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Environmental Enforcement in the Fifty States: The Promise and Pitfalls of Supplemental Environmental Projects

Steven Bonorris

Chelsea Holloway

Annie Lo

Grace Yang

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**Environmental Enforcement in the
Fifty States:
The Promise and Pitfalls of
Supplemental Environmental
Projects**

*By Steven Bonorris, Public Law Research
Institute, UC Hastings College of the Law
with Chelsea Holloway, Annie Lo,
and Grace Yang*

This article is a preliminary analysis of data collected over the past twelve months, surveying the supplemental environmental policies and practices of the fifty states, written in concert with the American Bar Association's Environmental Justice Committee; the authors would like to acknowledge the committee's co-chairs Nicholas Targ and Benjamin Wilson for their thoughtful leadership and support. We are also grateful to the numerous state regulators who consented to be interviewed, as well as the many people who commented on the analytic portions of the report, including Professors Eileen Gauna, Cliff Rechtschaffen, and attorneys at EPA and Department of Justice. Special thanks to Professor David Jung, Director of the Public Law Research Institute at UC Hastings College of the Law, and Jeff Levinsky of Interactive Sciences, Inc., who supplied a generous grant underwriting a great portion of the effort.

Steven Bonorris is the Fellow in Public Law at the Public Law Research Institute at UC Hastings College of the Law. Chelsea Holloway, Annie Lo, and Grace Yang are members of the Hastings Class 2005.

Table of Contents

Introduction and Summary	187
Background	187
Structure of the Report	188
Summary of Findings	188
I. EPA SEP Guidelines and Memoranda	188
Definition of SEPs	188
Legal Principles	189
Categories of SEPs	190
Calculation of the Final Penalty	190
Oversight and Drafting Enforceable SEPs	191
Liability for Nonperformance of a SEP and Stipulated Penalties	192
Community Input	192
EPA Procedures	193
Profitable SEPs	194
Aggregation of Funds	194
Third Parties	195
II. The Law of SEPs	195
Applicability to the States	195
The Federal Picture	196
EPA's General Enforcement Discretion	197
Going Beyond the Relief Outlined in the Statute through Consent Decrees	198
The GAO Opinions and the Miscellaneous Receipts Act	199
Other Legal Considerations	200
The Legal Significance of Guidelines	200
Nollan/Dolan and Nexus	201
III. Policy Implications of Supplemental Environmental Projects	202
The Benefits of SEPs	203
The Risks of SEPs	205
SEPs and the Separation of Powers	208
Summation	209
IV. Model Practices of the Fifty States	210
1. Towards a New Enforcement Model	210
Restorative and Environmental Justice	211
Social Justice	211
Practices	212
Facilitating Environmental Justice	212
SEP Idea Libraries to Solicit Input from Affected Communities	213
Towards a New Collaborative Compliance Model	214
State SEP Funds to Redress Environmental Degradation in Affected Communities	215
2. SEPs for States' Unique Issues	216
Practices	217
Contributions to Third Parties to Implement SEPs	217
Options to Facilitate SEPs for Small Violators	218
Accommodating Transboundary SEPs	218
3. Efficient and Effective Administration of Environmental Laws ("First, do no harm")	218
Practices	219
Oversight and Enforceability	219
Transparency and Neutrality in the SEP Approval Process	220
Community Input	220
V. Conclusion	221

Introduction and Summary

Background

The United States Environmental Protection Agency (“EPA”) has encouraged Supplemental Environmental Projects (“SEPs”) for more than a decade as part of the agency’s efforts to protect and enhance public health and the environment.¹ SEPs are environmentally beneficial projects voluntarily undertaken by violators of environmental laws, for which EPA may partially mitigate the civil penalties they would otherwise face.² The EPA reported that during fiscal year 2002, 10 percent of the EPA’s civil judicial and administrative settlements included SEPs valued at \$56.5 million.³ The use of SEPs may be characterized as part of a larger trend away from the traditional deterrence-based model, where regulators identify violators and fine them amounts that exceed the economic benefit derived from the violations; instead, this new model of environmental enforcement encom-

passes self-reporting of violations, community group input, and innovative “win, win” solutions to environmental problems.⁴

Most major environmental laws are enforced under a “cooperative federalism” model, as the states implement and enforce the major environmental laws with the EPA overseeing and supporting its minimum standards and procedural requirements.⁵ Although all SEP policies have common features as a result of the EPA’s leadership and memoranda of understanding executed with the states, they also vary across states in response to local needs and politics. This report is primarily concerned with the SEP policies and practices of the various states. However, since the federal example has dramatically influenced state policy and remains the chief source of principles, legal precedents, and case law, it is necessary to first set out the federal background against which the state policies operate. The report is structured with this in mind.

1. United States Environmental Protection Agency, *Policy on the Use of Supplemental Environmental Projects in EPA Settlements* (Feb. 12, 1991) (on file with West-Northwest); Interim Revised EPA Supplemental Environmental Projects Policy Issued, 60 Fed. Reg. 24,856, 24,857 (May 8, 1995) [hereinafter *Interim Revised EPA Supplemental Environmental Projects Policy*]; Jeff Ganguly, *Environmental Remediation Through Supplemental Environmental Projects and Creative Negotiation: Renewed Community Involvement in Federal Enforcement*, 26 B.C. ENVTL. AFF. L. REV. 189, 207 (1998).

2. Final EPA Supplemental Environmental Project Policy Issued, 63 Fed. Reg. 24,796, 24,797-98 (May 5, 1998), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/fnlsep-hermn-mem.pdf> (last visited Dec. 15, 2004) [hereinafter *Final SEP Policy*]. The EPA refers to entities undertaking SEPs as defendants/respondents; for purposes of concision, the report refers to them as violators, though guilt is rarely acknowledged in the decree.

3. *Expanding the Use of Supplemental Environmental Projects*, Memorandum from John Peter Suarez, Assistant EPA Administrator, to EPA Assistant Administrators and Enforcement Staff I (June 11, 2002), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-expandinguse.pdf> (last visited Dec. 15, 2004).

4. See, generally, Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998) (discussing the shift from a deterrence-based model to a compliance-based one). Cf. Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 403 (2003) (similarly, the Occupational Health and Safety Administration may settle workplace violation cases if violators agree to undertake additional safety measures at work locations not cited for violations).

5. Joel Mintz, *Scrutinizing Environmental Enforcement: A Comment on a Recent Discussion at the AALs*, 17 J. LAND USE & ENVTL. LAW 127, 130 (2001); David L. Markell, *The Role of Deterrence-Based Enforcement in a ‘Reinvented’ State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, at 35 (2000). Federal oversight over delegated state enforcement actions includes the possibility of “overfilling,” or parallel federal enforcement actions brought against violators that EPA considers too leniently treated by the states. The specter of overfilling has compelled some states to hew closely to the EPA’s *Final SEP Policy*, to avoid settlements with inadequate cash penalties. This risk cannot be overstated, however, as our research turned up no cases in which EPA had brought a second enforcement action to recover against a settlement with overly lenient SEP.

Structure of the Report

The report first examines the salient legal issues surrounding SEPs, including 1) a summary of current federal law as it applies to SEPs, 2) an inquiry into the meaning and authority of the state and federal guidelines, and, 3) a look at the policy implications of SEPs. Next, this report sets out a discussion of “model practices” and the values that they advance. For readers interested in the full results of the fifty state survey, it will be available on the web in the Summer of 2005, on the website of the American Bar Association, Section on Individual Rights & Responsibilities, Environmental Justice Committee (www.abanet.org/irr/committees/environmental).

Summary of Findings

The results of the fifty state survey indicate that thirty states have instituted formal, published SEP policies in the form of legislation, or executive agency regulation or guidelines. Only thirteen states rely on informal, unwritten practices in negotiating SEPs. This represents a significant increase in the number of states with formal policies over the past eight years, up from nineteen states with formal policies or statutes, as indicated in the only prior survey of state SEP practices.⁶ Two states, North Carolina and South Carolina, have rejected the use of SEPs in settlements as a matter of policy or law. In addition, eight states expressly include environmental justice as a factor in their SEP policies: New Mexico, Colorado, Utah, Virginia, Florida, Oregon, Massachusetts and Connecticut.⁷

6. HAZARDOUS WASTE ENFORCEMENT TASK FORCE, ASS'N OF STATE AND TERRITORIAL SOLID WASTE MGMT. OFFICIALS, SUPPLEMENTAL ENVIRONMENTAL PROJECTS: SURVEY OF STATES AND TERRITORIES (Oct. 1997), available at <http://www.astswmo.org/Publications/pdf/sepsur.pdf> (last visited Dec. 14, 2004).

7. For a discussion of environmental justice and SEPs, see notes 198 to 211 and accompanying text, *infra*.

This report argues against leaving the negotiation of SEPs to the unfettered discretion of enforcement personnel, because of the lack of transparency and equity to both violators and affected communities. The report also notes the prevalence of a nexus requirement, or mandatory connection between a violation and the SEP, from various bodies of law; this convergence of doctrine, as well as the strong policy reasons undergirding nexus outlined in Section III, provide a strong basis for state inclusion of a variant of nexus in their policies. In addition, this report will set out a variety of model SEP practices which, we will argue, serve three broad sets of values—a collaborative model of environmental enforcement, interests unique to the states, and the perpetuation of public interest that lies at the core of environmental laws and regulations.

I. EPA SEP Guidelines and Memoranda

Definition of SEPs

Supplemental Environmental Projects (SEPs) are environmentally beneficial projects that go beyond compliance and are undertaken as part of a settlement of an enforcement action, EPA may mitigate a portion of the civil penalty that otherwise might have been assessed.⁸ The project must improve, protect or reduce risks to public health or the environment.⁹ Further, the project must be implemented entirely after the EPA has identified a violation in order to be part of a “settlement of an enforcement action.”¹⁰ Finally, SEPs are voluntary endeavors and may not be already

8. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,797-98. Generally, the respondent to the civil enforcement action does not admit liability as part of the consent decree; however, for ease of reference, the report will use the term “violation” to indicate the party against whom the enforcement action was brought.

9. *Id.* at 24,798.

10. *Id.*

mandated by law, either as part of injunctive relief, as part of an existing settlement, or by state or local requirements.¹¹

Legal Principles¹²

Over the decades, EPA's SEP policies have evolved from informal practices into a body of guidelines and memoranda. The 1998 *Final SEP Policy* and the 2002 *Supplemental Environmental Projects (SEP) Policy* memorandum are designed to ensure that SEPs do not exceed the Federal Government's authority and do not run afoul of any statutory requirements, especially the Miscellaneous Receipts Act ("MRA") and other applicable principles of appropriations law.¹³ Specifically, the EPA principles preserve the Congressional prerogative to appropriate funds as provided in the U.S. Constitution.¹⁴ The EPA principles require the following:

1. A project cannot be inconsistent with the statutes that gave rise to the violation.¹⁵
2. "All penalties must be deposited into the US Treasury unless otherwise authorized by law."¹⁶

11. *Id.*

12. *Id.* The *Final SEP Policy* uses the term "guidelines," but "principles" will be used within this report to encompass the broader set of guidance given by the totality of the EPA SEP memoranda, as well as the individual states' SEP policies.

13. Miscellaneous Receipts Act, 31 U.S.C. § 3301(b)(2000) (directing that all assessed penalties be deposited in the U.S. Treasury); *Supplemental Environmental Projects (SEP) Policy 1*, Memorandum from Sylvia K. Lawrence, Acting Assistant EPA Administrator, to EPA Regional Administrators and Regional Counsel 1-2 (Mar. 22, 2002), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/sepguide-mem.pdf> (last visited Dec. 15, 2004) [hereinafter *SEP Policy Memorandum*]. For more detail on the legal questions surrounding the legal framework of the EPA Policy, please consult Section II, "The Federal Law of SEPs."

14. *Importance of the Nexus Requirement in the Supplemental*

3. All projects must further an objective in the violated statute and contain an adequate nexus to the violation.¹⁷ EPA provides examples of nexus as follows:

- a. "The project is designed to reduce the likelihood that similar violations will occur in the future"; or
- b. "The project reduces the adverse impact to the public health or the environment to which the violation at issue contributes"; or
- c. "The project reduces the overall risk to public health or the environment potentially affected by the violation at issue."¹⁸

4. EPA cannot control or manage the SEP or its funds.¹⁹

5. The type and scope of each project must be defined in a settlement agreement.²⁰

6. "A project cannot be used to satisfy EPA's statutory obligation or another federal agency's obligations to perform a particular activity."²¹

7. "A project may not provide EPA or any federal agency with additional resources to perform a particular activity for which Con-

tal Environmental Projects Policy 2, Memorandum from Walker B. Smith, Director, EPA Office of Regulatory Enforcement, to EPA Regional Counsel and Division Directors (Oct. 31, 2002), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/sep-nexus-mem.pdf> (last visited Dec. 15, 2004) [hereinafter *Importance of the Nexus Requirement in SEP Policy*]

15 *SEP Policy Memorandum*, *supra* note 13, at 1.

16 *Id.* For purposes of precision, much of the federal guideline language cited is verbatim or nearly so.

17 *Importance of the Nexus Requirement in SEP Policy*, *supra* note 14, at 1-2.

18 *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,798.

19 *Id.*

20 *Id.*

21 *Id.*

gress has specifically appropriated funds.”²²

8. “A project may not provide additional resources to support specific activities performed by EPA employees or EPA contractors.”²³

9. “A project may not provide a federal grantee with additional funds to perform a specific task identified within an assistance agreement.”²⁴

10. Projects that involve only contributions to a charitable or civic organization are not acceptable.²⁵

Categories of SEPs

In order for a project to be accepted as a SEP, it must fit within at least one of the following categories and satisfy all other requirements established in the *Final SEP Policy*.²⁶

1. *Public Health* projects provide “diagnostic, preventative and/or remedial health care.”

2. *Pollution Prevention* projects reduce the amount or toxicity of pollution produced.

3. *Pollution Reduction* projects reduce the amount or toxicity of pollution already released.

4. *Environmental Restoration and Protection* projects “enhance the condition of the ecosystem or immediate geographic area adversely affected” by the violation.

5. *Assessments and Audits* examine internal operations to determine if other pollution problems exist or if operations could be improved to avoid future violations. Pollution prevention assessments, environmental quality assessments, and environmental compliance audits are listed as possible projects.

6. *Environmental Compliance Promotion* projects help others in the regulated community to maintain compliance and reduce pollution.

7. *Emergency Planning and Preparedness* projects provide non-cash assistance to responsible state or local emergency response or planning entities.

8. *Other* projects have environmental merit, but must be approved by the case team and must be otherwise fully consistent with all other requirements of the *Final SEP Policy*.

9. Projects that are not acceptable as SEPs include general public environmental awareness projects, contributions to environmental research at a college or university, projects that are unrelated to environmental protection (e.g., donating playground equipment), studies or assessments without a requirement to address the problems identified in the study, and projects which the violator will undertake with some form of federal financial assistance or non-financial assistance (e.g., loan guarantees).

Calculation of the Final Penalty

Although the *Final SEP Policy* encourages violators to undertake environmentally beneficial projects, the Policy explains that a minimum cash penalty is still an important part of any settlement for reasons of deterrence and fairness.²⁷ The EPA calculates the final penalty in a five-step process.²⁸

The first step involves calculating the settlement amount without the SEP, considering the circumstances and extent of the violation.²⁹ The applicable media-specific

22. *Id.*

23. *Id.* at 24,798-99.

24. *Id.* at 24,799.

25. *Id.* at 24,801.

26. *Id.* at 24,799-801.

27. *Id.* at 24,801.

28. *Id.* at 24,801-802.

29. *Id.* at 24,801.

EPA penalty policy is used to determine the “gravity component”—which weighs the severity of the violation, and provides the deterrent effect of the civil penalty. Adjusting the gravity component by such factors as good faith efforts to comply, cooperation, and litigation risk, and adding this to the economic benefit of noncompliance yields the “settlement amount,” or minimum settlement penalty, in the absence of a SEP.

The second step is to determine the minimum cash penalty amount when there is a SEP.³⁰ The minimum penalty must be the greater of 1) the economic benefit of noncompliance plus 10 percent of the gravity component or 2) 25 percent of the gravity component.³¹

Third, the SEP’s cost is computed using a computer program called “PROJECT.”³² The program considers three types of SEP costs, including capital costs (e.g., equipment, buildings), one-time nondepreciable costs (e.g., removing contaminated materials, purchasing land), and annual operation costs *and* savings. The program also considers whether a violator will deduct the SEP expenditures from its income taxes. The resulting, after-tax SEP cost is the maximum amount that EPA may take into account when mitigating the penalty amount.

Fourth, the EPA determines the mitigation percentage (i.e., the percentage of penalty offset afforded each dollar of SEP costs) and the mitigation amount (i.e., the net amount of penalty offset).³³ Factors considered in calculating the mitigation percentage include the benefits to the public and envi-

ronment at large, the innovativeness of the project, the extent to which the SEP reduces risk to minority or low-income populations, the extent to which the violator seeks community input, the multimedia impact of the project, and the extent to which the project achieves pollution prevention. The better the project performs in each of these categories, the greater the mitigation percentage will be. The mitigation percentage cannot exceed 80 percent of the SEP cost, save for projects of outstanding quality undertaken by small businesses, government agencies and non-profits, and for outstanding pollution prevention projects for all types of entities. These projects may receive 100 percent mitigation.³⁴ Once the mitigation percentage is determined, the mitigation amount is calculated by multiplying the percentage by the SEP costs.

Fifth, the final settlement penalty is calculated.³⁵ This final penalty is the greatest amount of either the second step’s 1) 10 percent of the gravity component plus the economic benefit of noncompliance or 2) 25 percent of the gravity component; or the SEP mitigation amount subtracted from the initial settlement amount (i.e., economic benefit plus the adjusted gravity component) without the SEP.³⁶

Oversight and Drafting Enforceable SEPs

The *Final SEP Policy* specifies that the settlement agreement should accurately and completely describe the SEP.³⁷ It should describe the actions to be performed by the violator and provide objective means to verify completion of the project.³⁸ The

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 24,802.

34. *Id.* In cases of 100 percent mitigation, each

dollar spent on a SEP offsets a dollar from the initial penalty calculation.

35. *Id.*

36. *Id.* at 24,802.

37. *Id.* at 24,803.

38. *Id.*

violator may be required to submit periodic reports to the EPA.³⁹ A violator should be required to quantify the benefits associated with the project and provide EPA with a report setting forth how the benefits were measured or estimated.⁴⁰ The violator “should agree that whenever it publicizes a SEP or the results of a SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.”⁴¹ The EPA provides a model consent agreement and order to assist settlement negotiators with these requirements.⁴²

Liability for Nonperformance of a SEP and Stipulated Penalties

Violators are responsible and liable for ensuring that a SEP is completed satisfactorily.⁴³ According to the *Final SEP Policy*, if a SEP is not completed satisfactorily, the violator should be required, pursuant to the settlement agreement, to pay stipulated penalties.⁴⁴ Stipulated penalties for failing to satisfactorily perform a SEP range between 75 percent and 150 percent of the mitigation value originally awarded to the project.⁴⁵ A violator may avoid the penalty if good faith and timely efforts were made to complete the work and at least 90 percent of the funds budgeted for the SEP were spent.⁴⁶ Pursuant to the *Final SEP Policy*, overestimating the cost of a SEP should also be penalized, even if the SEP is successfully

completed. If the final cost of the SEP is less than 90 percent of the projected cost, the violator should pay stipulated damages, between 10 percent and 25 percent of the original mitigation awarded percent.⁴⁷

Community Input

In appropriate cases, EPA should make special efforts to seek input on proposed projects by the community adversely affected by a violation.⁴⁸ In order to provide the community with information regarding possible SEPs, the EPA negotiating team should seek community input after the EPA knows the violator is interested in conducting a SEP, how much money is available for a SEP, and that settlement is likely.⁴⁹ The EPA Policy notes that representatives of community organizations usually will not participate directly in the settlement negotiation itself due to the confidential nature of the negotiation and the difficulty in determining which community group should participate in the negotiations.⁵⁰ The negotiating team should use informal methods of seeking input such as making telephone calls to local organizations, local churches, local elected leaders, or other groups.⁵¹ A public notice in a newspaper may also be appropriate.⁵² The EPA negotiating team, perhaps in conjunction with the violator, should also provide information about what SEPs are and the reasonable possibilities and limitations of such projects.⁵³

39. *Id.*

40. *Id.*

41. *Id.*

42. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MODEL SUPPLEMENTAL ENVIRONMENTAL PROJECTS CONSENT AGREEMENT AND ORDER (Jan. 1, 1999), available at <http://www.epa.gov/compliance/resources/policies/civil/rcra/sepmodcao-rpt.pdf> (last visited Dec. 15, 2004).

43. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,802. Further, a violator may not transfer liability to another third party, although a violator may use contractors or consultants to assist in implementing a SEP.

44. *Id.* at 24,803.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* Also, only EPA can approve SEPs.

51. *Id.*

52. *Id.*

53. *Id.*

In 2003, the EPA issued *Interim Guidance for Community Involvement in Supplemental Environmental Projects*, further encouraging EPA regional offices to solicit community input.⁵⁴ The *Interim Guidance* did not significantly change the existing policy; however, it did recommend the use of “SEP libraries,” archives of community suggestions for possible SEPs.⁵⁵ In addition, SEPs implicating community input continue to be eligible for a higher mitigation percentage.⁵⁶

The enumerated benefits of community involvement include the promotion of environmental justice, the enhancement of community awareness of EPA enforcement, and the improvement of relations between the community and the facility.⁵⁷ And while the memorandum encourages community involvement, it is not a requirement for SEP approvals.⁵⁸ There are a number of factors to consider in determining whether community involvement may be appropriate in a particular case.⁵⁹ These factors include: the parameters surrounding the particular case (e.g., court-ordered deadlines); the willingness of the violator to conduct the SEP and consider community input; the impact of the violation on the community; the level of interest of the community in the particular facility or SEP; and the amount of the proposed penalty and the settlement that is likely to be mitigated by the SEP.⁶⁰ Finally,

the memorandum includes appendices containing resources for identifying communities and community outreach techniques.⁶¹

EPA Procedures

Generally, the authority of a government official to approve a SEP is included in the official’s authority to settle an enforcement case, and thus no special approvals are required.⁶² Situations in which special approval is required include cases where a project may not fully comply with the *Final SEP Policy*, when a SEP would involve activities outside the United States, and where an environmental compliance promotion project or project in the “other” category is contemplated.⁶³

The *Final SEP Policy* requires documentation of cases in which SEPs are used as part of a settlement.⁶⁴ An explanation of the SEP, a description of the expected benefits of a SEP, and a description by the enforcement attorney of how nexus and other legal requirements are satisfied are required as part of the documentation.⁶⁵ Such documentation and explanations of a particular SEP may be confidential, exempt from the Freedom of Information Act, and protected by various privileges.⁶⁶

54. *Interim Guidance for Community Involvement in Supplemental Environmental Projects*, 68 Fed. Reg. 35,884 (June 17, 2003), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/sepcomm2003-intrm.pdf> (last visited Dec. 15, 2004) [hereinafter *Interim Guidance for Community Involvement*].

55. *Id.* at 35,887.

56. *Id.*

57. *Id.*

58. *Id.* at 35,886.

59. *Id.* at 35,887.

60. *Id.*

61. *Id.* at 35,888.

62. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,803-04.

63. *Revised Approval Procedures for Supplemental Environmental Projects*, Memorandum from Eric V. Schaeffer, Director, EPA Office of Regulatory Enforcement, to EPA Regional Counsel, Directors, and Enforcement Coordinators (July 21, 1998), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/sepapprovrev-mem.pdf> (last visited Dec. 15, 2004).

64. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,804.

65. *Id.*

66. *Id.*

Profitable SEPs

A 2003 EPA memorandum effected a change in the *Final SEP Policy* to allow for the acceptance, where appropriate, of SEPs that may be ultimately profitable to the violators.⁶⁷ The Memorandum first gives guidance on how to calculate and detect profitable projects.⁶⁸ First, SEP information is entered into the PROJECT model that calculates the annual costs and savings of a SEP.⁶⁹ Projects that are profitable (a project with a net annual savings) within the first five years of their implementation (or three years for a small business) will be rejected.⁷⁰ If the project is not profitable within that first project period, personnel should next determine whether the project will be profitable at fifteen years.⁷¹ Projects not profitable in their first fifteen years may be accepted.⁷² However, if a project will be profitable in five to fifteen years (or between three and fifteen years for small businesses) the project may still be accepted if it meets all other SEP Policy criteria and conditions and “the benefits to the public are significant despite the profit to the defendant.”⁷³

However, those projects considered profitable must meet a “high hurdle” in determining the mitigation credit for the project; the Memorandum explains that it would be inappropriate for SEPs that are profitable to

receive the maximum allowable mitigation credit.⁷⁴ This “high hurdle” can be met if the project demonstrates attributes such as: a high degree of innovation with a potential for widespread application; technology that is transferable to other facilities or industries; extraordinary environmental benefits that are quantifiable; exceptional environmental or public health benefits to an Environmental Justice community; and/or a high degree of economic risk for the alleged violator.⁷⁵ The better the project performs in each of these areas, the higher the mitigation credit the project will receive. As a ceiling, EPA’s Office of Enforcement and Compliance Assistance recommends a maximum upper mitigation percentage of 80 percent for profitable pollution prevention SEPs and a maximum upper mitigation percentage of 60 percent for all other profitable SEPs.⁷⁶

Aggregation of Funds

A later memorandum clarifies the EPA’s position on aggregating separate SEPs in a larger project.⁷⁷ The Memorandum explains that aggregation would be allowed but not where EPA would be required to hold or manage the aggregated project funds.⁷⁸

Two examples of permissible aggregation are described.⁷⁹ In one situation, separate violators pool resources to hire a con-

67. Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects, Memorandum from John Peter Suarez, Assistant EPA Administrator, to EPA Regional Counsel and Division Directors 5 (Dec. 5, 2003), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-profitableprojects.pdf> (last visited Feb. 24, 2005).

68. *Id.* at 8-9.

69. *Id.*

70. *Id.* at 5.

71. *Id.* at 8.

72. *Id.*

73. *Id.* at 8-9.

74. *Id.* at 6.

75. *Id.*

76. *Id.*

77. Guidance Concerning the Use of Third Parties and the Performance of SEPs and the Aggregation of SEP Funds, Memorandum from John Peter Suarez, Assistant EPA Administrator, to EPA Regional Counsel, Enforcement Managers, Enforcement Coordinators and Division Directors 1 (December 15, 2003), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-thirdparties.pdf> (last visited Feb. 24, 2005).

78. *Id.* at 3.

79. *Id.* at 2.

tractor to manage and/or implement a consolidated SEP.⁸⁰ This type of project is permissible as long as the project is “carefully crafted” so that the violators remain liable in the same manner as they would under a typical settlement.⁸¹ In the second situation, separate violators perform discrete and segregable projects within a larger one.⁸² Such a project is permissible as long as the violators remain liable for the implementation and completion of a specific portion of the larger project.⁸³ EPA, on the other hand, may not aggregate funds in a SEP account to be used at a later time as the Miscellaneous Receipts Act prohibits the EPA from managing SEP funds.⁸⁴

Third Parties

The same memorandum also clarifies that a violator may use a private, third party organization to manage SEPs and SEP funds. EPA may not use private, third parties to complete a SEP since such a relationship could create the appearance that EPA is using the organization to indirectly manage or direct SEP funds, in violation of the Miscellaneous Receipts Act.⁸⁵ There is no such concern when violators contract with third party organizations to manage and/or complete a SEP, as long as a few conditions are met.⁸⁶ A violator must be obligated to complete the SEP satisfactorily, must fully expend the amount of funds agreed to be spent in performance of the

SEP, and the project must fulfill the requirements of the SEP Policy.⁸⁷ Further, the Memorandum underscores that the violator cannot merely use third parties to assist in implementing a SEP and avoid full legal responsibility for the implementation of the SEP.⁸⁸

II. The Law of SEPs

Applicability to the States

What follows is a discussion of the law of SEPs, with a focus on federal case law and administrative materials. The lessons gleaned are applicable to the states as well. For instance, most state environmental protection agencies find themselves in the same position as EPA, fashioning settlements not expressly authorized by their legislatures. PLRI has uncovered no state court cases finding that a state environmental agency overstepped its statutory authority in implementing SEPs, so it is impossible to assert with certainty that states must adopt an EPA-styled nexus requirement, as well as other EPA policies.⁸⁹ Nevertheless, many states have adopted the EPA nexus requirement as a means of deflecting any criticism of their environmental penalty policies. As seen in the following sections, there are strong policy grounds for invoking a form of nexus requirement as well.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 4.

85. *Id.* at 5. A more complete discussion of the Miscellaneous Receipts Act ensues in Section II of this report, “The Law of SEPs.” EPA may not directly or indirectly manage SEP funds.

86. *Id.* at 4.

87. *Id.*

88. *Id.*

89. Idaho’s Constitution echoes the federal Miscellaneous Receipts Act. Idaho Const. art. VII, § 13 (“No money shall be drawn from the treasury, but in pursuance of appropriations made by law.”); also, it should be noted that SEPs have been categorically rejected in the state of North Carolina, based on a clause in the state constitution requiring all civil penalties to be directed to a civil penalty forfeiture fund. *Craven County Bd. of Educ. v. Boyles*, 343 N.C. 87, 92, 468 S.E.2d 50, 53 (1996) (citing N.C. Const. art. IX, § 7).

The Federal Picture

No Congressional act expressly authorizes EPA to accept SEPs in mitigation of civil enforcement penalties. That said, EPA enjoys broad authority to bring enforcement actions and discretion in settling them, in accordance with the underlying objectives of the environmental statutes.⁹⁰ Moreover, PLRI research indicates that no court has ever invalidated an EPA-approved settlement with a SEP.⁹¹ This section will take a closer look at the statutory authorities and prosecutorial discretion of EPA, and the objections raised by the Federal General Accounting Office (“GAO”) to the early versions of EPA’s SEP policy, with the caveat that this section aims less at resolving the precise nature of EPA’s SEP authority and more at underscoring the legal issues that should be considered by the states as they move forward with their SEP policies and statutes. Of particular interest is the continual reappearance in various legal doctrines of “nexus,” or the connection between the statutory violation and the supplemental environmental project. Though most

states are not legally constrained to require nexus, it might benefit them to include a mild variant of nexus within their policies, in furtherance of circumspect use of their EPA-delegated powers.⁹²

Congress has never expressly authorized EPA (or the United States) to accept a lower settlement penalty in exchange for the performance of environmentally beneficial projects.⁹³ Some federal statutes contain provisions that implicitly support EPA’s use of SEPs in settlement agreements, however. The Toxic Substances Control Act specifically allows EPA to pursue “settlements with conditions.”⁹⁴ The Clean Air Act (“CAA”) also expressly grants EPA the authority to “compromise, modify, or remit, with or without conditions,” any administrative penalties under the Act.⁹⁵ However, there is no specific authority for EPA to settle suits with conditions in other environmental statutes.⁹⁶

EPA’s interpretation of its authority under the CAA, as allowing consent decrees with SEPs, gains support from long congres-

90. Marshall J. Breger, *The Fiftieth Anniversary of the Administrative Procedure Act: Past and Prologue: Regulatory Flexibility and the Administrative State*, 32 TULSA L.J. 325, 338 (1996) (“Traditional doctrines of prosecutorial discretion have given a wide range of discretionary authority to regulators to ‘plea bargain’ or settle cases.”).

91. In one of the few judicial pronouncements close to being on point, a federal court observed that briefing materials did not provide evidence of the “clear Congressional authorization for the EPA’s agreeing to the SEP” in a particular consent decree, but the court did not comment on the scope of EPA authority further. *United States v. Atofina Chemicals, Inc.*, 2002 U.S. Dist. LEXIS 15137, at *15 (E.D. Pa. Aug. 15, 2002).

92. Some commentators suggest that that nexus should serve as a policy tool, to ensure that projects benefit the communities affected by the violations, and while others observe that the legal fine points of nexus can undercut the restorative goal that should be the *sine qua non* of SEP policies.

93. Laurie Droughton, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 PACE ENVTL. L. REV. 789 (1995). One provision of the Clean Air Act does permit up to \$100,000 of civil penalties assessed to be directed to a special fund used for air pollution compliance and enforcement projects. 42 U.S.C. § 7406(g). Settlements with SEPs do not constitute “civil penalties” within the meaning of this provision.

94. Toxic Substances Control Act § 16(a)(2)(C), 15 U.S.C. § 2615(a)(2)(C) (2005) (specifically allowing EPA to “compromise, modify or remit, with or without conditions, any civil penalty which may be imposed under this subsection”).

95. Clean Air Act §§ 113(d)(2)(B), 304(g)(2), 42 U.S.C. § 7413(d)(2)(B) (2005).

96. David Dana, *The Uncertain Merits of Environmental Enforcement Reform: The Case of SEPs*, 1998 WIS. L. REV. 1181, 1183 (1998).

sional inaction in the face of a decade and a half of settlements with SEPs. While there is a “general reluctance of courts to rely on congressional inaction as a basis for statutory interpretation . . . under certain circumstances, inaction by Congress may be interpreted as legislative ratification of or acquiescence to an agency’s position.”⁹⁷ Relevant factors include whether Congress has held hearings on the issue as well as Congress’ awareness of the agency action in considering related legislation.⁹⁸ Congress has long been aware of EPA’s practice of including SEPs in settlements.⁹⁹ The Conference Committee Report discussing what would become of the 1987 amendments to the Clean Water Act noted:

In certain instances settlements of fines and penalties levied due to NPDES permit and other violations have been used to fund research, development and other related projects which further the goals of the Act. In these cases, the funds collected in connection with these violations were used to investigate pollution problems other than those leading to the violation. Settlements of this type preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of en-

vironmental protection. Although this practice has been used on a selective basis, the conferees encourage this procedure where appropriate.¹⁰⁰

Hence, it may be argued that this language amounts to approbation of EPA’s SEP practices, even though Congress has not passed legislation that would clarify EPA’s SEP authority.

EPA’s General Enforcement Discretion

While Congress has never given explicit authorization for the use of SEPs, Congress has, of course, authorized EPA to enforce federal environmental statutes. EPA’s authority to enforce environmental statutes carries with it the broad discretion to decide how to prosecute or whether to prosecute at all.¹⁰¹ This discretion is almost totally unreviewable by the judiciary.¹⁰² The authority to enforce also includes the authority to settle an enforcement action.¹⁰³ Consequently, EPA’s authority to include one or more SEPs in a consent decree falls within this broad discretion to administer and enforce environmental laws. Courts are hesitant to interfere with the inner workings of an agency’s allocation of its scarce resources in prioritizing among possible en-

97. *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 170 (4th Cir. 1998) (citations omitted) (finding support in Congressional inaction for FDA’s historic interpretation that it would exceed its statutory authority in regulating the sale and distribution of tobacco).

98. *Id.*

99. Dana, *supra* note 96, at 1221; “EPA does not keep use of SEPs a secret. Indeed, in testimony before congressional committees, EPA officials have touted the SEPs as evidence of the Agency’s commitment to improve upon older models of environmental regulation. See, e.g., Environmental Issues: Hearing on H.R. 1924, H.R. 1925, & H.R. 2015 Before the Subcomm. on Transp. & Hazardous Materials of the House Comm. on Energy & Commerce, 103d Cong. 155, 157 (1993) (statement of Kathleen Aterno, Deputy Assistant Administrator, Office of Administration and Resources Management, EPA).”

100. H.R. Rep. No. 99-1004, 99th Cong., 2d Sess. at 139 (Oct. 15, 1986) (emphasis added).

101. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (an agency’s discretion not to prosecute or enforce is generally committed to the agency’s absolute discretion); see also *Sierra Club v. Whitman*, 268 F.3d 898, 902-03 (9th Cir. 2001) (finding that Congress imposed no mandatory enforcement duty within the provisions or legislative history of the CWA, even when EPA finds a violation).

102. *Heckler*, 470 U.S. at 823.

103. See, e.g., *Oil, Chemical and Atomic Workers v. Occupational Safety & Health Review Comm’n*, 671 F.2d 643, 650 (D.C. Cir. 1982) (necessarily included within an agency’s prosecutorial power is the discretion to withdraw or settle a claim).

enforcement actions:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.¹⁰⁴

This deference to agency internal resource allocations may also cover the decision-making process of EPA in granting SEPs, permitting EPA to determine how to achieve the broad goals of environmental enforcement by promoting SEP-related pollution reduction and prevention, as well as achieving extrinsic goals, such as promoting a collaborative relationship among violators, affected communities and the EPA itself. The broad power that EPA enjoys to mitigate or abandon civil enforcement actions would appear to include the lesser power to settle an action by incorporating a SEP.¹⁰⁵

104. *Heckler*, 470 U.S. at 831.

105. Section 309(d) of the Clean Water Act requires a court to consider a defendant's good faith effort at compliance in assessing an appropriate penalty for Clean Water Act violations. 33 U.S.C. § 1319(d). This suggests that the Congressional scheme envisions that some violators will be treated more leniently, based on the individualized nature of their violations; the SEP policy is another expression of this broad intent.

106. *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied sub nom. Union Carbide Corp. v. Natural Resources Defense Council, Inc.*, 467 U.S. 1219, 104 S. Ct. 2668 (1984).

107. *Id.* at 1121.

Going Beyond the Relief Outlined in the Statute through Consent Decrees

That the form of relief proposed in a settlement with a SEP is greater than that outlined in the statute does not in itself invalidate the settlement. In different contexts courts have upheld the legality of consent decrees that go beyond the express relief outlined in a statute, with the proviso that the decrees are consistent with the underlying purpose of the statute. For example, in *Citizens for a Better Environment v. Gorsuch*, a citizen suit was brought against the Administrator of the EPA for not implementing certain provisions of the Clean Water Act.¹⁰⁶ The court approved a consent decree requiring the EPA to promulgate guidelines and limitations governing the discharge of pollutants even though the decree was more extensive and specific than required by the Clean Water Act.¹⁰⁷ The court upheld provisions of the consent decree that were "consistent with" the underlying statute, and expressly did not require that the provisions "track" the language of the statute.¹⁰⁸

In a different context, in *Local No. 93, International Association of Firefighters v. City of Cleveland*, the Supreme Court has held that a court may approve a consent decree con-

108. *Id.* at 1125.

109. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (holding that a voluntary consent decree's relief is not limited to the types of relief set out in the statute giving rise to the lawsuit, as "the parties' consent animates the legal force of a consent decree."). *Local No. 93* and other cases establish that a court has the power to enter and enforce consent decrees with provisions beyond the underlying statute's remedies; courts will retain jurisdiction over this type of consent decree. *See, e.g., Jeff D. v. Kempthorne*, 365 F.3d 844, 853 (9th Cir. 2004) ("[E]ven assuming that defendants are no longer in violation of federal law, the district court continues to vindicate federal interests by ensuring that its judgment is enforced.").

taining relief that the court itself could not grant after a trial.¹⁰⁹ The Court held that it was unnecessary to examine the precise limits of the underlying statute, because its limits “are not implicated by voluntary agreements.”¹¹⁰ However, some provisos remain: the consent decree must itself be legal, within the court’s subject matter jurisdiction, within the general scope of the complaint, and must further the objectives of the law upon which the complaint was based.¹¹¹ Thus, the Court shifted the inquiry away from the issue of the general legality of SEPs to whether a specific SEP is consistent with and enjoys a nexus to the underlying environmental statute. That these conditions so closely track the core elements of EPA’s current SEP Policy is a significant convergence of legal doctrines.

The GAO Opinions and the Miscellaneous Receipts Act

In the early 1990s, the GAO has twice opined that EPA lacked the authority to settle mobile source pollution enforcement actions under the Clean Air Act by agreeing to accept reduced penalties in exchange for a violator’s agreement to perform public awareness SEPs.¹¹² In particular, the GAO found that the implementation of SEPs that furthered the aims of statutes not related to the violation itself ran against a line of GAO

opinions, which interpreted statutes similar to the Clean Air Act.¹¹³ The GAO had previously found that the Nuclear Regulatory Commission’s authority to “compromise, mitigate or remit” penalties did not extend to reducing penalties in exchange for the funding of nuclear safety research at a university for the university because, “in all likelihood, [the university would have] no relationship to the violation and [would have suffered] no injury from the violation.”¹¹⁴ Similarly, although EPA pointed to independent provisions within the Clean Air Act that required EPA to improve public knowledge of the effects of air pollution on citizens’ health, the GAO was not persuaded that there was a sufficient relationship to the underlying violation.¹¹⁵

Moreover, the GAO was concerned that allowing these public awareness SEPs would circumvent the Miscellaneous Receipts Act (“MRA”) and the rule against the augmentation of appropriations, appropriations being a right reserved for Congress by the Constitution.¹¹⁶ The MRA requires that a “person having custody or possession of public money must deposit the money with the Treasury within a certain time limit.”¹¹⁷ The MRA’s purpose is to ensure that Congress retains control of the public purse and to effectuate Congress’ constitutional authority to appropriate monies.¹¹⁸ The GAO

110. *Local No. 93*, 478 U.S. at 526.

111. *Id.* at 525.

112. GAO Opinion B-247155, 1992 WL 726317 (Comp. Gen.) (July 7, 1992) (holding that EPA’s discretionary authority to “compromise, or remit, with or without conditions,” civil penalties assessed under CAA section 205 empowers EPA to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but does not extend to remedies unrelated to the correction of the violation in question); GAO Opinion B-247155.2, 1993 WL 798227 (Comp. Gen.) (March 1, 1993).

113. GAO Opinion B-238419, 1990 WL 293769 (Comp. Gen.), 70 Comp. Gen. 17 (Oct. 9, 1990); GAO Opinion B-

210210, 1983 WL 197623 (Comp. Gen.) (Sept. 14, 1983).

114. GAO Opinion B-238419, 1990 WL 293769, at *2, 70 Comp. Gen. 17, at 19.

115. GAO Opinion B-247155, 1992 WL 726317, at *3.

116. Miscellaneous Receipts Act, 31 U.S.C. § 3301(b) (2000) (directing that all assessed penalties be deposited in the U.S. Treasury); Anti-Deficiency Act, 31 U.S.C. § 1341(a) (prohibiting agency expenditures in excess of Congressional appropriations).

117. *United States v. Smithfield Foods*, 982 F. Supp. 373, 374 (E. D. Va. 1997) (citing 31 U.S.C. § 3302(c)(1)).

118. *Id.*

119. GAO Opinion B-247155.2, 1993 WL 798227,

opined that EPA oversteps its authority in approving some SEPs as this diverts funds from the Treasury and augments the amount of funds available for environmentally beneficial projects.¹¹⁹ The GAO further noted, in its second opinion on the EPA's approval of SEPs for public awareness, that the payment of funds to third parties for the performance of SEPs violates the MRA, even though EPA never actually "received" the funds in question.¹²⁰ At its most extreme, the GAO posture would imply that any payment pursuant to a SEP, independent of its recipient, would result in an MRA violation.¹²¹

EPA has read the GAO's opinions narrowly and only applied them to mobile source violations under the Clean Air Act, the focus of the GAO opinions.¹²² And more fundamentally, the conflict has been largely resolved by EPA's redrafting of its SEP policy in 1996 and 1998, which resulted in the removal of the public awareness category of SEPs, in the adherence to the nexus requirement, and in the prohibition on funding of projects that have already been authorized by Congress.¹²³ Supplemental memoranda lay out EPA's arguments explicitly, namely that nexus establishes continuity between EPA's authority over

the violation itself with the SEP conceptually serving as a mitigating factor in setting the final cash penalty.¹²⁴ In addition, that the GAO analysis has not influenced the courts, at least in the context of citizen suits where liability has not been acknowledged or adjudicated (as is the case with SEPs in consent decrees negotiated between EPA and violators): the nexus requirement has not been required to safeguard against MRA violations.¹²⁵

Other Legal Considerations

The Legal Significance of Guidelines

In viewing the range of state SEP laws and policies it becomes clear that specifying SEP guidelines rather than leaving decisions to ad hoc, departmental discretion is preferred. Such ad hoc decisions, as a policy matter, can be problematic as they can lead to possible abuses of the program, and diminish predictability. That said, even when guidelines are specified, the meaning of those guidelines remains unclear. What happens when a consent decree does not comply with the EPA's or a state's SEP guidelines? Must a court enforce or reject the guidelines? These are all questions that

at *1.

120. *Id.* at *2.

121. There is not a great deal of external support for GAO's contention equating expenditures on SEPs with civil penalties received by an agency, with the possible exception of the SEC's aggregating the cash portion of the penalty with the funds allocated to a SEP for purposes of reporting requirements under securities laws. 17 C.F.R. § 229.103.

122. Droughton, *supra* note 93, at 811.

123. *Interim Revised EPA Supplemental Environmental Projects Policy*, *supra* note 1, 60 Fed. Reg. 24,856, 24,857; *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,798. Additionally, a 2002 memorandum underscores that all penalties must be deposited into the U.S. Treasury unless otherwise authorized by law and that projects that involve only contributions to a charitable or civic organization are not acceptable. *Supplemental Environmental Projects (SEP) Policy*, *supra* note 13.

124. *Importance of the Nexus Requirement in SEP Policy*,

supra note 14 at 1-3.

125. See *Natural Resources Defense Council v. Interstate Paper Corp.*, 1988 WL 156749 (S.D.Ga. 1988), 29 ERC (BNA) 1135 (court entered a consent decree for a citizen suit against a CWA violator, notwithstanding the fact that the decree contained a \$27,500 grant to the Georgia Conservancy for education of schoolchildren, bearing no nexus to the underlying violation). In general, courts will permit third party payments, as long as there has been no adjudication of the violator's liability. See Quan Nghiem, *Comment: Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act*, 24 B.C. ENVTL. AFF. L. REV. 561 (1997); see also *CFTC v. Samaru*, 2001 U.S. App. LEXIS 26812, 26813 (9th Cir. 2001) (finding that restitution of the amount of the victim's loss was not a civil money penalty); see also *Sierra Club v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1356 (9th Cir. 1990) (finding that consent decree-based payments to environmental organizations are not made in recognition of liability under the Clean Water Act and hence are not civil penalties).

have no apparent answers.

A recent decision from a U.S. District Court expressed confusion regarding the meaning and authority of SEP guidelines. In *Atofina v. United States*, a non-party community group objected to a proposed consent decree between the EPA and defendant chemical company after numerous violations of environmental statutes.¹²⁶ The community group protested the SEP portion of the consent decree, objecting that no part of the SEP would be performed in the community where the violation occurred and did not allow for community input, in contradiction of the EPA Policy. While the court held that an adequate nexus between the SEP and the violation did in fact exist, it also held that the EPA did not comply with its own guidelines regarding community input.

The court questioned its role in this situation where the EPA SEP Policy was not followed. In trying to answer this question the court looked to the EPA Policy and noted that the EPA policy “states that it is ‘not intended for use by EPA, defendants, respondents, courts of administrative law judges at a hearing or in trial.’ The decision to accept an SEP is ‘purely within EPA’s discretion’ . . . The Policy ‘does not create any rights, duties, or obligations, implied or otherwise, in any third parties.’”¹²⁷ The court responded to this language and found it “unclear if violations of the Policy require, or allow a court to reject a consent decree.”¹²⁸

Ultimately, the court referred to the community input guideline as a recommendation, writing that “there is no evidence the

EPA held a public meeting with the local community, as the policy *recommends*.”¹²⁹ This demonstrates that court did not view the EPA guidelines as binding authority. The court went on to find that “[e]ven if the court had the clear authority to enforce the terms of the EPA policy, it lacks the power to modify the consent decree by striking the SEP and leaving the rest of the agreement intact.”¹³⁰ So, given the choice of rejecting or accepting the consent decree, the court entered the decree, finding the public interest served by such action.

Although this case holds that a court may enter a consent decree despite non-compliance with the EPA Policy recommendations on community input if the public interest is met, questions still remain. What if a more substantial EPA Policy requirement, such as the adequate nexus requirement, were not met? Further, what happens on the state level when state SEP policies are not followed? The *Atofina* case highlights the confusion regarding the meaning of the EPA guidelines and hopefully began a discourse in the courts that will begin to clarify the authority of such guidelines.

Nollan/Dolan and Nexus

Discussions regarding “nexus” may trigger recollections of the two famous Supreme Court cases, *Nollan v. California Coastal Commission*¹³¹ and *Dolan v. City of Tigard*,¹³² finding impermissible governmental takings under the Fifth Amendment. The *Nollan* and *Dolan* cases concerned variances from land use regulations offered in exchange for dedication of land for the public good. In *Nollan*,

126. *United States v. Atofina Chems., Inc.*, 2002 U.S. Dist. LEXIS 15137, at *1 (E.D. Pa. Aug. 5, 2002).

127. *Id.* at *17; *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. 24,804.

128. *United States v. Atofina Chems., Inc.*, 2002 U.S. Dist. LEXIS 15137, at *17.

129. *Id.* at *18-19 (emphasis added).

130. *Id.*

131. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (U.S. 1987).

132. *Dolan v. City of Tigard*, 512 U.S. 374 (U.S. 1994).

133. *Nollan*, 483 U.S. at 828.

the California Coastal Commission demanded a lateral public easement across the Nollans' beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house.¹³³ The public easement was designed to connect two public beaches that were separated by the Nollan's property.¹³⁴ Since the easement would not eliminate the problems that the new construction would cause, the Court found an absence of nexus and declared the permit a taking under the Fifth Amendment.¹³⁵

In *Dolan*, the Court set out an additional requirement: exactions imposed by the city must be "roughly proportionate" to the projected impact of the proposed development.¹³⁶ The Court stated, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."¹³⁷

The parallels with the SEP context are evident: a violator of an environmental statute is offered a reduced penalty in exchange for performance of a SEP, an environmental project for the public good. The violator offered a SEP as part of a settlement agreement could argue that the arrangement makes for an impermissible *Nollan*-like tak-

ing, particularly in states where nexus is not required for SEPs.¹³⁸ Several practical considerations stand in the way of this argument, however. For one, it is unlikely that a violator would seek to undo an agreement that mitigated a potential cash penalty. In addition, the EPA's *Final SEP Policy* requires nexus and "rough proportionality," would likely satisfy the dictates of *Nollan/Dolan*.¹³⁹

Most notably, however, the violator could not argue a taking since the *Nollan/Dolan* doctrine applies only to land use cases: in 1999, the Supreme Court explained that, "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."¹⁴⁰ Therefore, a violator discontent with its SEP could not invoke the *Nollan/Dolan* doctrine.

III. Policy Implications of Supplemental Environmental Projects

In general, enforcement actions seek to achieve several policy goals. According to the U.S. EPA:

Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and deterring violations

nificance of relating a SEP to the underlying violation. Legally, and as a policy matter (discussed in the following section, *infra*), states benefit from including at least a mild variant of nexus in their policies.

140. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (U.S. 1999). While there is some disagreement about whether the *Nollan/Dolan* doctrine applies to other forms of exactions besides those that require dedication of public land, there is little doubt that the doctrine is precluded outside the domain of land use. Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 636 (2004); Sharone Brown, *Administrative Mandamus as a Pre-requisite to Inverse Condemnation: 'Healing' California's Confused Takings Law*, 22 PEPP. L. REV. 99, 116-117 (1994).

134. *Id.*

135. *Id.* at 838-39. ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.")

136. *Dolan*, 512 U.S. at 391.

137. *Id.*

138. *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

139. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,798 and 24,802 (the EPA's "mitigation percentage" automatically renders the SEP's cost proportional to the potential penalty). The recurrence of the concept of "nexus" in a different context, signals to the states the penumbral sig-

by other members of the regulated community. Penalties help ensure a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Penalties also encourage regulated entities to adopt pollution prevention and recycling techniques in order to minimize their pollutant discharges and reduce their potential liabilities.¹⁴¹

In light of these overarching goals, there are several competing policy issues regarding the use of SEPs within the settlement of enforcement actions: How do SEPs alter the policies behind the enforcement of environmental statutes while promoting other goals as well?

The Benefits of SEPs

Proponents of SEPs believe that SEPs should be allowed as part of an enforcement action for several reasons. When applied judiciously, SEPs benefit all those involved—the regulators, industry, the community, and the environment. The presence of a SEP policy shows the regulator's willingness to cooperate with the regulated industry, and allows the regulator to create regulations and enforcement processes that industry is more willing to abide by. Industry advocates point out that SEPs can benefit communities through promoting environmental and health improvements beyond regulatory minimums, and underscore the "good neighbor" obligations of permitted facilities.¹⁴²

SEPs promote a cooperative relationship between the regulator and the violator, to the benefit of both. In the view of industry groups and regulators, SEPs can obviate litigation costs, allow for greater fairness to the regulated industry, and increase "popular support for the environmental regulatory endeavor."¹⁴³ Because of the nature of environmental enforcement, the regulator and the regulated industries will continually interact; an ongoing relationship that is cooperative may make for a more effective mode of regulation by reducing adversarial tensions. In the words of one state environmental attorney, "cooperative enforcement may dissuade regulated firms from making political attacks on the statutory regime or the agency's authority and budgets and may shore up general public support for the agency's regulatory mandate,"¹⁴⁴ making regulatory enforcement less contentious. One commentator notes that "rigidly punitive enforcement may be undesirable, even if it results in net social benefits such as reduced pollution, if it imposes unfair burdens on individuals."¹⁴⁵

Without the kind of back-end cooperative negotiation promoted by SEPs, "[u]nfairness may inspire recalcitrance in regulated firms that would otherwise comply voluntarily."¹⁴⁶ In the eyes of the industries, their resistance to regulations—non-compliance, concealment of procedure and pollution by-product, delay in dealings with regulators, and litigation challenging regulations—are all justified by what they view as "coercive, irrational, and suboptimal" regulations.¹⁴⁷ As a result, regulators may

141. *Final SEP Policy*, *supra* note 2, 63 Fed.Reg. 24,796-97.

142. E-mail from Susan Briggum, Director of Environmental Affairs, Waste Management, Inc. (June 29, 2004) (on file with authors).

143. Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 86 (2002).

144. *Id.* at 101.

145. *Id.* at 100.

146. *Id.*

147. *Id.* While industry must continue to comply with environmental regulations, SEP negotiations change the dynamic of regulatory enforcement.

benefit from a collaborative, rather than adversarial, relationship.

Resource scarcity . . . forces agencies to seek cooperation to legitimate their authority and streamline interactions with the regulated community. If the regulated community challenges every action taken by the agency, the agency's mission may be substantially hindered. And if a regulated entity views the regulator's authority as illegitimate, it is more likely to shirk compliance with imposed regulations (and cover up that noncompliance), which increases demand for already scarce agency resources.¹⁴⁸

Because violators may perform SEPs using new technologies or processes, regulators may gain insight into new compliance and pollution prevention techniques. SEPs also enable regulators to experiment with compliance and pollution reduction techniques that otherwise might not be attempted.

SEPs allow regulators to set the ground for future regulator initiatives and programs by affording them opportunities to experiment with new technologies and management practices. If, for example, a technology is proved cost-effective in a SEP experiment, the regula-

tory agency may be able to justify requiring the technology on a general industry basis. If the technology instead proves unworkable, the regulators know not to advocate its general adoption.¹⁴⁹

In addition, a violator may ordinarily be unwilling to undertake technical improvements due to the fears of "technical risk, temporary impacts on production rates during project implementation or a long pay-back period."¹⁵⁰ Colorado's SEP guidelines take this possibility into account, and the state's Department of Public Health and Environment uses SEPs as a means of inducing progressive pollution prevention/energy efficiency projects.¹⁵¹ In turn, because regulators often lack resources to pursue cutting edge environmentally beneficial projects, state SEP programs provide a laboratory for innovation. For example, the Pennsylvania Department of Environmental Protection states that the use of SEPs allows the more efficient funding of projects than the agency could normally pursue.¹⁵²

Affected communities stand to benefit from SEPs, as well, particularly as SEPs encourage restorative justice. The nexus requirement in most SEP policies results in local or regional environmental projects that help the area that suffered from the violation

148. *Id.* at 110.

149. Dana, *supra* note 96, at 1201; *see also* Massachusetts Institute of Technology, Center for Technology, Policy & Industrial Development, Report Summary Prepared for the EPA Office of Enforcement: Recent Experience in Encouraging the Use of Pollution Prevention in Enforcement Settlements (1994), at 2 (on file with the authors). ("[T]he enforcement context has two distinct advantages. First, firms can be motivated to innovate, i.e., to overcome the barriers to pollution prevention innovation that often exist in firms, through penalty reduction improved relations with the Agency, and improved public relations Second, since the firm has committed to implement the innovative project in its consent agreement with the Agency . . . there is a strong incentive to stick with the project even when technical difficulties arise. Enforcement thus creates a "window of opportunity" in which options for technological change receive

more serious consideration than usual.").

150. COLO. DEP'T OF PUBLIC HEALTH AND ENVIRONMENT, FINAL AGENCY WIDE SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 3 (June 2003), available at <http://www.cdph.state.co.us/sep/CDPHESEPPolicy.pdf> (last visited Feb. 25, 2005).

151. *Id.*

152. PA. DEP'T OF ENVTL. PROTECTION, POLICY FOR THE ACCEPTANCE OF COMMUNITY ENVIRONMENTAL PROJECTS IN CONJUNCTION WITH ASSESSMENT OF CIVIL PENALTY 2 (Sept. 18, 1999) (on file with authors).

153. Nghiem, *supra* note 125, 24 B.C. ENVTL. AFF. L. REV. at 566. It should be noted that the nexus requirement in the EPA Final SEP Policy may not adequately serve environmental justice interests as it defines the "immediate geographic area" as within a fifty mile radius of the violation's location: such a broad geographic nexus could leave affected communities unaided by the SEP. Final SEP Policy, *supra* note 2, 63 Fed. Reg. at 24,798.

in the first place.¹⁵³ A particular example of restorative justice is the policy goal of environmental justice.¹⁵⁴ Historically, communities that endure significant pollution exposure are disproportionately minority and/or low-income populations.¹⁵⁵ Judicious use of geographically tied SEPs helps ensure that the communities bearing the burden of environmental degradation will have the opportunity to directly benefit from sanctions against violators.¹⁵⁶ Moreover, SEPs can also be designed to go beyond the relief obtainable in a traditional punitive action, to rectify past degradations beyond mere compliance with current standards.¹⁵⁷

In conjunction with positive community reaction, regulators may also benefit from the perspective of the public choice theory of assessing the actions of government officials. The community may recognize that regulators have created tangible environmental benefits locally; additionally, regulators may meet with greater approval from local government and community representatives. “[T]hat political backing,” according to one enforcement attorney, “may translate into more resources for the regional or local offices responsible for the SEPs and perhaps even for the agency as a whole.”¹⁵⁸

Finally, SEPs benefits violators themselves, by repairing corporate images

harmed by negative environmental publicity. SEPs may also lead to greater efficiencies by allowing businesses to reevaluate and improve their current infrastructure, in advance of regulatory requirements. In sum, SEPs can give rise to win-win situation for all parties involved: regulators, industry, the community, and the environment.

The Risks of SEPs

Critics of SEPs argue that SEPs may be too much of a “win” for violators, and fail to maintain the deterrent effect that is the *raison d’être* of environmental regulation. SEPs raise the possibility of underdeterrence by opening up the possibility for opportunistic violators to reduce the actual cost of the environmental penalty, as well as the possibility of tax deductions for SEP costs.¹⁵⁹ To counteract this, many SEP policies prevent the violators from benefiting too strongly from the performance of a SEP. For example, instead of allowing violators to benefit from a public perception that they are actually environmental benefactors by their publicizing SEPs, SEP policies usually require violators to indicate that the SEPs have been undertaken as part of an enforcement agreement.¹⁶⁰

In addition, the allowance of a SEP as part of an enforcement action is a discre-

154. New Mexico, Massachusetts, Oregon, Connecticut, Colorado, Utah, Florida, and Virginia expressly implicate environmental justice in their SEP policies.

155. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,797.

156. At the same time, an overly tightly applied nexus requirement could result in SEPs that do not address cumulative impacts to a broader environmental justice community; similarly, a nexus requirement applied solely to the media or pollutant could result in SEPs not redressing harm experienced by a geographically proximate environmental justice community.

157. Droughton, *supra* note 93, at 809.

158. Dana, *supra* note 96, at 1200.

159. While EPA’s SEP penalty calculations take into account the possible deductibility of SEP costs, state policies vary.

160. *Final SEP Policy*, 63 Fed. Reg. at 24,803. See, e.g., ID. DEP’T OF ENVTL. QUALITY, GD98-1: SUPPLEMENTAL ENVIRONMENTAL PROJECTS (March 3, 1997), available at http://www.deq.state.id.us/about/policies/gd98_1.cfm (last visited April 24, 2005) (requiring identification of fact that SEP is part of the settlement of an enforcement action, and citation to the statute violated); OR. DEP’T OF ENVTL. QUALITY, INTERNAL MANAGEMENT DIRECTIVE — CIVIL PENALTY MITIGATION FOR SUPPLEMENTAL ENVIRONMENTAL PROJECTS (Sept. 26, 2000), at 4, available at <http://www.deq.state.or.us/programs/enforcement/enforcementSEPDDir.pdf> (last visited March 26, 2005).

tionary decision left up to the regulatory agency.¹⁶¹ Under most SEP policies, if the agency believes that a proposed project would fail to provide a sufficient deterrent effect, then the agency will not permit the project and instead demand the full payment of the civil penalty. For example, if the proposed project primarily benefits the violator, rather than the environment or the public health, then it will not be approved as a SEP.¹⁶² Similarly, if a project is approved but the agency finds that it still benefits the violator, those benefits will often be given a monetary value which the agency will then deduct from the mitigation amount of the SEP.¹⁶³

The capacity for underdeterrence is particularly acute as the SEP cost itself is a new source of regulatory uncertainty: usually, SEP costs are assessed and reported by the violator, and the regulator has no mechanism for confirming the reported figures.¹⁶⁴ Opportunistic violators may overestimate SEP costs in order to receive greater relief from the calculated penalty, or they may underreport the business benefits of SEPs.¹⁶⁵ In order to track SEP implementation, many state SEP policies require the submission of detailed cost estimates and certifications of progress, as well as provide for stipulated penalties for SEPs that end up costing less than estimated, but their efficacy against opportunistic violators has not been answered in the literature.¹⁶⁶

161. *Final SEP Policy*, *supra* note 2, 63 Fed.Reg. at 24,797; CONN. DEP'T OF ENVTL. PROTECTION, POLICY ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS I (Feb. 15 1996), available at <http://dep.state.ct.us/enf/policies/sep.pdf> (last visited April 24, 2005).

162. CONN. DEP'T OF ENVTL. PROTECTION, *supra* note 161, at 5; OR. DEP'T OF ENVTL. QUALITY, *supra* note 160, at 3 (Sept. 26, 2000).

163. See, e.g., *Final SEP Policy*, *supra* note 2, 63 Fed.Reg. at 24,801 (offsetting the value to the violator of the SEP from the SEPs cost, before calculating the mitigation amount).

164. Dana, *supra* note 96, at 1209.

Another criticism of the SEP system is that it creates inconsistency in enforcement, apart from the problem of the opportunistic violator. Because regulators cannot accurately assess all of the relevant variables for penalty calculations (or the collateral economic benefits conferred to the violator), the resulting inaccuracy of penalty assessments creates inconsistency in the application of regulations.¹⁶⁷ The imposition of a SEP with its penalty calculations adds another layer of uncertainty and possibility of error to this enforcement picture. Apart from the inherent inequity in inconsistent penalties across violators, overly light penalties effectively confer unfair economic advantage over competitors, who have made the required expenditures to comply with environmental regulations. In addition, the possibility that some violators might receive lighter penalties could induce risk-tolerant would-be violators to adopt a different compliance strategy.

While some proponents of SEPs argue that SEPs encourage early adoption of innovative pollution prevention technology ("anticipatory compliance"); others opine, "SEP programs may actually discourage regulated entities from adopting environmental improvements on their own (that is, without government inducement)."¹⁶⁸ A violator that knows it may obtain reduced pen-

165. *Id.*; another commentator points out the related problem of a violator concealing plans to implement an environmental project, and receiving SEP mitigation credit. David L. Tanenholz, *Supplemental Environmental Projects: EPA's Efforts to Transform the Invisible Hand into a Green Thumb*, 5 ENVTL. LAW 633, 647-48 (1999) (citations omitted).

166. *Final SEP Policy*, *supra* note 2, 63 Fed.Reg. at 24,803; CAL. ENVTL. PROTECTION AGENCY, CAL/EPA RECOMMENDED GUIDANCE ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS 7-8 (Oct. 2003), available at <http://www.calepa.ca.gov/Enforcement/Policy/SEPGuide.pdf> (last visited Nov. 22, 2004).

167. Dana *supra* note 96, at 1208.

168. *Id.* at 1216.

alties through SEP settlements might delay investments in environmentally beneficial projects until it has a civil penalty that it can be offset against. This violator may achieve a noncompliance benefit over its competitors by using those funds for other ventures; the violator later achieves its original plans for environmentally beneficial projects by carrying them out as a SEP.¹⁶⁹

Regarding this concern, many SEP policies explicitly state that violators cannot perform SEPs projects that the violator had intended to implement prior to the enforcement action.¹⁷⁰ However, it is unclear how well this provision of a state's SEP guidelines can be enforced. Regulators may be unable to accurately assess whether the violator would have undertaken the SEP proposed in the absence of the enforcement action.¹⁷¹ The danger of a violator benefiting from implementing pre-enforcement plans for an environmentally beneficial project as a SEP seems difficult to guard against completely.

Community groups have several distinct criticisms of SEPs as well, closely mirroring complaints about the consideration of environmental justice issues in environmental

agency permitting decisions. For one, they argue that their lack of technical expertise renders their involvement in the SEP approval and implementation process less than meaningful, and that community groups receive late, if any, notice about impending SEP negotiations.¹⁷² In addition, at least on the federal level, the intricacies of the federal SEP requirements complicate community groups' attempts to generate project ideas for SEP libraries.¹⁷³ EPA's implementation of Project XL is a front-end approach encouraging cooperative regulation, similar to the post-violation cooperative enforcement that are SEPs; "regulators and regulated entities negotiate site-specific environmentally-protective agreements to relieve regulated entities of relevant statutory requirements," in advance of any enforcement action.¹⁷⁴ Regarding Project XL, community groups and others have questioned whether these forms of "contractarian regulation" satisfy process concerns and bring about measurable environmental benefits.¹⁷⁵

In the eyes of community or environmental activist organizations, prosecution to its conclusion, rather than settlement with SEPs, may be a preferred option.¹⁷⁶

169. *Id.*

170. ME. DEP'T OF ENVTL. PROTECTION, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 3 (June 15, 2000); MICH. DEPARTMENT OF ENVIRONMENTAL QUALITY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS FOR PENALTY MITIGATION 3 (November 10, 1997), available at <http://www.deq.state.mi.us/documents/deq-wmd-opmemo-sep.pdf> (last visited Feb. 26, 2005).

171. Dana, *supra* note 96 at 1219.

172. Telephone interview with Veronica Eady, General Counsel, West Harlem Environmental Action (Jan. 5, 2005).

173. *Id.*

174. Jamie A. Grodsky, *Environmental Protection as a Jurisdynamic Experience: The Paradox of (Eco)pragmatism*, 97 MINN. L. REV. 1037, 1061 (2003). See also Thomas E. Caballero, *Project XL: Making It Legal, Making It Work*, 17 STAN. ENVTL. L.J. 399, 403 (1998); Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 122-23 (1998).

175. Grodsky, *supra* note 174, at 1057-1062.

176. Zinn, *supra* note 147, at 101. Zinn goes on to observe that the close interaction between regulators and the regulated industry may also give the impression of collusion: to reduce friction with industry, regulators may be more willing to compromise with industry to the detriment of their policy goals, according to one skeptical state attorney. *Id.* at 99.

The possibility of so-called "agency capture" is broad based, extends well beyond the specific negotiation of SEPs, and applies to all reductions of penalties, however. The unique capacity of SEPs to further agency capture likely lies only in the (rare) possibility of regulators approving SEPs that further their own programmatic ambitions. An example of this lies in the case of the former insurance commissioner of California, Charles Quackenbush, who mitigated claims against insurance companies in exchange for their donations to a network of non-profit organizations under his control, the proceeds of which were used to finance campaign commercials supportive of his re-election bid.

These critics are quick to note the propensity of regulators to “become beholden to private interest, undermining the [regulatory] agency’s legitimacy.”¹⁷⁷ The broad regulatory discretion and “opacity” of enforcement settlements prevent “third parties from effectively monitoring enforcement and allows agencies to favor industry without fear of reprisal.”¹⁷⁸ Without the input of environmentalists or community groups to balance violators’ demands, the regulator is more likely to favor the regulated industry.¹⁷⁹ EPA’s *Final SEP Policy* and its extensions, as well as some states, respond to this concern with the recommendation of community input as a curative counterweight.

Finally, SEP opponents argue that government grants (financed out of an environmental penalty fund, as in Delaware) to regulated entities for environmentally beneficial projects would be a better means of promoting environmentally beneficial projects and would not weaken deterrence.¹⁸⁰ Grant programs compel regulators to reject projects “that do not offer a high level of environmental return per dollar expenditure” and to disfavor applicants without demonstrated competence in implementing environmentally beneficial projects.¹⁸¹ By only accepting projects that offer a higher rate of environmental return, “regulators conserve resources in their limited grant budget for more promising projects” and help ensure that SEPs redound to the public benefit.¹⁸²

177 Zinn, *supra* note 143, at 111.

178. *Id.* at 102, 127.

179. *Id.* at 109.

180. Dana, *supra* note 96, at 1216. See Section IV, “Model Practices,” for a fuller description of the Delaware program, with its mandated community input for project selection.

181. *Id.* at 1219.

SEPs and the Separation of Powers

Legislatures are the only branch of government with control over the appropriation of funds. One commentator observes that environmental agencies could be perceived as circumventing the will of legislatures by implementing SEPs and effectively augmenting their budgets.¹⁸³ In Florida, violators provide “in kind” grants of materials and labor directly to the state agency’s environmental restoration projects; however, the Florida state legislature expressly sanctions this independent financing of agency programs.¹⁸⁴ The issue cuts more deeply, however, in states where there is no express authorization of agency augmentation of their budgets.

The separation of powers consideration is complicated further by the fact that administrative agencies commingle the disparate roles of modern governance. Environmental agencies act as legislative bodies when they make regulations; act as executives when they investigate statutory violations and enforce the laws; and once the legal process ensues, take on a judicial role in adjudging culpability and sculpting penalties. However, the principle of the separation of powers is predicated on each branch’s interest in checking the other branches of powers. Administrative agencies have no such internal checks.

On the federal level, EPA’s nexus requirement responds to this separation of

182. *Id.*

183. Droughton, *supra* note 93, at 811 (“Of particular concern is that the EPA could use SEPs to realize agency goals which go beyond addressing the violation, thus circumventing the appropriations process in contravention of the ADA.”).

184. The environmental agencies in Kansas and Pennsylvania also envision SEPs as a means of filling “gaps” in the execution of their mission to protect the environment.

powers concern.¹⁸⁵ The nexus requirement justifies the SEP by connecting the SEP to the underlying objectives of the statute that has been violated. For example, if the stated purpose of a particular statute is to prevent pollution in the water, then it may be argued that a SEP intended to improve water conditions would arguably not usurp a legislature's appropriation's power, for that SEP is *de facto* authorized by the organic statute.

In addition, EPA's *Final SEP Policy* has special approval requirements that must be met before SEPs can be implemented. For example, the *Final SEP Policy* requires approval from EPA Assistant Administrator for Enforcement and Compliance Assurance, when a SEP does not meet all the SEP guidelines.¹⁸⁶ A common requirement in state SEP policies is a detailed settlement agreement that outlines the violator's plans for the SEP.¹⁸⁷ Both requirements put the government acts in the open, and solicit the curative viewpoints of the legislature and affected communities.

States tend to mirror the EPA guidelines even though the states are not subject to the same legal limitations. By similarly adopting a form of nexus requirement in their SEP guidelines, states ensure that only SEPs furthering the aims embedded in environmen-

tal statutes (reflecting the input of legislative bodies, community groups and others) are approved. And in those cases where the connection to a statutory purpose is weak, the involvement of community input and legislative oversight helps to restore the separation of powers through a simulation of the open process that attends the creation of laws and regulations.¹⁸⁸ This helps ensure that SEPs benefit the public, and not exclusively private or regulatory interests.

Summation

The promulgation of formal, and public state SEP policies expressly counter many of the foregoing concerns. However, thirteen states approve SEPs without a formal, published SEP policy on the books to set out the parameters, standards and procedures for SEP approvals.¹⁸⁹ Without a formal SEP policy, the application of hidden standards to individual cases may create a perception of irrationality and unfairness by creating unbalanced costs and benefits.¹⁹⁰ In addition, without a formal policy or guidelines, individual violators may be treated differently, and unfairly relative to other violators in similar positions.

185. While the nexus requirement was devised in response to the Miscellaneous Receipts Act, which requires any civil penalty to be paid to the U.S. Treasury, it also plays a role in addressing the concern for the separation of powers.

186. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,804.

187. CAL. ENVTL. PROTECTION AGENCY, *supra* note 166, at 7.

188. See, e.g., Illinois's SEP program, affording the Illinois legislature an opportunity to comment on proposed SEPs. Interview with William Ingersoll, Manager of Enforcement Programs at the Illinois EPA (March 25, 2004) (on file with authors). With respect to community input, this prophylactic effect of open process point may be an unanticipated, collateral consequence to the primary purpose of community input, a purpose that

the EPA has identified as aimed at "addressing the needs of the impacted community; promot[ing] environmental justice" among other things. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24, 803.

189. These states are set out in the forthcoming fifty-state survey, available in the Summer of 2005 at www.abanet.org/committees/irr/environmental.

190. Zinn, *supra* note 143, at 99-100. The particular problem that some critics point to is the asymmetry between the open process by which environmental statutes are enacted and the closed-door negotiations where the settlement negotiations take place. Naturally, SEP policies such as the EPA's, which encourage public participation and community input in the SEP process, rebut this concern.

IV. Model Practices of the Fifty States

Forty-seven states currently allow violators to perform some form of supplemental environmental project to reduce their cash penalty. While many have followed the EPA's articulation of federal SEP policy, some states have promulgated significantly different approaches to SEPs. Of particular interest are policies that permit states to use their freedom from some of the strictures of the federal system, notably nexus and the prohibition against third party payments. This section of the report will examine in detail some of the unique policies and programs of the several states, with a view towards providing policymakers, state regulators, the affected communities, and the regulated community with a palette of model practices. These practices meet the (often) competing values of fidelity to the underlying federal and state environmental statutes that gave rise to the violation; the intent to promote restorative justice to the community affected by the underlying violations; and the unique challenges states face in enforcing environmental laws.

This section will lead off by articulating various sets of values that justify the model SEP practices. The first set of values is the most aspirational, utilizing SEPs to further larger processes and goals, including restorative justice, environmental justice and a new model of environmental enforcement. The second set of values asks the fundamental question: what issues are unique to the states in their enforcement of state and federal environmental laws with smaller violations and numerous jurisdictional bound-

aries? The third set of values seeks to ensure that SEPs "first, do no harm"¹⁹¹ to the goals of environmental laws, their enforcement and the orderly process of administrative action. Finally, this section will identify model practices that further each set of articulated values. The order of their presentation does not represent any attempt at ranking the practices according to any quantitative or qualitative measure.

I. Towards a New Enforcement Model

"... as a matter of public policy, simply depositing civil penalties into the vast reaches of the United States Treasury does not seem to be the most effective way of combating environmental problems caused by a specific polluter."

– *United States v. Smithfield Foods, Inc.*,
982 F. Supp. 373, 375 (E.D. Va. 1997).

The first set of values are concerned with extending environmental enforcement beyond the punitive to the remedial, and encompass the collaborative model of engagement between the regulator and the regulated community. These values share the common element of re-conceptualizing environmental violations as being against a particular community, and not solely against the common good. The older model is characterized by centralized regulation, with penalty schemes resulting in fines based on localized violations being funneled to the general treasury.¹⁹² The emerging, collaborative model emphasizes corporate self-regulation, disclosure, and collaborative problem-solving, reshaping the government's primary role into "catalyzing and enforcing such self-regulation."¹⁹³

191. This medical maxim is attributed variously to Hippocrates's *OF THE EPIDEMICS*, or to the Roman physician, Galen. See W.A. Drew Edmondson, *HEALTHCARE AND THE LAW: Improving End-of-Life Care: The Role of Attorneys General*, 27 OKLA. CITY U.L. REV. 911, n.4 (2002).

192. Daniel A. Farber, *Symposium: Innovations in Environmental Policy: Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection*, 2000 U. ILL. L. REV. 61 (2000).

193. *Id.* at 62, 69.

Various notions of justice may be furthered by SEPs: the doctrines of restorative and social justice from criminology are particularly relevant. In addition, as noted in Section III, proponents of SEPs consider them vital in the effort to build greater compliance through better relationships among the regulator, the regulated community and local communities.

Restorative and Environmental Justice

SEPs present an opportunity to achieve restorative justice, a term borrowed from criminal justice theory, with goals more restitutionary than retributive in treating crime and the communities affected by crime. One implication of restorative justice is that “government should surrender its monopoly over responses to crime to those who are directly affected by the crime—the victim, the offender, and the community.”¹⁹⁴ In the context of environmental violations, the concept of restorative justice dovetails with the use of SEPs, which focus on restoring the environmental quality of affected communities and can help reconceptualize the relationship among regulator, violator, and the affected community. Analogously to the criminal justice realm, SEPs dilute the monopoly of the government regulator over the environmental crime, and open the door to the involvement of community groups and citizens.

194 Leena Kurki, *Restorative and Community Justice in the United States*, 27 *CRIME & JUST.* 235, 236 (2000).

195. The Executive Order on Environmental Justice directs federal agencies, including U.S. EPA, “[t]o greatest extent practicable and permitted by law . . . [t]o make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” Exec. Order No. 12898, 59 *Fed. Reg.* 7,629 (Feb. 11, 1994).

196. Clifford Rechtschaffen, *Philosophy Meets Policy:*

Environmental justice, which seeks to protect minority and low-income communities from disproportionate amounts of environmental degradation, represents a subcategory of restorative justice.¹⁹⁵ One commentator has styled environmental justice as “an ethical challenge to the existing environmental regulation paradigm.”¹⁹⁶ Use of SEPs to redress environmental injustices resolves a tension inherent in the majoritarian aims of environmental regulation (protecting the common good as a whole against bad actors) and the race and class-based aims of the civil rights movement.¹⁹⁷ SEPs present an opportunity for affected communities to regain environmental equity.

Open questions remain, however, as to how the “community” should be defined and what an acceptable standard for justice might be, as the government no longer monopolizes the negotiation of sanctions. Violators are interested in seeing procedural safeguards against inequities in the imposition of penalties as the government’s monopoly on sanction recedes.

Social Justice

In contrast to restorative justice, the theory of “social justice” operates more broadly, stemming from the belief that there exists “a societal obligation (not just an individual one) to provide appropriate rem-

Giving Concrete Content to Abstract Ethical Norms: Advancing Environmental Justice Norms, 37 *U.C. DAVIS L. REV.* 95, 96 (2003).

197. Tseming Yang, *The Form and Substance of Environmental Justice: the Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation*, 29 *B.C. ENVTL. AFF. L. REV.* 143 (2002). The two movements are not always in conflict: open information about environmental risks promotes both the environmental justice movement and the majoritarian political process, but environmental justice advocates would argue that majority rule has failed minority and low-income populations, resulting in disproportionate concentrations of toxins and health risks in those communities.

edies for harm to others caused by legal, moral, or cultural structures instituted by society."¹⁹⁸ At its broadest, this notion of justice could justify a wide variety of SEP projects at the state and local level, particularly in states not restricting SEPs to the nexus requirement. The value promoted would support a wide variety of SEP policies and practices, but would run counter to the notion of protection of the commons, which lies at the heart of traditional environmental regulation. By loosening the connection between a specific injustice and its remedies, the broad notion of social justice could operate in a redistributive fashion, potentially cutting against the goals of more tightly focused restorative justice principles.

Practices

Facilitating Environmental Justice

A variety of regulatory mechanisms can ensure that affected communities receive environmental benefits from SEPs. For one, the nexus requirement can be tightened to be a tool to achieve restorative justice: SEPs could be required to have a geographical connection to the community affected by the violation, at least in those cases where a minority or low-income population was affected by the violation.¹⁹⁹ In mandating a tighter nexus than EPA, states could further the aims of the environmental justice movement.

198. David A. Brennan, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 B.Y.U.L. REV. 167, 172 n.14 (2001).

199. This proposal emanates from several sources, including a representative of a regulated industry as well as from the federal enforcement attorneys. Interview with Robert L. Harris, Vice President of Environmental Affairs, PG&E (Nov. 17, 2004); conference call with John Cruden, Deputy Assistant Attorney General, U.S. Dept. of Justice (May 13, 2004).

200. Meredith L. Flax and Benjamin F. Wilson, *Use of Supplemental Environmental Projects to Address Envi-*

At the same time, other commentators suggest that the nexus requirement may impede SEPs that could promote environmental justice, and advise that the EPA nexus requirement be relaxed in cases where the SEP furthers environmental justice.²⁰⁰ The project would not be required to have a nexus with the violation, but would "advance the SEP goals of protecting and enhancing public health and the environment."²⁰¹ While states are largely at liberty to relax the nexus requirement, the authors found no instances of states pursuing this strategy.

In practice, efforts by the states to promote environmental justice fall into two categories, either providing a preference for projects that advance environmental justice, or extending bonus mitigation credit for SEPs promoting environmental justice. The first approach, followed by Massachusetts, Oregon, and Connecticut, promotes environmental justice through the completion of SEPs.²⁰² For example, Connecticut's SEP Policy favors pollution prevention projects, "especially a pollution prevention project that positively impacts communities where environmental equity may be an issue."²⁰³ And while these states indicate that environmental justice is an "overarching goal," these states do not list environmental justice as a category of SEP nor consider it as a formal factor in determining whether to allow a SEP or mitigate a penalty.²⁰⁴

ronmental Justice, available at <http://www.bdlaw.com/media/news/news.287.pdf> (last visited April 9, 2005).

201. *Id.*

202. Selket Cottle, *State Supplemental Environmental Project Laws and Policies that Address Environmental Justice*, available at <http://www.abanet.org/irr/committees/environmental/newsletter/dec03/StateSEPS.html> (last visited Apr. 9, 2005).

203. CONN. DEPT. OF ENVTL. PROTECTION, *supra* note 161, at 6.

204. E.g. MASS. DEP'T OF ENVTL. PROTECTION, INTERIM POLICY ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS, available at <http://www.state.ma.us/dep/enf/enf97005.pdf> (last visited Apr. 9, 2005).

Mirroring the EPA's approach, New Mexico, Colorado, Utah, Florida, and Virginia use environmental justice as a factor in determining the appropriate penalty mitigation that a violator will receive for its SEP.²⁰⁵ The SEPs that perform well on the environmental justice factor will earn a higher mitigation ratio.²⁰⁶ In Colorado and Utah, projects that "mitigate damage or reduce risk to minority or low-income populations that have been disproportionately exposed to pollution, or are at environmental risk," are accorded a greater degree of penalty reduction.²⁰⁷ In Virginia, in order for a SEP to be approved, it is necessary that the "appropriateness and value" of the project be taken into account; and in so doing, the Virginia statute requires that the impact on "minority or low-income populations" be taken into consideration, among other factors.²⁰⁸

SEP Idea Libraries to Solicit Input from Affected Communities

The EPA's guidelines are premised on a violator, and not the regulator, proposing a particular SEP (see Section II, "The Federal Law of SEPs" for a discussion of federal law as it applies to SEPs.) Some states have adopted this model, and mandate that violators voluntarily propose and execute SEPs, born of a concern for the separation of powers between the legislative branch with its power of the purse and the executive agencies charged with implementation.²⁰⁹ Con-

sequently, the administrator is protected against charges that she is implementing her own programmatic agenda under the guise of environmental enforcement. Some states dispense with this "voluntary" model entirely, and solicit the cooperation of violators in implementing SEPs that meet agency goals, resulting in projects for which the agency would not otherwise have funding or staffing (e.g., Florida).²¹⁰

Other states have hit upon a middle position, creating "SEP idea banks" or pre-approved lists of possible SEPs, for violators to choose from, as described below. Regulators avoid the perception that the department is indirectly appropriating funds for projects that the legislature has not authorized, particularly when the project ideas themselves emanate from non-governmental organizations ("NGOs") or local government agencies. The states are following the lead of regional EPA offices: EPA has defined SEP libraries as "an inventory of potential SEPs that can be consulted in individual cases where the defendant requests assistance in identifying appropriate SEPs."²¹¹ EPA notes that a "SEP library can include specific projects identified as priorities by communities, non-governmental organizations, and others. SEP libraries can be developed from project ideas, obtained from the affected community through town meetings, publications, the internet [sic], or public hearings."²¹²

205. Cottle, *supra* note 202. See, e.g., NEW MEXICO AIR QUALITY BD., CIVIL PENALTY POLICY 29, available at http://www.nmenv.state.nm.us/aqb/enforce_compliance/Civil-Penalty.pdf (last visited April 24, 2005).

206. *Id.*

207. COLO. DEP'T OF PUBLIC HEALTH AND ENVIRONMENT, *supra* note 150, at 7.

208. VA. CODE ANN. § 10.1-1186.2(C) (West 2004).

209. WA. DEP'T OF ECOLOGY, SETTLEMENT GUIDELINES 4 (Feb. 1995) (on file with authors) (agency staff is

barred from proposing specific projects and may only inform the violator about the types of activities the agency has agreed to previously).

210. FL. DEP'T OF ENVTL. PROTECTION, PROGRAM DIRECTIVE SETTLEMENT GUIDELINES FOR CIVIL AND ADMINISTRATIVE PENALTIES 19-20 (Jan. 24, 2002), available at <http://www.dep.state.fl.us/admin/depdirs/pdf/923.pdf> (last visited April 24, 2005).

211. *Interim Guidance for Community Involvement, supra* note 54, 68 Fed. Reg. at 35,887.

212. *Id.*

The states of Delaware, Maine, and Illinois have SEP libraries.²¹³ Each encourages local environmental and community groups to submit proposed projects, usually through web-based forms. Illinois' Environmental Protection Agency has established procedures to determine whether projects are needed and desired.²¹⁴ The agency receives 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. Under the Illinois model of SEP libraries, the local community groups may assume responsibility for implementing these projects.²¹⁵ Notably, the Illinois idea bank sets out detailed project descriptions, including cost projections.²¹⁶

The benefits of SEP libraries are twofold. First, they ensure that projects actually redound to the benefit of local communities by soliciting community group proposals. Whereas community groups may lack the technical expertise to respond to a myriad of possible projects proposed by violators, the community groups are likely capable of marshalling the resources to iden-

tify a few discrete environmental projects, and to put forward a short description of the projects' benefits and timetable.²¹⁷ Second, the proposals reduce transaction costs for all parties, as there is no need to make under-informed and uncertain predictions about the risks and benefits of projects as they arise in the course of settlement negotiations. Since the projects have already been developed, violators may select and implement a project free of the risks of delay and additional negotiation. One commentator has also noted that "[d]evelopment of SEP [libraries] would help eliminate defendants' reluctance 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 and thus potentially raising expectations."²¹⁸

Towards a New Collaborative Compliance Model

Scholarly journals and policy articles discuss the possibility of reshaping the relationship among the regulator, the regulated community, and the affected community to increase joint efforts at effective and

213. ME. DEP'T OF ENVTL. PROTECTION, SEP PROJECT REGISTRATION, <http://www.maine.gov/dep/oc/sep/index.htm> (last visited Mar. 15, 2005); ILL. ENVTL. PROTECTION AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECT IDEA BANK, <http://www.epa.state.il.us/enforcement/sep/> (last visited Mar. 15, 2005); DEL. DEP'T OF NATURAL RESOURCES & ENVTL. CONTROL, POLICY ON PENALTY ASSESSMENTS ASSOCIATED WITH ADMINISTRATIVE ENFORCEMENT ACTIONS, <http://www.dnrec.state.de.us/dnrec2000/admin/enforcement/penaltyassessment/penaltyassessmentpolicy.htm> (last updated Mar. 31, 2003) (Delaware caps the cost of any project at \$100,000).

214. Interview with William Ingersoll, Chief Legal Counsel (Acting), Ill. Env'tl. Protection Agency (March 25, 2004).

215. Ill. Env'tl. Protection Agency, *Supplemental Environmental Project Idea Bank*, <http://www.epa.state.il.us/>

[cgi-bin/en/sep/sep.pl?rm=show_list&Submit=View+Projects](http://www.epa.state.il.us/cgi-bin/en/sep/sep.pl?rm=show_list&Submit=View+Projects) (last visited Mar. 15, 2005).

216. *Id.*

217. Insufficient technical and financial resources have compromised effective public participation by community groups in EPA's Project XL, and in the environmental justice movement generally. See, e.g., ENVIRONMENTAL LAW INSTITUTE, BUILDING CAPACITY TO PARTICIPATE IN ENVIRONMENTAL PROTECTION AGENCY ACTIVITIES: A NEEDS ASSESSMENT AND ANALYSIS 3 (1999), available at <http://www.eli.org/pdf/rrcapacity99.pdf> (last visited Mar. 15, 2005) (citing John Clayton Thomas, *Public Participation in Public Decisions: New Skills and Strategies for Public Managers*, at 25-26 (1995)).

218. Flax and Wilson, *supra* note 200, at 4.

efficient stewardship of the environment.²¹⁹ SEPs are highlighted as a tool in this collaborative effort through their use as a negotiated settlement, their community involvement, and the prospect for the creation of innovative environmental solutions by the regulated community, in contrast to penalties meted out by enforcement personnel.²²⁰

A concrete example of this new model of environmental regulation is evidenced in the New Hampshire Department of Environmental Services' SEP policy, which treats polluters who self-report violations preferentially. Under the New Hampshire guidelines, self-reporting violators may receive a greater mitigation amount for their SEPs: they pay either the greater of economic benefit received from the violation or 15 percent of the gravity component for self-reported violations, as opposed to the higher penalties for violations that are not self-reported—the greater of the economic benefit plus 10 percent of the gravity component or 25 percent of the gravity component, if a SEP is included in the settlement.²²¹ Oregon favors self-reported violators for SEPs, although no preferential mitigation is accorded.²²²

The new compliance model is not extended to all violators. Oregon withholds SEPs from violators that have willfully or

intentionally breached environmental laws, or are recidivists.²²³ Kansas presents a variation on this model, as its Bureau of Waste Management affords an escalating mitigation ratio scale for repeat offenders: ordinarily, corporate violators receive a 3:1 mitigation ratio, while repeat offenders must spend \$5 before offsetting \$1 from their assessed penalties.²²⁴

State SEP Funds to Redress Environmental Degradation in Affected Communities

A 2004 law in Delaware authorizes the funding of SEP-styled projects by using violators' penalties.²²⁵ The Delaware legislature created the Community Environmental Projects fund, authorizing the Delaware Department of Natural Resources & Environmental Control ("DNREC") to separate out 25 percent of all civil and administrative environmental penalties.²²⁶ The monies are dedicated, at DNREC's direction, to environmentally beneficial projects redressing environmental degradation within the same community where the violations occurred that resulted in the civil or administrative penalty.²²⁷ The law further specifies project categories similar to the EPA *Final SEP Policy*, in requiring that projects must effect "pollution elimination, minimization, or abatement, or improving conditions within the

219. See, e.g., Droughton, *supra* note 93, at 823-824; Christopher D. Carey, *Negotiating Environmental Penalties: Guidance on the Use of Supplemental Environmental Projects* 44 A.F. L. REV. 1, 3 (1998) ("A benefit shared by the regulator and the regulated entity is the enhancement of the regulatory relationship that is generally achieved during the negotiation and accomplishment of a SEP."), cited by Dana, *supra* note 96, at 1211 (Dana notes that there is no verified substantiation of "SEPs producing attitudinal transformations").

220. Kathleen Boergers, *The EPA's Supplemental Environmental Projects Policy*, 26 *ECOLOGY L.Q.* 777, 784-85 (1999).

221. N. H. DEP'T OF ENVTL. SERVICES, COMPLIANCE ASSURANCE RESPONSE POLICY VI-16 available at <http://www.des.state.nh.us/legal/carp/carp-ch-6.pdf> (last visited Apr. 9, 2005).

222. OR. DEP'T OF ENVTL. QUALITY, *supra* note 160, at 2. ("SEPs will be looked on most favorably when a Respondent has self-reported the violation and shown willingness and effort to correct violations in a timely manner once they are discovered.")

223. *Id.*

224. KAN. DEP'T OF HEALTH AND ENVIRONMENT, BUREAU OF WASTE MANAGEMENT POLICY 00-03 RELATED TO SUPPLEMENTAL ENVIRONMENTAL PROJECT 2 (July 20, 2000), available at http://www.kdhe.state.ks.us/waste/policies/BWM_00-03_SEP.pdf (last visited Apr. 9, 2005).

225. DEL. CODE ANN. tit. 7, §6041 (West 2004).

226. *Id.*

227. DEL. CODE ANN. tit. 7, §6041(d).

environment so as to eliminate or minimize risks to human health, or enhancement of natural resources for the purposes of improving indigenous habitats or recreational opportunities.”²²⁸

Significantly, the Secretary of DNREC has a statutory responsibility to consult with the Community Involvement Advisory Council (CIAC) in deciding which projects should be funded.²²⁹ CIAC’s overarching mission is to serve as a liaison between the DNREC and affected communities, with the further charge that it ensure that “no community in the State is disparately affected by environmental impacts.”²³⁰ The legislature has specified that the CIAC shall include “representatives from communities, community-based nonprofit organizations, environmental organizations, health care providers, local government, academic institutions and business/industry. CIAC’s membership includes representatives of communities that potentially may be adversely impacted by environmental factors or conditions.”²³¹ DNREC must submit quarterly reports to the Governor and the legislature on the progress of projects funded by the statute, and the statute also requires annual reports on the expenditures and the selection process for the projects.²³²

This provision of law is not a SEP, of course, as penalties are actually collected and appropriated to perform environmentally beneficial projects. Nevertheless, this practice illustrates the possibility of bring-

ing restorative justice to the fore, while ensuring that transaction costs are kept to a minimum. It also achieves a significant level of community input into, and community benefit from, projects funded by the proceeds of environmental penalties. It should be noted, however, that violators lose the public relations benefit of superintending and publicizing an environmentally beneficial project.

2. SEPs for States’ Unique Issues

States also may diverge from the EPA because states tend to deal with smaller violations, and smaller enforcement penalties, as well as the greater likelihood of environmental violations that cross jurisdictional boundaries. Smaller violators may require special SEP treatment as they tend to have smaller assessed fines, less ability to pay, and less funding to make systematic changes. An official at Georgia’s Department of Natural Resources noted that SEPs may not benefit small companies as much as larger companies because they tend to lack the technical and financial abilities to implement SEPs.²³³ Small companies also may not benefit as much from good press.²³⁴ Furthermore, mitigation caps may be too restrictive to implement a SEP with smaller penalties.²³⁵ Small states, in particular, are faced with the prospect of violations that spread over state boundaries, triggering an imperative to sculpt remedies that equitably treat neighboring communities.

228. *Id.* at § 6041(b).

229. The CIAC has a consultative role, in assessing whether a CEP grant affects the community that was the geographic focus of the violation. The CIAC membership is drawn from government, academia, community groups, and industry. DEL. DEP’T OF NATURAL RESOURCES, COMMUNITY INVOLVEMENT ADVISORY COUNCIL, <http://www.dnrec.state.de.us/ciac/> (last updated Mar. 4, 2005).

230. DEL. CODE ANN. tit. 29, § 8016A (2004).

231. DEL. CODE ANN. tit. 29, § 8016A(d).

232. DEL. CODE ANN. tit. 7, §6041(f).

233. Telephone Interview with John Fonk, Acting Coordinator, Remedial Site Unit (March 2004).

234. *Id.*

235. *Id.*

Practices

Contributions to Third Parties to Implement SEPs

SEPs for small violators may be facilitated through the practice of cash or in-kind contributions to third parties. Not only does this permit a small violator to make a small SEP contribution, but it leaves the implementation to an organization with proven competencies in managing environmental projects. Additionally, third parties may have experience in consulting with affected communities, a competence that a violating entity may not possess. This practice represents a departure from the EPA's guidelines, which specifically prohibit contributions to third parties in settlements between EPA and violators.²³⁶

The Arkansas Department of Environmental Quality allows violators to make cash contributions to mitigate civil penalties so long as the project advances environmental interests, although this may result in a contribution at a considerable geographical remove from the violation.²³⁷ In Vermont, a penalty for an environmental violation can include a "contribution toward other projects related to the violation, which the respondent and the secretary or the board agree will enhance the natural resources of the area affected by the violation, or their use and

enjoyment."²³⁸ California also allows third party contributions that satisfy its "enforcement project" category.²³⁹ For example, a SEP may include contributions to nonprofit organizations, such as the California District Attorneys Association.²⁴⁰ New Hampshire requires that the SEP be either a non-tax-deductible direct cash payment to an approved charity or other non-profit organization, or the purchase of a conservation easement or a parcel of land that is then made subject to a conservation easement.²⁴¹

Other states, notably Pennsylvania, have heightened criteria to ensure that the contributions will benefit the environment as well as the affected community. Pennsylvania requires that the donation must be dedicated to a specified project, and not merely to the general accounts of a nonprofit organization.²⁴² In addition, the contribution must fund projects related to the public health or the environment.²⁴³

Not all states have chosen to permit these kinds of SEPs: the Delaware statute specifically prohibits payment to charities or other entities as SEPs.²⁴⁴ It prohibits performance by third parties in part because the state would have no legal leverage over third parties in case of underperformance.²⁴⁵

236. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,781.

237. Ark. DEP'T OF ENVTL. QUALITY, SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP) POLICY AND PROPOSAL GUIDELINES, *available at* <http://www.adeq.state.ar.us/legal/sep.htm> (last updated Apr. 28, 2004).

238. 10 VT. STAT. ANN. tit 10, § 8007(b)(2) (2004).

239. CAL. ENVTL. PROTECTION AGENCY, *supra* note 166, at 4.

240. *Id.*

241. N.H. DEP'T OF ENVTL. SERVICES, *supra* note 221, at VI-17.

242. PA. DEP'T OF ENVTL. PROTECTION, *supra* note 152, at 5.

243. *Id.*

244. DEL. DEP'T OF NATURAL RESOURCES AND ENVTL. CONTROL, COMPLIANCE AND ENFORCEMENT RESPONSE GUIDE, CHAPTER 8: ENVIRONMENTAL IMPROVEMENT PROJECTS ASSOCIATED WITH ENFORCEMENT ACTIONS 4, *available at* <http://www.dnrec.state.de.us/dnrec2000/admin/enforcement/guide/chapter%20eight.pdf> (last visited Mar. 20, 2005) (Delaware refers to SEPs as Environmental Improvement Projects); DEL. CODE ANN. Tit. 29 § 8003(c)(15) (2004).

245. *Id.* at 4.

Options to Facilitate SEPs for Small Violators

Several states have shown an interest in facilitating small violators' access to SEPs. One possibility is to allow small-violator SEPs to mitigate the entire cash penalty.²⁴⁶ On the other hand, Indiana generally does not allow SEPs for penalties under \$10,000, which may effectively prevent small violators from performing SEPs.²⁴⁷

Some states, such as Utah, permit full mitigation of the penalty for all violators.²⁴⁸ The Kansas Bureau of Waste Management restricts waiver of the entire penalty to small businesses, preserving deterrence by requiring the cost of the SEP to equal or exceed twice the calculated penalty without the SEP.²⁴⁹ The Bureau defines a small business as either a facility with fewer than 100 full-time employees generating fewer than 1,000 kilograms of hazardous waste per month, or a solid waste processing facility accepting not more than twenty tons of solid waste per day.²⁵⁰

Accommodating Transboundary SEPs

Unlike the federal government, the states are continually confronted with boundary issues with surrounding jurisdictions, which may share the burden of environmental violations. A few states have taken the lead in ensuring that the other jurisdictions also benefit from SEPs. For

instance, The Texas SEP policy allows for the performance of SEPs in Mexico, subject to certain limitations.²⁵¹ Because natural resources are shared between Texas communities and their sister cities in Mexico, "[i]t makes sense for these communities to work together to preserve the environment they share."²⁵² The project must benefit the environment on the Texas side of the border, and cannot benefit the Mexican city at the expense of the Texas sister city.²⁵³ The project must also address a cross-border issue that is a problem of strong concern to Texans. To ensure that a transboundary project can be implemented, there must be both an existing infrastructure in place in Mexico through which the project can be performed, and channels for international communication about the project.²⁵⁴ The violator remains responsible for the primary oversight and implementation of the project.²⁵⁵

3. Efficient and Effective Administration of Environmental Laws ("First, do no harm")

Responding to many of the concerns set out in the Section III, "The Policy Implications of SEPs," the authors have found that some states have been particularly solicitous of the open, transparent and orderly administration of enforcement authority in the crafting of their SEP policies. This includes maintaining the deterrent effect of the underlying environmental laws. Under-

246. On the other hand, the EPA always requires a cash penalty to be paid. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,802.

247. IND. DEP'T OF ENVTL. MGMT., NONRULE POLICY DOCUMENT, SUPPLEMENTAL ENVIRONMENTAL PROJECT POLICY 7, *available at* <http://www.state.in.us/idem/oe/nrp/supplemental.html> (last visited Mar. 20, 2005).

248. The Utah Division of Air Quality policy allows 100 percent of the gravity component to be offset by a SEP for small businesses and nonprofit entities. UTAH DIVISION OF AIR QUALITY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 1 (on file with authors).

249. KAN. DEP'T OF HEALTH AND ENVIRONMENT, *supra* note 224.

250. *Id.*

251. TEX. COMM'N ON ENVTL. QUALITY, USE OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS 5, *available at* http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/rg/rg-367_201416.pdf (last visited Mar. 20, 2005).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

neath this overarching goal are sub-values such as ensuring the enforceability of a particular SEP across its life cycle, achieved through front-end screening and oversight mechanisms. Similarly, some states have focused upon improving the approval process, *inter alia*, creating openness in a process that does not merit confidentiality, given the public nature of harms created by the violation of environmental law. Commentators term this value “procedural justice,” referring to “fairness in the decision-making process, including the right of all members of the public to meaningful participation in all aspects of agency decisions.”²⁵⁶

Another value, reduction of transaction costs, has as many dimensions to it as there are stakeholders to the SEP itself—the regulator, the violator and the affected communities. Each has an interest in minimizing the costs of negotiating, implementing, and overseeing SEPs. Some within the environmental justice community contend that violators’ “unclean hands” render their transaction costs unworthy of concern, but violators would rejoin that they require SEP negotiations to be resolved expeditiously to permit them to clear their books of outstanding liabilities without incurring significant increases in attorneys’ fees.²⁵⁷ In any event, should transaction costs and undue delays attend the process of the SEP cycle, the number of SEPs and their environmental benefits would likely decline.

Practices

Oversight and Enforceability

An abiding concern for state regulators and the regulated community alike is the conversion of a dollar-certain and time-bound enforcement penalty into a project of indefinite liability and timeline. Some states have anticipated the need for finality by implementing policies that rule out projects with indefinite timelines, as well as projects with possible detriment to the environment if left unfinished. Connecticut’s example is noteworthy, as the Department of Environmental protection examines the “worst case” scenario in determining whether a SEP poses too many risks if “done poorly or . . . left uncompleted at any time during implementation.”²⁵⁸ This stringent front-end requirement can prevent the double blow of an environmental violation compounded by further environmental degradation from an ill-conceived or poorly executed SEP. Maine also scrutinizes a violator’s capacity to bring about a successful SEP, predicating approval upon demonstrated technical and economic resources needed for implementation.²⁵⁹ Maine may “require a letter of credit, escrow agreement, or third-party oversight as part of this demonstration.”²⁶⁰ By outsourcing the oversight of SEPs to the University of Maine or other branch of state government, and by charging those oversight costs back to the violator, Maine increases the possibility of successful outcomes through the project management expertise and neutrality of the third party.²⁶¹

256. Rechtschaffen, *supra* note 196, at 99 (citing Robert R. Kuehn, A *Taxonomy of Environmental Justice*, 30 *Envtl. L. Rep.* 10,681 (2000)).

257. Conference call with Chris Davis, Esq. (May 13, 2004).

258. CONN. DEP’T OF ENVTL. PROTECTION *supra* note 161, at 2.

259. ME. DEP’T OF ENVTL. PROTECTION, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 3,6 (Sept. 17, 2004), *available at* http://www.maine.gov/dep/pubs/sep_pol.pdf (last visited Mar. 20, 2005).

260. *Id.* at 3.

261. *Id.*

In Pennsylvania, SEPs that might be rejected include projects with implementation schedules of a year or more that require continued DEP oversight, projects that require significant continuing DEP review and approval or oversight, overly complex or time-consuming projects, and projects that are difficult to value.²⁶² In addition, to guard against the risk that the SEP's estimated cost might not be borne out in the implementation, projects with difficult to quantify costs may receive a lesser mitigation ratio.²⁶³

Transparency and Neutrality in the SEP Approval Process

Transparency and the interposition of neutral third parties into the approval process are critical success factors for SEPs, in part due to a need to preserve the symmetry between the openness of the legislative process establishing the environmental sanctions and the enforcement process reducing the full weight of those sanctions.²⁶⁴ Several states have actively promoted transparency through a variety of means, thereby combating the perception that environmental agencies are letting violators off too lightly, as well as rebutting the appearance of agency impropriety. Several states interpose independent committees and legislative bodies into the SEP approval process, in part to inform and circumscribe the discretion of environmental agency personnel. For instance,

262. PA. DEP'T OF ENVTL. PROTECTION, *supra* note 152, at 5. Connecticut expressly requires an estimate of the amount of agency time required to negotiate and oversee SEPs in determining whether to approve the SEP. CONN. DEP'T OF ENVTL. PROTECTION, *supra* note 161.

263. PA. DEP'T OF ENVTL. PROTECTION, *supra* note 152, at 5.

264. Droughton, *supra* note 93, at 811 ("Of particular concern is that the EPA could use SEPs to realize agency goals which go beyond addressing the violation, thus circumventing the appropriations process in contravention of the ADA.").

265. FLA. DEP'T OF ENVTL. PROTECTION, PROGRAM DIREC-

Florida's version of SEPs, pollution prevention projects, may require a more stringent approval procedure, i.e., approval by the Office of General Counsel and notification of the settlement to the Division Director.²⁶⁵

Paralleling the EPA practice of publishing notice of impending consent decrees in the Federal Register, the Louisiana legislature requires that proposed environmental settlement agreements be published in the newspaper closest to the site of the environmental violation, giving the public 45 days to comment.²⁶⁶ The Louisiana Department of Environmental Quality provides a website documenting proposed settlements, clearly identifying those with beneficial environmental projects.²⁶⁷ In addition, the Louisiana statute requires any settlement agreements with beneficial environmental projects and their justifications to be forwarded to the Attorney General for approval.²⁶⁸

Community Input

While discussed earlier as a means of furthering restorative justice, community input serves a different purpose, that of ensuring that the process of negotiating SEPs remains balanced and fair. Community input is vital during various stages of SEP implementation. The EPA's *Final SEP Policy* notes that "EPA should make special efforts to seek input on project proposals from the

TIVE SETTLEMENT GUIDELINES FOR CIVIL AND ADMINISTRATIVE PENALTIES 21 (Jan. 24, 2002), available at <http://www.dep.state.fl.us/admin/depdirs/pdf/923.pdf> (last visited Mar. 20, 2005).

266. LA. DEP'T OF ENVTL. QUALITY, BENEFICIAL ENVIRONMENTAL PROJECTS – FAQs, http://www.deq.state.la.us/enforcement/BEP_Information_Suggestions_Proposals.asp?strRequest=faq (last visited Mar. 20, 2005).

267. LA. DEP'T OF ENVTL. QUALITY, SETTLEMENT AGREEMENTS, <http://www.deq.state.la.us/enforcement/bep/bep.asp> (last visited Mar. 20, 2005).

268. LA. REV. STAT. ANN. § 30:2050.7(E)(2)(a) (West 2004).

local community that may have been adversely impacted by the violations,” particularly in cases with a great range of possible SEPs.²⁶⁹ EPA only solicits community input after the violator indicates the intent to perform a SEP and to seek community input.²⁷⁰ EPA believes that community input will promote environmental justice, will likely result in SEPs that better improve the affected community, and improve the relationship between the community and the violator.²⁷¹ To guarantee effective and meaningful community input, EPA provides information about the SEP process to the community.²⁷² Most critically, companies that welcome public input on the selection of projects are eligible for a greater mitigation of their assessed penalties.²⁷³

Several states have taken the EPA's community input framework and extended it. The Colorado Department of Public Health and Environment considers both community input and environmental justice in determining the degree of penalty mitigation.²⁷⁴ Specifically, the violator must actively solicit and incorporate input into the SEP.²⁷⁵ The environmental justice factor addresses damage or risk to minority or low-income communities disproportionately affected by the violation.²⁷⁶ In addition, the Utah Division of Air Quality looks at the extent to which community input was considered in the SEP as a factor to determine the mitigation percentage.²⁷⁷

As noted in greater detail in this section, some states have chosen to create SEP project libraries. One variant of SEP library actively solicits project descriptions from community groups typically affected by environmental violations, building in front-end input. This mechanism imposes fewer costs upon community groups, as they need not respond to a myriad of distinct project proposals, nor do the violators need to delay settlements by engaging in protracted negotiations with community groups.

V. Conclusion

SEPs can benefit all stakeholders in the environment—affected communities, industry and the regulators. Moreover, the SEPs process holds the promise of a re-invented regulatory model, one of cooperative enforcement, rather than the procrustean standard of traditional top-down, “command and control” regulation. Each stakeholder can benefit directly from the new model, through projects that benefit the affected community, improved public relations for the involved industry, and improved support for regulatory operations from industry and the public.

That said, there are also pitfalls associated with SEPs. There may be a need for safeguards to insure that the public actually benefits from the SEP, not just the regulators and industry. To this end, community groups should be offered meaningful opportunities to comment on how their

269. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,803; *see also Interim Guidance for Community Involvement*, *supra* note 54, 68 Fed. Reg. 35,884.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Final SEP Policy*, *supra* note 2, 63 Fed. Reg. at 24,802; *Interim Guidance on Community Involvement*, *supra* note 54, 68 Fed. Reg. at 35,884. While EPA encour-

ages violators to gather community input, community groups are not party to SEP negotiations.

274. COLO. DEP'T. OF PUBLIC HEALTH AND ENVIRONMENT, *supra* note 150, at 6-7.

275. *Id.* at 7.

276. *Id.*

277. UTAH DIVISION OF AIR QUALITY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY, 6 (on file with authors).

communities could best benefit from SEPs. Vigilant accounting of the implementation of SEPs will provide an additional safeguard, as well as helping to ensure that the acceptance of SEPs does not undercut the deterrent effect of environmental laws.

This report has outlined a variety of model practices that seek to accommodate the demand for safeguards, without rendering the SEP negotiation effort too costly for all concerned. Some of these practices streamline the process for negotiating SEPs, recognizing that states are not bound by the EPA's SEP policies, and relaxing the requirements to meet the unique concerns of states, such as smaller violators and violations. Nexus, the core of the EPA's SEP policies, should remain a valuable element of state SEP policies, however, given its vitality in a wide variety of legal contexts and its role in ensuring that affected communities themselves benefit from the SEPs. Most of the practices have the common thread of enhancing transparency and accountability in the SEP negotiation process, thus assuring that the open process attending the creation of environmental standards also permeates their enforcement. These practices can help ensure that the promise of SEPs is achieved while limiting the associated risks.