PETITION FOR RULEMAKING REGARDING DEPARTMENTAL USE OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

SUBMITTED TO
THE UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION

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On Behalf of:

Conservation Law Foundation, Surfrider Foundation, and Sierra Club

STATEMENT OF PETITION

Petitioners (Conservation Law Foundation, Surfrider Foundation, and Sierra Club) hereby petition the Department of Justice ("Department" or "DOJ"), Environment and Natural Resources Division ("ENRD") pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), to initiate a rulemaking proceeding to clarify that the Department can use Supplemental Environmental Projects ("SEPs") when settling civil enforcement actions brought under environmental statutes.

SUMMARY OF PETITION

The Department of Justice has long used Supplemental Environmental Projects to address the consequences of environmental harm when settling cases involving violations of environmental statutes. SEPs are tangible, real-world projects in communities, often low-income and communities of color, that would otherwise be left to grapple with the consequences of pollution on their own. In addition to facilitating settlements, SEPs serve an essential environmental justice function.

After decades of use by the Department, SEPs came under attack by the Trump Administration, which sought to eliminate SEPs through both internal policy memoranda and regulation. These abrupt moves confused regulated entities and the general public and highlighted the vulnerability of basing SEPs solely on policy statements and norms. Although the Biden Administration has attempted to re-introduce SEPs by withdrawing certain anti-SEP policies, confusion still exists as a result of a Trump-era rule, 28 C.F.R. § 50.28, which appears to prohibit the use of SEPs in ENRD settlements in some circumstances by treating them as "third party payments." The history of inconsistent policy documents and regulations limits the current administration and has led to widespread uncertainty among the public as to what the policy on SEPs actually is. While ENRD has revoked the prior administration's March 2020 memorandum prohibiting the use of SEPs, the Department of Justice must go further to withdraw the anti-SEP rule and replace it with one that will establish clear standards for the future use of SEPs.

We recommend that the Department of Justice (1) revoke 28 C.F.R. § 50.28 at least insofar as it applies to SEPs[1] and (2) initiate notice-and-comment rulemaking procedures[2] to formalize long-standing Department policy concerning the use of SEPs in a manner that is consistent with the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b). These actions would also comply with President Biden's Executive Order 13,990, Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, which instructs agencies to "immediately review and . . . take actions to address" regulations or agency actions that conflict with "important national objectives," such as improving public health and protecting the environment; ensuring access to clean air and water; holding polluters accountable, including those that disproportionately harm communities of color and low-income communities; reducing greenhouse gas emissions; and prioritizing environmental justice.[3] *See* 86 Fed. Reg. 7037 (Jan. 25, 2021). A clear policy that permits SEPs will provide the Environmental Protection Agency ("EPA") and ENRD flexibility to consider SEPs both in enforcement actions involving greenhouse gases, such as methane, and to consider possible co-benefits of SEPs in other enforcement actions. These steps would also align with President Biden's Executive Order 14,008, Tackling the Climate Crisis at Home and Abroad, which tasked DOJ with "develop[ing] a comprehensive environmental justice enforcement strategy, which shall seek to provide timely remedies for systemic environmental violations and contaminations and . . . ensur[ing] comprehensive attention to environmental justice throughout the Department [.]" 86 Fed. Reg.

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[1] This petition does not address or take any position on the portions of 28 C.F.R. § 50.28 that do not implicate SEPs.

[2] An agency must generally follow the same procedure when repealing a rule as when issuing it. *See* 5 U.S.C. § 551(5); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). As a general matter, notice-and-comment procedures are required for legislative rules unless an exception applies. 5 U.S.C. § 553. However, notice-and-comment procedures are not required to rescind 28 C.F.R. § 50.28 or any portion of that rule because it was issued not as a legislative rule but as a "matter of agency management or personnel and is a rule of agency organization, procedure, or practice" that was exempt. 85 Fed. Reg. 81,409, 81,410 (Dec. 16, 2020). While the Department could likewise forgo notice-and-comment procedures to issue a new rule formalizing its SEPs policy, we recommend that the Department nonetheless accept comments to improve the quality of the rule with public input.

[3] The Fact Sheet published with Executive Order 13,990 expressly lists the rulemaking containing 28 C.F.R. § 50.28 in the list of agency actions that should be reviewed. White House, *Fact Sheet: List of Agency Actions for Review* (Jan. 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/ (listing ENRD's prohibition on third party payments).

7619 (Jan. 25, 2021). As SEPs often provide a direct benefit to the very same communities harmed by environmental violations, they play an obvious environmental justice role.

STATEMENT OF INTEREST

Conservation Law Foundation ("CLF") is headquartered in Boston, Massachusetts. CLF has over 4,000 members, and the organization's mission is to protect New England's environment for the benefit of all people. CLF uses the law, science, and the market to create solutions that preserve New England's natural resources, build healthy communities, and sustain a vibrant economy. In particular, CLF regularly brings lawsuits to enforce clean water and clean air laws, including by using the citizen suit provisions of the Clean Air Act and Clean Water Act. CLF typically seeks to include payments to SEPs in citizen lawsuit settlement agreements or in court orders following a legal victory. To date, CLF's environmental enforcement work has generated more than $2,000,000 in funding for local environmental protection and restoration projects.

The Surfrider Foundation ("Surfrider") is a non-profit corporation with its principal office in San Clemente, California. Surfrider is a national grassroots organization with more than 350,000 supporters and members, 79 local chapters, and 92 school clubs in the United States. Surfrider's mission is the protection and enjoyment of the world's oceans, waves, and beaches, for all people, through a powerful activist network. Through its membership network, Surfrider advocates for clean water and ocean protection, coastal preservation, public beach access, and the prevention of marine plastic pollution. Surfrider's vision is to keep beaches open to everyone, promote smart coastal development that avoids coastal impacts, ensure that water is clean for coastal recreation including surfing and swimming, keep beaches free of plastic litter, and protect special ocean and coastal places when and before they are threatened. Surfrider's Clean Water Initiative seeks to protect water resources and prevent pollution along coasts and waterways by engaging communities, testing water, planting ocean-friendly landscapes, and advocating for holistic clean water solutions.

Sierra Club is the nation's oldest and largest grassroots environmental organization. The Sierra Club is a national nonprofit organization with over 800,000 members dedicated to exploring, enjoying, and protecting the wild places of Earth; to practicing and promoting the responsible use of the Earth's ecosystems and resources; to educating and enlisting humanity to

protect and restore the quality of the natural and human environment, and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the protection of clean air and clean water. Sierra Club frequently avails itself of the citizen suit provisions of the Clean Air Act, Clean Water Act, and other environmental statutes to secure such protections. Sierra Club has resolved many of its citizen enforcement suits by entering into consent decrees or other forms of settlement agreement that require defendants to fund SEPs to benefit impacted communities, and Sierra Club hopes and intends to continue this practice.

FACTUAL BACKGROUND

I. DOJ Has a Long History of Using Supplemental Environmental Projects in Settlements

In the 1980s, alleged violators of federal environmental statutes began settling civil enforcement actions by entering into administrative settlements and consent decrees that included SEPs. DOJ and EPA both entered into settlements requiring SEPs. DOJ did so in consent decrees, and EPA did so in administrative settlements. As early as 1984, EPA observed that "[o]ccasions have arisen in enforcement actions where violators have *offered* to make expenditures for environmentally beneficial purposes *above and beyond* expenditures made to comply with *all existing legal requirements*." U.S. EPA, Civil Penalty Policy (July 8, 1984) at 15 (emphasis added).

While SEPs initially drew a small group of critics, the Department of Justice regularly approved SEPs following a 1980 opinion from the Office of Legal Counsel ("OLC") finding that they do not violate the Miscellaneous Receipts Act[4] and subsequent court rulings allowing their use as fair, reasonable, and in the public interest.[5]

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[4] *See Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B Op. O.L.C. 684, 688 (1980). This OLC opinion is discussed in more detail below. *See infra* 13-14.

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

DOJ and EPA's SEPs policies have historically been intertwined. EPA, with assistance from the Department of Justice, adopted and refined its policies for SEPs, culminating in a key SEPs guidance in 2015. That Guidance defines SEPs as "environmentally beneficial projects which a defendant agrees to undertake in settlement of an enforcement action, but which the defendant, or any other third party, is not otherwise legally required to perform." U.S. EPA Suppl. Envtl. Projects Policy 2015 Update at 6 (hereinafter "2015 Guidance"). DOJ-approved SEPs have, in turn, generally been consistent with EPA's Guidance.

The 2015 Guidance sets forth guidelines for use of SEPs and explicitly encourages defendants in EPA enforcement actions to "consider SEPs in communities where there are [environmental justice] concerns." The Guidance explains that "SEPs can help ensure that residents who spend significant portions of their time in, or depend on food and water sources located near the areas affected by violations will be protected," and situates environmental justice as one of the six criteria used to evaluate SEPs and, separately, civil penalties applied alongside SEPs. 2015 Guidance at 4. *See generally* Patrice L. Simms, *Leveraging Supplemental Environmental Projects: Toward an Integrated Strategy for Empowering Environmental Justice Communities*, 47 Envtl. L. Rep. News & Analysis 10511 (2017). For instance:

- Between the late 1990s and the early 2000s, EPA found over 6,000 violations of opacity, visible air pollutant, limits and accompanying monitoring and reporting requirements at the Mystic Station Power Plant in Everett, Massachusetts. *United States v. Exelon Mystic, LLC*, No. 4-cv-10213, 1 (D. Mass. filed Jan. 28, 2004). Exelon Mystic entered into a consent decree requiring it to complete five SEPs, three of which directly contributed to reducing particulate matter and other air pollutants within the Greater Boston Metropolitan Area, which includes Everett. It installed oxidation catalysts in commuter rail trains (to reduce particulates) and supplied the trains with lower-sulfur diesel fuel. It retrofitted 500 Boston school buses with particulate matter filters. The company also spent $250,000 to build

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because [sic] it does not contain a provision requiring the Defendant to pay a civil penalty to the United States").

two bike paths providing bike access to the subway station in Mystic in order to encourage cleaner methods of transportation.[6]

- Between 2001 and 2008, EPA entered into fifteen agreements requiring electric power companies to perform SEPs worth roughly $225 million, prompting significant new renewable energy generation and pollution control and mitigation by the very same power plants that produced significant pollution. By December of 2011, EPA had entered into seven more such settlements worth nearly $400 million in SEPs. Among the most important beneficiaries of these SEPs are low-income and minority communities that disproportionately bear the worst effects of pollution. 2015 Guidance at 3-4.
- DOJ charged Shintech, Inc. with violating environmental statutes for failing to repair or retire leaking refrigeration equipment and improperly disposing of, treating, or storing hazardous waste. *United States v. Shintech, Inc.*, 08-cv-3519 (S.D. Tex. filed Dec. 1, 2008). This activity caused ozone-depleting substances ("HCFC") to leak into the atmosphere and hazardous waste to seep into ground water.[7] The consent decree in that case included three SEPs, one of which instructed Shintech to create a residential appliance recycling program for Houston, Texas to properly dispose of at least 6,400 appliances containing ozone-depleting chemicals. This program reduced the amount of HCFC in the area, leading to a decline in CO_2. Shintech, Inc. also agreed to improve its vinyl chloride monomer stripping process, leading to a decrease in emissions, and voluntarily reduce their legal emissions limit by 70%.[8]
- After EPA found Clean Air Act violations at three U.S. Steel manufacturing plants in the Midwest, the company agreed to a 2017 consent decree requiring it to complete SEPs focused on "protect[ing] human health and the environment in

[6] EPA, *Civil Enforcement Case Report: Sithe New England*, https://echo.epa.gov/enforcement-case-report?id=01-2002-0184 (last visited May 12, 2021).

[7] News Release, EPA, PVC Manufacturers Agree to Reduce Air Pollutants and Strengthen Control of Hazardous Wastes (Dec. 1, 2008).

[8] EPA, *Civil Enforcement Case Report: Shintech, Inc.*, https://echo.epa.gov/enforcement-case-report?id=06-2006-0920 (last visited May 12, 2021).

the communities affected by [its] pollution."[9] This included planting roadside vegetative particulate emissions buffers in Detroit, Michigan and purchasing a $260,000 street sweeper with enhanced particulate collection capability for Granite City, Illinois. U.S. Steel also spent $1 million replacing lighting ballasts that were thought to contain polychlorinated biphenyls (PCBs) in public schools in the areas surrounding its factories.[10]

- In 2017, EPA consent decrees included SEPs designed to reduce lead exposure in low-income communities in Lima, Ohio, and to install lead-filtering systems in public schools in East Chicago, Indiana.[11]

As these examples demonstrate, in many cases over several decades, SEPs have directly mitigated the harms resulting from violations of environmental statutes and are widely popular among settling parties. Without SEPs, it would be more much more difficult for communities affected by such unlawful behavior to receive environmental remedies. As noted, the resources that SEPs provide are especially important because many of the areas impacted by environmental harm are disproportionately low-income and communities of color, making SEPs a crucial instrument in achieving environmental justice. 2015 Guidance at 3-4. SEPs are also attractive to alleged violators of environmental statutes because they provide an opportunity to more directly correct the harm caused.[12] Perhaps most importantly, SEPs have had a direct effect on the environment; their implementation has "prevented significant amounts of pollution and restored contaminated water, wetlands, land, and air."[13]

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[9] News Release, DOJ, U.S. Steel Corporation Agrees to End Litigation, Improve Environmental Compliance at Its Three Midwest Facilities, Pay Civil Penalty of $2.2 Million and Perform Projects to Aid Communities Affected by U.S. Steel's Pollution (Nov. 22, 2016).

[10] EPA, *Civil Enforcement Case Report: U.S. Steel - CD*, https://echo.epa.gov/enforcement-case-report?id=05-2008-6620 (last visited May 12, 2021).

[11] U.S. EPA, Annual Environmental Justice Progress Report, 15-16 (2018), https://www.epa.gov/sites/production/files/2019-08/documents/ejprogress_report_fy2018-11.pdf.

[12] Thomas O. McGarity, *Supplemental Environmental Projects in Complex Litigation*, 28 Tex. L. Rev. 1405, 1407 (2020). *See also* Laurie Droughton, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 Pace Envtl. L. Rev. 789, 809-10 (1995).

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

II. The Trump Administration Sought to Eliminate the Use of SEPs

Former Assistant Attorney General for ENRD, Jeffrey Bossert Clark, broke with established practice and sought to eliminate the use of SEPs by DOJ and EPA when he opined that EPA's SEP policy violated the Miscellaneous Receipts Act. *See* Mem. from Jeffrey Clark, Assistant Att'y Gen., to ENRD Deputy Assistant Att'y Gens. and Section Chiefs re: Supplemental Environmental Projects ("SEPs") in Civil Settlements with Private Defendants at 7 (Mar. 12, 2020) (hereinafter "Clark Memorandum"). Although DOJ guidance documents and rules do not apply to other Executive agencies, they nonetheless greatly influence EPA's SEPs policy. The EPA under the Trump Administration halted its use of SEPs in administrative enforcement settlements after the Clark Memorandum was published.

Purporting to "exercise appropriate prosecutorial discretion," the Clark Memorandum categorically commanded that "attorneys negotiating consent decrees or compromise settlements in EPA cases should not include SEPs in those settlements." Clark Memorandum at 18. It permitted no exceptions to this policy. *Id.* at 19.

The Clark Memorandum included a series of criticisms of SEPs. According to Clark, one downside of SEPs was that the projects gave insufficient weight to "centuries of [pre-revolutionary] struggle between the [British] Crown and Parliament" over state finances. *Id.* at 17. And in what the Memorandum described as "*Federalist Paper 10* terms," it "confidently" concluded (in a footnote) that "SEPs are likely to foment the evil of [political] factions" in the United States. *Id.* at 17 n.20. The Assistant Attorney General also opined that SEPs make bad policy because they award a windfall to their beneficiaries. In the Memorandum's parlance, these communities—including poor and minority communities disproportionately burdened by pollution—are "vested interest[s]" that are "fortunate enough to be blessed . . . [with] SEP monies." *Id.* at 16.

The Clark Memorandum's main legal rationale was its determination that SEPs run afoul of the Miscellaneous Receipts Act. *See, e.g.*, *id.* at 2 (it "is inescapable that SEPs violate the Miscellaneous Receipts Act"); *id.* at 11 ("SEPs violate . . . the Miscellaneous Receipts Act, which is intended to protect Congress' constitutional power of the purse"); *id.* at 19 ("I do not have discretion to make exceptions to what is a sound construction of both statutory and constitutional law."). In reaching that conclusion, the Memorandum omitted any discussion of

why, for two decades, an OLC opinion, DOJ policy, and hundreds of district courts blessed SEPs as consistent with law and appropriate in settlements as fair, reasonable, and in the public interest.[14]

DOJ went even beyond the Clark Memorandum by promulgating a rule against third party payments that may also limit the use of SEPs. *See* Prohibition on Settlement Payments to Non-governmental Third Parties, 85 Fed. Reg. 81,410 (Dec. 16, 2020); 28 C.F.R. § 50.28. This rule extends guidance set out in a 2017 memo from then-Attorney General Jeff Sessions banning the use of third-party payments in most settlements. Mem. from Atty Gen. re: Prohibition on Settlement Payments to Third Parties (June 5, 2017). The Sessions memo specified that the limitation against third-party payments did not apply in circumstances in which such a payment would "directly remed[y] the harm that is sought to be repressed, including, for example, harm to the environment[.]" *Id.* However, 28 C.F.R. § 50.28 instructs Department attorneys that "in no case shall any [] agreements require defendants in environmental cases, in lieu of payment to the Federal Government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects," suggesting that, in at least some cases, DOJ may view SEPs as third-party payments that are impermissible under the rule.

III. The Department of Justice Should Fully Recommit to the Use of SEPs and Clarify the Standards for Their Use Going Forward

In February 2021, DOJ withdrew several ENRD guidance documents, including the Clark Memorandum and others that had been critical of SEPs. Mem. to ENRD Section Chiefs and Deputy Section Chiefs re: Withdrawal of Memoranda and Policy Documents (Feb. 4, 2021). These reversals followed President Biden's Executive Order 13,990, Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, which instructed agencies to "immediately review and . . . take actions to address" regulations or agency actions "that conflict with [] important national objectives, and to immediately commence work to confront the climate crisis." 83 Fed. Reg. at 7037. The documents withdrawn, including the Clark Memorandum, were "inconsistent with longstanding Division policy and practice" and

[14] SEPs permissibility under the Miscellaneous Receipts Act is discussed *infra* at 13-15.

posed possible "imped[iments to] the full exercise of enforcement discretion in [ENRD]'s cases." Mem. re: Withdrawal of Memoranda and Policy Documents at 2.

Although DOJ has now rescinded the Clark Memorandum, its SEPs policy, and EPA's related policy, remains in limbo because 28 C.F.R. § 50.28, the Trump Administration-era prohibition on settlement payments to non-governmental third parties, remains in effect. For instance, in April 2021, EPA issued a memo encouraging staff to use "the full array of policy and legal tools available" in civil enforcement settlements. Mem. to Regional Counsels and Deputies, Enf't and Compliance Assurance Division Dirs. and Deputies, OECA Office Dirs. and Deputies re: Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements, 1 (April 26, 2001). EPA's list of available tools includes SEPs but explains that the inclusion of SEPs in judicial settlements is "severely limited" by 28 C.F.R. § 50.28. Mem. at 3 n.3. Hamstrung by this rule, EPA advised that SEPs should only be included in settlements involving diesel emission reductions until further guidance is issued. *Id.* Career ENRD officials have also reportedly described frustrations over their inability to incorporate SEPs into consent decrees "in over four years" and their confusion when "Trump-era officials rolled out" 28 C.F.R. § 50.28, seeking to cement a SEPs ban, at the "eleventh-hour."[15]

Leaving 28 C.F.R. § 50.28 in place would continue to create confusion. Although the 2017 Sessions memo treated SEPs and third-party payments differently, *see supra* at 9-10, this rule appears to categorize SEPs as third-party payments ("[I]n no case shall any [settlement] agreements require defendants in environmental cases, in lieu of payment to the Federal Government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects[.]" 28 C.F.R. § 50.28(c)(1)). This apparent conflation is impacting DOJ's ability to use SEPs, which is reason enough for its removal. At the very least, even if ENRD reads 28 C.F.R. § 50.28 to still permit SEPs in some fashion, it creates confusion as to when they may be used and forces DOJ to continue determining their use through policy memos, leaving the public in a continual position of uncertainty.

The Department thus ought to *both* withdraw 28 C.F.R. § 50.28 at least insofar as it applies to SEPs *and* promulgate a SEPs *rule* laying out the legal rationale and standards for their

[15] *See* Ellen M. Gilmer, *Late Trump DOJ Rule Surprised Environment Team, Official Says*, Bloomberg Law (June 3, 2021), https://news.bloomberglaw.com/environment-and-energy/late-trump-doj-rule-surprised-environment-team-official-says.

use. These two actions in tandem will formalize DOJ's SEPs policy in a manner that is lasting and sensible. Without clear rules, the reasoning behind DOJ's settlement practices will only become more difficult for the public to understand and will continue to be subject to frequent change.

LEGAL AUTHORITY TO PROMULGATE

I. DOJ's Legal Authority

The Attorney General may "formulate and publish" regulations pertaining to the Department of Justice and the exercise of its prescribed authority. *Georgia v. United States*, 411 U.S. 526, 536 (1973), *rev'd on other grounds by Shelby Cty. v. Holder*, 570 U.S. 529 (2013); 5 U.S.C. § 301 ("[T]he head of an Executive department or military department may prescribe regulations for the government of his department.").

Federal enforcement of environmental statutes[16] generally occurs through administrative actions (brought by EPA) or through civil actions (brought by DOJ, on behalf of client agencies like EPA, generally upon referral).[17] DOJ, on behalf of EPA, can also intervene as a matter of right in citizen suits brought under environmental statutes like the Clean Water Act (*see* 33 U.S.C. § 1365(c)(2)) and Clean Air Act (*see* 42 U.S.C. § 7604(b)(1)(B)), if the government is not already joined as a party. The Attorney General is charged with conducting and supervising all litigation to which the United States, or its departments or agencies, is a party. 28 U.S.C. §§ 515-519. *See also* The Att'y Gen.'s Role as Chief Litigator for the U.S., 6 Op. O.L.C. 47, 48 (1982). The Attorney General has delegated civil enforcement of the environmental laws to

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

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

ENRD's Assistant Attorney General. 28 C.F.R. § 0.65; U.S. Att'ys' Manual 5-1.100, 5-1.300 (updated 2018).

Federal environmental statutes provide for civil judicial enforcement to secure injunctive relief, civil penalties, recovery of government response costs, enforcement of administrative orders, or other relief.[18] For some violations, particularly those calling for greater deterrent impact, statutory limitations on administrative authorities compel agencies to refer alleged violations to DOJ for civil enforcement.[19] If a civil complaint is filed, ENRD typically will seek an order that the defendant pay an appropriate civil penalty for the violation, as well as injunctive relief to remedy the violation and harm.

Most enforcement actions the EPA refers to the DOJ are resolved through settlement agreements or consent decrees. The Attorney General has "broad and plenary settlement authority as to any matter referred to the Department of Justice," Exec. Order No. 6,166 § 5 (June 10, 1933); 38 Op. Att'y Gen. 98 (1934), and that authority has been further delegated to the Deputy Attorney General, the Associate Attorney General, or the Deputy Assistant Attorney General depending on the size of the settlement.[20] Courts require that the consent decree "comes within the general scope of the case made by the pleadings, furthers the objectives upon which the law is based, and does not violate the statute upon which the complaint was based." *Elec. Controls Design*, 909 F.2d at 1355 (quoting *Local No. 93, Int'l Ass'n of Firefighters, AFL–CIO v. City of Cleveland*, 478 U.S. 501, 525-26 (1986) and *Pacific R.R. v. Ketchum*, 101 U.S. 289, 297 (1879)) (internal quotations omitted). As explained above, consent decrees that include SEPs have been approved and entered by courts.

[18] *See, e.g.*, 42 U.S.C. § 7414 (Clean Air Act), 33 U.S.C. §§ 1319(b), 1321 (Clean Water Act); 42 U.S.C. § 300g-3(b) (Safe Drinking Water Act); 33 U.S.C. § 2702 (Oil Pollution Act); 42 U.S.C. §§ 6928(a), 6973 (RCRA); 42 U.S.C. §§ 9606, 9607 (Comprehensive Environmental Response, Compensation, and Liability Act).

[19] For example, some statutes impose caps on the amount of civil penalties that can be assessed administratively. *See, e.g.*, 42 U.S.C. § 7413(d) (Clean Air Act) ($200,000 limit, unless waived by DOJ); 33 U.S.C. § 1319(g)(2)(B) (Clean Water Act) ($125,000 limit for class II penalties); 42 U.S.C. § 300g-3(g)(3) (Safe Drinking Water Act) ($25,000 limit).

[20] 28 C.F.R. § 0.161; ENRD Directive No. 2016-04, § II(A) (Dec. 20, 2016).

II. The Miscellaneous Receipts Act

As DOJ and EPA have previously—and correctly—concluded, and as various courts have confirmed, SEPs do not run afoul of the Miscellaneous Receipts Act as the now-withdrawn Clark Memo opined. The Act implements the Constitution's requirement that "[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law." Art. I § 9. To prevent the executive branch from augmenting its appropriated budget by diverting funds *before* they ever reach the Treasury, the Miscellaneous Receipts Act requires that "an official or agent of the Government *receiving money* for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b) (emphasis added). *See generally* Todd Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. Rev. 327, 340 (2009).

Since at least 1980, OLC has concluded that the government only constructively "receives" money intended for the Treasury—and therefore violates the Miscellaneous Receipts Act—when it directs funds *otherwise destined* to the Treasury to non-federal accounts. *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B Op. O.L.C. 684, 688 (1980). Thus, OLC has determined that the United States may not settle environmental enforcement actions by *directing* the violator to fund a non-governmental organization dedicated to wildlife preservation *in lieu of* accepting civil penalties. *Id.* at 688. According to OLC, "the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of [the Miscellaneous Receipt Act], if a federal agency [1] could have accepted possession [of the funds] and [2] retains discretion to direct the use of the money[.]" *Id.*

OLC has "consistently advised" that settlements *do not* violate the Miscellaneous Receipts Act so long as: (1) the settlement is executed before an admission or finding of liability in favor of the United States; and (2) the United States does not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement. *Application of the Gov't Corp. Control Act and the Misc. Receipts Act to the Can. Softwood Lumber Settlement Agreement,* 30 Op. O.L.C. 111, 119 (2006) (citing Mem. for the Files, from Rebecca Arbogast, Attorney-Adviser, O.L.C., *Misc. Receipts Act and Criminal Settlements* (Nov. 18, 1996)). "If these two

criteria are met, then the governmental control over settlement funds is so attenuated that the Government cannot be said to be receiving money for the Government." *Id.* at 119 (citation omitted).

Under these standards, SEPs do not violate the Miscellaneous Receipts Act:

First, SEPs are entirely independent from monies paid to the United States Treasury, such as civil penalties. In environmental enforcement actions, civil penalties both deter future violations and ensure a level playing field for the regulated community. 2015 Guidance at 1. The government calculates an appropriate penalty based on several considerations, including "the economic benefit associated with the violations, the gravity or seriousness of the violations[,] and the violator's prior history of noncompliance." *Id.* at 21. The 2015 Guidance states that "SEPs are not penalties, nor are they accepted in lieu of a penalty." *Id.*

To the contrary, "[s]ettlements that include a SEP must always include a settlement penalty that recoups the economic benefit a violator gained from noncompliance with the law, as well as an appropriate gravity [of violation]-based penalty reflecting the environmental and regulatory harm caused by the violation(s)." *Id. See also id.* at 22 (specifying formula for minimum civil penalties in settlements including SEPs). Like other enforcement considerations, the inclusion of a SEP in a settlement *may* influence a final stipulated penalty: "a violator's commitment to perform a SEP is a relevant factor for the EPA to consider in establishing an appropriate settlement penalty." *Id.* at 21. But the Guidance is clear that SEPs are in no way substitutes for penalties, and there is no mathematical link between SEPs and the quantum of civil penalties.

Specifically, the 2015 Guidance provides that "EPA will consider a variety of factors in determining the amount of penalty mitigation including, but not limited to, the evaluation criteria described in . . . [the] Policy," and that "[p]enalty mitigation in light of a SEP is within the EPA's discretion; there is no presumption as to the correct amount of mitigation." *Id.* at 24. At most, the "amount of penalty mitigation given for a SEP should be equivalent to *a* percentage of the estimated cost to implement the SEP and should [generally] not *exceed* eighty percent (80%) of that estimated cost." *Id.* (emphasis added). This is an upper bound of a SEP's potential impact on the assessment of an appropriate civil penalty, not a conversion rate.

Second, SEPs are independent from monies already appropriated from the United States Treasury, i.e., they do not "augment" any federal budgets beyond what Congress has

appropriated. The most important of EPA's anti-augmentation devices is its requirement that SEPs possess a "nexus" to the underlying statutory violation, tethering the projects to EPA's statutorily prescribed enforcement authority under the Clean Air Act and other statutes. As EPA explains, "[n]exus ensures the proper exercise of the EPA's prosecutorial discretion and enables appropriate penalty mitigation for including the SEP in the settlement." *Id*. at 7. To satisfy the nexus requirement, the SEP must, *inter alia*, (1) "advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action"; and (2) reduce the impacts of the alleged violation or the chance that it will occur again. *Id.* at 7-8.

III. Review of DOJ's Current SEPs Policy is Required Under Executive Order 13,990

The Department of Justice should withdraw 28 C.F.R. § 50.28, at least insofar as it applies to SEPs. As the Department initially issued this rule as a "matter of agency management or personnel and is a rule of agency organization, procedure, or practice" that was exempt from notice and comment rulemaking, 85 Fed. Reg. at 81,410, DOJ may revoke this rule without notice-and-comment proceedings. *See* 5 U.S.C. §§ 551(5); 553 (a)(2), (b), and (d). However, DOJ should follow the requirements of *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009), by acknowledging "that it is changing position" and explaining that the new policy is "permissible," "there are good reasons for the new policy," and DOJ "believes it to be better."

DOJ should also draft a SEPs rule to help clarify and solidify key Department policy for this and future administrations. Such a rule would be a Department "general statement[] of policy" exempt from notice and comment requirements. *See* 5 U.S.C. §§ 551(5); 553 (b)(3)(A). However, we recommend that the Department nonetheless seek public comment in its discretion to understand the full range of public concerns about SEPs and thus strengthen the resulting rule. Consistent with *Fox*, DOJ should also acknowledge the extent to which the new rule changes policy from the previous administration and explain the many benefits of formalizing DOJ's prior policy. *See Fox*, 556 U.S. at 515.

These actions would comport with President Biden's Executive Orders 13,990 and 14,008. Executive Order 13,990 lays out broad commitments to combatting climate change and striving for environmental justice, highlighting "improv[ing] public health . . . ensur[ing] access to clean air and water; limit[ing] exposure to dangerous chemicals and pesticides; [and] hold[ing]

polluters accountable, including those who disproportionately harm communities of color and low-income communities." 83 Fed. Reg. 7037, 7037. It instructs all agencies to "immediately review and . . . *take action to address* the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." *Id.* (emphasis added). Finally, the Order directs that "[h]eads of agencies shall . . . consider whether to take any additional agency actions to fully enforce the policy set forth in section 1 of this order." *Id.* at 7038. Executive Order 14,008 instructs DOJ to "develop a comprehensive environmental justice strategy" that includes procedures for "provid[ing] timely remedies for systemic environmental violations." 86 Fed. Reg. 7619 (Jan. 25, 2021). SEPs are tools particularly well suited to this task—they are designed to provide tangible resources to communities harmed by environmental violations.

The Department of Justice has begun following these Executive Orders, as evidenced by its withdrawal of ENRD guidance documents that prohibited SEPs, such as the Clark Memorandum. But to "fully enforce the policy set forth," the Department of Justice must revoke 28 C.F.R. § 50.28, insofar as it applies to SEPs, and promulgate a clear rule formalizing its position on SEPs.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that the Attorney General initiate a rulemaking proceeding pursuant to the Administrative Procedures Act, 5 U.S.C. § 553(e), to revoke 28 C.F.R. § 50.28 and issue a rule authorizing the use of SEPs when settling civil enforcement actions brought under environmental statutes. If you would like to discuss this petition, please contact Michael Martinez and Samara Spence.

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Respectfully submitted,

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