,008”].

⁵ U.S. EPA, Supplemental Environmental Projects Policy 2015 Update (2015) [hereinafter “2015 SEP Policy”].

I. The Use of SEPs is Legally Sound and Historically Uncontroversial

A. SEPs Defined

SEPs are “an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action.”⁶ SEPs are “projects or activities that go beyond what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with the applicable laws.”⁷

SEPs represent a unique opportunity in the environmental enforcement context to secure some form of restitution for communities harmed by violations given the difficulty of identifying and quantifying full individual harm from a violating pollution source to support adequate direct mitigation. It is often difficult, if not impossible, to fully trace all human ailments or natural problems to a particular pollution source, especially over long periods of time. For example, if a refinery has been exceeding its pollution limits for years, including emitting the carcinogen benzene in unlawful amounts, demonstrating and addressing the full harm to the community through mitigation terms alone can be challenging, especially given that some of the harm (e.g., respiratory disease, increased risk of cancer) may not manifest for years to come. Such calculations are even more challenging if there are multiple pollution sources in a community. SEPs bridge this gap between the violations and harm caused, allowing harmed communities to see some justice and receive some funding for the harm caused from the unlawful activity, based on the “nexus” between the violation and the SEP.

Under the nexus requirement, SEPs can only be approved if they would reduce the likelihood that a similar violation would occur in the future or reduce the violation’s adverse impact (or risk thereof) on public health and/or the environment.⁸ This nexus requirement does not demand a strict, direct remedy to the specific harm of the violation, and so SEPs complement traditional mitigation remedies that do require such a direct connection, allowing for more comprehensive harm reduction.

The nexus requirement thus permits some flexibility, never losing sight, however, of the underlying violation: “Nexus is easier to establish if the primary impact of the project is at the site where the alleged violation occurred, at a different site in the same ecosystem, or within the immediate geographic area. SEPs may have nexus even if they address a different pollutant in a different medium, provided the project relates to the underlying violation(s).”⁹ But “[e]cosystem or geographic proximity is not by itself a sufficient basis for nexus; a project must always demonstrate a relationship to the violation.”¹⁰

⁶ In the criminal context, SEPs are referred to as “community service” projects or payments. U.S. DOJ, Justice Manual, at Section 5-11.105 (updated Feb. 2021). For purposes of this letter, SEPs include administrative, civil, and criminal enforcement actions.

⁷ 2015 SEP Policy, at 1.

⁸ *Id.* at 7.

⁹ 2015 SEP Policy, at 8 (internal citations omitted).

¹⁰ *Id.*

In the end, SEPs represent a tailored approach to addressing intractable environmental justice challenges for communities who routinely face significant noncompliance from industry. The projects take diverse forms, depending on the type of violation and community needs, including: diagnostic, preventative, and treatment-based public health projects; pollution prevention and reduction; environmental restoration and protection; and emergency planning and preparedness.¹¹ Historically their evaluation has been based on: significant quantifiable benefits to public health or the environment; principles of environmental justice; innovation; multimedia impacts; and predicted pollution prevention.¹²

B. The First Four Decades of SEPs: 1980-2017

For almost four decades, through both Republican and Democrat administrations, SEPs were a recognized and valuable tool of the Department and EPA. Their use stretches back as far as 1980 when SEPs were approved by the Office of Legal Counsel.¹³ Courts have recognized SEPs as acceptable enforcement mechanisms over the decades.¹⁴ Congress has also contemplated and blessed SEPs in particular contexts.¹⁵

Throughout this period, SEPs enjoyed favorable treatment by all involved. As the Reagan EPA noted, “In general, the regulated community has been very receptive to this practice.”¹⁶ Defendants benefit from SEPs. SEPs provide an opportunity for a business that has broken the law to make right on their wrong and attempt to remediate the harm they caused. This can also help restore some position within the community. These are among the many reasons that corporate defendants in particular routinely request SEPs be part of any larger settlement.¹⁷ Their popularity with defendants motivated the Department in part to place percentage caps on SEPs in relation to criminal cases; Department policy was that a SEP “should not exceed 25 percent of the sanction package” since SEP payments do not carry the same stigma or possible deterrence as conventional penalties.¹⁸

¹¹ *Id.*, at 11-17.

¹² *Id.*, at 20-21.

¹³ Democracy Forward Foundation, Petition for Rulemaking Regarding Department Use of Supplemental Environmental Projects at 5 (June 14, 2021) [hereinafter “Petition”] (citing *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B Op. O.L.C. 684, 688 (1980) (“where the United States has not incurred any monetary loss as a result of the oil spill, [31 U.S.C.] § 484 would not be offended by a settlement that attributed the entire sum received to its co-plaintiff, which could then direct the money to a charity.”)). See also U.S. EPA, Civil Penalty Policy (July 8, 1984) at 15 (“[o]ccasions have arisen in enforcement actions where violators have offered to make expenditures for environmentally beneficial purposes above and beyond expenditures made to comply with all existing legal requirements.”).

¹⁴ *Id.* (citing *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990); *Pa. Env'tl. Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431, 436 (M.D. Pa. 1989)).

¹⁵ 42 U.S.C. § 16138 (specifying how diesel emission SEPs may be part of Clean Air Act settlements since 2008).

¹⁶ U.S. EPA, A Framework for Statute-Specific Approaches to Penalty Assessment at 25 (1984).

¹⁷ Stacey Geis, “Bringing Back a Critical Remedy for Communities Harmed by Unlawful Polluters,” *Earthjustice* (July 7, 2022), <https://earthjustice.org/from-the-experts/2022-july/bringing-back-a-critical-remedy-for-communities-harmed-by-unlawful-polluters>.

¹⁸ Kris Dighe, “Organizational Community Service in Environmental Crimes Cases” *United States Attorneys’ Bulletin* at 104-105 (July, 2012).

In 1991, the first Bush EPA began iteratively codifying how SEPs were intended to operate.¹⁹ These policies were updated in 1995 and 1998.²⁰ Thereafter, rather than curtail their use, agencies including the second Bush EPA sought to “expand the use of SEPs in the settlement of enforcement actions.”²¹ A dozen more examples of administrations optimizing SEPs’ impacts through policy tweaks are available.²² This continued through the last round of updates in 2015.²³

C. The Trump DOJ’s Errant and Aberrant Assault on SEPs: 2017-2021

In 2017 under President Trump, the Department broke with decades of bipartisan tradition and started to limit the use of SEPs. As described below, the Trump-era Department’s increasingly restrictive efforts included: a narrowing of the nexus criteria to require *direct* remedies for third-party payments; a bar on greater or different relief than could be otherwise applied administratively or in court, targeting SEPs; prohibitions on seeking SEPs with public defendants, and then later with private defendants; and eventually a 2020 rule, which banned SEPs Department-wide, codified at 28 C.F.R. § 50.28.

These restrictions began subtly in June 2017 with a Department policy announced by Attorney General Jeff Sessions prohibiting settlement payments to third parties in all DOJ enforcement contexts, environmental or not; this prohibition, however, exempted “an otherwise lawful payment or loan...that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment...”²⁴ SEPs remained on the table as possible lawful payments, but with a stricter requirement that the remedies from the SEPs be more directly related to the underlying violation than what SEP guidance had previously required under the nexus theory.

Then, in January 2018, Acting Assistant Attorney General (“Acting AAG”) for the Environment and Natural Resources Division (“ENRD”) Jeff Wood issued a memo applying the Attorney General’s policy to environmental matters, repeating insistence to “*directly* remedy harm to the environment.”²⁵ In effect, this meant a SEP needed to improve the watershed, airshed, species, or other impinged resource harmed by the violation by addressing the specific harm of the violation, no matter how difficult this ascertainment was, as discussed earlier. Acting AAG Wood noted that neither memo covered payments to state and tribal governments (i.e., payments

¹⁹ U.S. EPA, Policy on the Use of Supplemental Environmental Projects in EPA Settlements (1991). This document could not be located, EPA sources repeatedly acknowledge it. *See e.g.*, U.S. EPA, Interim Revised Supplemental Environmental Projects Policy at 1 (1995) [hereinafter “1995 SEP Policy”]; 2015 SEP Policy at 2.

²⁰ 1995 SEP Policy; U.S. EPA, Final SEP Policy (Apr., 1998) [hereinafter “1998 SEP Policy”].

²¹ U.S. EPA, Expanding the Use of Supplemental Environmental Projects at 1 (June 11, 2003).

²² *See, e.g.*, U.S. EPA, “Policy, Guidance & Publications” (accessed June 10, 2022), https://19january2017snapshot.epa.gov/enforcement/policy-guidance-publications_.html; U.S. EPA, “Past Supplemental Environmental Projects Guidance,” (accessed June 10, 2022), <https://www.epa.gov/enforcement/previous-supplemental-environmental-projects-guidance>.

²³ 2015 SEP Policy.

²⁴ U.S. DOJ, Prohibition on Settlement Payments to Third Parties (June 5, 2017). The memo closely resembles two failed legislative attempts to codify the same in statute. *See* Stop Settlement Slush Funds Act of 2016, H.R. 5063, 114th Cong. (2016); Stop Settlement Slush Funds Act of 2017, H.R. 732, 114th Cong. (2017).

²⁵ U.S. DOJ, Settlement Payments to Third Parties in ENRD Cases at 2 (Jan. 9, 2018) (emphasis added).

to a local air district for asthma vans would be reviewed under the established nexus theory compared to payments to a private foundation doing the same to be reviewed under the direct remedy framing).²⁶

On his last day in office in November 2018, Attorney General Sessions issued another memo that constrained consent decrees and settlements with state and local government defendants by specifying that such agreements “*must not be used to achieve general policy goals or to extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment.*”²⁷ An example of such a precluded settlement would be where a local government violated the Clean Air Act; a SEP would no longer be allowed in the settlement.

Taking the Attorney General’s latter prohibition on “greater relief,” ENRD AAG Jeffrey Clark barred the Department from seeking SEPs in settlements with state and local government defendants, and forewarned broader review of SEP use generally, including with non-governmental parties in August 2019.²⁸ This policy embraced a flawed understanding of the Miscellaneous Receipts Act (misciting caselaw on penalties by ignoring the distinctions between penalties and SEPs), as discussed at the close of this section of this comment letter.

That broader review kept with the disturbing trend, and eight months later in March 2020 AAG Clark prohibited SEPs in civil settlements with private parties (i.e., corporate defendants).²⁹ AAG Clark framed SEPs as a diversion of funds away from the Treasury in violation of the Miscellaneous Receipts Act and as allocations of funds not approved by Congress as contrary to the Ant-Deficiency Act.³⁰

Thirty-five days before President Biden was inaugurated, the Department took the unusual extra step of codifying a ban on SEPs in a rule specifying that “in no case shall any settlement agreement require defendants in environmental cases, in lieu of payment to the Federal Government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects.”³¹ The scope of this December 2020 rule included both civil and criminal cases.³²

²⁶ *Id.* at 5.

²⁷ U.S. DOJ, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities at 5 (Nov. 7, 2018) (emphasis added).

²⁸ U.S. DOJ, Using Supplemental Environmental Projects (“SEPs”) in Settlements with State and Local Governments (Aug. 21, 2019).

²⁹ U.S. DOJ, Supplemental Environmental Projects (“SEPs”) in Civil Settlements with Private Defendants (Mar. 12, 2020).

³⁰ *Id.* The Anti-Deficiency Act claims are easily dispelled; the federal government never received any funds to then expend without Congressional approval since SEPs never directed funds to the federal government. 2015 SEP Policy at 9 (“SEPs may not provide the EPA with additional resources to perform a particular activity for which the EPA receives a specific appropriation”).

³¹ Prohibition on Settlement Payments to Non-governmental Third Parties, 85 Fed. Reg. 81,410 (Dec. 16, 2020); 28 C.F.R. § 50.28.

³² *Id.*

In the final eight days of the Trump Administration, AAG Clark issued two more memos arguing that (1) mitigation requires direct remedies and (2) in addition to earlier arguments related to the Miscellaneous Receipts Act, the 2020 rule provides a separate basis for SEPs “unlawfulness.”³³

There are at least two errors worth highlighting in the various memos and rules that ultimately removed a key tool to restore harm to communities. The first error was an unfounded critique of SEPs as being contrary to the Miscellaneous Receipts Act, which requires that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”³⁴ The Department and EPA have been clear and consistent that SEPs “may not provide EPA or any other federal agency with additional resources to perform a particular activity for which Congress has not specifically appropriated funds.”³⁵ “All monetary penalties assessed against violators are deposited into the Treasury.”³⁶ Rather, “[a]n acceptable SEP is a *mitigating factor* that EPA may consider in deciding whether to settle a matter and what the terms of such a settlement are. SEPs are not substitutes for monetary penalties.”³⁷ This is a key and important distinction between SEPs and penalties. “Settlements that include a SEP must always include a settlement penalty that recoups the economic benefit a violator gained from noncompliance with the law, as well as an appropriate gravity-based penalty reflecting the environmental and regulatory harm caused by the violation(s). SEPs are not penalties, nor are they accepted in lieu of a penalty.”³⁸ For these reasons, staff at both EPA and the Department determined that SEPs complied with the Miscellaneous Receipts Act over their decades of use.³⁹ Nevertheless, the Trump Administration confused SEPs with penalties, or with diversions of funds destined for the Treasury. In so doing, it misstated and misunderstood decades of Department and EPA practice.

The second error stems from a gross simplification of tying environmental harms to the violations themselves, as seen in the requirement for “direct” remedies. The longstanding nexus requirement for SEPs appropriately accounts for the challenges of proving specific, individual harm when it comes to pollution exceedances. Attorney General Sessions narrowed and limited this nexus relationship to the point of impotency, rendering SEPs unavailable unless a direct remedy to a specific harm created by the specific violation could be offered. Simply put, this is often impossible. It is why SEPs were created in the first instance as a creative, flexible enforcement tool to provide some form of restitution to harmed communities, within certain guidelines, including the nexus requirement. This nexus relationship, not Attorney General Sessions’ insistence on direct remedies, appropriately captures the nature of environmental harms and available, practicable remedies.

³³ U.S. DOJ, *Equitable Mitigation in Civil Environmental Enforcement Cases* (Jan. 12, 2021); U.S. DOJ, *Guidance Regarding Newly Promulgated Rule Restricting Third-Party Payments*, 28 C.F.R. § 50.28 (Jan. 13, 2021).

³⁴ 31 U.S.C. § 3302(b).

³⁵ 1998 SEP Policy at 24798.

³⁶ *Interim Guidance for Community Involvement in Supplemental Environmental Projects*, 68 Fed. Reg. 35884, 35885 (June 17, 2003) [hereinafter “2003 Community Involvement Interim Guidance”].

³⁷ *Id.* (emphasis added).

³⁸ 2015 SEP Policy at 21.

³⁹ *Id.* at 34-35 (EPA’s view on compliance); Dighe, “Organizational Community Service in Environmental Crimes Cases” at 102-03 (Department’s view on compliance).

D. President Biden’s Restoration of SEPs: 2021-Present

On the first day of the Biden-Harris Administration, the President issued Executive Order 13,390, establishing the Administration’s priority “to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities” and ordering review of actions taken during the Trump Administration that hinder this work.⁴⁰ The 2020 rule, found at 28 C.F.R. § 50.28, was featured on the list published with the Executive Order to be reviewed by the Department.⁴¹ Days later, President Biden issued Executive Order 14,008, affirming his Administration’s commitment to environmental justice and directing the Attorney General in coordination with the EPA and others “to develop a comprehensive environmental justice enforcement strategy, which shall seek to provide timely remedies for systemic environmental violations and contamination.”⁴²

Agencies have proceeded accordingly. ENRD withdrew many of the discussed Trump Administration memos “[b]ecause these memoranda are inconsistent with longstanding Division policy and practice and because they may impede the full exercise of enforcement discretion in the Division’s cases.”⁴³

Lawrence Starfield, the Acting Assistant Administrator for EPA’s Office of Enforcement and Compliance Assurance, issued two memos in April 2021, encouraging the use of SEPs pending further coordination with the Department on rescinding the 2020 rule.⁴⁴

Democracy Forward (on behalf of Conservation Law Foundation, Surfrider Foundation, and Sierra Club) submitted a Petition for Rulemaking on June 14, 2021, asking that the Department revoke the 2020 rule in order to reestablish SEP viability.⁴⁵

Following President Biden’s Executive Orders and in line with the Petition, the Department issued this Interim Final Rule and guidance memorandum, effective May 10, 2022, revoking the 2020 rule at 28 C.F.R. § 50.28 and restoring SEPs as an available enforcement mechanism.⁴⁶

II. SEPs’ Adaptability Secures Meaningful Benefits for Impacted Communities

As explained, SEPs provide a unique opportunity in the environmental enforcement context to secure some type of restitution for harmed communities. The various funding model options and availability across criminal, civil and administrative enforcement contexts make SEPs especially responsive to community needs in light of related violations.

⁴⁰ Executive Order 13,990.

⁴¹ The White House, “Fact Sheet: List of Agency Actions for Review” (Jan. 10, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

⁴² Executive Order 14,008 at 7631.

⁴³ U.S. DOJ, Withdrawal of Memoranda and Policy Documents at 2 (Feb. 4, 2021).

⁴⁴ U.S. EPA, Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements (Apr. 26, 2021); U.S. EPA, Strengthening Enforcement in Communities with Environmental Justice Concerns (Apr. 30, 2021).

⁴⁵ Petition.

⁴⁶ 87 Fed. Reg. 27936; U.S. DOJ, Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties (May 5, 2022).

A. Different Funding Models Maximize SEPs' Potential in Different Circumstances

There are two primary funding models for SEPs. The first is a direct approach, where the settlement agreement identifies the particular project(s) the SEP will fund. An example of SEP funding for specified projects includes:

- In 2012, after modifying their coal power plant in violation of the Clean Air Act, Louisiana Generation agreed to pay \$250 million for onsite pollution reduction measures to bring the entity into compliance, a \$3.5 million fine, and \$10.5 million on local environmental mitigation projects.⁴⁷ Up to \$5 million of that project was for a SEP that installed solar panels at local schools, government facilities, or non-profits. More of the funds were appropriated to upgrading electric vehicle charging infrastructure in South Louisiana, all of which reduce harmful combustion from nearby power generators and local transportation.

Trust funds are the second often used SEP funding model. Trust funds allow for money to be collected and earmarked for use under certain parameters, with some implementation flexibility, as long as the future projects have some nexus to the underlying violations. Trust funds also allow for better community participation into the best use of the SEP monies. Trust funds can also be used to pool resources from various enforcement cases for maximum community effect. Examples of SEP trust fund arrangements include:

- In 2015, Volkswagen settled with federal regulators following Clean Air Act violations stemming from their installation of “defeat devices” on diesel automobiles designed to work during emissions testing to pass inspections but to be otherwise defunct during actual use.⁴⁸ As part of a SEP, the settlement established a \$2.7 billion trust fund to finance projects across the country that would offset the NOx pollution the defeat devices generated.
- In 2013, the U.S. Attorney’s Office in the Northern District of California established the San Francisco Bay Estuary Conservation Fund to fund local environmental protection and restoration projects with \$8.7 million in initial funding from various federal criminal enforcement actions undertaken by the USAO.⁴⁹ One of the many contributing settlements was with Wal-Mart after the company pled guilty to violating the Clean

⁴⁷ U.S. EPA, Louisiana Generating LLC, Civil Action No. 09-100-JJB-DLD at 67-76 (M.D. La., 2012) (Consent Decree), <https://www.epa.gov/sites/default/files/documents/lagen-cd.pdf>.

⁴⁸ United States District Court, Northern District of California, In re: Volkswagen “Clean Diesel” MDL, Executive Summary of Final Class Settlement Program (2.0 Liter Engine Vehicles) (accessed June 10, 2022) <http://www.cand.uscourts.gov/crb/vwmdl/final-settlement-2-Liter>.

⁴⁹ U.S. DOJ, U.S. Attorney’s Office Announces Creation of Conservation Fund (May 27, 2013), <https://www.justice.gov/usao-ndca/pr/us-attorney-s-office-announces-creation-conservation-fund>.

Water Act and the Federal Insecticide, Fungicide, and Rodenticide Act by failing to properly manage hazardous waste at thousands of stores across the country.⁵⁰

- Opportunities for trust fund arrangements also arise from smaller challenges and smaller settlements. In 2001, following an illegal tire pile fire that caused evacuations due to toxic smoke in one of the most polluted regions in the country, the settlement included a SEP endowing a County Environmental Trust Fund with \$65,000 to assist the County with various environmental projects, such as managing illegal tire piles.⁵¹

B. SEPs Respond to Harm in Administrative, Civil, and Criminal Contexts

SEPs have traditionally been used in federal civil, criminal, as well as administrative enforcement actions.

Administrative examples include:

- In 2016, after Carrington Real Estate Services allegedly violated the Toxic Substances Control Act by failing to include a necessary lead warning statement given the presence of lead-based paint in six homes, Carrington settled with EPA through which they agreed to fund a SEP that donated 21 blood lead analyzers to non-profit community health clinics in underserved areas.⁵²
- In 2020, following an administrative action by the EPA against Airtech for discharging water pollutants without the required permit, Airtech agreed to fund a marine restoration project through Orange County Coastkeepers at \$66,120.⁵³

EPA data offers 3,115 examples of civil settlements with SEPs.⁵⁴ Specific civil examples include:

- In 2015, following government and citizen suit allegations that the coal-based Four Corners Power Plant located on the Navajo Nation in New Mexico, operated by the Arizona Public Service Co. and Southern California Edison, violated the Clean Air Act, parties settled via civil consent decree.⁵⁵ As part of the settlement, the defendants agreed to fund nearly \$5 million in household energy improvements for homes in the Navajo

⁵⁰ *Id.*; U.S. DOJ, Wal-Mart Pleads Guilty to Federal Environmental Crimes, Admits Civil Violations and Will Pay More Than \$81 Million (May 28, 2013), <https://www.justice.gov/opa/pr/wal-mart-pleads-guilty-federal-environmental-crimes-admits-civil-violations-and-will-pay-more>.

⁵¹ Stanislaus County District Attorney, Westley Tire Fire Press Release (Dec. 5, 2001), <https://www.stanislaus-da.org/pdf/news/2001/westley.pdf>.

⁵² U.S. EPA Region IX, In the Matter of Carrington Real Estate Services, LLC, Docket No. TSCA-09-2016-0020 (Sep 26, 2016).

⁵³ U.S. EPA Region IX, In the Matter of Airtech International, Inc. Docket No. CWA-09-2020-0011 at 18 (Feb. 7, 2020).

⁵⁴ U.S. EPA, Enforcement and Compliance History Online (accessed June 10, 2022), <https://echo.epa.gov/facilities/enforcement-case-search/results/>.

⁵⁵ U.S. DOJ, Arizona Public Service Company et al., Case No. 1:15-cv-00537 at 89-94 (D.N.M., June 24, 2015) (Consent Decree), http://www.justice.gov/sites/default/files/enrd/pages/attachments/2015/06/24/arizona_public_service_consent_decree.pdf.

Nation, including upgrading appliances and weatherization. Compare that to the Trump Department and EPA eliminating a similar mitigation measure that would have secured \$3 million for a home energy improvement project in a civil suit against Harley-Davidson in 2017, originally brought on Clean Air Act violation allegations by the government.⁵⁶

- The Biden-Harris Administration agreed to its first SEP less than one month after the inauguration. Following alleged Clean Air Act violations related to its medical waste incinerator in North Salt Lake, Utah, Stericycle settled with the EPA and funded a \$2 million SEP that will purchase low-emission school buses for local school districts.⁵⁷

Criminal examples include:⁵⁸

- Shore Terminals LLC operated its fuel terminal on the San Francisco Bay by intentionally bypassing pollution control equipment in violation of the Clean Air Act, triggering the creation of ground-level ozone, a contributor to local smog issues.⁵⁹ The 2009 felony plea agreement included \$2.5 million in fines, as well as \$750,000 in SEP funding. \$500,000 was directed to the larger trust fund noted earlier to address local air issues, and the remaining \$250,000 went to the local air district's Bay Area Clean Air Foundation to improve air quality in the surrounding communities.

SEPs' adaptability to the specific underlying violation, the community's unique vulnerabilities, and diverse enforcement context speak to the Department's many "good reasons for the new policy" and why the Department "believes it to be better" to restore SEPs' viability than to leave the Trump rules in place.⁶⁰ We agree.

III. Recommendations for Additional Action

We again applaud the Department and EPA's efforts to restore SEPs and urge the Department and EPA to take the following steps to take full advantage of the unique opportunity SEPs provide to impacted communities.

A. Reaffirm the 2015 Policy

While to our knowledge there was never a withdrawal or replacement of the 2015 SEP Policy, we urge the Department and EPA to affirm that this past comprehensive guidance document still applies to SEP administration at EPA. The need for administrative procedural clarity would be

⁵⁶ Attorney General of New York, et al., Amended proposed consent decree in *United States v Harley-Davidson, Inc.* (D.D.C., Civil action No. 1:16-cv-01687)/D.J. Ref. No. 90-5-2-1-11333, August 25, 2017, http://www.law.nyu.edu/sites/default/files/upload_documents/States%20Comment%20Letter%20on%20Harley-Davidson%20Consent%20Decree.pdf.

⁵⁷ U.S. DOJ, Justice Department and EPA Announce Settlement with Stericycle Inc. to Address Environmental Violations at Medical Waste Incinerator (Jan 29, 2021), <https://www.justice.gov/opa/pr/justice-department-and-epa-announce-settlement-stericycle-inc-address-environmental>.

⁵⁸ Democracy Forward's Petition for Rulemaking notes more examples across enforcement contexts. Petition at 6-8.

⁵⁹ Josh Richman, "Tank farm operator hit with \$2.5 million punishment," East Bay Times (July 14, 2009), <https://www.eastbaytimes.com/2009/07/14/tank-farm-operator-hit-with-2-5-million-punishment/>.

⁶⁰ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

helpful to all those involved, including government staff, regulated entities, and, in particular, fenceline communities who have fewer resources to monitor EPA actions and guidance.

B. Codify Community Engagement in SEP Development and Implementation

SEPs represent one of the closest approximations of restorative justice practices that the Department and EPA can provide, if appropriately conducted. Restorative justice requires an understanding of the impact of the violation on the affected community, and a consensus of how the harm can be repaired. Thus, community engagement should be an essential component of model SEPs, from project conceptualization through implementation. Apart from passing discussion in the 2015 SEP Policy,⁶¹ the most focused document to address this need is a 2003 interim guidance memo, which gently “encourages EPA staff to include community involvement in settlements, where appropriate” but does not provide meaningful suggestions on how to do so apart from creating SEP libraries in consultation with communities or generally incorporating input during implementation.⁶² New guidance is warranted, both at EPA and the Department, drawing on the Biden-Harris Administration’s commitment to centering impacted and historically marginalized communities.⁶³ For example, providing public comment through Federal Register notices on consent decrees is not an effective or sufficient way to gather community input on SEPs provided in a proposed settlement.⁶⁴ Affected communities often lack the resources at the household and community level to take part in such bureaucratic, technical and often exclusionary government forums.⁶⁵ Communities should instead be brought in well before the settlement is at a point of finalization to be posted in the Federal Register.

With history as a haunting guide, and present-day patterns of discrimination that remain apparent, the Department and EPA should work proactively with fenceline communities to identify prevention and remediation priorities and develop SEPs before enforcing violations.⁶⁶ As the 2015 SEP Policy acknowledges, community engagement has historically been truncated due to court-imposed deadlines and other factors inherent in judicial and administrative enforcement proceedings.⁶⁷ But communities can tell the Department and EPA right now what their ongoing environmental justice challenges are, and what solutions would most benefit them. Farmworker communities in California’s San Joaquin Valley value safe drinking water, are often aware of the threats impacting them, including from non-compliant entities, and know what water projects, for example, would most benefit them. Communities along the Gulf of Mexico

⁶¹ 2015 SEP Policy at 18-20.

⁶² 2003 Community Involvement Interim Guidance.

⁶³ See Executive Order 13,990; Executive Order 14,008.

⁶⁴ 2015 SEP Policy at 18 (“in many civil judicial cases, the Department of Justice seeks public comment on lodged consent decrees through a Federal Register notice. 28 C.F.R. § 50.7. In certain administrative enforcement actions, there are also public notice requirements that are followed before a settlement is finalized. See 40 C.F.R. Part 22.”).

⁶⁵ Patrice L. Simms, *Leveraging Supplemental Environmental Projects: Toward an Integrated Strategy for Empowering Environmental Justice Communities*, 47 *Envtl. L. Rep. News & Analysis* 10511, 10512 (2017).

⁶⁶ This approach was deemed “meritorious” by the EPA in 2003, but not adopted as the standard procedure. 2003 Community Involvement Interim Guidance at 35885. The EPA has endorsed the idea of “SEP libraries,” which are lists of possible SEPs held by EPA regional offices that can be used in a future settlement. 2003 Community Involvement Interim Guidance., at 35887.

⁶⁷ 2015 SEP Policy at 19.

know the dangers of oil spills and are sadly too aware of companies that violate federal water laws.⁶⁸ They are in a strong place to advocate for local improvements that will benefit the communities most harmed. The Department and EPA should take full advantage of the incredible knowledge these communities hold as well as ensure their participation in the process given the SEPs are designed specifically to benefit them.

To meaningfully engage affected communities, the Department and EPA should undertake new training and commit additional resources to conduct effective outreach as highlighted in the Department's recent announcement of its Comprehensive Environmental Justice Enforcement Strategy.⁶⁹ As part of this strategy, the Department announced that each U.S. Attorneys' Office is to designate an environmental justice coordinator. These coordinators, possibly in coordination with other environmental and public health agencies, such as EPA, could be effective point-persons for community outreach in each District.

One specific strategy for the Department to also consider is consultation with community-based organizations who have existing relationships in these communities.⁷⁰ These organizations share trust with local partners, the skills to conduct culturally-competent outreach, and the technical capacity to bridge the knowledge gap between the federal government and affected communities. These collaborations could save the Department and EPA time and resources, relying on the existing social and physical infrastructures that exist to facilitate community engagement. Lastly, we encourage the Department and EPA to develop funding streams to compensate these organizations for their deep expertise. At no point, however, should engagement with community-based organizations be a substitute for hearing directly from impacted communities, whose perspectives are the most important.

Community input is so critical that it should be a key performance indicator in each SEP settlement, with mechanisms to seek input as early and as frequently as possible, and plans to adjust course based on community input. Reporting back to the Department and EPA, every SEP could teach the government how it, as well as third parties, can plan and implement future SEPs more effectively.

IV. Conclusion

Thank you for your time and consideration of these comments. Our coalition appreciates all that the Department and EPA have done to further environmental justice since the first day of the Biden Administration. We are proud to be your allies in this vital work supporting the low-income communities and communities of color who have been overlooked and disproportionately harmed by environmental violations for too long.

⁶⁸ See e.g. U.S. DOJ, BP Exploration and Production Inc. Pleads Guilty, Is Sentenced to Pay Record \$4 Billion for Crimes Surrounding Deepwater Horizon Incident (Jan. 29, 2013), <https://www.justice.gov/opa/pr/bp-exploration-and-production-inc-pleads-guilty-sentenced-to-pay-record-4-billion-crimes>.

⁶⁹ U.S. DOJ, "Comprehensive Environmental Justice Enforcement Strategy" at 3 (May 5, 2022).

⁷⁰ 2003 Community Involvement Interim Guidance, at 35888; see generally Simms, *Leveraging Supplemental Environmental Projects*.

We would be glad to discuss further and assist however possible as you move forward to ensure that SEPs meet the pressing environmental justice needs of communities across America. For more information, please contact Stacey Geis, Earthjustice at (415) 217-2000 or sgeis@earthjustice.org, and any of the undersigned groups.

Sincerely,

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