ARTICLES

CLEARING THE AIR ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

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SUMMARY

Supplemental environmental projects (SEPs) have received a growing amount of attention in recent years, from the Donald Trump Administration banning their use in settlements, to regulation and guidance from the Joseph Biden Administration reversing the ban, to legislative proposals prohibiting them altogether. This Article examines SEPs' legality under existing law, focusing on claims that they violate the Miscellaneous Receipts Act and the Antideficiency Act. It begins with a brief history of SEPs' policy evolution and the limitations on the U.S. Environmental Protection Agency's and U.S. Department of Justice's (DOJ's) settlement discretion. It then examines claims that SEPs are unlawful, focusing on arguments made in a 2020 DOJ policy memo. It concludes that the 2020 analysis is flawed, masking policy preferences under the guise of statutory interpretation; and that opponents' arguments ignore long-standing legal distinctions between payments negotiated in settlements and penalties assigned by a judge following a finding of liability.

The U.S. Environmental Protection Agency (EPA) and U.S. Department of Justice (DOJ) have many options to address a violation of federal environmental law. Statutes may allow for civil or criminal penalties, and generally allow federal officials to exercise discretion when pursuing these penalties. DOJ and EPA also have broad general discretion when prosecuting and settling cases.

For decades, supplemental environmental projects (SEPs)—voluntary commitments proposed by defendants to benefit third parties—have been a part of DOJ's and EPA's settlement tool kit. These projects allow defendants to provide health and environmental benefits "beyond those achieved by compliance,"[1] allowing defendants and government attorneys flexibility to "more fully compensate victims, remedy harm, and punish and deter future violations."[2] Despite this long-standing practice, some lawmakers and think-tanks continue to question the legality of SEPs.[3]

EPA began formalizing its SEP policy during the Ronald Reagan Administration, and has periodically refined that policy in the years since. Similarly, DOJ's Office of Legal Counsel (OLC) issued a series of memos starting in 1980 providing guidance on when third-party payments, including SEPs, were permissible in settlement agreements. DOJ attorneys have been involved in hundreds of settlements involving SEPs that followed EPA's policies. As with numerous other seemingly settled issues, the Donald Trump Administration reversed decades of DOJ precedent

Authors' Note: The authors thank Sarah Hart, Harvard Law School J.D. 2024, for her research supporting this Article.

1. U.S. EPA, Supplemental Environmental Projects Policy 2015 Update 1 (2015), https://www.epa.gov/sites/default/files/2015-04/documents/sepupdatedpolicy15.pdf [hereinafter 2015 SEP Policy].

2. Attorney General Memorandum, Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties (May 5, 2022) [hereinafter 2022 DOJ TPP Memo].

3. *See, e.g.*, Stop Settlement Slush Funds Act of 2023, H.R. 788, 118th Cong. (2023); Webinar, Federalist Society's Regulatory Transparency Project, The Return of Supplemental Environmental Projects (June 15, 2022), https://fedsoc.org/events/the-return-of-supplemental-environmental-projects; Paul Larkin Jr. & Zack Smith, *Brother, Can You Spare a Million Dollars?: Resurrecting the Justice Department's "Slush Fund,"* 19 Geo. J. L. & Pub. Pol'y 447, 465 (2021).

and promulgated a rule prohibiting the use of SEPs and other forms of third-party payments in settlement agreements, with extremely limited exceptions.[4]

Notwithstanding the use of SEPs by both Republican and Democratic administrations, the Trump rule and underlying memos claimed that including SEPs in a settlement agreement violated two statutes from the 1800s: the Miscellaneous Receipts Act (MRA) and the Antideficiency Act (AdA). Both statutes prohibit federal agencies from diverting funds that would otherwise go to the U.S. Treasury and thus be subject to the U.S. Congress' appropriations authority. In May 2022, DOJ issued an interim final rule revoking the Trump-era rule, and proposed new guidance authorizing third-party payments under specific circumstances.[5] DOJ plans to respond to comments received on the interim final rule in spring 2024.[6]

In this Article, we explore the threshold questions about the legality of SEPs. We begin with a brief history of SEP policy evolution and the limitations on EPA's and DOJ's settlement discretion, including under the MRA and AdA. We then examine claims that SEPs are unlawful, focusing on the arguments made in the 2020 policy memo released by then-U.S. Assistant Attorney General (AAG) Jeffrey Clark (2020 AAG Memo). We conclude that AAG Clark's analysis in the 2020 memo is flawed, masking policy preferences under the guise of statutory interpretation.

Our conclusion is shared by DOJ's OLC under President Trump, which affirmed that the prohibitions in the 2020 rule reflect policy choices not compelled by either the MRA or AdA.[7] Further, SEP opponents' arguments ignore the long-standing legal distinctions between payments negotiated in settlements and penalties assigned by a judge following a finding of liability. Rather, opponents treat penalties as foregone conclusions rather than unknown variables subject to the uncertainty of litigation. While it is certainly possible to conjure a hypothetical settlement agreement that could run afoul of EPA's and DOJ's current policies, and thus the MRA or AdA, neither statute prohibits SEPs as a general rule.

I. The Evolution of SEPs in Federal Environmental Enforcement

In addition to DOJ's and EPA's general authority to enforce environmental laws through traditional legal remedies, such as paying compensatory and punitive damages and seeking injunctive relief, some federal environmental statutes and regulations specify penalty requirements, such as minimum and maximum financial penalties, and requirements to cease the activity causing the violations and remedy any harms caused by the violations. While some or all of these traditional remedies are included in settlements, SEPs give defendants and government attorneys additional options to reach a settlement agreement that redresses the harm caused and deters future similar violations.

Both EPA and DOJ approve the inclusion of SEPs under specific circumstances in settlement agreements consistent with agency policy.[8] Importantly, settlement negotiations are not agreements predestined to reach a foregone conclusion. The parties make case-specific decisions, addressing their priority risks and rewards across many variables, when negotiating a settlement agreement. If the parties agree on a proposed agreement, those agreements are often then approved by a federal court with jurisdiction over the consent decree and its implementation. As of this writing, no federal court has struck down a proposed consent decree consistent with EPA or DOJ policy on the grounds that the particular agency-approved SEP, or SEPs in general, violate the MRA or the AdA.

In this part, we first address the evolution of EPA's SEP policy and then turn to DOJ's third-party payment policy. Under EPA's current policy, issued in 2015 (2015 SEP Policy), EPA defines a SEP as "an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action."[9] SEPs "go beyond what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws."[10] SEPs therefore are distinct from mitigation or other remedies that could be required as injunctive relief.

Also, as discussed below, if a defendant proposes a valid SEP during negotiations, under the 2015 SEP Policy EPA may reduce their civil penalty demand, subject to a case-specific assessment of preset criteria. The policy also sets a dynamic cap on such reductions depending on the gravity of the underlying violation(s) and resulting harms.[11] EPA considers SEPs as "an important component of EPA's enforcement program," but the Agency does not require SEPs when settling cases and recognizes that they may not be appropriate if the SEP could otherwise be required as injunctive relief.[12]

Importantly, SEPs are not presumed valid simply because a similar SEP has been approved before. Each SEP is one piece of a negotiated settlement that is specific to the facts and considerations of a particular case. The validity of a proposed SEP depends on a number of factors, including

4. Prohibition on Settlement Payments to Nongovernmental Third Parties, 85 Fed. Reg. 81409 (Dec. 16, 2020).
5. Guidelines and Limitations for Settlement Agreements Involving Payments to Nongovernmental Third Parties, 87 Fed. Reg. 27936 (May 10, 2022); 2022 DOJ TPP Memo, *supra* note 2.
6. Office of Information and Regulatory Affairs, *View Rule: Settlement Payments to Non-Governmental Third Parties*, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=1105-AB62 (last visited Mar. 18, 2024).
7. Memorandum from DOJ OLC for Attorney General William P. Barr, Re: Final Rule Prohibiting Settlement Payments to Non-Governmental Third Parties (Dec. 4, 2020), https://www.justice.gov/oip/foia-library/foia-processed/general_topics/settlement_guidelines_third_parties_2_14_23/download [hereinafter Memo for Attorney General Barr].
8. 2015 SEP Policy, *supra* note 1; 2022 DOJ TPP Memo, *supra* note 2.
9. 2015 SEP Policy, *supra* note 1.
10. *Id.*
11. *Id.* at 20 (discussing the various factors involved in determining the "appropriate mitigation credit").
12. *Id.*

its connection or "nexus" to the underlying violation, and whether the SEP addresses the resulting harm and prevents or deters similar violations in the future.

For example, a settlement with a company that illegally releases toxic chemicals might require the company to pay statutorily required penalties and remediate the toxic waste, while also including a SEP in which the company volunteers to donate safety equipment to local first responders so they can more quickly and effectively address similar releases in the future.[13] While EPA, DOJ, or a court cannot order the defendant to provide safety equipment as a form of injunctive relief, it is a remedy permissible in settlement agreements as a third-party payment *in addition to* civil penalties and other remedies necessary to achieve compliance with federal law.

In this case, the SEP is permissible because the project was volunteered by the defendant, is closely related to the underlying violation, deters or prevents similar future violations, and addresses concerns specific to the relevant statutes, namely protecting communities from the environmental and public health impacts of toxic chemicals. Thus, by including a SEP, the settlement better addresses the real, tangible harms of the underlying violation and its impact on the community.

According to EPA's Enforcement and Compliance History Online (ECHO) database, SEPs have been included in more than 2,800 federal environmental settlements since 1993.[14] Examples of court-approved SEPs in federal settlements include renting an infrared camera to use during four semiannual sampling and monitoring events for two consecutive years to help find and confirm any leaks[15]; converting the roof of a storage tank to a geodesic external floating roof to reduce emissions by improving roof performance[16]; installing charging infrastructure and signing long-term leases for 10 electric bucket trucks to reduce diesel emissions[17]; and donating emergency response equipment to local first responders that will enable them to better respond to chemical emergencies near a facility.[18]

In each case, the court-approved consent decree included civil penalties paid to the Treasury and injunctive relief, in addition to other remedies if applicable. Many of these settlements are the result of joint federal and state enforcement, and therefore may also include unique remedies consistent with state-specific authorities.[19]

A. *Evolution of EPA's SEP Policy*

EPA issued its first formal policy addressing the use of "environmentally beneficial expenditures" and "alternative payment projects" in settlement agreements in the 1980s.[20] EPA's 1984 Policy on Civil Penalties (1984 Policy) recognizes that the Agency has used these types of tools in prior settlement agreements, stating that "[i]n the past, the Agency has accepted various environmentally beneficial expenditures in settlement of a case and chosen not to pursue more severe penalties."[21] While the discussion of these projects is brief, spanning just four pages, the Reagan Administration established the framework for SEPs that persists today.

The 1984 Policy put guardrails in place to prevent abuse of third-party payments, and to ensure they are only used "as an incentive to settlement before litigation."[22] Specifically, the policy required that "alternative payments"

- do not provide credit for activities already required or soon to be required under law;
- do not provide credit for activities the defendant would perform as part of "sound business practices"; and
- provide the majority of environmental benefits to the general public, and not to the defendant or the government.

13. *See, e.g.*, Consent Agreement and Final Order, In re Suncor Energy (U.S.A.) Inc., Region 8 Docket Nos. CAA-08-2023-0008, EPCRA-08-2023-0002, CERCLA-08-2023-0002 (effective Aug. 10, 2023) (resolving violations under the Clean Air Act's Risk Management Program and the Emergency Planning Community Right-to-Know Act, including $60,000 in civil penalties and a $240,000 SEP donating emergency response equipment to a fire department selected by Suncor).
14. *See* EPA ECHO, *Enforcement Case Search Results*, https://echo.epa.gov/facilities/enforcement-case-search/results (last updated Sept. 26, 2022). *See also* Hannah Perls, *DOJ Revives Supplemental Environmental Projects (SEPs) as Part of EJ Agenda*, Harv. Env't & Energy L. Program (Feb. 1, 2023), https://eelp.law.harvard.edu/2022/06/doj-revives-supplemental-environmental-projects-seps-as-part-of-ej-agenda/.
15. EPA ECHO, *Civil Enforcement Case Report: Settlement With Drummond Company dba ABC Coke, Case Number 04-2012-9013*, https://echo.epa.gov/enforcement-case-report?activity_id=3000059002 (last updated Sept. 26, 2022) (including a civil penalty of $387,500 and a SEP valued at $16,000 approved by the U.S. District Court for the Northern District of Alabama Southern Division).
16. EPA ECHO, *Civil Enforcement Case Report: Settlement With Catlettsburg Refining, LLC aka Marathon Ashland, Case Number 04-2007-9019*, https://echo.epa.gov/enforcement-case-report?activity_id=600049557 (last updated Sept. 26, 2022) (including a civil penalty of $161,770 and a SEP valued at $525,000 approved by the U.S. District Court for the Eastern District of Michigan).
17. EPA ECHO, *Civil Enforcement Case Report: Settlement With Louisville Gas & Electric—Mill Creek, Case Number 04-2018-9000*, https://echo.epa.gov/enforcement-case-report?activity_id=3601300895 (last updated Sept. 26, 2022) (coal-fired electric power-generating unit emissions of sulfuric acid negatively impacted public health and the environment in nearby communities; settlement included $750,000 in state and federal penalties, compliance action costs of $206,448, and a SEP value of $500,000, approved by the U.S. District Court for the Western District of Kentucky Louisville Division).
18. EPA ECHO, *Civil Enforcement Case Report: Settlement With Dyno Nobel Inc., Case Number 10-2016-0175*, https://echo.epa.gov/enforcement-case-report?activity_id=3600828010 (last updated Sept. 26, 2022) (ammonia and nitric acid manufacturing plant failed to report large ammonia releases as required and failed to comply with numerous risk management program requirements; settlement included $492,000 in penalties, $61,000 in compliance costs, and a SEP value of $939,852, approved by the U.S. District Court for the District of Oregon Portland Division). *See* EPA ECHO, *supra* note 14. *See also* Perls, *supra* note 14.
19. *See, e.g.*, Consent Decree, United States v. FrieslandCampina Ingredients N. Am., Inc., No. 3:23-cv-00937-TJM-ML (N.D.N.Y. 2023) (including a SEP and civil penalty split between the Treasury and the state of New York, in which New York may use its civil penalty monies to "exclusively" fund environmental pollution mitigation projects consistent with state law).
20. *See* U.S. EPA, Policy on Civil Penalties 24-25 (1984), https://19january2017snapshot.epa.gov/sites/production/files/documents/epapolicy-civilpenalties021684.pdf [hereinafter 1984 Policy].
21. *Id.*
22. *Id.* at 25.

The 1984 Policy also barred EPA from lowering the amount it accepts in penalties by more than the after-tax amount the violator spends on the project, with exceptions for Clean Air Act-related projects with a "high general deterrent value."[23] These provisions helped to preserve the "deterrent value" of the settlement.[24] The policy also encouraged negotiators to favor projects that did not require a large amount of EPA oversight, projects that would abate pollution, and projects that were undertaken at the facility where the violation took place.[25]

EPA issued its first formal SEP policy in 1991,[26] which it updated in 1995 (1995 SEP Policy),[27] 1998 (1998 SEP Policy),[28] and most recently in 2015.[29] Each update expanded the guidance to ensure that SEPs accepted in federal settlements comply with relevant legal requirements. For example, the 1995 SEP Policy included "five legal guidelines to ensure that our SEPs are within the Agency's and a federal court's authority, and do not run afoul of any Constitutional or statutory requirements."[30]

The 1995 SEP Policy required that (1) "[a]ll projects must have an adequate nexus. . . . between the violation and the proposed project"; (2) "[a] project must advance at least one of the declared objectives of the environmental statutes that are the basis of the enforcement action"; (3) no federal agency "may play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP"; (4) "[t]he type and scope of each project [is] determined in the signed settlement agreement"; and (5) "[a] project may not be something that EPA itself is required by its statutes to do" or "provide EPA with additional resources to perform an activity for which Congress has specifically appropriated funds."[31]

The 1995 SEP Policy also provided a list of project categories that might qualify as SEPs (public health, pollution prevention, pollution reduction, environmental restoration and protection, assessments and audits, environmental compliance promotion, and emergency planning and preparedness),[32] and projects that would not be acceptable for a SEP (general educational or public environmental awareness, contribution to environmental research at a college or university, a project unrelated to environmental protection, studies or assessments without a commitment to implement the results, and projects funded by low-interest loans, federal contracts, or federal grants).[33] The 1995 SEP Policy also updated its guidance to EPA on whether and by how much the Agency can amend its civil penalty demand in negotiations if the defendant proposes a valid SEP. The policy created a five-factor test to assess the SEP's effectiveness,[34] provided guidelines on when mitigation of the penalty demand is allowed,[35] and capped the total reduction in the civil penalty demand at 80% of the SEP cost, with exceptions for certain entities and pollution prevention projects.[36]

The 1998 SEP Policy updated the penalty reduction calculations and offered more guidance on how to apply different factors to the calculation.[37] For example, the policy prohibited the use of SEPs to mitigate claims for stipulated penalties,[38] and added a sixth factor to the five-factor test in the 1995 SEP Policy to assess whether EPA received input from the community or communities affected by the underlying violation in developing the SEP.[39] The 1998 SEP Policy also allowed for projects that do not necessarily fit within the enumerated categories in the 1995 SEP Policy, but are otherwise consistent with the policy's SEP requirements.[40]

The 2015 SEP Policy offered additional discussion of both legal guardrails[41] and penalty mitigation,[42] developing the prior policies into a more comprehensive framework to ensure SEPs comply with both statutory and constitutional requirements.[43] For example, the initial 1984 Policy

23. *Id*. at 25-26; 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
24. 1984 Policy, *supra* note 20, at 26 n.5.
25. *Id*. at 26.
26. Memorandum from James M. Strock, Assistant Administrator, U.S. EPA, to Regional Administrators, Deputy Regional Administrators, Regional Counsels, Regional Program Division Directors, Assistant Administrators, General Counsel, Program Compliance Directors, and Associate Enforcement Counsels, Re: Policy on the Use of Supplemental Environmental Projects in EPA Settlements (Feb. 12, 1991), *available at* https://www.eli.org/guideance-policy-documents/memorandum-and-policy-use-supplemental-environmental-projects-epa.
27. Interim Revised EPA Supplemental Environmental Projects Policy Issued, 60 Fed. Reg. 24856 (May 10, 1995), https://www.govinfo.gov/content/pkg/FR-1995-05-10/pdf/95-11501.pdf [hereinafter 1995 SEP Policy].
28. Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24796 (May 5, 1998), https://www.govinfo.gov/content/pkg/FR-1998-05-05/pdf/98-11881.pdf [hereinafter 1998 SEP Policy].
29. 2015 SEP Policy, *supra* note 1.
30. 1995 SEP Policy, *supra* note 27, at 24858.
31. *Id*.
32. *Id*. at 24859-60.
33. *Id*. at 24860.
34. The five factors include benefits to the public or environment at large, innovativeness, environmental justice, multimedia impacts, and pollution prevention. *Id*. at 24861.
35. For example, the policy barred mitigation for profitable projects because doing so would create an "inequitable and perverse" subsidy incentivizing regulated entities to violate the law. *Id*.
36. *Id*.
37. 1998 SEP Policy, *supra* note 28, at 24802-04.
38. *Id*. at 24796 (with very limited exceptions).
39. *Id*. at 24802.
40. *Id*. at 24801.
41. 2015 SEP Policy, *supra* note 1, at 7-11.
42. *Id*. at 21-24. Key updates include clarifying the relevant criteria EPA should consider when assessing the percent by which the penalty may be mitigated, and noting circumstances in which lower penalty mitigation is appropriate, including SEPs that require significant agency resources to monitor and review implementation of the SEP. *Id*. at 24.
43. The 2015 SEP Policy requires a nexus between the violation and the proposed project; that the project is not inconsistent with any provision of the underlying statutes; that the project advance at least one objective from the underlying statutes; that the project relate to the underlying violation by reducing the likelihood of a similar violation, the adverse impact to public health or the environment to which the violation contributed, or the overall risk to public health or the environment potentially affected by the violation; that a SEP not be an agreement to spend a certain amount on a project that will be defined later; that EPA not play any role in managing or controlling funds or administering the SEP; that EPA not direct, recommend, or propose that the defendant hire a particular contractor or consultant to carry out the SEP or an organization to be the recipient of the SEP; that the project not satisfy EPA's or another agency's statutory obligation; that the SEP not fund an activity for which federal statute prohibits the expenditure of federal resources; that the project not support activities performed by EPA or any activity for which EPA receives a specific appropriation; that the SEP not provide resources to perform work on federally owned property or a project by another federal agency; and that the SEP not provide a recipient in a particular federal financial assistance transaction with another federal agency with additional resources for the same specific activity described in the terms or scope of work for the transaction. *Id*. at 7-10.

required that "[t]he majority of the project's environmental benefit should accrue to the general public rather than the source or any particular governmental unit."[44] By comparison, the 2015 SEP Policy requires that (1) the project either relate to the underlying violation, reduce the likelihood of similar violations, reduce the adverse impact to public health or the environment, or reduce the overall risk to public health or the environment; (2) the project or related funds not be managed, controlled, or directed by EPA; and (3) the project not provide additional resources to EPA or accomplish a task EPA is required to perform.[45] This evolution of the guidelines, with each iteration gaining sophistication and depth, reflects EPA's growing experience with SEPs, including a commitment to addressing statutory requirements and legal changes surrounding SEPs, as will be discussed in more detail below.

B. *Evolution of DOJ's Third-Party Payment Policy*

DOJ is responsible for enforcing federal environmental statutes in federal courts on behalf of EPA. When DOJ resolves alleged violations of those laws, any settlement that includes a SEP benefiting a third party must comply with DOJ's policies on third-party payments. DOJ's OLC issued an opinion in 1980 interpreting the MRA to apply "if a federal agency could have accepted possession and retains discretion to direct the use of the money" at issue. Therefore, the opinion allowed DOJ to include third-party payments in settlement agreements if (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 have post-settlement control over the "disposition or management" of funds or related projects, except to ensure compliance with the terms of the settlement agreement.[46]

Despite the nearly 40-year history of SEP policy guidance from Republican and Democratic administrations, the DOJ under President Trump began a series of policy changes to severely restrict settlement agreements that include payments to third parties,[47] including SEPs. This policy reversal on third-party payments culminated in a 2020 memo prohibiting SEPs, concluding that "[u]sing SEPs in settlements . . . is inconsistent with the spirit and letter of the law as well as DOJ policy and therefore must cease . . . ."[48] Even though no money touches the Treasury, the memo claims that a settlement is essentially an account receivable of the United States and "the vast majority of SEPs are no more than 'a reasonable means for fulfilling general responsibilities that Congress has delegated to [an] official in broad terms.'"[49] The memo does not cite any evidence to support these claims.

DOJ also codified the general prohibition on settlements with payments to third parties in its regulations.[50] Notably, under President Trump, EPA did not revise its 2015 SEP Policy, instead relying on Agency discretion to align with the new DOJ policy.[51] As a result, both EPA and DOJ dramatically reduced the use of SEPs in federal environmental settlement agreements, contradicting decades of precedent and practice.[52]

Notably, even DOJ's 2020 rule barring most third-party payments in settlement agreements is consistent with the interpretation that the MRA does not bar all third-party payments. In that rule, DOJ did not assert that the MRA barred such payments, but rather that the new prohibition echoed "the *policy* reflected in the [MRA]."[53] A contemporaneous memo prepared by then-AAG Steven A. Engel for then-Attorney General Barr affirmed that while "the [final rule's] prohibition on third-party payments is consistent with the policy underlying the MRA. . . . the proposed Order does not reflect an interpretation of the statute itself and thus prohibits certain payments to third parties that this Office has concluded that the MRA otherwise allows."[54]

In 2022, under President Joseph Biden, DOJ issued a final rule repealing the 2020 rule, and issued a memo clarifying when third-party payments, including SEPs, are allowed in settlement agreements (2022 DOJ TPP Memo).[55] The 2022 memo reinstated DOJ's discretion to use third-party payments (including SEPs) in settlement agreements while, like EPA's 2015 SEP Policy, imposing legal restrictions to ensure those settlements conform to statutory and constitutional requirements.[56]

The memo also rescinded a 2017 memo issued under the Trump Administration that undergirded the 2020 rule, noting that the policy was "more restrictive and less tailored than necessary to address concerns" that such payments might violate the MRA or AdA.[57] The 2022 DOJ TPP Memo includes OLC's two-step test first articulated

44. 1984 Policy, *supra* note 20, at 25.
45. 2015 SEP Policy, *supra* note 1, at 7-10.
46. Effect of 31 U.S.C. §484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 688 (1980), https://www.justice.gov/d9/olc/opinions/1980/06/31/op-olc-v004b-p0684_0.pdf.
47. *See* Attorney General Memorandum, Prohibition on Settlement Payments to Third Parties (June 5, 2017); AAG Memorandum, Settlement Payments to Third Parties in ENRD Cases (Jan. 9, 2018); Attorney General Memorandum, Principles and Procedures for Civil Consent Decrees and Settlement Agreements With State and Local Government Entities (Nov. 7, 2018); AAG Memorandum, Using Supplemental Environmental Projects ("SEPs") in Settlements With State and Local Governments (Aug. 21, 2019) [hereinafter 2019 AAG Memo]; AAG Memorandum, Supplemental Environmental Projects in Civil Settlements With Private Defendants (Mar. 12, 2020) [hereinafter 2020 AAG Memo].
48. 2020 AAG Memo, *supra* note 47, at 11.
49. *Id.* at 14 (concluding that SEPs "are putative accounts receivable by the United States").
50. Prohibition on Settlement Payments to Nongovernmental Third Parties, 85 Fed. Reg. 81409 (Dec. 16, 2020).
51. 2019 AAG Memo, *supra* note 47, at 12 (imposing additional limitations on the use of SEPs, stating they "should be included only as a matter of last resort").
52. *See* Perls, *supra* note 14.
53. Prohibition on Settlement Payments to Nongovernmental Third Parties, 85 Fed. Reg. 81409, 81410 (Dec. 16, 2020) (emphasis added). For more discussion of the 2020 rule, see Perls, *supra* note 14.
54. Memo for Attorney General Barr, *supra* note 7.
55. Guidelines and Limitations for Settlement Agreements Involving Payments to Nongovernmental Third Parties, 87 Fed. Reg. 27936 (May 10, 2022); 2022 DOJ TPP Memo, *supra* note 2.
56. 2022 DOJ TPP Memo, *supra* note 2.
57. *Id.* at 2. In February 2021, DOJ's Environment and Natural Resources Division (ENRD) also rescinded guidance issued during the Trump Administration addressing third-party payments in settlements. Memorandum from Deputy AAG Jean E. Williams to ENRD Section Chiefs and Deputy Sec-

in its 1980 opinion, along with other criteria including that the third-party payment (1) is defined with particularity to the nature and scope of the specific project or projects; (2) has a strong connection to the underlying violation; (3) does not include DOJ selecting the recipient of funds or controlling the funds; (4) is entered into before a ruling in favor of the United States on the underlying violation; and (5) is approved by a senior DOJ official before it is given final approval.[58]

II. Statutory Limits on Settlement: The MRA and the AdA

The authority to enforce federal law has long been understood to encompass the authority to settle claims based on that law. For example, DOJ's authority to settle claims in federal court is set in statute,[59] and has been confirmed by courts,[60] executive orders,[61] and legal opinions.[62] The attorney general has an obligation to serve the interests of the United States, and there are statutory constraints that serve as guardrails limiting the scope of DOJ's settlement authority.

According to the OLC, "[t]he Attorney General's settlement power . . . permits her to exercise broad discretion in determining when, and on what terms, settlement would best serve the interests of the United States."[63] While broad, the authority has limits. "The Attorney General must [ ] exercise her discretion in conformity with her obligation to 'enforce the Acts of Congress'"[64] and "in a manner that conforms to the specific statutory limits that Congress has imposed upon its exercise."[65]

Similarly, the statute at issue may impose specific penalty requirements that DOJ and EPA must comply with when undertaking enforcement actions and proposing settlements. For example, under the Clean Water Act (CWA),[66] certain violations trigger minimum or maximum penalties under the statute, which change if the violation is negligent or intentional.[67] Similarly, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[68] limits penalty amounts depending on the violator's status as a commercial applicator or private applicator.[69] These statutory parameters help define acceptable settlement parameters that the agencies must follow.

Judicial oversight provides additional safeguards on DOJ's and EPA's settlement authority. Almost all major violations of federal environmental law are enforced by DOJ on behalf of EPA. Many environmental statutes limit administrative enforcement to cases below a specific penalty cap, meaning significant violations are addressed by DOJ, and any resulting consent decree must be approved and monitored by a federal court.[70] Proposed consent decrees are also subject to public comment prior to a court's review and approval.[71]

Arguments that SEPs are unlawful typically do not focus on violations of these general authorities or safeguards, or any particular SEP. Instead, opponents of SEPs focus primarily on the MRA and the AdA, two statutes from the 1800s meant to prevent federal agencies from superseding Congress' appropriations authority.[72] Despite decades of precedent, opponents argue that SEPs violate one or both statutes as a general rule.

In sum, opponents argue that "[w]hen applied together, the Article I Appropriations Clause, the [MRA], and the [AdA] make clear that all funds due to the federal government are subject to Congress' prerogative to decide how to spend federal money"[73] and "the problem with SEPs is . . . that they trade civil penalties destined for the Treasury for projects selected by Executive Branch officials."[74]

tion Chiefs, Re: Withdrawal of Memoranda and Policy Documents (Feb. 4, 2021).

58. 2022 DOJ TPP Memo, *supra* note 2, at 2-4.
59. 28 U.S.C. §516; *id.* §2414 (describing the attorney general's authority to "compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States"); *id.* §2677 ("The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.").
60. *See, e.g.*, United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283, 1287 (4th Cir.), *cert. denied*, 439 U.S. 875 (1978) (authority of attorney general "to compromise and settle any case referred to Justice Department was expressly confirmed by §5 of Executive Order No. 6166"); New York v. New Jersey, 256 U.S. 296, 308 (1921) ("[W]e cannot doubt that the intervention of the government was proper in this case, and that it was within the authority of the Attorney General to agree that the United States should retire from the case upon the terms stated in the stipulation . . . .").
61. *See, e.g.*, Exec. Order No. 6166, §5 (June 10, 1933), *reprinted in* 5 U.S.C. §901 note.
62. *E.g.*, 38 Op. Att'y Gen. 98, 102 (1934), concluding that settlement power
> attaches, of course, immediately upon the receipt of a case in the Department of Justice, carrying with it both civil and criminal features, if both exist, and any other matter germane to the case which the Attorney General may find it necessary or proper to consider before he invokes the aid of the courts.

Authority of the United States to Enter Settlement Agreements Limiting the Future Exercise of Executive Branch Discretion, 23 Op. O.L.C. 126, 135 (1999), https://www.justice.gov/d9/olc/opinions/1999/06/31/op-olc-v023-p0126_0.pdf.
63. Authority of the United States to Enter Settlement Agreements Limiting the Future Exercise of Executive Branch Discretion, *supra* note 62, at 135.
64. *Id.*
65. *Id.* at 136.
66. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
67. 33 U.S.C. §1319 (c)(1), (2) (requiring fines of not less than $2,500 nor more than $25,000 per day of violation for negligent violations and not less than $5,000 nor more than $50,000 per day of knowing violations).
68. 7 U.S.C. §§136-136y, ELR Stat. FIFRA §§2-35.
69. 7 U.S.C. §136l(a)(1), (2) (limiting penalty amounts to no more than $5,000 per offense for commercial applicators while placing lower limits of no more than $1,000 for private applicators).
70. For example, when enforcing Clean Air Act violations, the statute authorizes administrative enforcement where the total penalty sought does not exceed $200,000 and enforcement is brought within 12 months of the first alleged violation. 42 U.S.C. §7413(d). *See also* 40 C.F.R. §22.18(b)(2) (EPA regulations describing required elements of consent agreements).
71. 28 C.F.R. §50.7 (DOJ regulations requiring the agency to accept comment on a proposed consent judgment prior to its entry by the court). *See also* DOJ ENRD, *Proposed Consent Decrees*, https://www.justice.gov/enrd/consent-decrees (last visited Mar. 18, 2024).
72. *See supra* note 3; U.S. Const. art. I, §9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").
73. Larkin & Smith, *supra* note 3, at 465.
74. 2020 AAG Memo, *supra* note 47, at 4 n.6.

Opponents further argue that SEPs allow federal agencies to fund projects that Congress has not specifically authorized. As we explain below, these arguments paint a simplistic picture that ignores agency safeguards limiting when and how SEPs can be included in settlement agreements, the complexities of settlement negotiations, and the crucial role of federal courts in approving and monitoring those agreements.

Congress enacted the MRA in 1849 to prevent federal agencies from diverting funds they received on behalf of the government for the agencies' own uses instead of depositing the funds in the Treasury.[75] The MRA requires that any "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"[76] and that "[a] person having custody or possession of public money . . . shall deposit the money without delay in the Treasury."[77]

Courts have held the MRA applies to a variety of funds that are received or should be received by the government. Civil penalties, for example, unless explicitly directed elsewhere in statute, are subject to the MRA and must be paid into the Treasury rather than directed to other projects.[78] Courts have also struck down federal contract provisions that required private parties to pay part of their fee or revenue derived from the contract to fund external projects rather than making payments to the Treasury.[79]

Similarly, the AdA, passed in 1870 and expanded incrementally over time, sought to combat two related issues. First, agencies were creating obligations beyond their appropriations by expending all the money appropriated before the end of the fiscal year, and then creating unauthorized obligations to keep operating. Second, agencies were obligating appropriations without authorization.[80]

The AdA prevents these practices by prohibiting government officials from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation,"[81] and from "involv[ing] [the government] in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."[82] Courts have held that the AdA prohibits activities such as a government officer binding the government to pay sums in excess of those provided by Congress,[83] entering into contracts that bind an agency for more than one year unless the agency has multi-year contracting authority or operates under a no-year appropriation,[84] and entering into indemnification agreements that bind the government to unknown and potentially unlimited future liability unless authorized by law.[85]

III. Responses to Legal Critiques of SEP Authority

Critics of SEPs, and of third-party payments generally, argue that "[w]hen applied together, the Article I Appropriations Clause, the [MRA], and the [AdA] make clear that all funds due to the federal government are subject to Congress' prerogative to decide how to spend federal money."[86] By extension, the argument goes, SEPs circumvent this principle by allowing agencies to divert funds owed to the Treasury to instead benefit nongovernmental third parties and/or indirectly fund projects that Congress

75. *E.g.*, Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 B.Y.U. L. Rev. 327, 340 (2009) ("Although one could certainly argue that the act of diverting money received by the government before it was to be deposited in the Treasury violates one of the implied requirements of the Appropriations Clause, Congress sought to close this loophole legislatively by adopting the Miscellaneous Receipts Act in 1849."); United States v. Morgan Stanley, 881 F. Supp. 2d 563, 569 (S.D.N.Y. 2012) (upholding a consent decree that deposited disgorged funds into the Treasury instead of returning them to ratepayers harmed by the underlying issue because reimbursement to ratepayers could violate the MRA, whose requirement to deposit money into the Treasury is "vitally important, as it 'derives from and safeguards a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause'") (citing Scheduled Airlines Traffic Offs., Inc. v. Department of Def., 87 F.3d 1356, 1361 (D.C. Cir. 1996)); Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1364 (1988) ("[T]he Miscellaneous Receipts statute and the Anti-Deficiency Act addressed a chronic problem Congress faced throughout the 19th century: ensuring that executive agencies did not obligate the public fisc except in the amounts appropriated by Congress.").

76. 31 U.S.C. §3302(b).

77. *Id.* §3302(c)(1).

78. *E.g.*, United States v. Smithfield Foods, Inc., 972 F. Supp. 373, 374, 28 ELR 20445 (E.D. Va. 1997):

> [T]he Clean Water Act . . . does not specify where the civil penalties are to be paid. However, the [MRA] requires that "a person having custody or possession of public money" must deposit the money with the Treasury . . . . [A penalty] must be deposited with the Treasury, in accordance with the [MRA], unless otherwise specified by Congress.

79. *E.g.*, *Scheduled Airlines Traffic Offs.*, 87 F.3d 1356 (holding that a contract provision requiring on-site government travel agencies to contribute a portion of their revenue to local "morale, welfare and recreation fund" violated the MRA because the travel revenues were derived from governmental procurement contracts in consideration for government resources); Reeve Aleutian Airways, Inc. v. Rice, 789 F. Supp. 417 (D.D.C. 1992) (holding that the contract requiring 10% of the concession fee for the use of government resources to be paid to the "Morale, Welfare, and Recreation Fund" violated the MRA by essentially siphoning 10% of the contract fee away from the Treasury).

80. Congressional Research Service, Congress's Power Over Appropriations: Constitutional and Statutory Provisions 24 (2020).

81. 31 U.S.C. §1341(a)(1)(A).

82. *Id.* §1341(a)(1)(B).

83. Hooe v. United States, 218 U.S. 322 (1910) (holding that the Secretary of the Interior could not create an implied contract for which the government would be liable and no contract for the rent of a building by the government could be made without an appropriation); Shipman v. United States, 18 Ct. Cl. 138 (Ct. Cl. 1883).

84. Leiter v. United States, 271 U.S. 204 (1926) (holding that if an agency does not have multi-year contracting authority, then the only authorized course of action is a one-year contract followed by a series of government renewal options); Cray Rsch., Inc. v. United States, 44 Fed. Cl. 327 (Fed. Cl. 1999) (holding that a multi-year contract violates the AdA unless the government retains the option to renew the contract each year after the base year).

85. Hercules Inc. v. United States, 516 U.S. 417 (1996) ("Ordinarily no federal appropriation covers contractors' payments to third-party tort claimants . . . and the Comptroller General has repeatedly ruled that Government procurement agencies may not enter into the type of open-ended indemnity for third-party liability that petitioner Thompson claims to have implicitly received under the Agent Orange contracts."); *see also* Johns-Manville Corp. v. United States, 12 Cl. Ct. 1 (Cl. Ct. 1987); Exxon Mobil Corp. v. United States, 101 Fed. Cl. 576 (Fed. Cl. 2011) (holding that oil companies could recover costs of cleaning up waste because open-ended indemnification agreements were authorized by executive order and First War Powers Act of 1941).

86. Larkin & Smith, *supra* note 3, at 465.

has not specifically authorized. Notably, as of this writing, no federal court has struck down a proposed consent decree consistent with EPA or DOJ policy on the grounds that the particular agency-approved SEP, or SEPs in general, violate the MRA or the AdA.

The 2020 AAG Memo cites a series of OLC and comptroller general opinions that found fault with different settlements to highlight how agencies have abused settlement power in the past.[87] The first is a 1980 OLC opinion finding fault with a federal settlement that required the defendant to donate damages to a waterfowl organization that otherwise would have gone to federal and state governments. The opinion found that this payment violated an earlier version of the MRA even though no money was technically received by a government official, stating that "the fact that no cash actually touches the palm of a federal official is irrelevant . . . if a federal agency could have accepted possession and retains discretion to direct the use of the money."[88]

The 2020 AAG Memo next cites a 1983 comptroller general opinion on a Commodity Futures Trading Commission (CFTC) policy that rejected a proposal to allow donations to educational institutions that had no relationship with the underlying violation, although the donation would fulfill one of CFTC's statutory goals: establishing and maintaining research and information programs regarding futures trading.[89] The comptroller general held that prosecutorial discretion did not "extend[ ] to remedies unrelated to the correction of the violation in question," such as donations "to an educational institution that has no relationship to the violation and that has suffered no injury from the violation."[90] The opinion concluded that "[t]he Commission perceives the proposal as a way of achieving its educational goals by means other than its own direct fiscal outlays," and that "the Commission is without authority to achieve its educational and information assistance function through the use of settlement agreements exacted from the exercise of its prosecutorial authority."[91]

Finally, the 2020 AAG Memo cites a 1990 comptroller general opinion that rejected a policy by the Nuclear Regulatory Commission (NRC) because the policy allowed payments that were not sufficiently related to the underlying violation.[92] NRC allowed violators to "mitigate" the civil penalties they owed by instead awarding contracts to nonprofit educational institutions, effectively supplementing the agency's own research program.[93]

Noting a lack of connection between the research project and the violation, the comptroller general held that such an arrangement would "result in an augmentation of NRC's appropriations, allowing NRC, in varying degrees, to control, in circumvention of the congressional appropriations process, the amount of funds available for nuclear safety research projects."[94] It is important to note that the opinion *affirmed* NRC's ability to "adjust the penalty to reflect the special circumstances of the violation or concessions exacted from the violator."[95] The opinion struck down the policy solely because NRC was imposing punishments "unrelated to prosecutorial objectives" (i.e., correcting illegal practices, punishment, or deterrence).[96]

The 2020 AAG Memo uses these three opinions to cast doubt on the legality of SEPs, ignoring that each example predates current EPA policies explicitly addressing the concerns raised by the opinions.[97] For example, EPA's 2015 SEP Policy explicitly requires a "sufficient nexus" to the underlying violation, specifies a limit on any penalty reductions if a SEP is involved in the settlement, and prohibits EPA from accepting a SEP in lieu of a penalty.[98] DOJ's policy similarly requires settlements involving third-party payments to have "a strong connection to the violations and further the goals of the underlying statutes."[99]

While the mere existence of policies does not insulate EPA or DOJ from MRA and AdA challenges, they do demonstrate that it is not a binary question. In other words, SEPs do not facially violate either statute. Instead, whether a particular SEP is unlawful depends on the details of the settlement agreement and the application of agency policies.

In this part, we consider the application of the MRA and AdA to SEPs in more detail, focusing on the key legal requirements of each statute. To violate the MRA, a SEP must involve "public money" or "money for the Government," the enforcing agency must have "custody or possession" of money or "receiv[e] money," and the agency must convert that money into an unauthorized payment.[100] To violate the AdA, as discussed above, a SEP must augment an agency's resources and spending without authorization by "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation,"[101] or "involv[ing] [the government] in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."[102]

Finally, we consider the argument that Congress' explicit authorization of diesel emissions reduction SEPs implies that other SEPs are necessarily not allowed. As stated in the 2020 AAG Memo: "[t]hat Congress has given EPA the authority to settle using SEPs of a single type leads one to conclude . . . that Congress has not affir-

87. 2020 AAG Memo, *supra* note 47, at 3-5.
88. 2020 AAG Memo, *supra* note 47 (citing Effect of 31 U.S.C. §484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 684-85 (1980)).
89. *Id.* at 4.
90. Commodity Futures Trading Commission—Donations Under Settlement Agreements, B-210210 (Comp. Gen. Sept. 14, 1983).
91. *Id.*
92. 2020 AAG Memo, *supra* note 47, at 5.
93. B-238419, 70 Comp. Gen. 17 (1990).
94. *Id.*
95. *Id.*
96. *Id.*
97. 2020 AAG Memo, *supra* note 47, at 4.
98. 2015 SEP Policy, *supra* note 1, at 8, 21-24.
99. 2022 DOJ TPP Memo, *supra* note 2, at 2.
100. 31 U.S.C. §3302.
101. *Id.* §1341(a)(1)(A).
102. *Id.* §1341(a)(1)(B).

matively approved of all forms of SEPs."[103] We show that this argument ignores both the context in which the relevant legislation was passed, and the text of the statute itself, which explicitly encourages agencies to accept SEPs in general, in addition to SEPs designed to redress diesel emissions reductions.

A. *SEPs Do Not Involve "Public Money" or "Money for the Government"*

SEPs do not violate the MRA because they do not involve "public money" or "money for the Government." In 1922, the attorney general interpreted the MRA's "money for the Government" language as money that will be used to "bear[ ] the expenses of the administration of the Government and pay[ ] the obligations of the United States."[104] This formulation continues to guide MRA interpretation.[105] Federal courts' interpretations of what constitutes "public money" or "money for the Government" are consistent with these opinions, holding that such things as concession fees[106] and airport user fees[107] must be deposited into the Treasury.

Opponents of SEPs suggest that SEPs substitute for money that would otherwise be deposited into the Treasury. The 2020 AAG Memo stated that "EPA's policy establishes a mathematical relationship between the cost of an approved SEP and diminution of civil penalties, which purposefully trades penalties for projects and thus brings the Miscellaneous Receipts Act squarely into play."[108] In the memo, AAG Clark argued:

> In all cases, reducing the amount of a penalty to be paid to the Treasury in exchange for the payment of money or in-kind goods or services to a third-party for activities that Congress either intentionally funded to a specific level, intentionally declined to fund, or simply had no occasion to consider raises the same problem.[109]

AAG Clark's arguments rest on the assumption that SEPs therefore represent a one-for-one quid pro quo with civil penalties that could otherwise be exacted from the defendant. However, this view assumes defendants would agree to an alternate settlement with a higher federal penalty, or that defendants would lose at trial and the result would be a similarly high fine. Neither assumption is reasonable.

The series of comptroller general opinions cited in the 2020 AAG Memo discussed above also capture a concern that agencies will subvert the anti-augmentation principle enshrined in the MRA by diverting penalties that should go to the Treasury to instead pay for projects or benefit third parties. While these arguments do not always explicitly tie an agency's conduct to the text of the MRA, they assert that settlements containing third-party payments are inconsistent with the principles animating the MRA. Specifically, they argue that SEPs and other third-party payments circumvent Congress' "power of the purse" by using settlements to fund projects that are unrelated to the underlying violation or to fund an entity's existing obligations beyond what Congress appropriated.

While the comptroller general opinions and 2020 AAG Memo highlight potential pitfalls that unrestrained SEPs could fall into, these criticisms overlook the guidelines EPA and DOJ have implemented to avoid violating the anti-augmentation principle embodied in the MRA. EPA's 2015 SEP Policy clearly distinguishes SEPs from monetary penalties: "SEPs are not penalties, nor are they accepted in lieu of a penalty."[110] In fact, the policy requires that settlements with SEPs "must always include a settlement penalty that recoups the economic benefit a violator gained from noncompliance with the law, as well as an appropriate gravity-based penalty reflecting the environmental and regulatory harm caused by the violation(s),"[111] thus explicitly requiring penalties when including a SEP in a settlement rather than trading penalties for the SEP. Further, the 2015 SEP Policy states that SEPs cannot be accepted unless they are proposed by the defendant(s), and EPA cannot select the beneficiary or control the SEP in any way, reinforcing their voluntary nature.

Finally, while the 2020 AAG Memo argues that EPA's 2015 SEP Policy contains a mathematical formula for penalty mitigation when using SEPs, this is a deceptive mischaracterization of EPA's actual policy. The 2015 SEP Policy does not establish a mathematical formula equating the value of a SEP to a specific reduction in civil penalties. Rather, EPA's policy sets a maximum acceptable percentage by which the penalty can be mitigated, but the actual mitigation amount depends on several case-specific considerations,[112] including a six-factor assessment of the effectiveness of the SEP.[113] Further, the value of the SEP and the civil penalty are just two of many variables driving settlement negotiations, along with other remedies

103. 2020 AAG Memo, *supra* note 47, at 18.
104. Interstate Commerce Commission—Disposition of Excess Railway Operating Income, 33 Op. Att'y Gen. 316, 321 (1922).
105. *E.g.*, Congressional Research Service, *supra* note 80, at 24; Commodity Futures Trading Commission—Consistency of Real Property Leases With the Miscellaneous Receipts Statute, B-327830 (Comp. Gen. Feb. 8, 2017).
106. Scheduled Airline Traffic Offs., Inc. v. Department of Def., 87 F.3d 1356, 1361-62 (D.C. Cir. 1996) (holding that concession fees paid by a travel agent to the U.S. government pursuant to a government contract, in consideration for government resources, were "money for the government"). *See also* Reeve Aleutian Airways, Inc. v. Rice, 789 F. Supp. 417 (D.D.C. 1992).
107. Motor Coach Indus. v. Dole, 725 F.2d 958 (4th Cir. 1984) (while not addressing the MRA directly, the case does address "public money," holding that airport user fees paid by the airlines were "public money").
108. 2020 AAG Memo, *supra* note 47, at 7.
109. *Id.* at 14.
110. 2015 SEP Policy, *supra* note 1, at 21.
111. *Id.*
112. *Id.* at 24 ("EPA will consider a variety of factors in determining the amount of the penalty mitigation including, but not limited to, the evaluation criteria described in . . . [the] Policy," and "[p]enalty mitigation in light of a SEP is within EPA's discretion; there is no presumption as to the correct amount of mitigation.").
113. The six factors are the same as those in the 1998 SEP Policy: significant, quantifiable benefits to public health and/or the environment, environmental justice, community input, innovation, multimedia impacts, and pollution prevention.

required or available under the relevant statute(s), unique enforcement authorities available under state law in joint state-federal enforcement, and the severity and scope of harms resulting from the violation.

Courts have long recognized this crucial distinction between third-party payments included in settlement agreements and civil penalties ordered by a judge following a finding of liability. Specifically, courts allow more flexibility for remedies negotiated in settlements than for post-judgment penalties ordered by a court.[114] In a landmark 1990 case before the U.S. Court of Appeals for the Ninth Circuit, the court considered a lower court decision resolving a citizen suit under the CWA. The federal government objected to the proposed consent judgment, and the lower court agreed, holding that payments to third-party environmental organizations included in the consent judgment were effectively civil penalties and thus must be paid into the Treasury.[115]

The Ninth Circuit reversed and ordered the lower court to enter the consent judgment, holding that the third-party payments were not civil penalties because "while it is clear that a court cannot order a defendant in a citizens' suit to make [third-party payments], 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."[116] Citing U.S. Supreme Court precedent, the court noted that because settlement agreements "are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts," and the proper standard of review is whether the proposed consent judgment is "fair, reasonable and equitable and does not violate the law or public policy."[117] The court ultimately approved of the proposed consent judgment because it "preserve[s] the punitive nature of enforcement actions while putting the funds collected to use on behalf of environmental projection."[118]

B. *SEPs Do Not Involve "Having Custody or Possession" of Public Money or "Receiving Money for the Government"*

In addition to the "public money" or "money for the Government" MRA triggers, the statute also covers situations where an agency has "custody or possession" of public money or receives "money for the Government." As discussed above, in 1980 DOJ's OLC interpreted the MRA to also cover the "constructive receipt" of money (i.e., where the federal agency "could have accepted possession and retains discretion to direct the use of the money").[119]

Settlement agreements including third-party payments are distinct from "constructive receipt" in two crucial ways. Long-standing OLC policy has allowed such payments if (1) the settlement is executed before an admission or finding of liability in favor of the United States (i.e., before the United States has authority to exact nonconsensual penalties), and (2) the United States does not have post-settlement control over the "disposition or management" of funds or related projects, except to ensure compliance with the terms of the settlement agreement.[120]

EPA's 2015 SEP Policy and the 2022 DOJ TPP Memo are consistent with both prongs of OLC's policy. The 2022 DOJ Memo explicitly requires that "settlements must be executed before an admission or finding of liability in favor of the United States."[121] Similarly, EPA's 2015 SEP Policy is expressly limited to settlements, and therefore inapplicable at an administrative hearing or civil trial in which a court might make a finding of liability in favor of the United States.[122]

Regarding post-settlement control, when a consent agreement or decree includes a SEP, the government never receives or has custody or possession of the SEP money or benefits, whether literally or constructively. EPA's 2015 SEP Policy makes this distinction clear, prohibiting EPA from "play[ing] any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP"[123] and from "retain[ing] authority to manage or administer the SEP."[124] Ensuring EPA does not constructively control the funds of a SEP is further reinforced by prohibitions on EPA "direct[ing], recommend[ing], or propos[ing] that the defendant hire a particular contractor or consultant to carry out the SEP"[125] or "a specific organization to be the recipient of a SEP."[126]

Similarly, the 2022 DOJ TPP Memo prohibits agencies' post-settlement control over funds or management related to SEPs. The memo makes it clear that "client agencies must not retain post-settlement control over the disposition or management of the funds or any projects carried out under any such settlement, except for ensuring that the parties comply with the settlement,"[127] and that "client agencies shall not propose the selection of any par-

114. *See* Sierra Club, Inc. v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355, 20 ELR 21081 (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.

115. *Id.* at 1352. The proposed judgment required defendants to pay $45,000 to identified private environmental organizations dedicated to maintain and protect water quality in the affected state, and to pay additional sums to those organizations if the defendant violated its permit within the target compliance period.
116. *Id.* at 1355.
117. *Id.*
118. *Id.* (quoting H.R. Conf. Rep. No. 1004 (1986)).
119. Effect of 31 U.S.C. §484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 688 (1980).
120. Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement, 30 Op. O.L.C. 111, 119 (2006).
121. 2022 DOJ TPP Memo, *supra* note 2, at 3.
122. 2015 SEP Policy, *supra* note 1, at 2 ("This is a *settlement* policy and thus is not intended for use by the EPA, defendants, courts, or administrative law judges at a hearing or in a trial.").
123. *Id.* at 8.
124. *Id.*
125. *Id.* at 9.
126. *Id.*
127. 2022 DOJ TPP Memo, *supra* note 2, at 3.

ticular third party to receive payments to implement any project" or "propose a specific entity to be the beneficiary of any projects."[128]

Even the 2020 AAG Memo acknowledges that "money, goods, or services at issue in SEPs never touch the Treasury," but nonetheless dismisses EPA policy as "an overly literal and overly narrow view of the prohibition on exchanging extra-statutory relief for a reduction in monetary payments."[129] Instead, according to the 2020 memo, defendants' commitments to benefit third parties amount to "in-kind payments" and are thus no different than direct monetary payments.[130]

Taken to its logical conclusion, the 2020 AAG Memo would prohibit defendants from agreeing to any additional measures if they settle for anything less than the maximum allowable financial penalty. Further, the memo's logic reads a limitation into the MRA that is simply not there. The text of the MRA does not, as a rule, prohibit settlements that include nonmonetary benefits for third parties.

The clear restrictions included by both the EPA 2015 SEP Policy and the 2022 DOJ TPP Memo ensure that any money used for a SEP is never received by the government, either literally or constructively. The money for SEPs flows directly to projects chosen by the defendant and not controlled by EPA. To the extent that EPA and DOJ oversee any commitment involving a direct payment or in-kind contribution to a third party, it is only to determine if the settlement is fair and if the terms of the deal are met.

C. SEPs Do Not Convert Penalties Into Unauthorized Payments

Opponents of SEPs have also argued that because SEPs may impact a defendant's penalty payments,[131] SEPs effectively convert civil penalties into funding for projects and therefore the payments should count as money received by the government and the use of SEPs should be prohibited by the MRA.[132] First, as discussed above, there is no clear penalty reduction calculation with SEPs; this argument ignores the many case-specific considerations required under EPA's SEP policy to determine if, and by how much, to mitigate a civil penalty demand, if at all. More importantly, the argument misunderstands the nature of settlements, treating penalties as foregone conclusions rather than unknown variables subject to the uncertainty of litigation.

Litigation could end in a range of outcomes, from the most severe penalty payment to no payment at all, and the parties necessarily remain unsure of the outcome until the end. Settling parties often compromise from their best possible outcomes in a settlement, essentially trading the risk and reward of potential outcomes for certainty. That a settlement payment is less than a potential penalty does not indicate that the parties are somehow converting a penalty into payments for a SEP. Parties are making complicated and idiosyncratic decisions, considering risks and rewards across several variables when agreeing to settlements.

For example, a 50-50 chance of winning $100 on a coin flip is worth $50, even if there is a chance it could be worth $100. Thus, settling for $75 before the coin is flipped would be a better-than-expected outcome. Similarly, EPA or DOJ might assess the many uncertain aspects of litigating a particular case and decide that the best possible outcome is to settle the case for less than the maximum potential penalty before a court has rendered a final decision.

The uncertainty of litigation makes settlements necessarily different from final penalty judgments. The 2022 DOJ TPP Memo acknowledges this distinction between final determinations and settlements, requiring that any settlement happen "before an admission or finding of liability."[133] Courts agree, holding that once a court assesses a civil penalty, the penalty must be paid into the Treasury,[134] but before a judgment is made, a settlement takes on a "contractual nature" and can therefore include a host of other remedies.[135]

D. SEPs Do Not Unlawfully Augment an Agency's Resources

Opponents of SEPs argue that SEPs violate the AdA because they are used to fund projects not authorized by Congress,

128. *Id.*
129. *Id.*
130. *Id.* ("In appearance and effect, in-kind payments are no different than direct monetary payments.").
131. As EPA notes in its 2015 SEP Policy, there is some consideration for penalty mitigation for performance of a SEP; however, it is generally limited to no more than 80% of the cost of the SEP, and is considered alongside many penalty mitigation factors. 2015 SEP Policy, *supra* note 1, at 24.
132. Unless otherwise provided for in statute, penalty payments are generally subject to the MRA, requiring them to be deposited into the Treasury. *E.g.*, United States v. Smithfield Foods, 982 F. Supp. 373 (E.D. Va. 1997) (holding that a penalty under the CWA must be deposited into the Treasury because the Act does not specify where it should be paid and the penalty constitutes "public money," which the MRA requires to be deposited into the Treasury); 47 Comp. Gen. 70 (1967) (holding that court costs should be deposited into the Treasury absent other authority); TVA—False Claims Act Recoveries, 2000 U.S. Comp. Gen. Lexis 98 (Comp. Gen. Feb. 14, 2000) (holding that Tennessee Valley Authority must deposit into the Treasury the full amount of any additional recovery made under the False Claims Act).
133. 2022 DOJ TPP Memo, *supra* note 2, at 3.
134. *See* Public Interest Rsch. Grp. v. Powell Duffryn Terminals, 913 F.2d 64, 82, 20 ELR 21216 (3d Cir. 1990) (citing numerous cases and concluding that "once the court labeled the money as civil penalties it could only be paid into the Treasury"); *Smithfield Foods*, 982 F. Supp. at 376 ("[O]nce a penalty has been assessed by the court, the penalty must be paid into the Treasury.").
135. *See* United States v. Roll Coater, Inc., Cause No. IP 89-828 C, 1991 U.S. Dist. LEXIS 8790, at *29-30 (S.D. Ind. Mar. 22, 1991) (while courts may "allow other remedies in settlements because of their contractual nature," after judgment, "once labeled as a civil penalty, the money must be paid to the Treasury"). *See also* Friends of the Earth v. Archer Daniels Midland Co., 780 F. Supp. 95, 100, 22 ELR 21024 (N.D.N.Y. 1992) ("[O]nce there has been a judicial finding of liability, a court has no choice but to impose a civil penalty."); Sierra Club, Inc. v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355, 20 ELR 21081 (9th Cir. 1990) (approving a proposed consent judgment providing payments to a third-party organization because no judicial finding of liability had been made); Firefighters v. City of Cleveland, 478 U.S. 501, 525-26 (1986) (holding that a court may enter a consent decree containing provisions the court would otherwise be barred from ordering after a trial).

or in excess of what Congress appropriated for those projects, essentially augmenting an agency's resources and spending without authorization. The basis for this critique can be seen in the comptroller general opinions discussed above, where CFTC and NRC were seen as augmenting their own programs and statutory goals in ways unrelated to the underlying violation.

EPA's 2015 SEP Policy draws clear lines to prevent EPA from violating the anti-augmentation principle. The policy prohibits a SEP from being "used to satisfy the EPA's statutory obligation or another federal agency's obligation to perform a particular activity"[136] or to support an activity that a federal statute otherwise prohibits spending federal resources on.[137] It also prohibits a SEP from providing additional resources to support activities of EPA employees or contractors, perform work on EPA-owned property, or provide EPA with additional resources to perform a particular activity for which the Agency receives a specific appropriation.[138] The policy also prohibits a SEP from providing similar resources to other federal agencies.[139] Finally, the policy requires both EPA and the defendant to independently make a "reasonable inquiry to ensure that a SEP does not inadvertently augment federal appropriations."[140]

The 2022 DOJ TPP Memo contains similar restrictions, prohibiting any settlement from being "used to satisfy the statutory obligation of the Justice Department or any other federal agency to perform a particular activity."[141] The memo also prohibits a settlement from "provid[ing] the Justice Department or any other federal agency with additional resources to perform a particular activity for which the Justice Department or any federal agency, respectively, receives a specific appropriation."[142]

EPA and DOJ guidelines, both together and separately, reinforce a clear understanding of what is allowed under the AdA, preventing SEPs from crossing the line the comptroller general found problematic in the CFTC and NRC settlements. Further, as discussed above, SEPs go through a rigorous approval process. For SEPs included in consent decrees resolving litigation brought by DOJ on behalf of EPA, the SEP not only must be reviewed and approved by the deputy attorney general or associate attorney general[143] but also the reviewing federal court following a public comment period.

EPA has previously interpreted these provisions in an extremely restrictive way, so much so that Congress passed a law to correct that interpretation and reaffirm EPA's authority to accept SEPs supporting diesel emission reductions. Congress first enacted the Diesel Emissions Reduction Program under the Diesel Emissions Reduction Act (DERA) as part of the Energy Policy Act of 2005, authorizing EPA to administer grant and loan programs to reduce emissions from legacy diesel vehicle engines and appropriating $200 million annually for five years for those purposes.[144]

In 2006, EPA issued a broad prohibition on any SEP related to a diesel retrofit project, concluding that such SEPs were barred by the Agency's 1998 SEP Policy,[145] which (similar to the updated 2015 SEP Policy) prohibited SEPs that "provide EPA or any federal agency with resources to perform a particular activity for which Congress has specifically appropriated funds" or that provide "additional resources to support specific activities performed by EPA employees."[146] Diesel emissions reduction SEPs, EPA believed, would violate the MRA because Congress was actively funding a Diesel Emissions Reduction Program.[147]

Responding to public health and environmental advocates' calls to enact a swift statutory fix "rather than engage in a protracted argument with EPA" over its interpretation of the MRA,[148] Congress passed legislation in 2008 expressly allowing diesel emissions reduction SEPs.[149] 42 U.S.C. §16138 provides that EPA may accept those SEPs "notwithstanding sections 3302" (the MRA[150]) and "1301 of title 31, United States Code," which sets out several requirements on appropriations.[151]

As discussed below, the 2008 legislation also affirmed EPA's general authority to include SEPs in settlement agreements, in addition to correcting the Agency's overly restrictive interpretation of the MRA regarding SEPs for reducing diesel emissions.

136. 2015 SEP Policy, *supra* note 1, at 9.
137. *Id.*
138. *Id.*
139. *Id.* at 10.
140. *Id.* at 10-11.
141. 2022 DOJ TPP Memo, *supra* note 2, at 3.
142. *Id.*
143. *Id.* at 3-4.
144. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 838 (codified at 42 U.S.C. §§16131-16137).
145. 154 Cong. Rec. H5295 (daily ed. June 11, 2008) (statement of Rep. Boucher) ("EPA has determined that it can no longer use private funding from case settlements to accomplish diesel retrofits since Congress has directly appropriated some funds for that purpose."); Congressional Budget Office, Cost Estimate H.R. 3754, at 1 (2008), https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/costestimate/hr37540.pdf ("Under EPA's SEP policy, if the agency receives a specific appropriation for grants under the Diesel Emission Reduction Act (DERA), the agency may no longer agree to diesel SEPs as part of any enforcement settlement."); *see* Memorandum from Granta Y. Nakayama, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, Re: Transmittal of Updated List of "Project Ideas for Potential Supplemental Environmental Projects" 2 (July 20, 2006) (on file with author) ("In light of the Diesel Emission Reduction Act of 2005, USEPA and USDOJ enforcement staff are advised to discuss the diesel emission reduction projects identified below with USEPA Headquarters enforcement staff prior to their inclusion as SEPs in a federal enforcement settlement.").
146. 1998 SEP Policy, *supra* note 28, at 24798.
147. *See* S. Rep. No. 110-266, at 2 (2008).
148. *Authorizing Supplemental Environmental Projects to Incent Reductions of Diesel Emissions: Hearing on H.R. 3754 Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy & Com.*, 110th Cong. 36 (2008) (statement of Conrad Schneider, Advocacy Director, Clean Air Task Force).
149. An Act to Authorize the Administrator of the Environmental Protection Agency to Accept, as Part of a Settlement, Diesel Emission Reduction Supplemental Environmental Projects, and for Other Purposes, Pub. L. No. 110-255, 122 Stat. 2423 (2008) (codified at 42 U.S.C. §§16138-16139).
150. 31 U.S.C. §3302.
151. *Id.* §1301.

E. Congressional Action to Preserve Diesel Emissions Reduction SEPs Further Confirms That the MRA and AdA Do Not Prohibit SEPs

While some critics have argued that Congress' explicit blessing of diesel emissions reduction SEPs necessarily means that other types of SEPs are disallowed,[152] the 2008 legislation supports the opposite conclusion. First, the statute carved out an exception to EPA's general view, as embodied in its 1998 SEP Policy, that the MRA prohibits SEPs targeted at the kinds of activities that were already receiving congressional appropriations. The plain text of the 2008 amendment states that Congress passed the amendment to clarify EPA's authority to accept diesel emissions reduction SEPs following the passage of the 2005 DERA.

Contrary to the argument made in the 2020 AAG Memo, there is no evidence in the text or legislative history of the 2008 DERA amendment to show that Congress intended for the amendment to preclude EPA from accepting SEPs absent clear congressional authorization. Rather, as the accompanying U.S. Senate Report states, "[the 2008 DERA amendment] is intended to clarify that Congress did not intend the funding of the [2005] Diesel Emissions Reduction Act to affect EPA's ability to enter into SEPs that fund diesel retrofit projects."[153] The *Congressional Record* also includes multiple examples of Congress applauding the benefits of diesel SEPs,[154] emphasizing the ongoing need for diesel SEPs in the future,[155] and broad, bipartisan support for affirming EPA's authority to accept diesel emissions-related SEPs.[156]

Notably, the second part of the 2008 amendment requires a settling defendant to "certify they would have agreed to perform a comparably valued, alternative project other than a diesel emissions reduction [SEP] if the Administrator were precluded by law from accepting a diesel emission reduction [SEP]."[157] As explained by the Congressional Budget Office in its analysis of the 2008 amendment, Congress assumed that "in most cases, the diesel SEP would displace other types of SEPs within a particular settlement agreement."[158]

This section of the 2008 DERA amendment therefore explicitly affirms EPA's general authority to accept SEPs in settlement agreements, in addition to clarifying EPA's authority to approve diesel emissions reduction SEPs in spite of congressional appropriations to fund those same activities. Far from calling other types of SEPs into question, the context and statutory text of the 2008 amendment preserving diesel emissions reduction SEPs confirms the legality of SEPs in general.

IV. Conclusion

The MRA and AdA indisputably apply to DOJ and EPA settlement agreements. However, the fact that a settlement agreement includes a defendant's commitment to benefit a third party does not, on its face, violate either statute. Whether or not a SEP violates either statute depends on the terms of the agreement, and both EPA's 2015 SEP Policy and the 2022 DOJ TPP Memo establish detailed safeguards to ensure compliance.

Further, most settlement agreements resolving significant violations of environmental law must ultimately be reviewed and approved by a federal court. While it may be possible to conjure up hypothetical SEPs that could violate the MRA or AdA, hypotheticals do not render thousands of SEPs over the past decades illegal, nor should they prevent the use of SEPs in the future.

152. *See, e.g.*, 2020 AAG Memo, *supra* note 47, at 18.
153. S. Rep. No. 110-266, at 2 (2008).
154. 110 Cong. Rec. H5295 (daily ed. June 11, 2008) (statement of Rep. Boucher) ("These supplemental environmental projects used for diesel emission reductions have totaled $45.5 million from fiscal year 2001 through fiscal year 2006, and they've been a very valuable source of obtaining emission reductions from the existing diesel fleet.").
155. *Id.* (statement of Rep. Boucher) ("In view of the fact that there are 10 million heavy duty diesel vehicles and other engines in use today, the continued use of supplemental environmental projects in case settlements is both cost effective and environmentally beneficial."); *Authorizing Supplemental Environmental Projects to Incent Reductions of Diesel Emissions: Hearing on H.R. 3754 Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy & Com.*, 110th Cong. 2 (2008) (statement of Rep. Boucher) ("[T]here is an extraordinary need to continue to fund diesel retrofit programs. The reduction of diesel emissions through retrofit technologies is cost-effective, and it clearly will produce a needed environmental benefit.").
156. 110 Cong. Rec. H5295 (daily ed. June 11, 2008) (statement of Rep. Boucher) ("The [2008 DERA] enjoys bipartisan support and has been endorsed by more than 45 interested organizations, including a broad range of health, environmental and industry groups.").
157. 42 U.S.C. §16139.
158. H.R. Rep. No. 110-705, at 5 (2008).