



July 11, 2022

Hampton Y. Dellinger
Assistant Attorney General
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Ave NW
Washington, DC, 20530

Re: Interim Final Rule Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties (Docket No. OAG 177, RIN 1105-AB62) and Attorney General Memorandum (AG Order No. 5384-2022)

Dear Mr. Dellinger:

Commenters Conservation Law Foundation (CLF), Surfrider Foundation, and Sierra Club appreciate the opportunity to comment in response to the Department of Justice's (DOJ's) recent Interim Final Rule rescinding 28 CFR § 50.28 (2020) and the related Attorney General Memorandum outlining DOJ's approach to settlement agreements involving payments to non-governmental third parties (2022 Guidance).

Commenters provide this letter to address the new policy's impact on the use of Supplemental Environmental Projects (SEPs) in environmental enforcement settlements. Commenters previously submitted a petition for rulemaking seeking the removal of barriers to the use of SEPs¹ and collectively have significant experience with the use of SEPs to resolve environmental violations and have members who have benefitted from SEPs implemented in their communities or regions.

CLF is a Boston-based non-profit that works to protect New England's environment. CLF regularly brings lawsuits to enforce clean water and clean air laws, including by using the citizen suit provisions of the Clean Air Act and Clean Water Act. CLF routinely seeks to include SEPs in settlement agreements or court orders, generating more than \$2,000,000 in funding for local environmental protection and restoration projects to date.

The Surfrider Foundation is a national grassroots organization that works to protect the world's ocean, waves, and beaches, for enjoyment by all people. Surfrider's Clean Water Initiative seeks to protect water resources and prevent pollution along coasts and waterways by engaging

¹ Conservation L. Found., Surfrider Found., and Sierra Club, Petition for Rulemaking Regarding Departmental Use of Supplemental Environmental Projects (June 14, 2021), <https://democracyforward.org/wp-content/uploads/2021/06/SEPs-Petition-for-Rulemaking-06.14.21.pdf>.

communities, testing water, planting ocean-friendly landscapes, and advocating for holistic clean water solutions.

Sierra Club, the nation’s oldest and largest grassroots environmental organization, is dedicated to protecting and restoring the quality of the natural and human environment using all lawful means. Sierra Club frequently avails itself of the citizen suit provisions of the Clean Air Act, Clean Water Act, and other environmental statutes and has resolved many of its citizen enforcement suits by entering into settlements that require defendants to fund SEPs to benefit impacted communities.

Commenters strongly support DOJ’s new policy, including the rescission of 28 C.F.R. § 50.28 (2020) and DOJ’s endorsement of the use of SEPs in appropriate settlements. Commenters agree that the prior policy presented unnecessary and inappropriate barriers to appropriate settlement tools, including SEPs. This comment provides information on three topics. First, we explain that the use of SEPs is permissible and should be considered for mitigating environmental harm from violations. Second, we provide examples of successful and appropriate uses of SEPs. Finally, we urge DOJ to update its Guidance to remove potentially counter-productive language and to ensure that the communities harmed by environmental violations have a role in proposing suitable SEPs.

I. DOJ Correctly Concludes That SEPs Are a Permissible and Appropriate Tool to Remedy Harm from Environmental Violations.

For four decades, DOJ has used SEPs to address the consequences of environmental harm when settling cases involving violations of environmental statutes. SEPs are “environmentally beneficial projects which a defendant agrees to undertake in the settlement of an enforcement action, but which the defendant, or any other third party, is not otherwise legally required to perform.”² In practice, SEPs are tangible, real-world projects that mitigate environmental harm caused by polluters in communities, often low-income communities of color, that would otherwise be left to grapple with the consequences of pollution on their own. They serve a mitigation function and an environmental justice function.

The now-rescinded 28 C.F.R. § 50.28 (2020) appeared to limit the use of SEPs. Specifically, it instructed Department attorneys that “in no case shall any [] agreements 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.”³ Commenters agree with DOJ that this provision was too restrictive and that payments to third parties (including to carry out SEPs) “allow the United States to more fully accomplish” the enforcement goal of “[c]ompensating victims, remedying harm, and punishing and deterring unlawful conduct.”⁴ The rescinded regulation limited the tools available to EPA and DOJ in enforcement cases—in conflict with EPA’s directive to use “the full array of policy and legal tools available” in civil

² Interim Revised EPA Supplemental Environmental Projects Policy Issued, 60 Fed. Reg. 24,856-62 (May 10, 1995).

³ Prohibition on Settlement Payments to Non-Governmental Third Parties, 85 Fed. Reg. 81,409, 81,410 (Dec. 16, 2020) (rescinded).

⁴ Guidelines and Limitations for Settlement Agreements Involving Payment to Non-Governmental Third Parties, 87 Fed. Reg. 27,936, 27,937 (May 10, 2022) (to be codified at 28 C.F.R. pt. 50).

enforcement settlements⁵—and created confusion over whether DOJ views SEPs as third-party payments.

Moreover, as DOJ has again recognized, the use of SEPs to resolve environmental violations is lawful. DOJ and courts have long treated SEPs as permissible and appropriate in suitable enforcement cases. DOJ began regularly approving SEPs in the early 1980s, and subsequent court rulings allowed their use as fair, reasonable, and in the public interest.⁶

Federal enforcement of environmental statutes⁷ generally occurs through administrative actions (brought by EPA) or through civil actions (brought by DOJ, on behalf of client agencies like EPA).⁸ DOJ can also intervene as a matter of right in citizen suits brought under environmental statutes like the Clean Water Act (*see* 33 U.S.C. § 1365(c)(2)) and Clean Air Act (*see* 42 U.S.C. § 7604(b)(1)(B)). Federal environmental statutes provide for civil judicial enforcement to secure injunctive relief, civil penalties, recovery of government response costs, enforcement of administrative orders, or other relief.⁹ Most environmental enforcement actions are resolved through settlement agreements or consent decrees. Consent decrees merely have to “come[] within the general scope of the case made by the pleadings, further[] the objectives upon which the law is based, and [] not violate the statute upon which the complaint was based.” *Elec. Controls Design*, 909 F.2d at 1355 (quoting *Loc. No. 93, Int’l Ass’n of Firefighters, AFL–CIO v. City of Cleveland*, 478 U.S. 501, 525-26 (1986) and *Pac. R.R. v. Ketchum*, 101 U.S. 289, 297 (1879)) (internal quotations omitted). As SEPs are intended to provide an environmental benefit

⁵ Memorandum from Acting Assistant Administrator Lawrence E. Starfield to Reg’l Couns. and Deputies, Enf’t and Compliance Assurance Div. Dirs. and Deputies, OECA Off. Dirs. and Deputies re: Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements, 1 (Apr. 26, 2001).

⁶ *See, e.g., Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990) (“While it is clear that a court cannot order a defendant in a citizens’ suit to make payments to an organization other than the U.S. treasury, this prohibition does not extend to a settlement agreement whereby the defendant does not admit liability and the court is not ordering non-consensual monetary relief”); *Pa. Env’t. Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431, 436 (M.D. Pa. 1989) (declining to “disapprove a proposed consent decree solely for the reason because [sic] it does not contain a provision requiring the Defendant to pay a civil penalty to the United States”).

⁷ These laws include the Clean Air Act (42 U.S.C. §§ 7401-7431), the Clean Water Act (33 U.S.C. §§ 1251-1275), the Oil Pollution Act (33 U.S.C. §§ 2701-2720), the Safe Drinking Water Act (42 U.S.C. §§ 300f-300j-27), the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. §§ 136-136y), the Toxic Substances Control Act (15 U.S.C. §§ 2601-2629), the Resource Conservation and Recovery Act (“RCRA”) (42 U.S.C. §§ 6901-6908a), the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) (42 U.S.C. §§ 9601-9675), and the Emergency Planning and Community Right-to-Know Act (42 U.S.C. §§ 11001-11050).

⁸ *See* U.S. EPA, *General Enforcement Policy Compendium* (Dec. 1994), <https://nepis.epa.gov/Exe/ZyPDF.cgi/9100TIBO.PDF?Dockey=9100TIBO.PDF>.

⁹ *See, e.g.,* 42 U.S.C. § 7414 (Clean Air Act), 33 U.S.C. §§ 1319(b), 1321 (Clean Water Act); 42 U.S.C. § 300g-3(b) (Safe Drinking Water Act); 33 U.S.C. § 2702 (Oil Pollution Act); 42 U.S.C. §§ 6928(a), 6973 (RCRA); 42 U.S.C. §§ 9606, 9607 (Comprehensive Environmental Response, Compensation, and Liability Act). Caps on the amounts of civil penalties will often compel agencies to refer matters to DOJ for civil enforcement. *See, e.g.,* 42 U.S.C. § 7413(d) (Clean Air Act) (\$200,000 limit, unless waived by DOJ); 33 U.S.C. § 1319(g)(2)(B) (Clean Water Act) (\$125,000 limit for class II penalties); 42 U.S.C. § 300g-3(g)(3) (Safe Drinking Water Act) (\$25,000 limit).

to the very same community harmed by an environmental violation, they easily satisfy these requirements.

A small group of early critics raised concerns that SEPs may violate the Miscellaneous Receipts Act, but this notion was dispelled in a 1980 opinion from the Office of Legal Counsel (OLC).¹⁰ Despite a recent attempt to resurrect this theory,¹¹ it remains meritless.

The Miscellaneous Receipts Act implements the Constitution’s requirement that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹² To prevent the executive branch from augmenting its appropriated budget by diverting funds *before* they ever reach the Treasury, the Miscellaneous Receipts Act 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.”¹³

OLC has concluded that the government only constructively “receives” money intended for the Treasury—and therefore violates the Miscellaneous Receipts Act—when it directs funds *otherwise destined* to the Treasury to non-federal accounts.¹⁴ Thus, DOJ may not settle environmental enforcement actions by *directing* the violator to fund a project *in lieu of* accepting civil penalties.¹⁵ But OLC has “consistently advised” that SEPs 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 disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement.”¹⁶

SEPs are not penalties or payments in lieu of civil penalties that might conflict with the Miscellaneous Receipts Act; they are separate projects intended to mitigate environmental harm. Any civil penalty due is a separate calculation based on statutory factors.¹⁷ As EPA explained in

¹⁰ See Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 688 (1980).

¹¹ See Memorandum from Assistant Att’y Gen. Jeffrey Clark to ENRD Deputy Assistant Att’y Gens. and Section Chiefs re: Supplemental Environmental Projects (“SEPs”) in Civil Settlements with Private Defendants (Mar. 12, 2020).

¹² U.S. Const. Art. I § 9, cl. 7.

¹³ 31 U.S.C. § 3302(b) (emphasis added). See generally Todd Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. Rev. 327, 340 (2009).

¹⁴ *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, *supra* note 10, at 688.

¹⁵ *Id.* at 688.

¹⁶ *Application of the Gov’t Corp. Control Act and the Misc. Receipts Act to the Can. Softwood Lumber Settlement Agreement*, 30 Op. O.L.C. 111, 119 (2006) (citing Memorandum for the Files, from Attorney-Advisor Rebecca Arbogast, O.L.C., *Misc. Receipts Act and Criminal Settlements* (Nov. 18, 1996)) (“If these two criteria are met, then the governmental control over settlement funds is so attenuated that the government cannot be said to be receiving money for the Government”) (internal quotations omitted).

¹⁷ *E.g.*, 33 U.S.C. § 1319(e) (factors considered in determining amount of civil penalties in certain Clean Water Act cases include “the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the

a 2015 Guidance document on SEPs, “[s]ettlements 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).”¹⁸ A violator’s willingness to perform a SEP and thus mitigate some of the harm caused *may* be a relevant factor in determining a penalty amount, but it is not a substitute for a penalty, nor does it provide any kind of direct mathematical link to the penalty amount.¹⁹

Some critics have also argued that SEPs give DOJ a blank check to direct funds to pet organizations without Congressional oversight. The 2022 Guidance requirement that projects have a “strong connection to the underlying violation” at issue and should be used “to reduce the detrimental effects of the underlying violation” is a reasonable means to eliminate the risk of inappropriate use of SEPs. Pre-existing limits also prevent inappropriate use of SEPs. Specifically, EPA’s 2015 Guidance requires that SEPs possess a “nexus” to the underlying statutory violation, tethering the projects to enforcement authority.²⁰ To satisfy the nexus requirement, a SEP must, among other things, (1) “advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action”; and (2) reduce the impacts of the alleged violation or the chance that it will occur again.²¹ EPA’s 2015 Guidance also provides examples of inappropriate use of SEPs, showing that SEPs may not be general cash payments (such as contributions for environmental research at a university or to sponsor an environmental awareness campaign) but should be used to carry out defined projects.²²

The rescission of 28 C.F.R. § 50.28 (2020) is also consistent with Executive Order 13,990, which instructed agencies to “immediately review and . . . take action to address” regulations or agency actions “that conflict with [] important national objectives,” including “improv[ing] public health,” “ensur[ing] access to clean air and water,” and “hold[ing] polluters accountable.”²³ SEPs are particularly well-suited for these goals, as they are designed to ensure that polluters who caused environmental harm provide tangible resources to the harmed communities.

Indeed, as EPA explained in 1984 in the context of *administrative* enforcement actions (i.e., enforcement actions brought by EPA, without the assistance of DOJ or the courts), “[o]ccasions have arisen in enforcement actions where violators have *offered* to make expenditures for environmentally beneficial purposes above and beyond expenditures made to

applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require”).

¹⁸ Memorandum from Assistant Administrator Cynthia Giles to Regional Administrators, re: Issuance of the 2025 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy, at 21 (Mar. 1, 2015) (“2015 Guidance”).

¹⁹ *Id.*

²⁰ *Id.* at 7.

²¹ *Id.* at 7-8.

²² *Id.* at 17.

²³ Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7,037, 7,037 (Jan. 20, 2021) (Exec. Order 13,990).

comply with all existing legal requirements.”²⁴ As private company representatives explained to researchers in the 1990s, SEPs help their firms correct environmental harms and “recognize other opportunities for environmentally beneficial improvements.”²⁵

II. Prior to 2020, SEPs Have Been Used Successfully to Mitigate Environmental Harm Caused by Environmental Violations.

As the 2022 Guidance explains, SEPs help to remedy the harms to communities most directly affected by violations of environmental laws by compensating victims and mitigating or offsetting the environmental damage caused by the violator’s conduct.²⁶ Examples abound of SEPs that were used to directly mitigate environmental harms. Here are just a few:

- Between the late 1990s and the early 2000s, EPA found over 6,000 violations of air pollutants limits intended to protect visibility and accompanying monitoring, and reporting requirements at the Mystic Station Power Plant in Everett, Massachusetts.²⁷ Exelon Mystic entered into a consent decree requiring it to complete five SEPs, three of which directly contributed to reducing particulate matter and other air pollutants within the Greater Boston Metropolitan Area, which includes Everett. It installed oxidation catalysts in commuter rail trains (to reduce particulates) and supplied the trains with lower-sulfur diesel fuel. It retrofitted 500 Boston school buses with particulate matter filters. The company also spent \$250,000 to build two bike paths providing bike access to the subway station in Mystic in order to encourage cleaner methods of transportation.²⁸
- Between 2001 and 2008, EPA entered into fifteen agreements requiring electric power companies to perform SEPs worth roughly \$225 million, prompting significant new renewable energy generation and pollution control and mitigation by the very same power plants that produced significant pollution. By December 2011, EPA had entered into seven more such settlements worth nearly \$400 million in SEPs. Among the most important beneficiaries of these SEPs are low-income and minority communities that disproportionately bear the worst effects of pollution.²⁹
- DOJ charged Shintech, Inc. with violating environmental statutes for failing to repair or retire leaking refrigeration equipment and improperly disposing of, treating, or storing

²⁴ U.S. EPA, Civil Penalty Policy (July 8, 1980), at 15 (emphasis added).

²⁵ Charles Caldart & Nicholas Ashford, *Negotiations as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 Harv. L. Rev. 141, 190-91 (1999) (citing Monica Becker & Nicholas Ashford, *Exploiting Opportunities for Pollution Prevention in EPA Enforcement Agreements*, *Environmental Science & Tech*, May 1995 at 226A).

²⁶ Memorandum from the Att’y Gen. to Heads of Dep’t Components U.S. Att’ys re: Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties, at 1-2 (May 5, 2022) (“2022 Memo”).

²⁷ Complaint at 1, *United States v. Exelon Mystic, LLC*, No. 1:04-cv-10213-PBS (D. Mass. filed Jan. 28, 2004).

²⁸ *Civil Enforcement Case Report: Sithe New England*, EPA, <https://echo.epa.gov/enforcement-case-report?id=01-2002-0184> (last visited July 11, 2022).

²⁹ See 2015 Guidance, *supra* note 18, at 3-4.

hazardous waste.³⁰ This activity caused an ozone-depleting substance (HCFC) to leak into the atmosphere and hazardous waste to seep into groundwater.³¹ The consent decree included three SEPs, one of which instructed Shintech to create a residential appliance recycling program for Houston, Texas, to properly dispose of at least 6,400 appliances containing ozone-depleting chemicals. This program reduced the amount of HCFC in the area, leading to a decline in atmospheric CO₂. Shintech, Inc. also agreed to improve its vinyl chloride monomer stripping process, leading to a decrease in emissions, and to voluntarily reduce its legal emissions limit by 70%.³²

- After EPA found Clean Air Act violations at three U.S. Steel manufacturing plants in the Midwest, the company agreed to a 2017 consent decree requiring it to complete SEPs focused on “protect[ing] human health and the environment in the communities affected by [its] pollution.”³³ This included planting roadside vegetative particulate emissions buffers in Detroit, Michigan, and purchasing a \$260,000 street sweeper with enhanced particulate collection capability for Granite City, Illinois. U.S. Steel also spent \$1 million replacing lighting ballasts that were thought to contain polychlorinated biphenyls (PCBs) in public schools in the areas surrounding its factories.³⁴
- EPA brought an action against the City and County of Honolulu under various provisions of the Clean Air Act for failing to design, construct, and operate a gas collection and control system at a municipal solid waste landfill, resulting in the release of 6,875 tons of illegal uncontrolled non-methane organic compounds over a ten-year period.³⁵ Honolulu agreed to a \$16 million SEP that required it to install a photovoltaic system at a waste-to-energy facility, operate the project for at least three years, and generate at least 15,056 MWh of energy.³⁶ The project resulted in a reduction of air pollution, offsetting the harm caused by the violation.
- EPA brought an action against Airtech International for illegal stormwater discharges that included waste from industrial processes, specifically plastic resin pellets, oil and grease, and scrap metal. The stormwater discharge entered a storm drain at the facility, flowed into the City of Huntington Beach sewer system, and ultimately entered the Pacific

³⁰ Complaint at 10, 18-19, *United States v. Shintech, Inc.*, 4:08-cv-03519 (S.D. Tex. filed Dec. 1, 2008).

³¹ *PVC Manufacturers Agree to Reduce Air Pollutants and Strengthen Control of Hazardous Wastes*, U.S. Dep’t of Just. (Dec. 1, 2008), <https://www.justice.gov/archive/opa/pr/2008/December/08-enrd-1057.html>.

³² *Civil Enforcement Case Report: Shintech, Inc.*, EPA, <https://echo.epa.gov/enforcement-case-report?id=06-2006-0920> (last visited July 11, 2022).

³³ *U.S. Steel Corporation Agrees to End Litigation, Improve Environmental Compliance at Its Three Midwest Facilities, Pay Civil Penalty of \$2.2 Million and Perform Projects to Aid Communities Affected by U.S. Steel’s Pollution*, U.S. Dep’t of Just. (Nov. 22, 2016), <https://www.justice.gov/opa/pr/u-s-steel-corporation-agrees-end-litigation-improve-environmental-compliance-its-three>.

³⁴ *Civil Enforcement Case Report: U.S. Steel - CD*, EPA, <https://echo.epa.gov/enforcement-case-report?id=05-2008-6620> (last visited July 11, 2022).

³⁵ Complaint at 6-7, 12, *United States v. Honolulu*, No. 1:15-cv-00173 (D. Ha. filed May 12, 2015).

³⁶ Consent Decree and Order at 9, *United States v. Honolulu*, No. 1:15-cv-00173-DKW-BMK (D. Ha. 2015).

Ocean, harming coastal life.³⁷ Airtech agreed to a SEP to complete five beach clean-up projects and to conduct oyster and other marine life recovery projects that would repair the native habitat and improve the ecological and economic benefits of the local estuarine ecosystem.³⁸

- DOJ brought suit against the City of Fitchburg for discharging pollutants into navigable waters of the United States from a publicly owned water treatment plant in violation of its permit and the Clean Water Act.³⁹ The settlement required Fitchburg to prevent further violations by completing projects at the treatment plant that prevented further illegal discharges. The settlement also included a SEP that required Fitchburg to remedy prior harm by completing projects at the stream bank that would control nonpoint source runoff into the watershed and enhance fishing and contact recreation opportunities in the polluted river.⁴⁰
- EPA brought an action against BioMarin for discharging pollutants, generated from the production of enzymes to treat various diseases, into the Novato Sanitary District domestic sewer system and Ignacio Wastewater Treatment Plant.⁴¹ EPA found 62 violations from 2004 through 2007.⁴² The wastewater effluent ultimately reached San Pablo Bay.⁴³ In addition to a civil penalty, the settlement required BioMarin to complete a SEP to fund a stream restoration project in an affected tributary. The project was completed by subcontractors and included restoration and maintenance of native vegetation harmed by the pollution.
- DOJ filed suit against H. Kramer Company, which manufactures brass and bronze ingots, for illegal emissions of lead and failure to properly maintain its smelting furnaces, in violation of the Clean Air Act.⁴⁴ H. Kramer agreed to a SEP requiring it to retrofit eleven diesel school bus vehicles operating in the neighborhood where the facility is located with emission control equipment designed to reduce emissions of particulates and/or ozone precursors in diesel vehicle exhaust, reducing air pollution in the same neighborhood as the violation.⁴⁵

³⁷ *Civil Enforcement Case Report: Total Petroleum Puerto Rico Corporation*, EPA, https://echo.epa.gov/enforcement-case-report?activity_id=3400160832 (last visited July 11, 2022).

³⁸ Complaint, Consent Agreement and Final Order at 6-7, *Airtech International, Inc.*, No. CWA-09-2020-0011 (EPA filed Dec. 16, 2019).

³⁹ Complaint at 3-8, *United States v. Fitchburg*, No. 1:12-cv-11511-JGD (D. Mass. filed Aug. 15, 2012).

⁴⁰ Consent Decree at 33-35, *United States v. Fitchburg*, No. 1:12-cv-11511-JGD (D. Mass. filed Aug. 15, 2012).

⁴¹ Consent Order at 3, *BioMarin Pharmaceutical, Inc.*, No. CWA-09-2008-0002 (EPA filed Sep. 4, 2008).

⁴² *Id.* at Attachment A.

⁴³ *Id.* at 4.

⁴⁴ *H. Kramer Company Settlement*, EPA (Jan. 31, 2013), <https://www.epa.gov/enforcement/h-kramer-company-settlement#seps>.

⁴⁵ Consent Decree at 21-22, *United States v. Illinois*, No. 13-cv-0771 (N.D. Ill. filed Jan. 31, 2013).

- EPA brought an administrative enforcement action against Canyon Plastics for illegal stormwater discharge containing such pollutants as plastic resin pellets, powders, flakes, powdered additives, regrind, dust, and other types of preproduction plastics at its Valencia, California, facility.⁴⁶ Stormwater runoff from the facility discharged into drain inlets connected to the County of Los Angeles’ municipal separate storm sewer system, eventually flowing through the Santa Clara River to the Pacific Ocean. Canyon Plastics agreed to perform a SEP requiring the installation of plastic tail and scrap recycling systems and existing on-site plastic material grinding and pelletizing equipment to ensure at least 540,000 pounds of tail and scrap plastic materials are recycled annually through use as raw materials for the production of appropriate plastic containers, thus reducing the amount of plastic available to further pollute the affected waterways.⁴⁷

As these examples demonstrate, in many cases over several decades, SEPs have mitigated the harms resulting from violations of environmental statutes and are widely popular among settling parties. Without SEPs, enforcement actions are less able to reduce or offset the detrimental effects that the unlawful behavior has already had on affected communities.

The resources that SEPs provide are especially important because many of the areas impacted by environmental harm are disproportionately low-income and communities of color, making SEPs a crucial instrument in achieving environmental justice.⁴⁸ SEPs are also attractive to alleged violators of environmental statutes because they provide an opportunity to more directly make up for the harm caused.⁴⁹ Perhaps most importantly, SEPs correct the detrimental effects of violations on the environment, and their implementation has “prevented significant amounts of pollution and restored contaminated water, wetlands, land, and air.”⁵⁰

III. DOJ Should Update Its Guidance to Ensure that Communities Harmed by Environmental Violations Have a Role in Proposing SEPs.

Commenters agree with DOJ’s statements that SEPs should be used to redress harms to impacted communities. DOJ could ensure that SEPs are directed to impacted communities by updating its guidance to provide opportunities for DOJ and EPA to work with community members to devise suitable SEP proposals.

As written, the 2022 Guidance contains statements that could potentially run counter to DOJ’s stated purpose. Specifically, it instructs Department attorneys to “not propose the selection of any particular third party to receive payments to implement any project carried out under any such settlement”⁵¹ and twice refers to projects that “the defendant” proposes. This could

⁴⁶ Complaint/Consent Agreement and Final Order at 3, *Canyon Plastics, Inc.*, No. CWA-09-2017-0001 (EPA filed Nov. 4, 2016).

⁴⁷ *Id.* at 8-10.

⁴⁸ 2015 Guidance, *supra* note 18, at 3-4.

⁴⁹ Thomas McGarity, *Supplemental Environmental Projects in Complex Litigation*, 28 Tex. L. Rev. 1405, 1407 (2020); *see also* Laurie Droughton, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 Pace Env’t L. Rev. 789, 809-10 (1995).

⁵⁰ Kenneth Kristl, *Making A Good Idea Even Better: Rethinking the Limits on Supplemental Environmental Projects*, 31 Vt. L. Rev. 217, 218-19 (2007).

⁵¹ 2022 Memo, *supra* note 26, at 3.

potentially be read to give the defendants sole control over project selection. DOJ likely does not intend to disempower impacted communities in this way.

To ensure DOJ's policies are not misread and that SEPs are consistently implemented in a way that fully meets the goal of remedying harms to communities impacted by environmental violations, Commenters suggest first that DOJ update its guidance to strike the references to projects "the defendant proposes."⁵² Acceptable SEPs should not be limited to those proposed by the defendant because, in many cases, impacted communities are better situated than defendants to understand what projects would best remedy the harm caused by violations. A policy that allows only defendants to propose projects would essentially compel communities to work directly with defendants who perpetrated the harm in order to be involved in generating acceptable SEP proposals. This would not further the goals of justice and fairness. Instead, SEPs should be defined broadly, consistent with the language used in the Federal Register notice, to "include any payment or a loan, in cash or in kind, to a non-governmental person or entity that is not a person to the dispute for environmentally beneficial projects."

Second, DOJ should update its guidance to make it easier for members of the impacted communities to propose SEPs and SEP recipients. This approach would avoid potential concerns over projects solely proposed by the government without ceding all control to the defendant or otherwise excluding impacted communities. It would also help guard against other potential abuses, such as SEP proposals that direct funds toward recipient organizations controlled by or aligned with a defendant. To this end, the third bullet in the list of "Guidelines and Limitations" in the 2022 Guidance should be revised as follows (*proposed new language in italics*):

It shall be the policy of the Justice Department to favor projects and third-party recipients proposed by communities directly impacted by the violations giving rise to the underlying enforcement action. The Justice Department and its client agencies shall not unilaterally propose the selection of any particular third party to receive payments to implement any project carried out under any such settlement but may facilitate a process through which impacted communities may develop acceptable projects and propose third-party recipients. Similarly, the Justice Department and its client agencies shall not propose a specific entity to be the beneficiary of any projects carried out under any such settlement, although the Department and its client agencies may specify the type of entity and may assist impacted communities in developing and proposing projects and third-party recipients. The Department and its client agencies may also disapprove of any third-party implementer or beneficiary that the defendant propose[d] for consideration, provided that the disapproval is based upon objective criteria for assessing qualifications and fitness outlined in the settlement agreement. Acceptable criteria for disapproval shall include objections from the impacted community to either a project or a third-party recipient.

In order to avoid further burdening impacted communities by requiring them to expend their own resources on engaging community members to develop appropriate and beneficial project proposals, DOJ should also consider appropriate ways to fund or otherwise support communities for this purpose. Among other approaches, DOJ should consider whether the Environmental

⁵² *Id.*

Crime Victim Assistance program could assist impacted communities in the process of developing and proposing projects.

Third, DOJ could consider using “Idea Banks” as a way to generate community-driven SEP proposals. In a 2005 study, forty-seven states used SEPs in some form, and some states, including Maine, Delaware, and Illinois, had, at the time of the study, SEP Idea Banks. Idea Banks consist of project proposals submitted by local governmental agencies, nonprofits, and local groups that violators can choose from during settlement negotiations.⁵³ Often, Idea Banks come in the form of web-based forms that allow the agency to receive “feedback from the state legislature, environmental groups, and the regulated community, with the benefit that the agency is seen as only approving SEPs that have been validated by the larger community.”⁵⁴ The Illinois system was created to ensure that any project that on the list of potential projects had the support of the harmed community, with the Illinois EPA having established procedures to determine whether projects are needed and desired. Creating a website that allows for the submission of ideas by the public, as well as voting and commentary on submissions, would create a consistent, direct connection between the harm done to the community and the SEP picked, while also alleviating potential concerns that the government could use settlements to fund pet organizations. The study also identified two primary benefits of Idea Banks: 1) “they ensure that projects actually redound to the benefit of local communities,” and 2) they “reduce transaction costs for all parties”⁵⁵ by allowing violators of environmental statutes to choose from already-developed SEP ideas, cutting down the time spent on settlement negotiations. This could also encourage defendants to participate in the SEP process “by reducing the amount of resources defendants would have to spend on outreach efforts and by giving defendants an idea of a potential SEP project without involving the community.”⁵⁶

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Commenters appreciate the opportunity to comment and provide recommendations on this matter and would be happy to provide further information. If you have any questions or would like to discuss the information in this comment, please contact our counsel, Samara Spence, Senior Counsel at Democracy Forward, at 202-701-1785 or sspence@democracyforward.org.

Respectfully submitted,

Conservation Law Foundation
Surfrider Foundation
Sierra Club

⁵³ Steven Bonorris, *Environmental Enforcement in the Fifty States: The Promise and Pitfalls of Supplemental Environmental Projects*, 11 *Hastings W.-NW. J. Env't L. & Pol'y* 185, 214 (2005).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*