

MAKING A GOOD IDEA EVEN BETTER: RETHINKING THE LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Kenneth T. Kristl^{*†}

INTRODUCTION

Many federal environmental statutes advocate the dual goals of preventing pollution and restoring the environment.¹ The civil enforcement tools in those statutes,² focused on the individual violation at issue, may miss the opportunity to advance these goals by improving the environment on a broader basis.³ To increase the efficacy of enforcement, citizen

* Associate Professor of Law and Director of the Environmental and Natural Resources Law Clinic, Widener University School of Law; J.D. 1984, ITT/Chicago–Kent College of Law; B.A. 1981, University of Notre Dame.

† The author wishes to thank the following people for their assistance in making this article possible: Professors David Hodas, James May, and David Markell, for their substantive and stylistic insights and input; Janet Lindenmuth, who tracked down many obscure historical documents; Jennifer Clark, who did preliminary research on the nexus issue; and Theresa Swift, who provided critical moral support.

1. *See, e.g.*, Clean Water Act (CWA), 33 U.S.C. § 1251(a) (2000) (“The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”); Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. § 6902(a) (2000)) (“The objectives of the chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources.”); Clean Air Act (CAA), 42 U.S.C. § 7401(b) (2000) (noting the dual goals “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its populations” and to prevent air pollution).

2. The primary civil enforcement tools are injunctions to achieve compliance. *See* Toxic Substances Control Act (TSCA), 15 U.S.C. § 2616(a) (2000); CWA, 33 U.S.C. § 1319(b) (2000); Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. § 1415(d) (2000); Safe Drinking Water Act (SDWA), 42 U.S.C. § 300g–3(b) (2000); RCRA, 42 U.S.C. § 6928(a)(1) (2000); CAA, 42 U.S.C. § 7413(b) (2000); Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046(c) (2000). Civil penalties can also be used to achieve compliance. *See* TSCA, 15 U.S.C. § 2615(a) (2000); CWA, 33 U.S.C. § 1319(d); MPRSA, 33 U.S.C. § 1415(a) (2000); SDWA, 42 U.S.C. § 300g–3(b) (2000); RCRA, 42 U.S.C. § 6928(g) (2000); CAA, 42 U.S.C. § 7413(b) (2000); EPCRA, 42 U.S.C. § 11045(a) (2000). The citizen suit provisions of these statutes likewise recognize the availability of injunctive relief. *See* TSCA, 15 U.S.C. § 2619(a)(1) (2000); CWA, 33 U.S.C. § 1365(a) (2000); SDWA, 42 U.S.C. § 300j–7(a) (2000); RCRA, 42 U.S.C. § 6972(a) (2000); CAA, 42 U.S.C. § 7604(a)(3) (2000); EPCRA, 42 U.S.C. § 11046(c) (2000). For penalties, *see* CWA, 33 U.S.C. § 1365(c) (2000); SDWA, 42 U.S.C. § 300j–8(a) (2000); RCRA, 42 U.S.C. § 6972(a) (2000); CAA, 42 U.S.C. § 7604(a) (2000); EPCRA, 42 U.S.C. § 11046(c) (2000).

3. Injunctions and civil penalties stop the environmental harm that the defendant’s non-compliance generates and thereby prevent future harm that this defendant might have otherwise caused. However, stopping more harm from happening does not necessarily undo the harm already done (i.e., to restore the environment back to some semblance of what it was before the non-compliance), nor does it address the broader issue of reducing contamination in the environment that may be present for reasons other than the defendant’s non-compliance.

plaintiffs and governmental enforcement efforts have created a mechanism that can serve these goals by looking beyond the violation at issue. Supplemental Environmental Projects (SEPs) allow a defendant to undertake an environmentally beneficial project that it was not otherwise obligated to do as part of a settlement of an enforcement action.⁴ To fit within the statutory framework, SEPs are linked to penalties via a conceptual trade-off: the defendant agrees to undertake the SEP in exchange for paying a lower penalty.⁵ Properly structured, an SEP is a “win-win” proposition: the citizen or governmental plaintiff achieves both prevention and restoration (and the putative public relations/political benefits that flow from them), the defendant pays a smaller penalty, and the environment benefits from the expenditure of dollars on environmental improvements. SEPs have in fact prevented significant amounts of pollution and restored contaminated water, wetlands, land, and air.⁶ Thus, the environmental

4. Final EPA Supplemental Environmental Projects Issued, 63 Fed. Reg. 24,797 (May 5, 1998) [hereinafter 1998 SEP Policy]. EPA precedes the acronym “SEP” with the article “a” rather than “an.” This practice is preserved in quotes from EPA documents.

5. Only one statute—the Clean Air Act—recognizes something resembling an SEP. *See* 42 U.S.C. § 7604(g)(2) (2000) (“[T]he court . . . shall have discretion to order that such civil penalties, in lieu of being deposited in [a special fund in the United States Treasury established in 42 U.S.C.A. § 7604(g)(1)], be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment.”). The provision places a \$100,000 cap on such beneficial mitigation project payments. *Id.* Thus, a non-CAA SEP arguably must try to fit within the injunctive and penalty provisions of the statute being enforced.

6. There is no comprehensive database of SEPs, and thus it is difficult to determine the cumulative impacts of SEPs. However, EPA has from time to time provided summary estimates of the environmental good that SEPs have done. For example, in Fiscal Year (FY) 1992, EPA estimated that pollution-prevention SEPs reduced or eliminated more than 185,400 pounds per year of 1,1,1 TCE; 87,300 lbs/yr of toluene; 30,000 lbs/yr of methyl-ethyl-keytone (MEK); 32,855 lbs/yr of xylene; 250,000 lbs/yr of acetone; and 1,500,000 lbs/yr of ammonia. *See* EPA, OFFICE OF ENFORCEMENT, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1992 app. at 25 ch. 2 (1993), available at <http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy92accomp-rpt.pdf> [hereinafter FY 1992 ACCOMPLISHMENTS REPORT]. In 1995, EPA reported that SEPs would result in the “reduction of 637,000 lbs of non-halogenated organics, including toluene and xylene”; 483,000 pounds of halogenated organics, including solvents; 4,000 tons per year of sulfur dioxide emissions; and 104,000 lbs/yr of volatile organic compound (VOC) air emissions. EPA, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, FY 1995 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT 3-13 (1996), available at <http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy95accomplishment.pdf> [hereinafter FY 1995 ACCOMPLISHMENTS REPORT]. In addition to these summaries, EPA has estimated benefits from numerous individual SEPs. *See, e.g.*, EPA, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENFORCEMENT AND COMPLIANCE ASSURANCE: FY98 ACCOMPLISHMENTS REPORT 64 (1999), available at <http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy98accomplishment.pdf> [hereinafter FY 1998 ACCOMPLISHMENTS REPORT] (describing a \$350,000 SEP under EPCRA at the Sinclair Oil Corp. Tulsa, Oklahoma, plant to build a “70,000 barrel external floating roof tank to store wastewater prior to treatment,” estimated to reduce fugitive emissions of VOCs by 8,000 lbs/yr); *id.* at 68 (describing a \$627,000 SEP under RCRA at a Conoco refinery in Colorado requiring reduction of

benefits of SEPs are real.

Given the real environmental and potential political benefits of SEPs, it is surprising that, historically, only a small percentage of government-initiated enforcement settlements have contained SEPs. In fact, this Article—performing the first known attempt to analyze data from 1992–2006—finds that, on average, fewer than 12% of settlements annually in cases involving penalties during this period used SEPs. Further, the analysis reveals that this annual utilization percentage has been steadily declining since the mid-1990s. This “low-and-getting-lower” use of SEPs comes despite nearly twenty-five years of both United States Department of Justice (DOJ) and United States Environmental Protection Agency (EPA) recognition of the appropriateness of SEPs and the existence for the last fifteen years of an official EPA policy⁷ designed to encourage the use of SEPs.⁸ In fact, EPA regularly trumpets settlements involving SEPs that it has reached,⁹ and it maintains a database of potential SEPs that suggests that the types of projects and environmental benefits are wide ranging.¹⁰

sulfur emissions by 200 tons/yr); EPA, OFFICE OF ENFORCEMENT OF COMPLIANCE, FY 1994 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT 2-13 (1995), <http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy94accomplishment.pdf> [hereinafter FY 1994 ACCOMPLISHMENTS REPORT] (describing six SEPs under RCRA totaling \$12 million at Eastman Kodak’s Rochester, New York, facility requiring a reduction of 2.3 million pounds of hazardous waste generation, and a separate \$3.6 million SEP under TSCA requiring the removal of seventeen PCB transformers); *id.* at 2-14 (describing a \$30 million SEP under the CWA at a City and County of Honolulu, Hawaii, wastewater treatment plant that would result in the recycling instead of disposal of ten tons of sewer sludge per day and 10 million gallons of wastewater per day); EPA, OFFICE OF ENFORCEMENT, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1993 3-13 (1994), <http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy93accomp-rpt.pdf> [hereinafter FY 1993 ACCOMPLISHMENTS REPORT] (describing an SEP requiring “analysis and removal of contaminated sediments” at Port of Portland, Oregon). Clearly, SEPs from government-initiated litigation alone produce significant environmental benefits without even considering the benefits from SEPs in citizen-initiated litigation, which are extremely difficult to track.

7. The most current version is 1998 SEP Policy, 63 Fed. Reg. at 24,796.

8. *Id.* (“The primary purpose of this Policy is to encourage and obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by this Policy.”).

9. EPA posts summaries of recent settlements and links to the consent decrees embodying those settlements on its website. *See* EPA, Cases and Settlements, <http://cfpub.epa.gov/compliance/cases> (last visited Dec 9, 2006). The site makes note when a settlement involves an SEP and oftentimes describes the SEP in at least general terms.

10. EPA, PROJECT IDEAS FOR POTENTIAL SUPPLEMENTAL ENVIRONMENTAL PROJECTS (2005), available at <http://www.epa.gov/Compliance/resources/policies/civil/seps/sepprojectidealist063005.pdf> [hereinafter PROJECT IDEA LIST]. The Project Idea List includes more than eighty-five project-idea categories, covering such diverse projects as: lead paint abatement, inspections, and risk assessments (to reduce exposure to lead); diesel retrofits (to reduce emission of particulates and other pollutants contributing to childhood asthma); installing hybrid power technologies (to reduce emissions); installing sewer lines for private residences (to reduce groundwater pollution from septic systems); restoring migratory bird habitat, wetlands, streams, fish and other aquatic habitat; funding green buffers,

While SEPs are not possible in all cases, the historical utilization rate seems extremely low—a fact that even EPA concedes.¹¹ What can explain such underutilization of SEPs? It is the thesis of this Article that the answer lies in the approach that DOJ and EPA have taken to SEPs, now embodied in EPA's SEP Policy, which insists on imposing the legal requirements of nexus and mitigation percentage when using SEPs.

“Nexus” requires that an SEP be connected to the violations being resolved by the settlement. It evolved out of DOJ and EPA concern about legal authority to enter SEPs when statutes only authorized injunctive and penalty relief. Of course, the tighter the connection must be between the SEP and the violation, the fewer the options will be for acceptable SEPs. Thus, the nexus requirement is a restraint on SEP utilization, and if the legal bases for nexus are in fact weak or non-existent, then the restraint created by nexus is even more unfortunate. The legal justification and strength of the nexus requirement have not, however, been the subject of scholarly analysis; most articles simply distill the requirements of EPA's policy without critically exploring whether the restraints created by the nexus requirement are legally appropriate. This Article conducts a critical analysis of nexus. Consequently, this Article concludes that the nexus requirement used by DOJ and EPA is not legally justified and that elimination or substantial relaxation of the nexus requirement would create significant opportunities for increasing SEP utilization.

“Mitigation percentage” is a reduction in the penalty reducing power of money spent on SEPs by a fixed percentage. Current EPA Policy sets a maximum mitigation percentage of 80%, meaning that a defendant who spends \$1 on an SEP can only get, at best, an 80¢ reduction in its penalty. Thus, official EPA policy requires a defendant who wants to perform an SEP to pay more than the defendant would if it were simply paying a penalty alone. This economic disincentive likely creates a restraint on SEP utilization. The justification for a mitigation percentage less than 100% has never before been the subject of scholarly analysis. This Article concludes that the mitigation percentage requirement used by DOJ and EPA is neither

conservation easements, and site revegetation; funding an existing or building a new recycling center; health clinics, health screening, fish testing, and educational efforts to combat mercury pollution effects; roof gardens and green roofs; conducting inventories, audits, and educational programs to reduce chemical risks in schools; wind and solar power projects; and environmental management systems. *Id.* at 1–12.

11. See Memorandum from John P. Suarez, Acting Assistant Adm'r, U.S. Env'tl. Prot. Agency, Office of Enforcement and Compliance, to Assistant Adm'rs et al. (June 11, 2003), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-expandinguse.pdf> [hereinafter *Expanding Use of SEPs Memo*] (describing a 10% utilization rate in Fiscal Year (FY) 2002 and noting that there is “tremendous opportunity” to increase SEP usage).

legally nor economically justified and that allowing dollar-for-dollar penalty reductions would create significant opportunities for increasing SEP utilization.

This Article consists of three Parts. Part I provides the historical background for SEPs and EPA's evolving SEP policy. Part II explores the SEP policies' "nexus" requirement. Part III focuses on "mitigation percentage." Each Part explores the key concepts and legal issues impacting SEPs and the faulty logic that hampers SEP usage. This Article concludes that abolishing the nexus requirement and raising the mitigation percentage to 100% are simple, legally justifiable steps that will unshackle SEPs and allow the maximum environmental benefits possible.

I. SUPPLEMENTAL ENVIRONMENTAL PROJECTS AND THE EPA POLICY TO ENCOURAGE SEPS

Supplemental Environmental Projects are environmentally beneficial¹² projects that a defendant undertakes as part of the resolution of an enforcement action under an environmental statute.¹³ EPA's own list of SEP project ideas¹⁴ and actual SEPs identified in settlement agreements¹⁵ suggest that legitimate SEPs can cover a broad array of projects. While a court might be theoretically able to order an SEP after a trial or dispositive motion,¹⁶ most SEPs are found in settlements; both because that is where the government thinks SEPs should be¹⁷ and because the defendant's agreement to the SEP removes a major source of opposition to its terms.

12. EPA defines "[e]nvironmentally beneficial" to mean that the SEP "must improve, protect, or reduce risks to public health, or the environment at large" and that "there must be no doubt that the project primarily benefits the public health or the environment." 1998 SEP Policy, 63 Fed. Reg. at 24,798.

13. *Id.* at 24,797.

14. See PROJECT IDEA LIST, *supra* note 10, at 1–12.

15. See sources cited, *supra* note 6.

16. Some argue that the imposition of SEPs is inherent in the equitable powers of the district court. See Quan B. Nghiem, Comment, *Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act*, 24 B.C. ENVTL. AFF. L. REV. 561, 593 (1997) (concluding that federal law permits courts to use their equitable powers "to give effect to the goals of the CWA"). The cases are at best split on the subject. See, e.g., Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 81–82 (3d Cir. 1990) (recognizing that the district court could have created a trust fund as part of injunctive relief, but holding that payments as penalties must be paid to the Treasury); United States v. Roll Coater, Inc., [1991] 21 Env'tl. L. Rep. (Env'tl. Law Inst.) 21,073, 21,077–78 (S.D. Ind. Mar. 22, 1991) (rejecting the claim that the court had equitable discretion to allow a penalty to be paid for an environmental research project while also admitting that the court has power under the Act to grant injunctive relief).

17. See 1998 SEP Policy, 63 Fed. Reg. at 24,797 ("This is a *settlement* Policy and thus is not intended for use by EPA, defendants, respondents, courts or administrative law judges at a hearing or in a trial.").

A. Historical Emergence of SEPs

While the exact time of its origin is shrouded in mystery, by 1980 the concept of SEPs was established enough that EPA could reference it in articulating its own policy.¹⁸ Thus, in its policy on determining civil penalties, issued in 1980 under the Clean Air and Clean Water Acts, EPA stated:

Occasions 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, in lieu of paying penalties to the treasury of the enforcing government. Courts have sometimes accepted such payments, and in some circumstances such arrangements are acceptable under this penalty policy.¹⁹

From 1980 onward, called by different names,²⁰ a variety of different types of SEPs were used in settlements reached by both citizen and governmental plaintiffs, as numerous authors have shown.²¹ From a broad perspective, the most interesting historical development was the evolution

18. See Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations As Well As to Achieve Significant Additional Environmental Benefits*, 10 WIDENER L. REV. 413, 416 (2004) (“Before it published its 1980 Penalty Policy, the EPA had a history of using SEPs in the settlement of its enforcement actions.”) (citation omitted). In support, Lloyd cites to David S. Mann, Comment, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?*, 21 ENVTL. L. 175, 191 n.94 (1991) and to a settlement in *United States v. City of Los Angeles*, No. CV-773047-HP (C.D. Cal. 1980). See Lloyd, *supra*, at 416 n.10, 416 n.11.

19. EPA, Civil Penalty Policy—Clean Water Violators and Stationary Source Violators of the Clean Water Act (July 8, 1980), available at <http://www.envinfo.com/caain/enforcement/caad42.html> [hereinafter 1980 Civil Penalty Policy]. This language supports the notion that SEP-like projects had been part of settlements prior to 1980. See Lloyd, *supra* note 18, at 415 (“The earliest written reference to the use of SEPs generally is in EPA’s 1980 Penalty Policy.”). This author has never seen an admission that Penalty Policies are legally binding, but rather the Agency appears to view them as merely internal guidance.

20. The variety of names have included “environmentally beneficial expenditures,” Mann, *supra* note 18, at 175; “mitigation projects,” *Atl. States Legal Found., Inc. v. Simco Leather Corp.*, 755 F. Supp. 59, 61 (N.D.N.Y. 1991); “supplemental enforcement projects” and “environmental improvement projects,” Leslie J. Kaschak, Note, *Supplemental Environmental Projects: Evolution of a Policy*, 2 ENVTL. LAW. 465, 467 n.15 (1996); and SEPs.

21. See Marcia R. Gelpe & Janis L. Barnes, *Penalties in Settlements of Citizen Suit Enforcement Actions Under the Clean Water Act*, 16 WM. MITCHELL L. REV. 1,025, 1,032 n.35–38 (1990) (citing to cases leading to settlements); Lloyd, *supra* note 18, at 415; Mann, *supra* note 18, *passim*; Michael Paul Stevens, Note and Comment, *Limits on Supplemental Environmental Projects in Consent Agreements to Settle Clean Water Act Citizen Suits*, 10 GA. ST. U. L. REV. 757, *passim* (1994).

of the government's view of SEPs, as that story suggests something of a love-hate relationship.

During the 1980s, EPA's position that settlements involving expenditures for environmentally beneficial purposes could be "acceptable" was subject to a number of conditions and limitations on the use of SEPs. These limitations included that the majority of the environmental benefits of the SEP "should accrue to the general public rather than to the source or any particular governmental unit,"²² that the SEP "cannot be something which the violator could reasonably be expected to do as part of sound business practices[.]"²³ and that SEPs only reduce (rather than replace) penalties paid to the Treasury.²⁴ These conditions likely reflect a concern by EPA that early SEPs may not have been as beneficial as initially thought. In a companion document issued with its 1984 iteration of the Civil Penalty Policy, EPA suggested that these early experiences counseled for a more cautious approach when it stated:

In the past, the Agency has accepted various environmentally beneficial expenditures in settlement of a case and chosen not to pursue more severe penalties. In general, the regulated community has been very receptive to this practice. In many cases, violators have found "alternative payments" to be more attractive than a traditional penalty. Many useful projects have been accomplished with such funds. But in some instances, EPA has accepted for credit certain expenditures whose actual environmental benefit has been somewhat speculative.

The Agency believes that these alternative payment projects should be reserved as an incentive to settlement before litigation. For this reason, such arrangements will be allowed only in prelitigation agreements except in extraordinary circumstances.²⁵

22. EPA, *A Framework for Statute-Specific Approaches to Penalty Assessments*, 17 *Envtl. L. Rep. (Envtl Law Inst.)* 35,073, at 35,080 (Feb. 16, 1984) [hereinafter 1984 Framework].

23. *Id.*

24. See EPA, *RCRA Civil Penalty Policy*, 21 *Envtl. L. Rep. (Envtl. Law Inst.)* 35,273, at 35,283 (Oct. 1990) ("Mitigation based on the defendant's activity must not detract significantly from the general deterrent effect of the settlement as a whole. . . . Accordingly, every settlement should include a substantial monetary penalty component.").

25. 1984 Framework, *supra* note 22, at 35,080. This notion continued through subsequent policy statements. See, e.g., EPA, *INTERIM CLEAN WATER ACT SETTLEMENT POLICY 4* (1995), available at <http://www.epa.gov/compliance/resources/policies/civil/cwa/cwapol.pdf> [hereinafter *INTERIM CLEAN WATER ACT SETTLEMENT POLICY*] (discussing the use of SEPs in calculating settlement amounts).

Thus, EPA reacted to its early experience by seeking to limit SEPs to settlements before litigation commenced, thereby excluding the use of SEPs in settlements after litigation began. While this litigation timing restraint no longer applies,²⁶ the cautiousness continues. The 1998 SEP Policy echoes the notion that SEPs are not always appropriate.²⁷

While embracing SEPs in its policies governing its own litigation, in 1985 the DOJ, on behalf of EPA, began challenging SEPs in citizen-suit settlements on the grounds that the payments were “penalties” that should be remitted to the Treasury,²⁸ as well as other policy grounds related to deterrence and interference with governmental enforcement efforts.²⁹ These challenges to SEPs met with mixed results, with courts rejecting the government’s claim of a requirement that all payments in settlements must go to the Treasury³⁰ unless a finding of liability had already been made.³¹

From an historical perspective, it is difficult to reconcile the government’s consistent opposition to SEPs in citizen suits with the express policy of EPA allowing SEPs. Some have suggested that the opposition, at least to non-governmental SEPs, could be explained in essentially political terms—that the Reagan administration did not want to enforce environmental laws and was concerned that citizen suits would expose a weak enforcement record.³² Whatever the reason, the government’s actions

26. See 1998 SEP Policy, 63 Fed. Reg. at 24,797 (“This Policy applies to all civil[,] judicial[,] and administrative enforcement actions taken under the authority of the environmental statutes and regulations that EPA administers.”). The fact that it applies to *all* enforcement actions of necessity means that it can apply to an already-commenced action.

27. See *id.* (“This Policy establishes a framework for EPA to use in exercising its enforcement discretion in determining appropriate settlements. In some cases, application of this Policy may not be appropriate, in whole or part.”). Precisely because the SEP Policy is tied so closely to EPA enforcement discretion, the guidelines for when an SEP is or is not appropriate (despite compliance with the Policy) are not clear.

28. Mann, *supra* note 18, at 192; Stevens, *supra* note 21, at 763.

29. Stevens, *supra* note 21, at 763 (characterizing a statement by Raymond Ludwizewski, Associate Deputy Attorney General, U.S. Department of Justice, to the Subcommittee on Fisheries and Wildlife Conservation and the Environment and the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries in 1987 as stating that the government was concerned that allowing polluters to avoid paying the government would “undermine the deterrent effect” of penalties, “complicate[] government enforcement efforts,” be difficult to enforce, and raise the risk of alternative settlements spreading “to other types of law enforcement for which they would be even less appropriate.”) The Ludwizewski Statement and related testimony are discussed more fully *infra* Part II.

30. *E.g.*, *Sierra Club, Inc. v. Elec. Controls Design*, 909 F.2d 1,350, 1,354 (9th Cir. 1990); *Pa. Evtl. Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431, 436 (M.D. Pa. 1989); *N.W. Evtl’l Def. Ctr. v. Unified Sewerage Auth.*, 21 Evtl. L. Rep. (Evtl. L. Inst.) 20,676, 20,677 (D. Or. July 26, 1990).

31. *E.g.*, *Elec. Controls Design*, 909 F.2d at 1,354; *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 81 n.32 (3d Cir. 1990).

32. See Mann, *supra* note 18, at 182–83 n.39 (citing Comment, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U.L. REV. 127, 130 n.14–15 (1985) and characterizing it

in the 1980s made clear that EPA needed to develop a fundamental approach to SEPs that would explain both the legal justification for SEPs and the principles that would guide the use of SEPs in the government's own enforcement cases.

B. EPA's Evolving SEP Policy

At the start of the 1990s, EPA decided to move SEPs out of the Penalty Policy and into a separate policy statement. Thus, EPA embarked on a process to redefine its view of SEPs, ultimately culminating in a final SEP Policy in 1998.³³ An examination of this process reveals that EPA's view of the legal concepts inherent in SEPs and the practical rules for using SEPs evolved over time. In order to understand EPA's final Policy, it is helpful to examine this evolution in detail.

1. The 1991 SEP Policy

The first step in the evolution came in February 1991 with the issuance of EPA's Policy on the Use of Supplemental Environmental Projects in Enforcement Settlements.³⁴ In promulgating the policy, EPA recognized its past difficulties³⁵ and articulated a hierarchy of purposes that would govern the use of SEPs in the broader context of settlement strategy:

In settlement of environmental enforcement cases, the United States will insist upon terms which require defendants to achieve and maintain compliance with Federal environmental laws and regulations. In certain instances, additional relief in the form of projects remediating the adverse public health or environmental consequences of the violations at issue may be included in the settlement to offset the effects of the particular violation which prompted the suit. As part of the settlement, the size

as "documenting diminished budgetary resources and the Reagan Administration's reluctance to enforce environmental laws"); *id.* at 183 n.42 (citing *Ruckelhaus Worried Citizen Suits Will Reveal Poor Enforcement Record*, INSIDE EPA, May 11, 1984, at 1).

33. 1998 SEP Policy, 63 Fed. Reg. at 24,796.

34. EPA, *Policy on the Use of Supplemental Environmental Projects in EPA Settlements*, 25 Env'tl. L. Rep. (Env'tl. Law Inst.) 35,607, at 35,607 (Feb. 12, 1991) [hereinafter 1991 SEP Policy].

35. See Memorandum from James Strock, Assistant Administrator, to Assistant Adm'rs (Regions I-X) (Feb. 12, 1991), available at <http://www.eli.org> (distributing the 1991 SEP Policy to EPA personnel: "The Agency's past experience with these projects has sometimes been problematic, in part because [the Penalty Policy] did not fully describe the kinds of projects that are appropriate for penalty reduction, the situations under which they should be considered, and the amount by which the penalty demand can be reduced.")

of the final assessed penalty may reflect the commitment of the defendant/respondent to undertake [SEPs].³⁶

Thus, the 1991 SEP Policy remained close to its philosophical roots in the penalty policies of the 1980s by making it clear that, SEP or not, “assessment of a substantial monetary penalty” is required in all cases.³⁷ As a result, from the very inception of a separate policy on SEPs, EPA placed penalties as the first and foremost object of any enforcement settlement, relegating the environmental benefits of SEPs to a subsidiary role. Nevertheless, EPA viewed the 1991 SEP Policy as an “expansion” of its approach to SEPs,³⁸ perhaps because it wanted the Policy to provide the particular guiding principles that had been lacking in the past.

The 1991 SEP Policy introduced certain concepts into the SEP calculus that had not been previously articulated. These included: identification of five categories of projects that can be acceptable SEPs;³⁹ limitation of when the main beneficiary of an SEP can be the defendant/respondent;⁴⁰ various rules for reviewing, overseeing, and administering the SEP;⁴¹ the requirement of a relationship or “nexus,” between the original violation and the SEP;⁴² and a rule about how SEPs can reduce or mitigate the penalty.⁴³ Because these last two concepts are the subject of this Article, a closer examination of each is appropriate.

a. Nexus in the 1991 SEP Policy

The 1991 SEP Policy (Policy) introduced the new concept of nexus within the context of the Policy’s discussion of the five categories of acceptable projects that could be SEPs. The Policy initially views nexus as a type of “relationship” between the SEP and the violation:

The categories of Supplemental Environmental Projects described above (except for Public Awareness Projects) may be considered if there is an appropriate “nexus” or relationship between the nature of the violation and the

36. 1991 SEP Policy, *supra* note 34, at 35,607.

37. *Id.*

38. *Id.* (“EPA will expand its approach to [SEPs] . . .”).

39. *Id.* at 35,607–08. The five categories are pollution prevention projects, pollution reduction projects, environmental restoration projects, environmental auditing projects, and enforcement-related environmental public awareness projects.

40. *Id.* at 35,609.

41. *Id.* at 35,610.

42. *Id.* at 35,608–09.

43. *Id.* at 35,609–10.

environmental benefits to be derived from the type of supplemental project. For example, the “nexus” between the violation and an environmental restoration project exists when it remediates injury caused by the same pollutant at the same facility giving rise to the violation. Such projects must further the Agency's mission as defined by appropriate statutory mandates, including the purpose sections of the various statutes under which EPA operates. The Agency will evaluate whether the required “nexus” between the pollutant discharge violation and the project exists.⁴⁴

Notice that in this articulation the relationship is between the SEP's benefits and the *nature* of the violation (as opposed to the violation itself). While the example given—remediating injury caused by the same pollutant at the same facility—is the easiest and most direct example of a relationship between benefit and violation (both nature and the actual violation itself), the 1991 SEP Policy uses broader language. For example, remediating an injury by the same pollutant but at a different factory still appears to have the required relationship because the *nature* of the violation (i.e., release of the pollutant) is still the same. The key, of course, is how one defines the “nature” of the violation—defining it in terms of the medium polluted or statute violated (i.e., air pollution or water pollution), for example, could make the list of acceptable projects quite broad.

After articulating this broad conceptual view of nexus, the 1991 SEP Policy provides guidance on the appropriate nexus for two groups of categories of SEPs: remediation projects and the combined categories of pollution prevention, pollution reduction, environmental restoration, and environmental auditing projects.⁴⁵ It is unclear why the 1991 SEP Policy separates out remediation projects, especially because the Policy earlier lumps remediation projects within the environmental restoration category.⁴⁶ Nevertheless, the discussion on nexus for remediation projects reveals EPA's thinking by providing three examples of “circumstances presenting an appropriate nexus.”⁴⁷ The examples are: “[a] project requiring the purchase of wetlands which then act to purge pollutants unlawfully discharged in receiving waters”; a project to acquire and preserve “wetlands in the immediate vicinity of wetlands injured by unlawful discharges”; and a restoration project that “determine[s] the extent and nature of pollution

44. *Id.* at 35,608.

45. *Id.*

46. *Id.*

47. *Id.*

caused by the violation and [that] formulate[s] and implement[s] a plan for remediating” the impacted area (unless such restoration is obtainable as injunctive relief in the case).⁴⁸ In discussing the wetlands purchase example, the Policy appears to limit the expansive view of nexus suggested by the notion of relationship to the nature of a violation by noting a geographic connection:

In this example, EPA will evaluate whether the required “nexus” between the pollutant discharge violations and the wetlands to be purchased can be established. EPA will evaluate the nexus between the project and the violation in terms of both geography and the pollution treatment benefits of the wetlands.⁴⁹

The Policy’s discussion of nexus in the context of pollution prevention, pollution reduction, environmental restoration, and environmental auditing projects provides a detailed construct of nexus that suggests a broad scope. According to the 1991 SEP Policy, nexus for projects in these categories can be either “vertical” or “horizontal.”⁵⁰ Vertical nexus exists “when the supplemental project operates to reduce pollutant loadings to a given environmental medium to offset earlier excess loadings of the same pollutant in the same medium which were created by the violation in question.”⁵¹ As the description suggests, the focus is on the pollutant loading and the medium. Thus, for example, a project reducing pollutant discharges from the defendant’s facility below that required for compliance would exhibit vertical nexus. However, the Policy does not limit vertical nexus to projects at the defendant’s facility. Instead, it recognizes that, in appropriate cases, the reductions “may be obtained from another source, either upstream, up gradient[,] or upwind of the responsible source.”⁵² To illustrate, the Policy provides two examples of appropriate vertical nexus: reducing discharges of the “same pollutant at an upstream facility on the same river” to offset Clean Water Act violations⁵³ and “alteration of a production process at a facility which handles a portion of the manufacturing process antecedent to that which caused the violation of the regulatory requirement in a way that yields reductions or total elimination of the residual pollutant discharges to the environmental media assaulted by

48. *Id.*

49. *Id.*

50. *Id.* at 35,608–09.

51. *Id.* at 35,608.

52. *Id.*

53. *Id.* at 35,608–09.

the violation.”⁵⁴ This recognition of “upstream” changes uses the violation only to identify the pollutant and the medium and is concerned more with counteracting the violation’s or the pollutant’s effect.

“Horizontal” nexus is even broader than vertical nexus, and exists “when the supplemental project involves either (a) relief for different media at a given facility or (b) relief for the same medium at different facilities.”⁵⁵ The 1991 SEP Policy states that horizontal nexus exists “if the supplemental project would reduce the overall public health or environmental risk posed by the facility responsible for the violation or enhances the prospects for reducing or eliminating the likelihood of future violations substantially similar to those which are the basis for the enforcement action.”⁵⁶ The Policy provides four examples of projects satisfying the horizontal nexus requirement that show the potential breadth of this view of nexus:

(1) If a Resource Conservation and Recovery Act (RCRA) or Clean Water Act violation results in a contaminated drinking water supply, the Policy suggests that an SEP which reduces “toxic air emissions from the same facility in order to compensate for the excess health risk to the community” from the violation would have adequate horizontal nexus.⁵⁷

(2) In response to a Clean Air Act or Clean Water Act violation, the Policy suggests that an SEP “which reduces pollutant discharges at . . . [the defendant’s] other facilities within the same air quality basin or watershed as the facility” at which violations took place would satisfy horizontal nexus because the project “would be designed to reduce the overall health or environmental risk posed by related operations to the environment or to the health of residents in the same geographic vicinity by reducing pollutant discharges . . . and to compensate for past excess discharges.”⁵⁸

(3) In response to a more general category of violations, the Policy states that pollution reduction SEPs at a defendant’s other non-violating facilities, provided they are engaged in the same production activities with the same risks, would “reduce the overall health or environmental risk posed by such

54. *Id.* at 35,609.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

operations to the environment or to the health of residents in the same geographic vicinity” and therefore have an acceptable horizontal nexus.⁵⁹

(4) In response to a Toxic Substances Control Act (TSCA) premanufacture notification violation, the Policy suggests that an SEP which established a closed loop recycling system that reduced the facility’s product waste sent to a landfill would satisfy horizontal nexus because “[o]perating the facility in violation of TSCA created a risk of unwarranted health or environmental injury . . . [and the SEP] would compensate for this unwarranted risk by reducing the overall health or environmental risk presented by the facility.”⁶⁰

In all of these examples, the breadth of horizontal nexus is tempered by an apparent need for a connection to the defendant—whether to the defendant’s operations or through a geographic connection within the same air or watershed as where the violations occurred. Nevertheless, the effects test implicit in the concept of vertical nexus is present here as well: SEPs which reduce or offset some effect or risk arguably created by the violation have adequate nexus.

b. Mitigation Percentage in the 1991 SEP Policy

The 1991 SEP Policy’s penalty calculation methodology was simple, and the rule on how an SEP could mitigate the penalty was straightforward: an SEP could reduce or mitigate a penalty “up to the net present after-tax cost” of the SEP.⁶¹ In other words, a defendant could secure as high as an SEP-dollar for penalty-dollar reduction, or a 100% mitigation.

2. The 1995 Interim Revised SEP Policy

After four years of experience under the initial policy, EPA decided in 1995 to issue the Interim Revised EPA Supplemental Environmental Projects Policy⁶² to replace the 1991 SEP Policy. EPA indicated that the new 1995 SEP Policy was intended to “expand[] and clarif[y]” the 1991 SEP Policy by “establish[ing] a framework” in which an SEP can be

59. *Id.*

60. *Id.*

61. *Id.* at 35,610.

62. Interim Revised EPA Supplemental Environmental Projects Policy, 60 Fed. Reg. 24,856 (May 10, 1995) [hereinafter 1995 SEP Policy].

considered and setting out “clear legal guidelines, well-defined categories of acceptable projects and simple, easy-to-apply rules for calculating and applying the cost of an SEP in determining an appropriate settlement penalty.”⁶³ In the course of expanding and clarifying the 1991 SEP Policy, the 1995 SEP Policy provides further insight into EPA’s settlement philosophy while also making several significant changes to EPA’s approach to SEPs.

The primary insight into EPA’s settlement philosophy that the 1995 SEP Policy provides is a clearer statement of the preeminent role penalties play in EPA’s enforcement approach. While the 1991 SEP Policy spoke in general terms about the importance of penalties, the 1995 SEP Policy made clear that EPA seeks two things in settling environmental enforcement actions: (1) making the violator cease its violations so that it will achieve and maintain compliance with the applicable federal laws and regulations; and (2) making the violator pay a “substantial monetary penalt[y] in order to deter noncompliance.”⁶⁴ For EPA, the importance of the deterrent effect of penalties cannot be overemphasized because it is essential to making the system work, as EPA made clear in the 1995 SEP Policy itself:

Without penalties, companies would have an incentive to delay compliance until they are caught and ordered to comply. Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and deterring violations by other members of the regulated community. Penalties help ensure a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Penalties also encourage [regulated entities] to adopt pollution prevention and recycling techniques, so that they minimize their pollutant discharges and reduce their potential liabilities.⁶⁵

This sense of deterrence colors EPA’s view of SEPs. Even though SEPs “can play an additional role” beyond deterrence, EPA nevertheless links SEPs to the penalty side of the equation because the 1995 SEP Policy views SEPs in the context of reducing or mitigating the penalty to be paid.⁶⁶ As the Policy puts it, “[a]ll else being equal, the final settlement penalty will be

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

lower for a violator who agrees to perform an acceptable SEP compared to the violator who does not agree to perform a SEP.”⁶⁷ Thus, SEPs are tied and ultimately subservient to the deterrence policy served by penalties, although the 1995 SEP Policy recognizes that SEPs can contribute to deterrence when the policy states that “[d]epending on circumstances and cost, SEPs also may have a deterrent impact.”⁶⁸ Deterrence, and not environmental benefit, will drive EPA’s approach to a settlement.

The 1995 SEP Policy changed the process by which SEPs are reviewed by creating a five-step process for evaluating SEPs:

- (1) Ensure that the project meets the basic definition of a SEP
- (2) Ensure that all legal guidelines, including nexus, are satisfied
- (3) Ensure that the project fits within one (or more) of [EPA’s] categories of SEPs
- (4) Calculate the net-present after-tax cost of the [SEP] and then determine the appropriate amount of penalty mitigation [that will be given the defendant]
- (5) Ensure that the project satisfies all of the implementation and other criteria.⁶⁹

The Policy describes each of the steps in separate sections.⁷⁰ The 1995 SEP Policy also increases the categories of projects that can be SEPs⁷¹ and

67. *Id.*

68. *Id.* at 24,857 n.1.

69. *Id.* at 24,857.

70. Step 1 is described in Section B of the 1995 SEP Policy (*id.* at 24,857–58); Step 2 in Section C (*id.* at 24,858); Step 3 in Section D (*id.* at 24,858–60); Step 4 in Section E (*id.* at 24,860–61); and Step 5 in Sections F through I (*id.* at 24,861–62).

71. The 1995 SEP Policy identifies seven categories of SEPs: (1) public health projects (including providing diagnostic, preventative, or remedial health care, collecting epidemiological data, and analysis of data or tissue samples); (2) pollution prevention (reducing the amount of a hazardous substance, pollutant, or contaminant that enters a waste stream or is otherwise released to the environment); (3) pollution reduction (reducing amount or toxicity of any hazardous substance, pollutant, or contaminant that enters a waste stream or is otherwise released to the environment in a manner that is not pollution prevention); (4) environmental restoration and protection (enhancing the condition of the ecosystem or immediate geographic area adversely affected by the pollution); (5) assessments and audits (including pollution prevention, environmental quality, and compliance audits, provided that the defendant agrees to provide a copy of the report to EPA); (6) environmental compliance promotion (training other members of the regulated community to identify, achieve and

provides the first definition of a legitimate SEP. This new definition of an SEP has three component parts:

- (1) the project must be “environmentally beneficial” (in that it “improve[s], protect[s], or reduce[s] risks to public health or the environment at large”);⁷²
- (2) the defendant must agree to undertake the project in settlement of an enforcement action (i.e., it cannot be something the defendant was going to undertake anyway and allow EPA to play a role in shaping or designing the project);⁷³ and
- (3) the project must be something the defendant is otherwise not legally required to perform (so that the defendant cannot obtain penalty mitigation credit from doing something they are already required to do by federal, state, or local law or regulation, injunctive relief in the case or another case, or a settlement in another case).⁷⁴

All three of these component parts in some way limit the scope of SEPs, at least to the extent that a project not meeting a component will not be allowed under the policy. Nothing in the Policy explains where these components came from or why EPA felt it appropriate to include them.

a. Nexus in the 1995 SEP Policy

The 1995 SEP Policy’s treatment of nexus is significantly different

maintain or go beyond compliance with applicable requirements); and (7) emergency planning and preparedness (providing equipment and training to responsible state or local emergency response or planning authorities). *Id.* at 24,858–60. Thus, the 1995 SEP Policy keeps the 1991 SEP Policy’s categories of pollution prevention, pollution reduction, restoration, and audits; adds the public health and emergency planning and preparedness categories; and morphs the old public awareness category into compliance promotion.

72. *Id.* at 24,857.

73. *Id.* The 1995 SEP Policy specifically states that this second component requires that “(1) EPA has the opportunity to help shape the scope of the project before it is implemented; and (2) the project is not commenced until after the Agency has identified a violation (e.g., issued a notice of violation, administrative order, or complaint).” *Id.* The Policy goes on to justify the exclusion of projects already committed to or started before the Agency identifies a violation because “the primary purpose of this Policy is to obtain environmental or public health benefits that may not have occurred ‘but for’ the settlement.” *Id.* n.3.

74. *Id.* The 1995 SEP Policy does recognize, however, that projects to accelerate compliance with legal obligations that will become effective two or more years in the future can be acceptable SEPs. *Id.* at 24,857–58.

from the 1991 SEP Policy's. Gone are the notions of vertical and horizontal nexus, as well as the examples of acceptable SEPs from which a fuller understanding of EPA's thinking might be gleaned. Instead, the entire discussion of nexus occurs in a single paragraph that suggests a significantly narrower view of nexus:

All projects must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future. SEPs are likely to have an adequate nexus if the primary impact of the project is at the site where the alleged violation occurred or at a different site in the same ecosystem or within the immediate geographic area. Such SEPs may have sufficient nexus even if the SEP addresses a different pollutant in a different medium. In limited cases, nexus may exist even though a project will involve activities outside of the United States.⁷⁵

Three things suggest that this statement significantly narrows the concept of nexus as compared to the 1991 SEP Policy. First, the 1995 SEP Policy's language itself is significantly narrower. Whereas the 1991 SEP Policy viewed the connection in terms of the "nature of the violation"⁷⁶ to the SEP's benefits, the 1995 SEP Policy now requires the SEP's connection be to the violation itself. Thus, an SEP involving remediation of an injury by the same pollutant but at a different factory might pass muster under the 1991 SEP Policy because the *nature* of the violation (i.e., release of the pollutant) is still the same, while the 1995 SEP Policy concept of nexus might not find that to be a sufficient connection. Similarly, the 1995 SEP Policy's concept of nexus appears to curtail the scope of horizontal nexus by limiting both the certainty and the reach of the 1991 Policy's recognition that nexus can exist for SEPs involving "(a) relief for different media at a given facility or (b) relief for the same medium at different facilities."⁷⁷

75. *Id.* at 24,858. In a footnote, the 1995 SEP Policy indicates that "immediate geographic area" generally means "the area within a 50 mile radius of the site on which the violations occurred." *Id.* n.5. It is unclear why fifty miles is "immediate," or why EPA felt the need to provide a specific measurement of immediacy.

76. 1991 SEP Policy, *supra* note 34, at 35,609

77. *Id.* at 35,609.

Second, the elimination of the 1991 SEP Policy's extensive discussion of nexus in the 1995 SEP Policy serves as an explicit rejection of both the specific ideas and the general approach to nexus that the 1991 SEP Policy advocated. Third, the 1995 SEP Policy's elimination of the use of examples and guiding principles contained in the 1991 SEP Policy, and the vagueness of the general language offered in their place, likely encourage a very conservative approach to applying nexus to proposed SEPs. The 1995 SEP Policy simply makes it harder to determine where the boundaries of nexus fall.

b. Mitigation Percentage in the 1995 SEP Policy

The 1995 SEP Policy provides clear direction on how to calculate the penalty mitigation effect of an SEP by providing a three-step method the agency will use:

- (1) Use the Agency's penalty policy to calculate all components of the penalty;
- (2) "[C]alculate the net-present after-tax cost of the SEP";
and
- (3) Determine what percentage of the SEP's cost may be applied to mitigate the penalty,⁷⁸ with a ceiling on this mitigation percentage of 80%.⁷⁹

The third step represents a significant change from the 1991 SEP Policy. Whereas the 1991 Policy allowed up to 100% of the SEP cost to reduce or mitigate the penalty, the 1995 Policy envisions a sliding scale based on the SEP's performance under a five-factor test⁸⁰ and abandons the 100% ceiling (which would allow a dollar-for-dollar reduction in penalty) in favor of a maximum of 80% (which requires \$1.25 in SEP funds for every \$1.00

78. 1995 SEP Policy, 60 Fed. Reg. at 24,860–61.

79. *Id.* at 24,861. The Policy recognizes two exceptions to the 80% ceiling: (1) if the defendant is a small business, government agency or non-profit organization; or (2) if the defendant is undertaking a pollution-prevention SEP, the percentage can go up to 100% if the project is one EPA determines to be of outstanding quality. *Id.* The Policy does not define how small a business must be or what constitutes an SEP of outstanding quality, but it is clear that the Policy does not contemplate that these exceptions will occur very often.

80. *Id.* at 24,861. The five factors that affect the mitigation percentage under the 1995 SEP Policy are: benefits to the public or environment at large; innovativeness; environmental justice (i.e., mitigating damage or risk to minority or low income populations); multimedia impacts (i.e., reducing emissions to more than one medium); and pollution prevention. *Id.* Theoretically, the better an SEP achieves each of these factors, the closer to 80% the mitigation percentage can be.

reduction in penalty). The 1995 SEP Policy does not explain or attempt to justify the lowering of this mitigation percentage ceiling, nor does it explain why 80% is appropriate. Thus it is unclear whether EPA considered the economic considerations of the change.⁸¹

3. The 1998 SEP Policy

In May 1998, EPA issued what it termed its final Supplemental Environmental Projects Policy.⁸² The 1998 SEP Policy is mostly a restatement of the 1995 SEP Policy, with some minor word changes. There are, however, two changes of note. The first is the addition of a new section encouraging Agency personnel to make “special efforts” to seek community input on SEP proposals.⁸³ The second is the deletion of the footnote in the 1995 SEP Policy specifically recognizing that SEPs can themselves have a deterrent impact.

a. Nexus in the 1998 SEP Policy

Nexus in the 1998 SEP Policy largely parallels the 1995 SEP Policy, taking the general statement of nexus from 1995 and reformulating it into a three-part definition of nexus that reads as follows:

Nexus is the relationship between the violation and the proposed project. This relationship exists only if:

- a. The project is designed to reduce the likelihood that similar violations will occur in the future; or
- b. The project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
- c. The project reduces the overall risk to public health or the environment potentially affected by the violation at issue.⁸⁴

Consistent with the 1995 approach, the 1998 SEP Policy directly ties nexus

81. *See infra* Part III for a further discussion of the legal and economic issues underlying the 80% mitigation percentage ceiling.

82. 1998 SEP Policy, 63 Fed. Reg. at 24,796.

83. *Id.* at 24,803.

84. *Id.* at 24,798.

to “the violation at issue,”⁸⁵ reiterating the rejection of the breadth of the 1991 SEP Policy’s “nature of the violation”⁸⁶ and “horizontal nexus”⁸⁷ concepts. The 1998 SEP Policy again eschews the use of examples or other explanations of guiding principles. In effect, the 1998 SEP Policy continues and institutionalizes as final policy the narrower view of nexus first articulated in 1995.

b. Mitigation Percentage in the 1998 SEP Policy

The 1998 SEP Policy’s discussion of mitigation percentage occurs within its provisions of penalty calculation. The 1998 SEP Policy restructures the 1995 SEP Policy’s three-step process by expanding and redefining penalty calculation methodology into these five steps:

- (1) Use EPA’s penalty policy to calculate in dollar terms the economic benefit of the defendant’s non-compliance plus the gravity component. The 1998 SEP Policy refers to this as the “Settlement Amount Without a SEP.”⁸⁸
- (2) Determine the greater of the following monetary amounts: “economic benefit of noncompliance plus 10% of” gravity or 25% of gravity alone.⁸⁹ The Policy refers to this greater amount as the “Minimum Penalty Amount With a SEP”⁹⁰ and mandates that the monetary penalty paid by the defendant must equal or exceed this amount.⁹¹
- (3) Calculate “[t]he net present after-tax cost of the SEP.”⁹² The Policy notes that a negative cost (showing “a positive cash flow to the defendant”) is “generally not acceptable as a SEP” because it is in the economic interest of the defendant to do the project anyway.⁹³

85. *Id.*

86. 1991 SEP Policy, *supra* note 34, at 35,608.

87. *Id.* at 35,609.

88. 1998 SEP Policy, 63 Fed. Reg. at 24,801.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* The 1998 SEP Policy discusses at length an internal computer program (called “PROJECT”) that looks at “capital costs,” “one-time nondepreciable costs,” and “annual operation costs and savings”; subtracts out tax savings based on the defendant’s marginal tax rate; and then brings the costs to net present value. *Id.* at 24,801–02.

93. *Id.* at 24,802.

(4) Calculate a “Mitigation Percentage”—that is, the percentage of the SEP costs that can actually be applied as mitigation against the Settlement Amount Without a SEP.⁹⁴ The 1998 SEP Policy uses the same five factors identified in the 1995 SEP Policy plus “community input” to calculate the Mitigation Percentage,⁹⁵ and maintains the 1995 Policy’s 80% ceiling for the Mitigation Percentage.⁹⁶ The Mitigation Percentage is then multiplied by the SEP cost to determine the Mitigation Amount.

(5) Calculate the “Final Settlement Penalty” by (a) subtracting the Mitigation Amount from the Settlement Amount without a SEP, and then (b) using the greater of this number and the Minimum Penalty Amount with a SEP.⁹⁷

This methodology appears to be a linear calculation, progressing from the first to the fifth of these steps. The Policy further emphasizes this linearity by including an SEP Penalty Calculation Worksheet as an attachment to the Policy.⁹⁸ Of course, this presumes that all steps of the calculation in fact take place, and the defendant is aware of the amounts in each step. That presumption may not be true and therefore may affect how this five-step calculation is in fact performed.⁹⁹

4. Post-1998 Statements Concerning SEPs

Since issuing the 1998 SEP Policy, EPA has issued at least 17 guidance and internal memoranda on SEPs.¹⁰⁰ The documents include such diverse topics as the Project Ideas List¹⁰¹ and other ideas for SEPs,¹⁰² procedures

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 24,804.

99. *See infra* Part III (discussing the use of the calculation in settlement).

100. A listing of these guidance documents, with links to the documents themselves, is available at <http://cfpub.epa.gov/compliance/resources/policies/civil/seps>.

101. *See supra* note 10.

102. *See* EPA, USING SUPPLEMENTAL ENVIRONMENTAL PROJECTS TO FACILITATE BROWNFIELDS REDEVELOPMENT 3 (1998), <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/proj-brownf-mem.pdf> (discussing the use of environmental quality assessment projects and environmental restoration projects as SEPs for brownfields redevelopment); Memorandum from Susan E. Bromm, Dir., Office of Site Remediation Enforcement, U.S. Env'tl. Prot. Agency, to the Dir. Office of Env'tl. Stewardship, Region I et al. (July 27, 2004), available at <http://www.epa.gov/compliance/resources/policies/cleanup/brownfields/sep-redev->

for using SEPs in settlements,¹⁰³ a model consent decree for use with SEPs,¹⁰⁴ a memo on the nexus requirement,¹⁰⁵ and a memo on expanding the use of SEPs.¹⁰⁶ The consistent theme in all these post-1998 SEP Policy statements is EPA's commitment to SEPs and the desire "to encourage and expand the use of SEPs in the settlement of enforcement actions" by urging all enforcement staff to "consider every opportunity to increase our use of SEPs and include more environmentally significant SEPs wherever

fs.pdf (discussing the use of "'green building SEPs' at contaminated properties undergoing cleanup and redevelopment"); Memorandum from Phyllis P. Harris, Principal Deputy Assistant Adm'r, Office of Enforcement & Compliance, U.S. Env'tl. Prot. Agency, to Reg'l Adm'rs (I-X) and Reg'l Counsel (I-X), U.S. Env'tl. Prot. Agency (Jan. 10, 2003), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/sepauditclar-mem.pdf> (discussing the expansion of environmental compliance audits as a category of SEPs); Memorandum from Granta Y. Nakayama, Assistant Adm., Office of Enforcement and Compliance Assurance, U.S. Env'tl. Prot. Agency, to Assistant Adm'rs., Reg'l Adm'rs, Regions I-X et al. (July 20, 2006), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/potentialproject-seps0607.pdf> (transmitting list of SEP project ideas); Memorandum from Walker B. Smith, Dir., Office of Regulatory Enforcement, U.S. Env'tl. Prot. Agency, to Enforcement Div. Dirs., Regions I-X et al. (Jan. 8 2004), *available at* http://www.epa.gov/compliance/resources/policies/civil/seps/dieselbus_guidancefinal.pdf (discussing retrofitting diesel buses as SEPs).

103. See EPA, INTERIM GUIDANCE FOR COMMUNITY INVOLVEMENT IN SUPPLEMENTAL ENVIRONMENTAL PROJECTS (June 17, 2003), <http://www.epa.gov/compliance/resources/policies/civil/seps/sepcomm2003-intrm.pdf>; Memorandum from Mark Pollins, Dir., Water Enforcement Div., Office of Regulatory Enforcement, U.S. Env'tl. Prot. Agency, to David A. Nielson, Dir., Multimedia Enforcement Div., Office of Regulatory Enforcement, U.S. Env'tl. Prot. Agency, Reg'l Counsel (I-X) et al. (Mar. 22, 2002), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/cwasepclar-mem.pdf>; Memorandum from Eric V. Schaeffer, Dir., Office of Regulatory Enforcement, U.S. Env'tl. Prot. Agency, to Reg'l Counsels, Regions I-X et al. (July 21, 1998), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/sepapprovrev-mem.pdf> (revising SEP approval procedures); Memorandum from Walker B. Smith, Dir., Office of Civil Enforcement, U.S. Env'tl. Prot. Agency, to Reg'l Counsel (I-X) et al. (Mar. 21, 2005), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/sepwaiver32105.pdf> (noting the requirements of a sufficient waiver when SEPs fail to meet conditions of SEP policy); Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement & Compliance Assurance, U.S. Env'tl. Prot. Agency, to Reg'l Counsels, Region I-X et al. (Dec. 15, 2003), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-thirdparties.pdf> (describing how the Regions should approach the use of funds and working with private entities to comply with the Miscellaneous Receipts Act); Memorandum from John Peter Suarez, Assistant Adm'r, U.S. Env'tl. Prot. Agency, to Reg'l Counsels (I-X) et al. (Dec. 15, 2003), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-profitableprojects.pdf>.

104. See EPA, MODEL SEP CAFO (Jan. 1, 1999), <http://www.epa.gov/compliance/resources/policies/civil/rcra/sepmodcao-rpt.pdf> [hereinafter MODEL SEP CAFO].

105. See Memorandum from Walker B. Smith, Dir., Office of Regulatory Enforcement, U.S. Env'tl. Prot. Agency, to Reg'l Counsel et al. (Oct. 31, 2002), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/sep-nexus-mem.pdf> [hereinafter 2002 Nexus Memo] (discussing the importance of nexus in SEPs).

106. Expanding Use of SEPs Memo, *supra* note 11.

possible.”¹⁰⁷

EPA’s memo on the nexus requirement boils nexus down to a kind of “we know it when we see it” platitude. In this October 31, 2002, memorandum to Regional Counsel and Regional Enforcement Division and Media Division Directors,¹⁰⁸ the Director of EPA’s Office of Regulatory Enforcement recites the three-part definition from the 1998 SEP Policy. The memo states that “[i]n most cases, nexus is not difficult to establish,”¹⁰⁹ offering some simple examples,¹¹⁰ but recognizes that “[i]n some cases, however, the nexus is not as clear.”¹¹¹ In lieu of providing guidance on how to deal with such circumstances, the memorandum in effect takes the decision out of the hands of enforcement personnel and puts it squarely within EPA headquarters:

In such cases, we urge your staff to contact us so that we can fully discuss case-specific information and evaluate the proposed project under the SEP Policy and the [Miscellaneous Receipts Act]. Many times, after further review and discussion, we determine that the original project has a nexus to the violations. Sometimes, projects must be modified in order to establish nexus. In a few cases, even after discussions, no nexus is found. In those cases, we can suggest alternative projects that do have a nexus to the violations at issue. It is helpful, therefore, for any case team that has questions about nexus to contact my staff early in the process.¹¹²

After reiterating the 1998 SEP Policy’s cautions about geographic proximity,¹¹³ the 2002 Nexus Memo reduces nexus to this truism:

107. *Id.* at 1.

108. 2002 Nexus Memo, *supra* note 105, at 1.

109. *Id.*

110. *Id.* at 1–2. These examples are: eliminating the “use of the particular chemical that was the basis [of] the violation” (because this “reduces the likelihood that similar violations will occur in the future”); a Clean Air Act defendant holding an asthma screening day in the community affected by the violation (because it “reduce[s] the adverse impact to public health”); and an Emergency Planning and Community Right to Know Act defendant agreeing to operate a “reverse 911” community notification system in “the community that would be affected by a release” from the defendant’s facility (because it “would reduce the overall risk to public health”).

111. *Id.* at 2.

112. *Id.*

113. The 2002 Nexus Memo states:

It is important to note that geography alone does not create nexus. The mere fact that a SEP is beneficial to an area near the facility does not by itself satisfy the nexus requirement. Enforcement staff must be able to demonstrate how the project relates to the violations that are the subject of the enforcement action.

If there is a relationship between the alleged violation and the SEP, then it is within the Agency's discretion to take the SEP into account as a mitigating factor when determining the amount of a penalty that the Agency will agree to as part of an overall settlement. If there is no nexus, then the Agency does not have that discretion.¹¹⁴

The 2002 Nexus Memo thus completes the process begun in 1995 of shrinking both the definition and the scope of nexus and likely results in eliminating nexus as a useful policy concept that can guide Agency staff or defendants seeking to conduct SEPs, because it is difficult to tell just what is needed to satisfy the nexus requirement. Indeed, less than a year after the 2002 Nexus Memo, the Agency recognized that headquarters staff was having difficulty applying the nexus concept¹¹⁵—an admission that belies the “headquarters knows best” message of the 2002 Nexus Memo. On a more fundamental level, the notion that it is necessary to “call headquarters” for a case-specific discussion might resolve a question in a particular matter, but it offers no guidance on a programmatic basis. Without clear guidance on what nexus really is, Agency personnel and defendants are likely to “play it safe” and choose projects that have been approved before or simply avoid SEPs altogether instead of exploring new ways of utilizing SEPs that might in fact be at the outer limits of nexus.

C. Effects of EPA's SEP Policy—Historical Utilization of SEPs

Given EPA's commitment to SEPs, the question is whether EPA's policies and approach have had any appreciable effect on the use of SEPs. Unfortunately, the historical data suggest low and ever-shrinking utilization rates.

In order to determine the historical rates of SEP utilization, I reviewed the best available data¹¹⁶ for the fiscal years 1992 (the year of EPA's first

Id. This does little to explain what nexus really is, but likely has the effect of further narrowing the concept, for a staff member could easily read this to mean that even geographic proximity may not be enough to satisfy the nexus requirement.

114. *Id.*

115. See Expanding Use of SEPs Memo, *supra* note 11, at 1 (describing internal discussions as being “useful in educating senior Agency staff about SEPs,” suggesting that, five years after the 1998 SEP Policy, senior staff were still unfamiliar with the Policy and its issues); *id.* at 3 (“During the discussions to date, several Regional and Headquarters offices raised questions . . . concerning how to define an appropriate nexus in certain situations, and whether or not nexus can be waived in a particular circumstance. . . . Given this . . . we believe that there may be ways to simplify nexus . . .”).

116. The data reviewed came from EPA annual reports of its enforcement activities. From FY

SEP Policy and when EPA first began reporting SEP data¹¹⁷) to the present. The basic idea was to compare the total number of cases in which an SEP could theoretically be used to the number of settlements actually using SEPs, which should reveal a utilization percentage rate. This seemingly straightforward approach nevertheless presented some difficulties.

The first difficulty was determining the total number of cases in which an SEP could theoretically be used. EPA typically reports Administrative Compliance Orders, Administrative Penalty Complaints, Civil Referrals to DOJ, Administrative Penalty Order Settlements, and Judicial Settlements. Because the focus here is on settlements (as that is the only time where EPA Policy says SEPs can be used), data concerning cases filed or referred and Administrative Compliance Orders are irrelevant to the analysis. I therefore took the reported number of Administrative Penalty Order Settlements and the Judicial Settlements to produce a total number of cases in which SEPs could theoretically be used.¹¹⁸ Comparison of this total number against the reported number of settlements with SEPs reveals an SEP utilization percentage.

The second difficulty is that the numbers necessary for this analysis have become increasingly difficult to determine because EPA's data are not always complete. For example, EPA's data for the number of Administrative Penalty Settlements in a given fiscal year often change in subsequent reports.¹¹⁹ Some years, categories reported in other years are

1985 until FY 2002 (with the exception of FY 2000, for which no report can be found), these were called Accomplishment Reports, and links to these reports are available at <http://cfpub.epa.gov/compliance/resources/reports/accomplishment/details.cfm>. From FY 2003 to the present, the numbers must be found by looking at Accomplishments Reports and Annual Reports, available at <http://www.epa.gov/compliance/data/results/annual/index.html>. Given that the focus is on government utilization of SEPs, it made the most sense to use the government's own data on that usage.

117. FY 1992 ACCOMPLISHMENTS REPORT, *supra* note 6, app. at 1.

118. This methodology is supported by two EPA documents. First, the combination of Administrative Penalty and Judicial cases is consistent with the SEP Policies, which indicate that they apply to both administrative and judicial cases. *See, e.g.*, 1998 SEP Policy, 63 Fed. Reg. at 24,797 ("This Policy applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations that EPA administers."). Second, this methodology produces a result for FY 2002 that matches the percentage that EPA reached the one and only time it publicly revealed a utilization percentage. *See* Expanding Use of SEPs Memo, *supra* note 11, at 1 (revealing a 10% utilization rate in FY 2002).

119. For example, reports from FY 2001 and 2002 both report the number of Administrative Penalty Settlements during FY 2000 as 1,730 and the number for FY 2001 as 1,584. The FY 2004 Report, however, lists the FY 2000 number as 1,922 (an increase of 192) and the FY 2001 number as 1,734 (an increase of 150). *Compare* EPA, FY 2001 ENFORCEMENT COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT 66 (Dec. 1, 2002), *available at* <http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy01accomplishment.pdf>, *and* EPA, NATIONAL TOTALS-EPA CIVIL ENFORCEMENT ACTIVITY, FY 1998-FY 2002 (Jan. 14, 2003), *available at*

omitted from the report.¹²⁰ Thus, data from other reports or extrapolation from other years are necessary to complete the analysis. As to the number of SEPs, EPA has increasingly chosen to report the *dollar value* of the projects undertaken rather than the *actual number* of SEPs.¹²¹ The problem is that dollar value can be skewed by a few large SEPs¹²² and mask a decrease (or increase) in the total number of SEPs entered. Of course, without the actual numbers of cases or SEPs, it is impossible to conduct the utilization percentage analysis proposed here.

Despite these difficulties, it is possible to create a picture of historical SEP utilization that is best displayed in the following chart summarizing the data. In the interest of continuity, footnotes for the chart have been moved to the end of this Article, pages 270–71.

<http://www.epa.gov/compliance/resources/reports/endofyear/eoy2002/mosfy2002ceaenfactivity.pdf>, with EPA, END OF YEAR ENFORCEMENT AND COMPLIANCE FIVE YEAR TRENDS 2 (Nov. 15, 2004), available at

<http://www.epa.gov/compliance/resources/reports/endofyear/eoy2004/fy045yeartrend.pdf> [hereinafter 2004 TRENDS CHART]. The FY 2004 Report does contain a disclaimer that “minor corrections” were made to previously reported data “[d]ue to enhanced data quality reviews.” *Id.* Thus, I have used FY 2004 data when available. However, because the FY 2004 Report does not contain all of the categories of data as previous years, one is forced to use old data for some categories and new data for others.

120. For example, FY 2002 data do not report the number of settlements with SEPs. See EPA, NATIONAL TOTALS-EPA CIVIL ENFORCEMENT ACTIVITY, FY 1998–FY 2002 (Jan. 14, 2003), available at

<http://www.epa.gov/compliance/resources/reports/endofyear/eoy2002/mosfy2002ceaenfactivity.pdf>.

The FY 2004 data do not report the number of civil judicial settlements. See 2004 TRENDS CHART, *supra* note 119, at 2.

121. In recent years, data in reports covering FY 2000–2003 provide the actual number of settlements involving SEPs. The FY 2004 report, however, lists data from FY 2000–2004 solely in terms of the dollar amount of SEPs during those years (\$56 million for FY 2000; \$89 million for FY 2001; \$58 million for FY 2002; \$65 million for FY 2003; and \$48 million for FY 2004). See 2004 TRENDS CHART, *supra* note 119, at 1. The FY 2005 Report continues this trend. See EPA, EPA FY 2005 COMPLIANCE AND ENFORCEMENT ANNUAL RESULTS 5 (2005), available at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2005/2005resultscharts.pdf> (showing \$57 million in value for 2005 SEPs). Fortunately, the data were found in another EPA document issued at the same time.

122. Even EPA admits that this can happen. See EPA, FY 1996 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT 2–8 (1997), available at

<http://www.epa.gov/compliance/resources/reports/accomplishments/oea/fy96accomplishment.pdf>

(“The total value of settlements in any single year depends upon the profile of the non-complying sectors and violations addressed. SEPs and injunctive relief [dollar totals] can be affected by a few abnormally large cases.”) [hereinafter FY 1996 ACCOMPLISHMENTS REPORT].

FY	# of Admin. Penalty Settlements (A)	# of Civil Judicial Settlements (B)	Total # of Settlements (A+B)	# of Settlements with SEPs (C)	SEP Utilization Percentage $C/(A+B) * 100$ ¹²³
1992	1,487 ¹²⁴	157 ¹²⁵	1,644	409/222 ¹²⁶	24.88/13.50 ¹²⁷
1993	1,614 ¹²⁸	(165) ¹²⁹	1,779	291/229 ¹³⁰	16.36/12.87 ¹³¹
1994	1,433 ¹³²	166 ¹³³	1,599	190 ¹³⁴	11.88
1995	1,114 ¹³⁵	179 ¹³⁶	1,293	348 ¹³⁷	26.91
1996	1,004 ¹³⁸	292 ¹³⁹	1,296	(240) ¹⁴⁰	18.52
1997	1,350 ¹⁴¹	274 ¹⁴²	1,624	266 ¹⁴³	16.38
1998	1,245 ¹⁴⁴	253 ¹⁴⁵	1,498	221 ¹⁴⁶	14.75
1999	1,358 ¹⁴⁷	215 ¹⁴⁸	1,573	197 ¹⁴⁹	12.52
2000	1,922 ¹⁵⁰	219 ¹⁵¹	2,141	193 ¹⁵²	9.01
2001	1,734 ¹⁵³	221 ¹⁵⁴	1,955	164 ¹⁵⁵	8.39
2002	1,417 ¹⁵⁶	216 ¹⁵⁷	1,633	157 ¹⁵⁸	9.61
2003	1,706 ¹⁵⁹	195 ¹⁶⁰	1,901	150 ¹⁶¹	7.89
2004	2,248 ¹⁶²	(201) ¹⁶³	2,449	213 ¹⁶⁴	8.70
2005	2,273 ¹⁶⁵	157 ¹⁶⁶	2,430	207 ¹⁶⁷	8.52
2006	4,624 ¹⁶⁸	173 ¹⁶⁹	4,797	220 ¹⁷⁰	4.59

Figure 1: Historical Utilization of SEPs, 1992–2006

These data reveal three important facts. First, the percentage of settlements involving SEPs has historically been low, with the highest rate being 26.91% in 1995. Over this fourteen year period, the average utilization rate has been only 11–12%.¹⁷¹ Setting aside percentages (which could fluctuate depending on the total number of cases), the actual number of settlements with SEPs shows a steady decline over this same period until recovering somewhat in FY 2004. While it is unlikely that SEPs would have been appropriate in 100% of the cases over the years, and there are certainly cases in which SEPs are inappropriate because the penalty amount is too small or the defendant is simply uninterested, 12% utilization is extremely low and suggests that significant opportunities for SEPs are

171. The table shows a total of 29,612 settlements between FY 1992 and FY 2006. There are 3,446 settlements with SEPs if one includes the Mobile Sources Air Program SEPs in FY 1992–1993, producing a 11.70% utilization rate, and 3,217 settlements with SEPs if the Mobile Sources SEPs are excluded, producing a 10.86% utilization rate.

being missed.¹⁷²

Second, the table clearly shows that the annual utilization rate has been steadily declining since 1995, with only a temporary stabilization in the 8% range during FY 2004–2005. This decline has occurred despite the consistent pronouncements of EPA since the 1995 SEP Policy that the agency wants to encourage and increase the use of SEPs. The data clearly show that ten years of these pronouncements have had no apparent effect on SEP utilization.

Third, and perhaps most interesting, the steady decline in actual number of SEPs and annual SEP utilization rates began after 1995, which is exactly when EPA changed the SEP Policy to put a further emphasis on nexus and lowered the mitigation percentage ceiling from 100% to 80%. The length of time and the extent of this decline strongly suggest that a link between these policy changes and the SEP utilization decline is more than simply coincidental. In fact, if *any* part of the decline was caused by the policy changes, then it is worth exploring the justifications for nexus and mitigation percentage to see if at least those effects can be removed. The article therefore considers each of these concepts in turn in Parts II and III.

II. COMING UP CLOSE: THE UNNECESSARY REQUIREMENT OF NEXUS

In its three official policy statements on SEPs, EPA has consistently identified “nexus” as a necessary requirement for an SEP being acceptable. The definition of what constitutes an adequate nexus changed between the issuance of the 1991 and 1995 SEP Policies, and utilization of SEPs in settlements after 1995 declined dramatically. As noted above, as of 2003, the agency knew that the nexus issue continued to create internal issues and that further clarification was necessary—though so far it has not issued such a clarification.¹⁷³ Given the apparent confusion nexus engenders, and the documented decline in SEP utilization paralleling the narrowing of the scope of nexus, it seems fair to ask why EPA has historically insisted and continues to insist on a nexus requirement. Is nexus necessary? To answer this question, this article now examines the possible legal sources of the nexus requirement and then turns to the flaws in the nexus requirement, ultimately concluding that nexus is not necessary.

172. See Expanding Use of SEPs Memo, *supra* note 11, at 1 (noting that an FY 2002 10% utilization rate presents a “tremendous opportunity” for increasing use of SEPs).

173. See *id.* at 3 (indicating that “several Regional and Headquarters offices raised questions about the complexity of the existing SEP Policy. Specifically, we heard a number of questions concerning how to define an appropriate nexus in certain situations, and whether or not nexus can be waived in a particular circumstance. . . . Given this . . . we believe that there may be ways to simplify nexus . . .”).

A. Possible Sources of a Nexus Requirement

Although EPA has insisted on a nexus requirement from the 1991 SEP Policy onward, its legal basis for the requirement was never fully articulated until 2002. The 1991 SEP Policy offered no legal justification, simply positing nexus as something each SEP must have.¹⁷⁴ The 1995 and 1998 Policies include nexus as one of five legal guidelines designed 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”¹⁷⁵ without any articulation of what those requirements are with respect to nexus. Finally, the 2002 Nexus Memo gave a specific legal source: “An adequate nexus is important because it ensures that the Agency complies with the SEP Policy and the requirements of the [Miscellaneous Receipts Act].”¹⁷⁶ The article thus considers these possible sources in detail.

1. Constitutional and Statutory Sources

The 1995 and 1998 SEP Policies describe nexus as necessary to ensure that SEPs do not “run afoul of” constitutional or statutory requirements, without identifying what particular constitutional or statutory provisions might be violated by an SEP without nexus. One must therefore consider the most likely provisions to see if nexus is really needed for compliance.

The constitutional requirements applicable to an SEP are perhaps the most difficult to divine but do not need to be specifically identified because they are ultimately tied to the environmental statute that defines the violation being resolved by a settlement containing an SEP. An SEP addressing a Clean Water Act violation, for example, derives its constitutional propriety from the underpinning of the Clean Water Act itself; if the government has the constitutional power to bring and settle the enforcement action, then it has the constitutional power to include a particular remedy (penalty, injunction, SEP, or combination thereof) in the settlement. In this light, it is difficult to distinguish an SEP with nexus from one without nexus, because there is nothing to suggest that the constitutional authority underlying the enforcement action would only allow SEPs with nexus and exclude as unconstitutional an SEP without nexus. In other words, the nexus requirement seems superfluous to the

174. 1991 SEP Policy, *supra* note 34, at 35,607.

175. 1995 SEP Policy, 60 Fed. Reg. at 24,858; 1998 SEP Policy, 63 Fed. Reg. at 24,798.

176. 2002 Nexus Memo, *supra* note 105, at 2. The Miscellaneous Receipts Act, 31 U.S.C. § 3302 (2000), is discussed in more detail *infra* Part II.A.2.

constitutional question—either EPA has the authority to agree to an SEP as part of an enforcement settlement or it does not. If EPA does not have that authority then all SEPs, including those with nexus, violate the constitutional provision. Conversely, if EPA does have the authority, then all SEPs, including those without nexus, pass constitutional muster. Given that EPA clearly believes some SEPs are constitutionally legitimate, constitutional analysis cannot justify a nexus requirement.

The question of a statutory source of the nexus requirement entails a more extensive analysis. None of the federal environmental statutes expressly set forth any nexus requirement for SEPs. Indeed, with the exception of the Clean Air Act,¹⁷⁷ none of the statutes even mention anything approaching an SEP.¹⁷⁸ Thus, if there is a statutory basis for nexus, it must be implicit in some other provisions or limitations in the statutes.

The most likely implicit statutory source of nexus is the types of remedies available under the various environmental statutes. For example, all statutes allow civil penalties.¹⁷⁹ If SEPs are viewed as a reduction of the civil penalty, perhaps there is a need for the SEP to be connected to the violation in order for it to be an appropriate basis for reducing the penalty assessed because of the violation. There are at least two flaws in this logic. First, several statutes allow courts the power to impose relief beyond penalties and injunctions.¹⁸⁰ If courts can enter relief beyond penalties,

177. See 42 U.S.C. § 7604(g)(2) (2000) (“[T]he court . . . shall have discretion to order that such civil penalties, in lieu of being deposited in [a special fund in the United States Treasury established in 42 U.S.C. § 7604(g)(1) (2000)] be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment.”).

178. Despite the lack of express statutory language authorizing SEPs, EPA can point to statutory authority in provisions relating to the ability of the Administrator to settle violations. See, e.g., TSCA, 15 U.S.C. § 2615(a)(2)(C) (2000) (allowing settlement “with or without conditions”); CAA, 42 U.S.C. § 7413(d)(2)(B) (2000) (same). Other statutes grant the Administrator the ability to consider various factors (including mitigating factors) in determining the penalty amount to seek. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a)(4) (2000); Clean Water Act, CWA, 33 U.S.C. § 1319(d), (g)(3) (2000); Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11045(b)(1)(C) (2000).

179. See *supra* note 2.

180. See, e.g., RCRA, 42 U.S.C. § 6972 (2000). The statute grants district courts: Jurisdiction . . . to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in [42 U.S.C. § 6972(a)(1)(A)], to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in [42 U.S.C. § 6972(a)(1)(B)], to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in [42 U.S.C. § 6972(a)(2)], as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

with no requirement of a nexus for such relief, the notion that the penalty provision puts a nexus limit on an SEP approved by the government makes no sense. Second, SEPs are parts of *settlements*, and the strictures of the statute involved do not limit the terms of a settlement under the statute.¹⁸¹ The classic formulation of the requirements for judicial approval of a settlement via consent decree is extremely broad: the decree need only come “‘within the general scope of the case made by the pleadings,’ further[] ‘the objectives upon which the law is based,’ and . . . not ‘violate the statute upon which the complaint is based.’”¹⁸² Thus, in a settlement, the fact that the statute speaks in terms of penalties and injunctive relief does not limit the relief to penalty- or injunction-related relief. Further, none of these three requirements imply that an SEP must have a nexus to the violation; the closest—coming within the general scope of the case made by the pleadings—is likely satisfied by the injunctive relief against further violations and the fact that the defendant whose violations gave rise to the complaint is ultimately resolving the claims through the settlement.¹⁸³ An SEP that has no nexus to the violations at issue would not run afoul of these basic requirements. The simple fact of the matter is that EPA has the

(emphasis added); Clean Air Act, 42 U.S.C. § 7413(b) (2000) (granting district court “jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed to the United States under this chapter . . . and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief”) (emphasis added).

181. See *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 522–23 (1986):

[I]t is the parties’ agreement that serves as the source of the court’s authority to enter any judgment at all. . . . More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree. Consequently, whatever the limitations Congress placed in § 706(g) on the power of federal courts to impose obligations on employers or unions to remedy violations of title VII, these simply do not apply when the obligations are created by a consent decree.

See also *id.* at 525:

[I]n addition to the law which forms the basis of the claim, the parties’ consent animates the legal force of a consent decree. . . . Therefore, a federal court is not necessarily barred from entering a judgment decree merely because the decree provides broader relief than the court could have awarded after a trial.

(citing *Courtwright v. EEOC*, 446 U.S. 952 (1980); *Swift & Co. v. United States*, 276 U.S. 311, 327–31 (1928); *Pacific R.R. v. Ketchum*, 101 U.S. 289, 295–97 (1880); *Turner v. Orr*, 759 F.2d 817, 825–26 (11th Cir. 1985); *Sansom Committee v. Lynn*, 735 F.2d 1,535, 1,538–39 (3d Cir. 1984); *Citizens for a Better Env’t v. Gorsuch*, 718 F.2d 1,117, 1,127–30 (D.C. Cir. 1983); *EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 799–800 (10th Cir. 1979)).

182. *Elec. Controls Design*, 909 F.2d at 1,355 (quoting *Ketchum*, 101 U.S. at 297).

183. The requirement that the settlement further the objectives of the statute might imply a requirement that the SEP should be in the same environmental medium as the violations, but that appears to be a very narrow reading of the requirement. After all, if the settlement contains injunctive relief against further violations, the purposes of the statute at issue (specifically, to prevent violations of the statute) are furthered regardless of the medium in which the SEPs may work.

authority to enter into settlements and to agree to SEPs as part of a settlement, and federal courts have the authority to enter consent decrees memorializing those settlements. Nothing in the settlement context gives rise to a legal requirement of nexus.

2. The Miscellaneous Receipts Act

The 2002 Nexus Memo's citation to the Miscellaneous Receipts Act (MRA)¹⁸⁴ provides the next potential legal source of a nexus requirement. As the Memo points out, the MRA 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."¹⁸⁵ According to the 2002 Nexus Memo, the MRA "is intended to preserve Congressional prerogatives to appropriate funds as provided for in the U.S. Constitution."¹⁸⁶ This explanation, however, is unenlightening as to how the MRA impacts SEPs. Nevertheless, the 2002 Nexus Memo makes sure that Agency personnel are aware of the MRA's requirements as well as the penalties for violating the Act,¹⁸⁷ thereby creating a strong personal incentive to make sure nexus exists.

The federal government's reliance on the MRA in connection with SEPs has a long history, attributed to a Department of Justice policy originating in a 1983 draft memorandum from the Office of the Attorney General.¹⁸⁸ It received a more thorough airing in a congressional hearing in 1987.¹⁸⁹ The Department of Justice interpreted the MRA as constraining

184. 31 U.S.C. § 3302 (2000).

185. *Id.* § 3302(b). In a similar vein, 31 U.S.C. § 3302(c) (2000) requires "[a] person having custody or possession of public money" to deposit it in the Treasury.

186. 2002 Nexus Memo, *supra* note 105, at 2.

187. Violating the Miscellaneous Receipts Act can result in removal from office and personal liability for the amount of money misappropriated. 31 U.S.C. § 3302(d) (2000).

188. Donald W. Stever, *Environmental Penalties and Environmental Trusts—Constraints on Sources of Funding for Environmental Preservation*, 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,356, at 10,359 (Sept. 1987). Unfortunately, Stever does not provide a citation to the memorandum, or to the September 5, 1985 letter he quotes from a Department of Justice attorney who invokes the "policy" when expressing disapproval of a defendant making a donation to an "established environmental cause in lieu of paying a civil penalty" because under the policy "the Miscellaneous Fees Act . . . is viewed as prohibiting the U.S. from agreeing to the payment of such funds to an entity other than the U.S. Treasury." *Id.*

189. *Environmental Credit Projects Under Clean Water Act: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment and the Subcomm. on Oceanography of the Comm. on Merchant Marine and Fisheries H.R.*, 100th Cong. 20-33, 57-67 (1988) (testimony and statement of Raymond Ludwizewski, Associate Deputy Att'y General, U. S. Dept. of Justice). Ludwizewski's prepared statement appears at 57-67 [hereinafter Ludwizewski Statement]. His responses to questions from the subcommittee members appear at 24-33 [hereinafter Ludwizewski Testimony].

the government's ability "to accept direct substitutes for civil penalties" but allowing the government "to mitigate the civil penalty based on an environmentally beneficial credit project."¹⁹⁰ The DOJ's witness articulated the distinction between substitution and mitigation as a form of prosecutorial discretion:

A substitution is a direct decision by the Executive Branch of the United States that we will not receive penalties to the Treasury, as Congress directed us to, but instead do some other action that we prefer. . . . A mitigation is a decision by the Attorney General that either an action already taken, or a pledge to take an action by a violator, if you'll pardon an analogy, perhaps something akin to the returning of the purse to the victim by the purse snatcher, shows a certain degree of understanding that an action that has been taken is unlawful, incorrect. Repentance if you will. In recognition of that, we realize that we don't need quite so high a penalty as we would otherwise require from a violator.¹⁹¹

Because it is at least theoretically possible to "mitigate" a penalty down to zero (and thus have all the hallmarks of a "substitution"), it appears that the distinction rests on a subjective assessment by the Attorney General of the violator's "repentance." That of course is not a legal basis and in fact suggests that the supposed role of the MRA in creating this substitution versus mitigation dichotomy is little more than a cover for prosecutorial discretion.¹⁹²

Regardless of the lack of an apparent legal basis for the substitution versus mitigation dichotomy, this 1987 testimony exposes the seeds of a nexus requirement. For if "repentance" for the violation triggers mitigation, then linkage between the SEP and the violation makes repentance easier to find. In discussing potential abuses of SEPs, the DOJ's witness cited a

190. *Id.*

191. Ludwiszewski Testimony, *supra* note 189, at 25–26.

192. Ludwiszewski made this clear in his statement:

The [Clean Water Act] and the [Marine Protection, Research, and Sanctuaries Act] do not clearly authorize the use of credit projects as substitution for civil penalties. Nor do I believe that any such endorsement is necessary. The Acts do, however, allow the government to exercise its historically-recognized discretion to mitigate civil penalties where appropriate and permit this mitigation to be based on a defendant's environmentally beneficial activities.

Ludwiszewski Statement, *supra* note 189, at 60. Thus, when the government wants to approve a project, it has discretion to do so as long as it views it as "mitigation."

1979 case in which a municipality's air pollution fine was waived in return for the funding of a study of loggerhead turtle behavior and stated:

I don't really get the connection there.

And that has a potential, frankly for getting a letter from one of your colleagues, Bill Proxmire, with one of his Golden Fleece Awards.¹⁹³ So, we are somewhat cautious about being sure that there is indeed some connection between the credit project that's actually performed and the violation.

. . . .

. . . A credit project that makes good sense to the Justice Department, generally speaking, is one that corrects the damage done by the polluter. A best case scenario might be something along the lines of . . . where a pollutant was allowed into a stream or a river and there was a substantial fish kill. Typically that may affect only a specific type of fish, bass, trout, and the polluter agreed to restock those fish. That seems to us to respond to the remedy, if you will, the harm caused.¹⁹⁴

When asked how to avoid the MRA in doing this, he replied:

[W]e view the polluter's agreement or his activities in doing this as the equivalent, if you'll pardon the analogy, of returning the purse to the victim. And we say, well he's tried to remedy the damage that he caused. He's tried to right the wrong, and we can reduce the amount of penalties we'd otherwise require as a result.¹⁹⁵

193. Senator William Proxmire regularly gave what he called "Golden Fleece Awards" to government-funded projects that he believed were wastes (or "fleecing") of taxpayer money. Richard Severo, *William Proxmire, Maverick Democratic Senator from Wisconsin, Is Dead at 90*, N.Y. TIMES, Dec. 16, 2005.

194. Ludwiszewski Testimony, *supra* note 189, at 28–30. An EPA employee specifically links Ludwiszewski's testimony to the nexus requirement in the 1995 SEP Policy. See Kaschak, *supra* note 20, at 476 n.89 (observing that the nexus requirement in the 1995 SEP Policy "acknowledges and addresses DOJ's prior testimony stating a concern that a connection must be present between the violation and the project"). Interestingly, Kaschak characterizes Ludwiszewski's testimony as showing "distaste," "personal contempt," and "restrained enthusiasm" for SEPs. *Id.* at 469, 469 n.30.

195. Ludwiszewski Testimony, *supra* note 189, at 30.

In effect, the government's position is that an SEP tied to the violation shows repentance, and repentance allows mitigation, which does not run afoul of the MRA. If one accepts the premise that mitigation is essential to avoiding MRA problems, one can see how a nexus requirement makes perfect sense.

In 1992–1993, a further discussion of SEPs and the MRA took place, this time in the context of two letters from the Comptroller of the United States to John Dingell, then Chairman of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce.¹⁹⁶ The letters were in response to Representative Dingell's inquiries concerning EPA's authority under the Clean Air Act to enter into settlements of mobile source air pollution administrative enforcement actions allowing alleged violators to fund public awareness and other automobile air pollution projects in exchange for reduced civil penalties.¹⁹⁷ The Comptroller General found that EPA did not have the authority to enter into these types of settlements, even in light of the 1991 Penalty Policy.¹⁹⁸ At the core of the Comptroller General's analysis was an interpretation of the MRA that rested largely on a notion of nexus.

The first Comptroller General letter relied primarily on the precedent of two previous Comptroller General interpretations of the statutory phrase allowing a federal agency to "compromise, mitigate, or remit" civil penalties. The first of these interpretations, involving the Nuclear Regulatory Commission's practice of allowing licensees to fund nuclear safety research projects at universities or other nonprofit institutions, was described as follows:

We determined that the NRC's discretionary authority to "compromise, mitigate, or remit" civil penalties empowered it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but that its authority did not extend to

196. Letter from Comptroller of the United States to Honorable John Dingell, Chairman of the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce (July 7, 1992), *available at* 1992 WL 726317 [hereinafter 1992 Letter]; Letter from James F. Hinchman, Comptroller of the United States to Honorable John Dingell, Chairman of the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce (Mar. 1, 1993), *available at* 1993 WL 798227 [hereinafter 1993 Letter]. It appears that Rep. Dingell's inquiries to the GAO were part of a larger effort by Dingell to examine the legality of certain settlements involving SEPs. *See* Kaschak, *supra* note 20, at 471–73.

197. 1992 Letter, *supra* note 196, at *1. These are the very Mobile Sources SEPs reflected in the "# of Settlements with SEPs" column for FY 1992 and FY 1993 lines on the historic utilization chart set forth *supra* Section I(C).

198. *Id.*; 1993 Letter, *supra* note 196, at *1.

remedies unrelated to the correction of the violation in question. Under the NRC proposal, we noted, a violator would contribute funds to an institution that, in all likelihood, would have no relationship to the violation and would not have suffered any injury from the violation.

Moreover, from an appropriations law perspective, such an interpretation would have required us to infer that Congress had intended to allow the NRC to circumvent 31 U.S.C. § 3302(b) and the general rule against augmentation of appropriations. Section 3302(b) requires agencies to deposit money received from any source into the Treasury; its purpose is to ensure that Congress retains control of the public purse. In our view, the enforcement scheme proposed by the NRC would have resulted in an augmentation of NRC's appropriations, allowing it to increase the amount of funds available for its nuclear safety research program.¹⁹⁹

After citing a similar conclusion with respect to a Commodity and Futures Trading Commission practice of allowing donations to an educational institution as part of settlements,²⁰⁰ the Comptroller General concluded that there was "no basis for concluding that EPA's prosecutorial authority . . . is any more expansive than that of the NRC or the CFTC."²⁰¹

The second Comptroller General letter responded to EPA's letter challenging the conclusion in the 1992 Letter.²⁰² EPA had questioned whether the Comptroller General had considered the 1991 SEP Policy in reaching its conclusion.²⁰³ Confirming that it had considered the Policy, the 1993 Letter makes clear that "nexus" is essential:

EPA's SEP policy, which discusses the types of supplemental projects which will be considered acceptable

199. 1992 Letter, *supra* note 196, at *2-*3 (citation omitted).

200. *Id.* at *3.

201. *Id.* This has been interpreted as "a desire to uphold the separation of powers doctrine" in the sense that, because EPA was delegated the power to prosecute environmental violations, allowing a project not sufficiently related to the violation "permits an agency to take on more power than delegated by Congress because the action ceases to be mere prosecution of the violation." Kathleen Boergers, Note, *The EPA's Supplemental Environmental Projects Policy*, 26 *ECOLOGY L.Q.* 777, 783 n.33 (1999). Of course, EPA's delegated authority includes much more than prosecuting environmental violations, and thus it is overly simplistic to focus on only one of several delegated powers to judge whether the SEP violates separation of powers principles.

202. 1993 Letter, *supra* note 196, at *1.

203. *Id.*

for use in enforcement settlements, does require what it calls a “nexus” or relationship between the violation and the environmental benefits to be derived from several types of supplemental projects it permits. For example, under the policy, the appropriate nexus would exist between an environmental restoration project which calls for the acquisition and preservation of wetlands in the immediate vicinity of wetlands injured by unlawful discharges, in order to replace the environmental services lost by reason of such injury.

However, the SEP Policy also allows what it calls “public awareness” projects, and for these projects, no nexus at all is required. Therefore, these projects, which constitute the majority of supplemental projects approved by EPA in settlement of mobile source penalties under section 205, can and do go beyond correcting the violation at issue. . . . It is our view that the EPA’s authority to compromise or remit civil penalties does not extend to imposing such remedies through settlement.²⁰⁴

On the issue of the MRA, the 1993 Letter was similarly direct:

EPA also asserts that settlements involving these supplemental projects do not violate the Miscellaneous Receipts Act, 31 U.S.C. § 3302, since the cash portion of the penalty assessed goes to the Treasury. This argument misses the point. As we noted in an earlier opinion, allowing alleged violators to make payments to an institution other than the federal government for purposes of engaging in supplemental projects, in lieu of penalties paid to the Treasury, circumvents 31 U.S.C. § 3302, which requires monies received for the government by government officers to be deposited into the Treasury. In addition . . . an interpretation of an agency’s prosecutorial authority to allow an enforcement scheme involving supplemental projects that go beyond remedying the violation in order to carry out other statutory goals of the agency, would permit the agency to improperly augment its appropriations for those other purposes, in circumvention of the congressional appropriations process.²⁰⁵

204. *Id.* (citation omitted).

205. *Id.* at *2 (citation omitted).

Although Representative Dingell pressed EPA in light of the GAO letters, he ultimately dropped the matter.²⁰⁶ Even though one cannot pin the origin of the nexus requirement on the Comptroller General's two letters, as the concept predated both in the 1991 SEP Policy,²⁰⁷ it is easy to see why EPA might have been inclined to insist on nexus given the Comptroller General's strong condemnation of SEPs lacking a connection to the violation.

The problem of justifying nexus based on the Miscellaneous Receipts Act (especially as interpreted in the 1987 testimony and the 1992–93 Comptroller General Letters) is that the legal analysis is fundamentally flawed on several levels.

First, the analysis does not comport with the language of the MRA itself. The statutory subsections at the core of the analysis are only implicated upon the *receipt*²⁰⁸ or *possession*²⁰⁹ of money for the government. In a typical SEP under the SEP Policy, the money for the project is never given to nor in possession of the EPA, but instead stays with the defendant or a third party. It is therefore difficult to see how the "receipt" necessary for 31 U.S.C. § 3302(b) or the "possession" necessary for 31 U.S.C. § 3302(c)(1) ever takes place.²¹⁰ Perhaps what the

206. After the first letter, Dingell wrote then EPA Administrator William Reilly requesting that Reilly advise how EPA would comply with the GAO's ruling. See Kaschak, *supra* note 20, at 472. After the second letter, Dingell wrote then Administrator Carol Browner requesting that she reverse her predecessor's policy and come into compliance with the GAO holding. *Id.* at 473. However, Representative Dingell did not push the matter further after this letter. *Id.*

207. However, at least one author links the two together. See Boergers, *supra* note 201, at 783 n.33 ("While the exact basis for the 'nexus' requirement is not explained in the [1998 SEP] Policy, I believe it stems from a report written by the [GAO] determining that EPA lacked authority to allow certain SEP settlements because of an inadequate relationship between the violation and the project." (citing the 1993 Letter)).

208. 31 U.S.C. § 3302(b) provides in relevant part: "[A]n 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." (emphasis added).

209. 31 U.S.C. § 3302(c)(1) provides in relevant part: "A person having custody or possession of public money, including a disbursing official having public money not for current expenditure, shall deposit the money without delay in the Treasury or with a depository designated by the Secretary of the Treasury under law." (emphasis added).

210. Others have reached the same conclusion. See Mann, *supra* note 18, at 197 ("There is little or no basis in the argument that private payments to [SEPs] ever 'vest' in the United States. The crucial inquiry is whether the [SEP] is either 'public money' or money that belongs to the government. Generally, a defendant pays directly into the [SEP] trust or fund, which is managed either by the defendant or by a third party. Government officials at no time have sufficient control over the funds so that they can be deemed 'vested.'"); Stever, *supra* note 188, at 10,360 ("Quite clearly, a trust established by the defendant and administered by the defendant, or by a third party using monies paid directly to the trust by the defendant should not implicate the Miscellaneous Fees Act. The funds are at no time in the custody of a government official, and the government retains insufficient control over the expenditures to taint the fund with a public aura . . .").

Department of Justice and the Comptroller General mean is that an SEP without nexus in a settlement agreement results in a “constructive” receipt or possession by the government and therefore violates the MRA. The problem is that the notion of “constructive receipt” cannot be found in caselaw under the MRA, and even if it did exist, it only creates an internal inconsistency for the government. For if a payment via settlement agreement to an SEP without nexus is a “constructive” receipt barred by the MRA, it is impossible to see how a payment to an SEP with nexus is not also a “constructive” receipt that should likewise be barred by the MRA. In short, the plain language of the MRA requires “receipt” or “possession,” and the only way to make this language work to exclude SEPs without nexus is to create an interpretation that bars *all* SEPs (a result neither EPA, the Department of Justice, nor the Comptroller General supports). Simple statutory construction belies the claim that the MRA creates a requirement of nexus.

Second, the unstated assumption underlying the SEP Policies, the 1987 Department of Justice position, and the Comptroller General’s analysis is that all dollars involved in a settlement with SEPs are really “penalty dollars.”²¹¹ Courts have made it clear that the MRA requires that “penalties” must go to the Treasury.²¹² Yet it is also clear that not all

A variation on this argument is the idea that, when “specific statutory authority exists . . . to handle . . . funds differently, the MRA is inapplicable.” Laurie Droughton, Note and Comment, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 PACE ENVTL. L. REV. 789, 817 (1995). Because the various statutes expressly give EPA broad discretion in determining penalty amounts, any funds not “collected” (because they were spent on an SEP) are “directly authorized by law” and therefore do not require deposit in the Treasury under the MRA. *Id.* at 817–18.

211. For example, the 1998 SEP Policy sets forth a formula that requires calculation of the Settlement Amount without a SEP (i.e., a penalty calculation) and then subtracts the SEP’s after-tax value times the mitigation percentage and calls the final amount the Settlement Penalty. *See* 1998 SEP Policy, 63 Fed. Reg. at 24,801–02. The 1987 Department of Justice position is that “mitigation” is a reduction in the penalty amount. *See* Ludwizewski Testimony, *supra* note 189, at 25–26. The Comptroller General’s analysis rests upon the notion that EPA can only “compromise, remit, or mitigate” civil penalties, implying that only penalties are involved. *See* 1992 Letter, *supra* note 196, at *2–*3.

212. *See* *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 53 (1987) (“If the citizen prevails in such an action, the court may order injunctive relief and/or impose civil penalties payable to the United States Treasury.”); *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n.*, 453 U.S. 1, 14 n.25 (1981) (“Under the FWPCA, civil penalties, payable to the Government, also may be ordered by the court.”); *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 81 (3d Cir. 1990) (“Congress intended that any penalties assessed in a citizen suit be treated as ‘miscellaneous receipts.’ Under the Miscellaneous Receipts Act, any person having custody of such public funds must deposit them in the Treasury within three days of receipt.”); *Sierra Club, Inc. v. Elec. Controls Design*, 909 F.2d 1,350, 1,354 (9th Cir. 1990) (“We agree with the district court that if the payments required under the proposed consent decree are civil penalties within the meaning of the Clean Water Act, they may be paid only to the U.S. treasury.”); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1,517, 1,522 (9th Cir. 1987) (“[A]ny penalties recovered from such an

payments involved in a settlement are automatically considered “penalties”; numerous courts have found that payments not delineated as “penalties,” or made before a finding of liability has taken place, are not required to be paid to the Treasury.²¹³ It is precisely before liability is determined that most settlements take place, and thus the caselaw exempts SEP payments from the category of penalties and thus from the purview of the MRA. In short, the caselaw rejects the government’s unstated assumption. Worse, assuming that all dollars involved in a settlement are penalty dollars creates an internal inconsistency for the government, because under the caselaw all such dollars must go to the Treasury—thereby barring SEPs in *all* situations. This is completely inconsistent with the government’s notion that SEPs with nexus are permissible. Indeed, given this caselaw, it is difficult to see how the presence or absence of nexus has any impact on the analysis at all. The “penalty dollars” assumption is certainly no valid legal basis for—and may in fact undermine the legal propriety of—the nexus requirement.

Third, the notion that nexus has any relevance to the issue of the prohibition against augmentation of appropriations is dubious at best. While the MRA essentially protects the separation of powers inherent in the Constitution’s Appropriations Clause,²¹⁴ it still requires “receipt” or “possession” of government monies—an occurrence that does not appear to take place with an SEP. The situations discussed in the Comptroller General Letters add a wrinkle: What if the SEP allows the agency to accomplish a goal it otherwise has no funds for? On at least a theoretical

action are paid into the United States Treasury.” (quoting *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp 440, 449 (D. Md. 1985)); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n.5 (N.D.N.Y. 1991) (“Penalties paid as a result of a [33 U.S.C.A.] § 1365 citizen suit do not go to the plaintiff who instituted the suit, but rather are paid into the United States Treasury.”).

213. See *Powell Duffryn Terminals*, 913 F.2d at 82 (“[W]e do not reject PIRG’s argument that in a Clean Water Act case, a court may fashion injunctive relief requiring a defendant to pay monies into a remedial fund. . . . But here, once the court labeled the money as civil penalties it could only be paid into the Treasury.”); *Elec. Controls Design*, 909 F.2d at 1355 (“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.”); Stevens, *supra* note 21, at 777 (“None of the cases decided since [*Elec. Controls Design*] challenge the proposition that if a consent decree precedes a finding of liability, the payments therein can go to [SEPs].” (citation omitted)).

214. See *Scheduled Airline Traffic Offices, Inc. v. Dept. of Def.*, 87 F.3d 1356, 1361–62 (D.C. Cir. 1996) (“The [MRA]’s requirement that a Government official ‘receiving money for the Government from any source’ deposit the money in the Treasury, 31 U.S.C. § 3302(b), derives from and safeguards a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause, that ‘[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,’ U.S. Const. art. I, § 9, cl. 7. . . . By requiring government officials to deposit government monies in the Treasury, Congress has precluded the executive branch from using such monies for unappropriated purposes.”).

level, substituting SEP projects for funding that Congress did not provide appears to be an end-run around the appropriation process. The educational programs at the heart of the Nuclear Regulatory Commission, Commodities Futures Trading Commission, and EPA schemes discussed in the 1992 and 1993 Letters seem to come close to the line of allowing the agency to accomplish educational goals within the agency's mandate without congressional funding. This argument seems to place the focus on the effect of the funding: Does the funding accomplish an agency goal without congressional appropriation? Yet such a focus cannot justify the fine line the Comptroller General wants to draw, for an SEP with nexus can accomplish the same end-run around the appropriations process by allowing EPA to accomplish a goal without congressional funding. In short, the effect focus of the argument certainly does not justify a nexus requirement—in fact, it renders nexus irrelevant by changing the focus from the SEP-violation link to the effect of the funding. Furthermore, it is doubtful that the vast majority of potential SEPs can really be said to accomplish an EPA goal without congressional appropriation, both because the SEP Policy expressly precludes it,²¹⁵ and because the federal environmental statutes leave a significant amount of responsibility to parties other than EPA so that the environmental benefits of an SEP cannot always be seen as having the effect of avoiding the federal appropriations process.²¹⁶ There is simply no principled way to distinguish the

215. See 1998 SEP Policy, 63 Fed. Reg. at 24,798–99, which identifies the following as “legal guidelines” (separate from nexus) that govern SEPs under the Policy:

- a. A project cannot be used to satisfy EPA's statutory obligation or another federal agency's obligation to perform a particular activity. Conversely, if a federal statute prohibits the expenditure of federal resources on a particular activity, EPA cannot consider projects that would appear to circumvent that prohibition.
- b. A project may not provide EPA or any federal agency with additional resources to perform a particular activity for which Congress has specifically appropriated funds. A project may not provide EPA with additional resources to perform a particular activity for which Congress has earmarked funds in an appropriations committee report. Further, a project cannot be used to satisfy EPA's statutory or earmark obligation, or another federal agency's statutory obligation, to spend funds on a particular activity
- c. A project may not provide additional resources to support specific activities performed by EPA employees or EPA contractors. For example, if EPA has developed a brochure to help a segment of the regulated community comply with environmental requirements, a project may not directly, or indirectly, provide additional resources to revise, copy[,] or distribute the brochure.

216. For example, the Clean Water Act and the Clean Air Act shift significant responsibilities to the states that have programs approved by EPA. Environmental benefits at a local level may thus only indirectly benefit EPA programmatic goals. Clearly, the more broadly one views EPA's goals, the easier it is to claim that an SEP's environmental benefit achieves that goal in violation of the

Appropriations Clause effects of SEPs with nexus from those without nexus, and thus the argument for a nexus requirement based on the prohibition against augmenting appropriations fails.

It is clear that the MRA cannot provide a legal basis for a nexus requirement. Either it does not apply at all (because SEPs do not satisfy the requirements of receipt or possession) or it creates a situation in which all SEPs must be viewed as either permissible or prohibited.

3. Political Sources

There is no doubt that a rule mandating that SEPs be connected to the violation makes political sense. Requiring that the environmental benefits/reduced risks created by an SEP be given to the population/ecosystem affected by the violation is equitable—having borne the brunt of the damage caused by a violation, it is fair that the population or ecosystem receive some benefit.²¹⁷ From a political perspective, an affected population is the most likely to react positively or negatively to the settlement of a violation, and an SEP that adequately addresses that population's injuries or interests no doubt increases the chance of a positive reaction. Such political considerations, however, do not necessarily justify a legal rule requiring *all* SEPs be connected to the violation, as the nexus portion of the SEP Policies require. Indeed, one can imagine situations in which some (but not all) of a series of SEPs are local (and thereby satisfy affected populations) while others address different, non-local concerns. The point is that the balance here is political, not legal. If EPA wants all SEPs to be connected to the violation because of political exigencies, then it should admit that fact, and articulate the political principles (such as equity or environmental justice) that govern the decision-making process, instead of trying to dress up a political concern as a "legal requirement" of nexus.

B. Possible Consequences of Eliminating Nexus

Given that there appears to be no legitimate legal basis for requiring nexus, the policy question becomes what would happen without a nexus requirement. The answer is that there would be a considerably broader range of possibilities in which SEPs could bestow environmental benefits.

Appropriations Clause, but the harder it is to justify allowing SEPs with nexus while excluding SEPs without nexus, as both will achieve environmental benefits.

217. See Boergers, *supra* note 201, at 787–88 (arguing that SEPs “ensure that those close to the harm receive a direct remedy” and are consistent with the goals of the environmental justice movement), 792–93 (arguing that a nexus requirement is necessary “[t]o ensure SEPs benefit those injured by violations of environmental regulations.”).

A violation in New York could conceivably create an opportunity for benefits in California or some other environmentally threatened area. The broader range of possibilities would also give EPA planning or administrative options that could result in coordinated (or “aggregated”) benefits in areas needing assistance. For example, one could envision a coordinated effort to use SEP aggregation in an area devastated by a natural disaster.

The notion of aggregation is not new. It has been used for years in the context of wetlands mitigation “banks” that combine SEPs from different defendants within a watershed into a single project to develop or improve wetlands.²¹⁸ Further, EPA has acknowledged that, at least in some circumstances, aggregation can produce additional benefits by providing “increased leverage” for larger environmental benefits and the opportunity for defendants “in smaller cases to take advantage of the SEP Policy.”²¹⁹ As an example of permissible aggregation, EPA describes how three different defendants can work together on the restoration and conservation of a particular piece of property, with one defendant acquiring the property and transferring it to a third party, the second conducting a stream-bank cleanup and revegetation project, and the third building a fish ladder.²²⁰ Yet despite the recognition of the potential benefits of aggregation, EPA lets the perceived need for nexus force it to impose limits on aggregation based on geography,²²¹ time,²²² and the need for each individual project to

218. As EPA describes it, “[a] mitigation bank is a wetland stream, or other aquatic resource area that has been restored, created, enhanced, or (in certain circumstances) preserved” which is then set aside to compensate for future conversions of wetlands for development activities. “A mitigation bank may be created when a government agency, corporation, nonprofit organization undertakes these activities under a formal agreement with a regulatory agency. . . . The value of a bank is defined” by quantifying the wetland values restored or created in terms of “credits.” EPA, MITIGATION BANKING FACTSHEET, <http://www.epa.gov/owow/wetlands/facts/fact16.html>. According to EPA, a 2005 assessment by the Army Corps of Engineers estimated that approximately 450 mitigation banks were in operation and an additional 198 were in the planning stages. *Id.* EPA identifies as one of the benefits of mitigation banking over individual projects that “it may be more advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation into a single large parcel or contiguous parcels.” EPA, Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58,605 (Nov. 28, 1995).

219. See Memorandum from John Peter Suarez, Assistant Administrator, U.S. Env'tl. Prot. Agency, to Reg'l Counsels (Region I-X) et al. (Dec. 15, 2003), *available at* <http://www.epa.gov/compliance/resources/policies/civil/sep/seps-thirdparties.pdf> at 2 [hereinafter 2003 Aggregation Memo].

220. *Id.* The 2003 Aggregation Memo also offers as a second example the development of a compliance and training program for a regulated sector in which defendants develop specialized training materials for different users so that a larger group of users gets covered. *Id.* at 2–3.

221. *Id.* at 2 (limiting analysis to violations “in the same general geographic area”).

222. *Id.* (limiting analysis to settlements “at approximately the same time”); *see also id.* at 3 (“[A]ggregation of SEPs in this manner may require that all settlements be completed at approximately

meet SEP Policy requirements to be “itself worthwhile with environmental or public health benefits.”²²³ If in fact there are no compelling legal requirements for nexus, the imposition of these limits only serves to hamstring SEP potential. If instead it were freed from the geographic restrictions of nexus and the related misperceptions of the requirements of the MRA, EPA would have the ability to coordinate the aggregation of projects on a regional or national basis. In short, removing nexus creates a more hospitable environment for SEPs and the benefits they can produce, makes those benefits available in a higher number of locations, and likely increases the number of SEPs that actually take place—exactly the goals EPA wants to achieve.

III. A DOLLAR AIN'T WORTH WHAT IT USED TO BE: THE ECONOMIC DISINCENTIVE OF THE MITIGATION PERCENTAGE

A second potential impediment to wider SEP usage lies in the clear “second rate” status that dollars spent on SEPs suffer under the EPA’s later SEP Policies. While the 1991 SEP Policy recognized that the penalty reduction afforded by an SEP could be as high as 100% of the value of the SEP,²²⁴ with a wide variety of percentages used,²²⁵ since the 1995 SEP Policy EPA has capped the mitigation percentage at 80%,²²⁶ and in practice sought much lower percentages.²²⁷ EPA’s approach presents defendants

the same time . . .”).

223. *Id.* at 2. In discussing aggregation through the performance of complementary, segregable SEPs, the 2003 Aggregation Memo states: “Such an approach would have to meet the following conditions to address any MRA concerns: (1) each discrete project must have a nexus to the violations at issue in the particular settlements and meets [sic] all conditions of the SEP Policy; (2) each discrete project must be itself worthwhile with environmental or public health benefits; and (3) the settlement must hold each defendant/respondent responsible for implementation and completion of a specific portion of the larger project.” *Id.*

224. See 1991 SEP Policy, *supra* note 34, at 35,610. Although the Policy does not cite a percentage number, the fact that it allows a penalty reduction or mitigation “up to the net present after-tax cost” of the SEP clearly sets the ceiling at 100%. *Id.*

225. Anecdotal evidence exists of 100% mitigation percentages being used. See *Current Developments: Enforcement, Company Begins Work on Pollution Prevention Project Under Dollar-for-Dollar Settlement with EPA*, 23 ENV’T REP. (BNA) 1,413, 1,413 (1992). Other evidence exists that lower percentages were being used. See *Correction*, 25 ENV’T REP. (BNA) 325 (June 17, 1994) (EPA states a company must typically spend \$2.50 on an SEP for each one dollar reduction in fines (a 40% mitigation percentage)).

226. See 1995 SEP Policy, 60 Fed. Reg. at 24,861; 1998 SEP Policy, 63 Fed. Reg. at 24,802. Both policies recognize two exceptions to the 80% ceiling: (1) if the defendant is a small business, government agency or non-profit organization, or (2) if the defendant is undertaking a pollution prevention SEP, then the percentage can go up to 100% if the “project is of outstanding quality.” 1995 SEP Policy, 60 Fed. Reg. at 24,861; 1998 SEP Policy, 63 Fed. Reg. at 24,802.

227. The author’s own experience in private practice is that EPA (and state agencies following EPA’s lead) generally started at a 1.5:1 ratio (meaning that the defendant would have to spend \$1.50 on

with an unusual choice: simply pay a penalty (so that each dollar paid reduces the penalty owed by \$1) *OR* pay a smaller amount of penalty cash and cover the rest with an SEP in which the defendant must spend \$1.25 or more to reduce the penalty amount by a dollar. Assuming a rational economic actor (which EPA must assume in order for the deterrence of substantial civil penalties to work²²⁸), the SEP Policies create a built-in economic disincentive to undertake SEPs by making the dollars spent on SEPs less valuable than dollars simply paid as penalties. This SEP dollar “discount” could explain why only 12% of settlements involve SEPs: it is cheaper for most defendants to avoid undertaking an SEP. Given this obvious disincentive, why would EPA want to cap the mitigation percentage (and hence the value of an SEP dollar) at 80%?

One possible reason is that EPA believes the defendant gets some economic value for doing an SEP that raises the value of an SEP dollar. For example, the Department of Justice long worried about defendants trying to take tax deductions for SEPs.²²⁹ That concern, however, has been addressed by the SEP Policy since 1991, for the cost of the SEP that is to be used to reduce the penalty is an *after-tax* cost,²³⁰ thereby removing the value that a tax deduction might have otherwise provided.²³¹ No other economic benefit has been cited to justify a discount of SEP dollars, and thus the 80% mitigation percentage cap cannot rely on economic

an SEP to get a \$1.00 reduction in penalty), or about a 66% mitigation percentage. This is consistent with the language of the 1998 SEP Policy, which identifies six factors and only awards the 80% mitigation percentage to SEPs performing very well under all six factors. *See* 1998 SEP Policy, 63 Fed. Reg. at 24,802.

228. The 1998 SEP Policy, for example, states that substantial monetary penalties “promote environmental compliance and help protect public health by deterring future violations by the same violator” by ensuring that the “unfair economic advantage” of non-compliance is negated, thereby “leveling” the national playing field. *Id.* at 24,796–97. This assumes that a rational actor weighs the economic impact of the penalty and determines that compliance is cheaper than non-compliance.

229. *See* Ludwiszewski Testimony, *supra* note 189, at 21 (“[C]redit projects also have substantial benefits for one group of people: polluters. To this extent, they may significantly undermine the deterrent impact of a government enforcement action. For example, polluters often attempt to take tax deductions for payments to environmental trusts, or for money that they use to finance a credit project.”).

230. *See* 1991 SEP Policy, *supra* note 34, at 35,609–10 (“EPA must not lower the amount it decides to accept in penalties by more than the after-tax amount the violator spends on the project.”); 1995 SEP Policy, 60 Fed. Reg. at 24,857 (Step 4 in the process to determine how much penalty mitigation is appropriate is to “[c]alculate the net-present after-tax cost of the project and then determine the appropriate amount of penalty mitigation.”); 1998 SEP Policy, 63 Fed. Reg. at 24,801 (“The net present after-tax cost of the SEP, hereinafter called the ‘SEP COST,’ is the maximum amount that EPA may take into consideration in determining an appropriate penalty mitigation for performance of a SEP.”).

231. In the alternative, the defendant can agree not to take the SEP costs as a tax deduction. The EPA’s MODEL SEP CAFO, *supra* note 104, contains a paragraph requiring the defendant to provide proof to the Agency that none of the dollars spent on the SEP were deducted from federal taxes. *Id.* ¶25.

differences between SEP and penalty dollars.

Another possible reason for the SEP “discount” is that a defendant gets some other, non-economic benefit for undertaking the SEP. The most likely benefit is one of public image or relations: the defendant can portray itself as doing the environmentally beneficial project,²³² and thus the SEP “discount” simply monetizes the defendant’s ability to “look green.” There are two problems with this notion. First, there is no evidence to suggest that a 20% reduction in the value of SEP dollars is an accurate value of the public-relations benefit. Second, the likelihood of such a benefit is small because the SEP Policy seeks to diminish such a benefit by “re-tarnishing” the defendant. The Policy specifically requires a defendant to agree “that whenever it publicizes an SEP or the results of an SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.”²³³ EPA’s model consent agreement for settlements involving SEPs requires memorializing this requirement.²³⁴ Given this requirement to link the SEP to the enforcement action, it is doubtful that there is a significant public-relations benefit to be gained. It is certainly not a basis for requiring a discount of at least 20% on all SEP dollars.

A third possible reason for the SEP discount is that SEP dollars simply do not have the same deterrent effect as penalty dollars. The SEP Policies do not affirmatively claim this. In fact, the 1995 SEP Policy explicitly stated that SEP dollars can have a deterrent effect.²³⁵ The problem, however, is that there is no evidence to suggest that defendants treat SEP dollars differently. Indeed, EPA’s underlying notion that penalties deter

232. See Ludwizewski Testimony, *supra* note 189, at 21 (“[P]olluters often are careful to structure their credit projects to give themselves the maximum public relations benefit, to appear to the public as people who support the environment rather than people who have been caught violating our laws and damaging the environment.”).

233. See 1998 SEP Policy, 63 Fed. Reg. at 24,803.

234. EPA’s MODEL SEP CAFO, *supra* note 104, provides model language to use in resolving administrative or judicial actions via settlements involving SEPs. The relevant provision of the Model Agreement includes public statement language similar to that in the SEP Policy:

Any public statement, oral or written, in print, film, or other media, made by Respondent making reference to the SEP shall include the following language:
“This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of [citation to legal requirements violated].”

See id. ¶22. This idea is not new. EPA’s 1984 Framework directed Agency negotiators to take into account that “[t]he company should agree that any publicity it disseminates regarding its funding of the [SEP] must include a statement that such funding is in settlement of a lawsuit brought by EPA or the State.” 1984 Framework, *supra* note 22, at 35,080.

235. 1995 SEP Policy, 60 Fed. Reg. at 24,857 n.1 (“Depending on circumstances and cost, SEPs also may have a deterrent impact.”).

non-compliance²³⁶ rests on a rational economic actor premise—that regulated entities will choose compliance because the cost of non-compliance will ultimately be greater.²³⁷ If regulated entities are reacting rationally to the economic costs of compliance versus non-compliance, it is hard to see how \$1 paid in penalty has a 20% greater deterrent effect than \$1 paid for an SEP. A net dollar out of a defendant’s pocket has the same economic effect on the defendant regardless of the reason why the dollar is being removed. If anything, a rational economic actor will view “discounted” SEP dollars as a cost to avoid (given that it will take more SEP dollars to achieve the same net effect as penalty dollars)—an effect that is magnified as the mitigation percentage gets smaller.²³⁸ Thus, absent a finding that there is some additional benefit from an SEP dollar that makes it more attractive to spend (and EPA has not identified such a benefit), it is dubious to claim that penalty dollars deter more than SEP dollars.

236. See 1998 SEP Policy, 63 Fed. Reg. at 24,796–97:

EPA also seeks substantial monetary penalties in order to deter noncompliance. Without penalties, regulated entities would have an incentive to delay compliance until they are caught and ordered to comply. Penalties promote environmental compliance and help protect public health by deterring future violations Penalties help ensure a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time.

237. EPA views deterrence from penalties as affecting the defendant’s economic position: “If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion.” EPA, *Policy on Civil Penalties*, 17 *Env’tl. L. Rep. (Env’tl. L. Inst.)* 35,083, at 35,083 (Feb. 1990). EPA seeks to assure this result by requiring that the violator pay the economic benefit of non-compliance plus an amount for the “gravity” of the violation because:

The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount [i.e., the gravity component] to ensure that the violator is economically worse off than if [he] had obeyed the law.

INTERIM CLEAN WATER ACT SETTLEMENT POLICY, *supra* note 25, at 6 (quoting EPA, *Policy on Civil Penalties*, 17 *Env’tl. L. Rep. (Env’tl. L. Inst.)* 35,083, at 35,803 (Oct. 1990) (first alteration added by author and second alteration by EPA).

238. For example, a mitigation percentage of 80% (the maximum allowed under the SEP Policy) requires that a defendant spend \$1.25 on an SEP to achieve a \$1.00 deduction (because $1.25 \times .80 = 1.00$). A mitigation percentage of 66.67% requires the expenditure of \$1.50 in SEP dollars to achieve a \$1.00 penalty deduction ($1.50 \times .6667 = 1.00$), and a 50% mitigation percentage requires \$2.00 in SEP for every one dollar in penalty reduction. Thus, from a defendant’s perspective, an 80% mitigation percentage requires a 25% higher expenditure (i.e., actual dollars out of the defendant’s pocket) on the SEP than can be achieved by paying a straight penalty, a 66.67% mitigation percentage requires a 50% higher expenditure, and a 50% mitigation percentage requires paying double the cost of a straight penalty payment. From this perspective, the economic disincentive of SEPs becomes plainly evident, and such disincentive grows rapidly as the percentage moves downward.

A fourth possible reason for the SEP discount is that it gives EPA flexibility to assure that SEPs with greater benefits receive greater credit. The 1995 and 1998 SEP Policies made clear that SEP proposals are to be assessed according to certain criteria;²³⁹ the better the SEP scored on those criteria, the higher the mitigation percentage should be.²⁴⁰ This ability to apply a kind of “sliding scale” to evaluate SEPs makes sense as a way to encourage defendants to make the best possible proposals or, to put it a different way, to protect against mediocre proposals. Yet if the goal is to encourage the best possible proposals, a cap that prohibits the mitigation percentage from exceeding 80% seems a poor way to achieve that goal because the best possible, most innovative projects will still require the defendant to pay more to do an SEP than simply pay a penalty alone.

It therefore appears that there is no legal or economic basis for discounting SEP dollars. However, one can question whether this SEP “discount” really creates an economic disincentive—after all, on average 12% of defendants over the past several years chose to do an SEP. If one presumes rational economic actors, why would 12% of defendants act in a way that appears to be against their economic interest? One possible explanation may lie in the fact that the SEP Policy does not necessarily create two economically different alternatives for defendants to compare and thereby discover the economic disincentive of an 80% mitigation percentage.

The assumption underlying the SEP negotiation process is that a defendant starts with the penalty amount without knowing the cost of an SEP, and then the SEP’s mitigation percentage is calculated so that the defendant can compare the total cost of paying a penalty only to the cost of paying a smaller penalty plus an SEP. The SEP Policy’s five-step calculation process²⁴¹ in general and the 1998 SEP Policy’s SEP Penalty Calculation Worksheet²⁴² in particular create the illusion that EPA *starts* with a penalty amount without an SEP and *then* calculates a penalty plus SEP amount.²⁴³ With both amounts on the table, the SEP “discount”

239. The 1995 SEP Policy used five criteria: (1) benefits to the public or environment at large; (2) innovativeness; (3) environmental justice (i.e., mitigating damage or risk to minority or low income populations); (4) multimedia impacts (i.e., reducing emissions to more than one medium); and (5) pollution prevention. 1995 SEP Policy, 60 Fed. Reg. at 24,861. The 1998 SEP Policy used six (the five from the 1995 SEP Policy plus community input). 1998 SEP Policy, 63 Fed. Reg. at 24,802.

240. 1998 SEP Policy, 63 Fed. Reg. at 24,802.

241. 1995 SEP Policy, 60 Fed. Reg. at 24,857; 1998 SEP Policy, 63 Fed. Reg. at 24,801–02.

242. 1998 SEP Policy, 63 Fed. Reg. at 24,804.

243. EPA Penalty Policies suggest that at least agency personnel know the penalty amount without an SEP (Step 1 in the SEP Policy’s five-step process). For example, the Interim Clean Water Act Settlement Policy states that “[a] settlement penalty calculation [i.e., the minimum penalty amount for which EPA is willing to settle the case] is generally required before the Agency files an

inherent in the mitigation percentage virtually guarantees that the penalty plus SEP amount will be higher (in total dollar terms), and the economic disincentive will be plain to see. What would happen, however, if only one amount—the cost of a penalty plus SEP—was on the table?

The SEP Policy is structured in such a way that SEP proposals come from the defendant, *not* from EPA.²⁴⁴ Nowhere in the Policy does EPA commit to proposing SEPs. Rather, the Policy speaks in terms of “proposed” SEPs,²⁴⁵ suggesting that EPA is reviewing a proposal from a defendant to see if the SEP is acceptable under the Policy. Indeed, the extensive discussion of the legal principles (including nexus) governing review of SEPs and the various detailed descriptions of the SEP categories make more sense as guidance to *defendants* wishing to propose an acceptable SEP. One would not think that EPA would need more than twenty pages of Policy text to tell itself what is and is not acceptable for SEPs the agency was proposing. From the perspective of administrative efficiency, it makes sense for EPA to expect defendants to propose SEPs because it is more efficient (given that defendants know best what they are interested in doing) than EPA guessing what the defendant might be willing to do. Thus, the most likely scenario for an SEP’s appearance in the negotiating process is for a defendant to propose an SEP.

As the SEP Policies make clear, SEPs do not exist in isolation but rather are part of a larger settlement, and thus a defendant will only be interested in proposing an SEP as part of a full settlement offer. This means that the SEP will appear as part of an offer that includes injunctive relief, a penalty amount, the SEP, and a penalty mitigation percentage. The defendant, as a rational economic actor, will propose a package that makes economic sense to it, and this package in turn will become the basis for

administrative complaint or refers a civil action to the Department of Justice.” See INTERIM CLEAN WATER ACT SETTLEMENT POLICY, *supra* note 25, at 3.

244. See 1995 SEP Policy, 60 Fed. Reg. at 24,858 (“This Policy is being issued to provide greater flexibility to EPA in exercising its enforcement discretion to establish appropriate settlement penalties *and to the regulated community in proposing [SEPs] . . .*”) (emphasis added); Boergers, *supra* note 201, at 781:

SEPs are considered during settlement negotiations between EPA and alleged violators Once the EPA finds a violation and the violator acknowledges responsibility, the parties begin negotiations. During those negotiations, the defendant has the opportunity to propose a potential SEP as part of its penalty package. EPA then evaluates the proposed project to determine whether it is acceptable under the 1998 SEP guidelines.

245. See 1998 SEP Policy, 63 Fed. Reg. at 24,797 (“Further, whether the Agency decides to accept a proposed SEP as part of a settlement, and the amount of any penalty mitigation that may be given for a particular SEP, is purely within EPA’s discretion.”); *id.* at 24,799 (“EPA has identified seven specific categories of projects which may qualify as SEPs. In order for a proposed project to be accepted as a SEP, it must satisfy the requirements of at least one category plus all the other requirements established in this Policy.”).

negotiations with EPA. In this scenario, the package drives the negotiations, and whether settlement is achieved is a function of whether EPA and the defendant can reach agreement on a final version of the package that both can accept. There is no penalty amount without an SEP (Step 1 of the five-step process) for the defendant to compare the negotiations against—only the economics of the package. As such, the economic disincentive inherent in the “discount” for SEP dollars does not surface in such a scenario.

How can such a scenario ever occur when the SEP Policy sets forth a five-step process and an SEP Penalty Calculation Worksheet that must be included in the case file?²⁴⁶ One possibility is that the analysis and the Worksheet can easily be filled out *after* the settlement is negotiated so that they both show that the already agreed-upon SEP meets the Policy. This ability to “back calculate” gives EPA maximum flexibility in settlement negotiations. When the defendant proposes the package, EPA never has to disclose any of its internal calculations—it need only negotiate until the “package” reaches a level which EPA will accept in settlement.²⁴⁷ EPA’s own policies give it wide latitude in this regard because the strictures guiding EPA’s calculation of the penalty in the first place leave significant room for movement. The Penalty Policy driving the calculation of the Settlement Amount Without a SEP (Step 1 in the SEP Policy’s five-step process) looks to the quasi-quantitative factor of the economic benefit of non-compliance²⁴⁸ and the purely qualitative factors of the gravity of the

246. See 1998 SEP Policy, 63 Fed. Reg. at 24,804 (“In each case in which a SEP is included as part of a settlement, an explanation of the SEP with supporting materials . . . must be included as part of the case file. The explanation of the SEP should explain how the five steps set forth in Section A.3 above have been used to evaluate the project . . .”).

247. The author’s own experience in private practice mirrored this very scenario. EPA never revealed any of the calculations in the five-step process; rather, EPA simply negotiated from the defendant’s proposal until agreement on all terms was reached. Given the fact that the SEP Policy views the calculations as outside the Freedom of Information Act and protected by the attorney-client and attorney work-product privileges, see 1998 SEP Policy, 63 Fed. Reg. at 24,804 (explaining the Policy is a public document unlike documentation and explanations of a particular SEP), it is not surprising that EPA would not want to reveal its internal calculations to a defendant—especially if the numbers being negotiated are *above* the minimum penalty amount at which EPA is willing to settle.

248. See INTERIM CLEAN WATER ACT SETTLEMENT POLICY, *supra* note 25, at 4 (describing the economic benefit calculation as having the objective of “plac[ing] violators in the same financial position as they would have been if they had complied on time [because] [p]ersons that violate the CWA are likely to have obtained an economic benefit as a result of delayed or completely avoided pollution control expenditures during the period of noncompliance”). Thus, EPA requires tallying up all pollution control expenditures (such as monitoring and reporting costs like sampling and analysis; capital equipment improvements, replacements, or repairs, including the engineering and design costs; and operation and maintenance costs for the equipment that should have been but was not installed) and running them all through an EPA computer program called the BEN model. *Id.* at 4–5. BEN in turn generates a dollar amount said to be the “economic benefit of noncompliance” that the Penalty Policy

violation,²⁴⁹ gravity adjustment factors such as flow reduction²⁵⁰ and the defendant's history of recalcitrance,²⁵¹ and the risks of litigation.²⁵² The second step of the SEP Policy process looks at gravity and economic benefit as well.²⁵³ The large amount of discretion inherent in these factors means that there is a wide range of dollar amounts which can be used in a "back calculation" to justify a settlement package with an SEP. In this way, it is entirely possible for EPA to satisfy the SEP Policy without ever putting a penalty-only number on the table or revealing its internal calculations under the five-step process in the Policy—and thereby avoid revealing directly the "discount" in the mitigation percentage.

The natural consequence of EPA's inherent discretion in a "back calculation" system is that the mitigation percentage becomes relatively meaningless "window dressing" from an economic perspective. For if the defendant's economic analysis rests upon the settlement package negotiated with EPA, then the defendant only cares about the actual amount of penalty and the actual cost of the SEP and not some theoretical number or value which was "mitigated" to achieve that final, total package. Indeed, much of the apparent structure of the five-step penalty calculation process is illusory, especially if it is merely a post-hoc justification for an already agreed upon

and the SEP Policy both require be considered in determining the penalty the defendant must pay. *Id.* at 4; 1998 SEP Policy, 63 Fed. Reg. at 24,801. While seemingly straightforward, the calculation of economic benefit has generated controversy in enforcement litigation, especially in terms of the interest rate being used to calculate the time value of the money the defendant delayed spending by not coming into compliance when the defendant should have done so. *See* United States v. Allegheny Ludlum Corp., 366 F.3d 164, 177–84 (3d Cir. 2004); United States v. Smithfield Foods, Inc., 191 F.3d 516, 529–31 (4th Cir. 1999); United States v. WCI Steel, Inc., 72 F. Supp. 2d 810, 830–31 (N.D. Ohio 1999).

249. The gravity component looks at such qualitative factors as the significance of the violation, the "actual or *potential* harm to human health or the environment," and the significance of non-effluent limit violations, as well as the quantitative factor of the "number of effluent limit violations." INTERIM CLEAN WATER ACT SETTLEMENT POLICY, *supra* note 25, 6–10. While the Policy seeks to create the appearance of quantifying these factors (by requiring that numerical values be assigned to each, and then the sum of these numerical factors being multiplied by a dollar amount to show the gravity factor component of the penalty), the way identified for assigning the numerical values still leaves a significant amount of discretion and therefore makes gravity more subjective than objective. *Id.* at 6.

250. *Id.* at 12. According to the 1995 Interim Policy, gravity can be reduced by as much as 50% depending on the flow from the defendant's facility (the lower the flow, the greater the percentage reduction). *Id.*

251. The Policy says this factor "is used to increase the penalty based on a violator's bad faith, or unjustified delay in preventing, mitigating, or remedying the violation" and is present when the violator ignores an EPA or state order. *Id.* There is no definition of what constitutes "bad faith."

252. This factor, used to decrease the penalty amount, looks at "weaknesses or equitable problems" with the government's case "that could be expected to persuade a court to assess a penalty less than the statutory maximum amount." *Id.* at 13. It requires an assessment of legal strengths, evidentiary matters, witness availability, and equitable defenses. *Id.* at 14. Such an assessment is clearly subjective.

253. 1998 SEP Policy, 63 Fed. Reg. at 24,801.

amount.

If in fact the mitigation percentage is ultimately meaningless, why have it in the SEP Policy at all? Perhaps because it allows EPA to create the illusion that it is being “tough” on violators, consistent with the Policy’s strong assertions about the importance of “substantial monetary penalties” and deterring non-compliance.²⁵⁴ One must question, however, whether the illusion is worth the price if that price is to discourage defendants from seeking to propose SEPs because of the perceived “discount” their SEP dollars will receive. The fact that almost 90% of defendants have chosen not to do SEPs strongly suggests that this discouragement of SEP participation is not merely theoretical. If EPA is really serious about encouraging more SEPs, it needs to explore why nearly 90% of defendants are turning away from what EPA says it wants to encourage.

The better solution is to get rid of the 80% cap on the mitigation percentage and re-adopt the 100% ceiling in the 1991 SEP Policy. Such a cap would allow EPA to treat mediocre projects less favorably but would incentivize and reward defendants who develop proposals that deliver solid environmental benefits. More importantly, it would remove the “second class” stigma that SEPs inevitably get when SEP dollars are “discounted.” Such a change is much more likely to increase SEP participation rates, and thereby allow more environmental benefits from SEPs.

CONCLUSION

Having defendants agree to undertake Supplemental Environmental Projects holds great promise for providing environmental benefits beyond those arising from mere compliance with the law or governmental programs. If EPA is seriously committed to its stated goal of increasing the use of SEPs above the historically low participation levels, it needs to examine critically the restraints its own policies impose on such projects. The insistence on nexus and a mitigation percentage ceiling found in EPA’s approach toward SEPs both lack legal or economic justification and work to shackle SEPs in ways that forfeit potential benefits. Careful reexamination of nexus and the mitigation percentage ceiling justify removal of these concepts from EPA’s policies. Such a change is simple to implement and would unshackle SEPs, likely increase their use in environmental enforcement cases, and make the good idea of SEPs even better by increasing the environmental benefits that enforcement activity can bring.

254. 1995 SEP Policy, 60 Fed. Reg. at 24,856; 1998 SEP Policy, 63 Fed. Reg. at 24,796.

CHART FOOTNOTES

123. Numbers are rounded to nearest hundredth.

124. FY 1992 ACCOMPLISHMENTS REPORT, *supra* note 6, app. at 6 tbl. 2.

125. *Id.*

126. *Id.* app. at 20. EPA reported a total of 409 SEPs, but 187 of them were in the Mobile Sources Air Program, and 183 of those were public awareness SEPs arising out of tampering or fuel switching violations. *Id.* app. at 20 n.2. EPA thought it necessary to exclude these Mobile Sources SEPs from its analysis. *See id.* Thus, the table also shows the number of SEPs without these Mobile Sources SEPs included.

127. The first number represents the utilization rate for the number of SEPs including the Mobile Sources Air Program SEPs (i.e., 409/1,644), and the second reflects the number without the Mobile Sources SEPs (i.e., 222/1,644).

128. *See* FY 1993 ACCOMPLISHMENTS REPORT, *supra* note 6, at 2–3.

129. No direct data exist for this category. I have therefore inserted an average number based on EPA, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1991, app. at 7 tbl. 2 (1992), <http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy91accomp-rpt.pdf> (showing, in the National Penalty Report, 1,505 Administrative Penalty settlements and 159 Civil Judicial settlements, for a total of 1,664 settlements), FY 1992, FY 1994, and FY 1995 numbers, on the assumption that the number during FY 1993 would be reflective of the trends in the data from these surrounding years. This assumption seems justified given that the average being inserted here fits into the trend suggested by the number of Civil Judicial settlements from these other years, but there is admittedly no proof that such a trend reflects EPA policies or other actions. Because this is an estimated number, the Total Number of Settlements column and the SEP Utilization percentage column for this FY are impacted by the relative nature of this number.

130. FY 1993 ACCOMPLISHMENTS REPORT, *supra* note 6, at 2–6. As was the case in FY 1992, EPA reported sixty-two SEPs attributable to the Mobile Sources Air Program, and thus the numbers here reflect the amount including and excluding these SEPs.

131. The first number represents the utilization rate for the number of SEPs including the Mobile Sources Air Program SEPs (291/1,779), and the second reflects the number without the Mobile Sources SEPs (229/1,779).

132. FY 1994 ACCOMPLISHMENTS REPORT, *supra* note 6, at 4–6 tbl. 4-2.

133. *Id.* at 4–6.

134. *Id.* at 2–12.

135. FY 1995 ACCOMPLISHMENTS REPORT, *supra* note 6, at 3–4 tbl. 3-2.

136. *Id.*

137. *Id.* at 3–15 tbl. 3-4.

138. FY 1996 ACCOMPLISHMENTS REPORT, *supra* note 122, at 2–5 Exhibit 2-4.

139. *Id.*

140. EPA, ANNUAL REPORT ON ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT IN 1999, at 8 (2000),

<http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy99accomplishment.pdf> [hereinafter FY 1999 ACCOMPLISHMENTS REPORT]. This number is an estimate derived by interpreting a bar graph. Because it is an estimate, the SEP Utilization % column for this FY is impacted by the relative nature of this number.

141. EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT: FY 1997 app. at A-1 tbl. A-1 (1998),

<http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy97accomplishment.pdf> [hereinafter FY 1997 ACCOMPLISHMENTS REPORT].

-
142. *Id.*
143. *Id.* at 2–7.
144. FY 1998 ACCOMPLISHMENTS REPORT, *supra* note 6, at 91.
145. *Id.* at 92.
146. EPA, ENFORCEMENT AND COMPLIANCE TRENDS 1 (2003) [hereinafter 2003 TRENDS CHART], available at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2003/fy2003enforcementandcompliancefiveyeartrends.pdf>.
147. FY 1999 ACCOMPLISHMENTS REPORT, *supra* note 140, at B-4.
148. *Id.* at B-5.
149. *Id.* at 8. This is the only time that EPA provided a breakdown of the SEPs, reporting that 173 were in administrative actions, and twenty-four were in judicial actions. *Id.* Thus, one can calculate SEP utilization rates for each type of enforcement action. Those utilization rates were 12.74% for Administrative Penalty Settlements and 11.16% for Civil Judicial Settlements.
150. 2004 TRENDS CHART, *supra* note 119, at 2.
151. EPA, FY 2001 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT 66 (Dec. 1, 2002), available at <http://www.epa.gov/compliance/resources/reports/accomplishments/oea/fy01accomplishment.pdf>.
152. 2003 TRENDS CHART, *supra* note 146, at 1.
153. 2004 TRENDS CHART, *supra* note 119, at 2.
154. 2003 TRENDS CHART, *supra* note 146, at 2.
155. *Id.* at 1.
156. 2004 TRENDS CHART, *supra* note 119, at 2.
157. 2003 TRENDS CHART, *supra* note 146, at 2.
158. *Id.* at 1.
159. 2004 TRENDS CHART, *supra* note 119, at 2.
160. 2003 TRENDS CHART, *supra* note 146, at 2.
161. *Id.* at 1.
162. 2004 TRENDS CHART, *supra* note 119, at 2.
163. Because no data were available, I have inserted an average number based on FY 2000–2003 and FY 2005 numbers, on the assumption that the number during FY 2004 would be reflective of the trends in the data from these surrounding years. As with the insertion for FY 1993, the assumption seems justified by the fit of the inserted number into the trend suggested by these surrounding years, but there is admittedly no other proof of such a trend. Because this is an estimated number, the Total Number of Settlements column and the SEP Utilization % column for this FY are impacted by the relative nature of this number.
164. 2004 TRENDS CHART, *supra* note 119, at 1.
165. EPA, COMPLIANCE AND ENFORCEMENT ANNUAL RESULTS: FY2005 NUMBERS AT A GLANCE 2 (2005), available at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2005/2005numbers.pdf>.
166. *Id.*
167. EPA, COMPLIANCE AND ENFORCEMENT ANNUAL RESULTS: FY2005 SUPPLEMENTAL ENVIRONMENTAL PROJECTS HIGHLIGHTS (2005), available at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2005/2005sepscsehighlights.html>.
168. EPA, COMPLIANCE AND ENFORCEMENT ANNUAL RESULTS: FY2006 NUMBERS AT A GLANCE (2006), available at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2006/fy2006numbers.pdf>.
169. *Id.*
170. *Id.*