

The EPA's Supplemental Environmental Projects Policy

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INTRODUCTION

On May 5, 1998, the U.S. Environmental Protection Agency (EPA) issued a final policy regarding Supplemental Environmental Projects (SEP).¹ This policy provides an alternative to the traditional requirement of paying civil penalties to the U.S. Treasury² for violations of the Clean Water Act (CWA),³ Clean Air Act (CAA),⁴ and other environmental statutes. The SEP policy allows a violating party to implement a designated project, which benefits the environment, related to the party's violation in exchange for mitigation of the penalty.⁵

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1. See Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24,796 (1998) [hereinafter 1998 SEP Policy]. The policy can also be accessed through EPA's website, Office of Enforcement and Compliance Assurance, U.S. Env'tl. Protection Agency, *EPA Supplemental Environmental Projects Policy* (visited Feb. 10, 1999) <<http://es.epa.gov/oeca/sep/sepfinal.html>>.

2. See Miscellaneous Receipts Act, 31 U.S.C. § 3302(b) (1994) (requiring agencies to deposit money received from any source into the Treasury of the United States). This money is known as a "civil penalty." See EPA Civil Penalty Policy, [Federal Laws] Env't Rep. (BNA) 21:0761 (Feb. 16, 1984).

3. 33 U.S.C. §§ 1251-1387 (1994).

4. 42 U.S.C. §§ 7401-7671q (1994).

5. See 1998 SEP Policy, *supra* note 1, at 24,796. For a more detailed discussion of specific SEPs, see *infra* Part III. For further examples of actual SEPs, search the EPA's National SEP Database on its website at U.S. Env'tl. Protection Agency, *National SEP Database* (visited Dec. 11, 1998) <<http://es.epa.gov/oeca/sep/searchsep.htm>>. For consent decrees entered containing SEPs, see *Armstrong v. ASARCO, Inc.*, 138 F.3d 382 (8th Cir. 1998); *United States v. Hudson Foods, Inc.*, No. Civ. A. CB98-1468, 1998 WL 279168 (D. Md. Sept. 4, 1998); *United Anglers v. City of S. San Francisco*, No. C 96-3116 EFL, 1997 WL 362118 (N.D. Cal. June 19, 1997); *United States v. Georgia-Pacific Corp.*, 960 F. Supp. 298 (N.D. Ga. 1996); *Conservation Law Found. v. City of Fall River*, Civ. A. No. 87-3067-Z, 1992 WL

All else being equal, the penalty of a party performing a SEP will be lower than the penalty of a party who does not perform a SEP.⁶

The SEP policy's primary purpose 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."⁷ Through the implementation of a SEP, the violator performs environmental remediation beyond that required by law. Businesses often need an additional incentive to act beyond the minimum required by law, and the SEP policy helps provide that incentive.

This Note is divided into four parts. Part I discusses the new SEP policy, providing background on the policy as well as insight into its implementation. Part II uses insights of the environmental justice movement to argue that EPA should use the policy to provide relief to the injured community. Part III elaborates on these themes through case studies of specific SEP settlements. Finally, Part IV outlines a model SEP policy that focuses on community involvement and increasing the connection between violations and the SEPs.

I

THE 1998 SUPPLEMENTAL ENVIRONMENTAL PROTECTION SEP POLICY

A. *Background of the SEP Policy*

SEPs evolved during a time of change for environmental regulation. The original schemata of environmental regulation arose after Americans realized that common law tort and property causes of action were insufficient to remedy increasing environmental harms. Consequently, Congress enacted a series of environmental statutes aimed at controlling those harms. The statutory and administrative environmental regulatory scheme became known as "command and control" regulation. Under command and control regulation, the regulating agency dictated the standards, limits, and technology to be used by industry.⁸

Command and control regulation, however, has been

52520 (D. Mass. Mar. 11, 1992).

6. See 1998 SEP Policy, *supra* note 1, at 24,797.

7. *Id.* at 24,796.

8. See generally Michael C. Blumm, *Studying Environmental Law: A Brief Overview and Readings for a Seminar*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 309, 314-18 (1992) (discussing pollution control schemes pursuant to command and control regulation).

criticized by law and economics theorists as inefficient and time consuming.⁹ Recognizing the problems of command and control techniques, a call for regulatory reform went out and was answered with new ideas for environmental enforcement, including SEPs. Unlike command and control regulation, which focuses on the harm done to the environment, SEPs look to the future by providing incentive for polluters to go beyond the minimum required by law.¹⁰

Because of reform efforts, environmental laws have shifted away from "end-of-the-pipe" regulation¹¹ and toward "pollution prevention."¹² The shift to pollution prevention began when Congress included a provision in the CAA allowing up to

9. See generally Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985); Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era From an Old Idea?*, 18 ECOLOGY L.Q. 1 (1991); Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVTL. L. 153 (1988); Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1259 (1981) (arguing for the establishment of pollution trading in which parties would be able to buy and sell the right to pollute). The law and economics school of thought introduced economic analysis into legal scholarship, which has impacted many areas of law, most notably tort law. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). One scholar argued that the law and economics analysis of tort law highlights its deterrence function, a reason now given as the primary rationale for tort liability rules among mainstream scholars. See Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 378 (1994).

10. The belief behind the goal of encouraging industry to go "beyond compliance" is that environmental regulations are derived from a process that is, to some extent, political. Thus, the regulations developed are not those that necessarily produce the optimal benefit for the environment but instead are the outcome of a war between opposing groups, viewpoints, and priorities. The regulations also represent an application of a "cost-benefit" analysis in which the rule-maker recognizes that the highest standard may be too stringent (*i.e.*, too costly) for many companies to comply with. Thus, the setting of the standard recognizes a compromise. In the introduction to the Final SEP Policy, EPA recognizes that additional environmental benefit is possible when parties choose to go "beyond compliance." See 1998 SEP Policy, *supra* note 1, at 24,796. Therefore, an underlying assumption of the SEP Policy, and of this Note, is that additional benefit usually accrues to the environment when measures greater than those required by law are taken to restore and protect the environment.

11. This term indicates that most environmental regulations only penalize the violator after the damage has already been done, *i.e.*, released by the pipe. See EPA's *Pollution Prevention Strategy*, 56 Fed. Reg. 7849 (1991) [hereinafter *Pollution Prevention Strategy*] (statement by President George Bush noting that end-of-the-pipe programs are inadequate).

12. See Laurie Droughton, Note and Comment, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 PACE ENVTL. L. REV. 789 (1995).

\$100,000 of a penalty to be spent on settlement projects.¹³ Pollution prevention remains important today, as evidenced by Congress' 1990 enactment of the Pollution Prevention Act (PPA)¹⁴ mandating that "the national policy of the United States [will be] that pollution should be prevented or reduced at the source whenever feasible."¹⁵ EPA has interpreted PPA's enactment as support for the SEP policy.¹⁶

While SEPs improve the environment through mitigation projects, they can also be viewed as "pollution prevention" projects because they encourage actions that reduce pollution. For example, a CAA violator who installs a higher level filter on its smokestack than that required by law ejects fewer particulates into the air. In this manner, SEP projects can play an important role in reducing pollution through prevention.

SEPs began as environmental improvement projects (also called credit or mitigation projects)¹⁷ used by EPA instead of fines to settle civil enforcement cases under the authority of the CAA.¹⁸ In 1991, EPA published a formal policy on the use of environmental projects to mitigate penalties.¹⁹ After "numerous complaints that the 1991 SEP Policy was too cumbersome, rigid and difficult to understand and apply,"²⁰ EPA promulgated the 1995 Interim SEP Policy. The 1995 Interim SEP Policy became

13. 42 U.S.C. § 7604(g)(2) (1994).

14. *Id.* §§ 13101-13109.

15. *Id.* § 13101(b).

16. See Pollution Prevention Strategy, *supra* note 11, at 7859 (designating "inclusion of pollution prevention conditions in Agency enforcement settlements" as one method of complying with Congress' mandate in the PPA); see also Droughton, *supra* note 12, at 793.

17. These projects later became known as SEPs. See Leslie J. Kaschak, *Supplemental Environmental Projects: Evolution of a Policy*, 2 ENVTL. LAW. 465, 467-68 (1996).

18. 42 U.S.C. § 7524(c)(1) (1994) ("The Administrator may compromise, or remit, with or without conditions, any administrative penalty which may be imposed under this section.").

19. See Kaschak, *supra* note 17, at 469.

20. Interim Revised EPA Supplemental Environmental Projects Policy Issued, 60 Fed. Reg. 24,856 (1995) [hereinafter 1995 Interim SEP Policy]. The Policy can also be accessed through EPA's website at *Interim Revised Policy on the Use of Supplemental Environmental Projects in EPA Enforcement Settlements* (visited Nov. 9, 1998) <<http://es.epa.gov/oeca/osre/950508.html>>. The 1995 Interim SEP Policy outlined a five-step process to determine whether a proposed project would qualify for SEP status. See 1995 Interim SEP Policy, *supra* at 24,857. Further, the 1995 Policy established guidelines to ensure that SEPs fall under the authority of EPA. See *id.* One example of these guidelines is the requirement that the SEP and the environmental violation contain a nexus. See *id.* at 24,858. However, the definition of nexus is quite broad; the SEP can involve a different pollutant in a different medium. See *id.* Finally, the 1995 Interim Policy laid out a three-step process for calculating the final penalty. See *id.* at 24,860-61.

the basis for public comment and revision,²¹ resulting in the final 1998 SEP Policy. The 1998 SEP Policy incorporates feedback from users of the 1995 Interim SEP Policy and attempts to increase the use of SEPs by encouraging violators to choose SEPs as a means of mitigating their penalties. The major changes in the 1998 policy are: (1) explicit encouragement of community input into the development of SEPs, (2) prohibition on SEP use to mitigate claims for stipulated penalties, and (3) the creation of an "other" category for projects that satisfy all SEP criteria but do not fit into the seven delineated categories.²²

B. Mechanics of the 1998 SEP Policy

SEPs are considered during settlement negotiations between EPA and alleged violators of an environmental statute or regulation. Once 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. In particular, the project cannot be an action already required by federal, state, or local law or one the party will likely be compelled to execute.²³ This ensures that parties anticipating an injunction do not propose an SEP similar in design to the anticipated injunction, thereby receiving a double benefit through manipulation of the SEP program.

One major goal of the 1998 SEP Policy is to assist the violator in devising a project that EPA will accept. To further this goal, the policy delineates seven categories of approved SEPs.²⁴ In addition, prior to approving a SEP, EPA considers the following six factors to determine mitigation percentages: (1) benefits to the public/environment at large, (2) innovativeness, (3) environmental justice, (4) community input, (5) multimedia impacts, and (6) pollution prevention.²⁵ If the SEP proposal is

21. See Kaschak, *supra* note 17, at 466.

22. See 1998 SEP Policy, *supra* note 1, at 24,796. The categories are: (1) public health, (2) pollution prevention, (3) pollution reduction, (4) environmental restoration and protection, (5) assessments and audits, (6) environmental compliance promotion, and (7) emergency planning and preparedness. The policy also provides an "other" category that allows violators to suggest SEPs that may not fall into a designated category. See *id.* at 24,799-801.

23. See *id.* at 24,798.

24. See *supra* note 22.

25. See 1998 SEP Policy, *supra* note 1, at 24,802.

accepted, then EPA will calculate a final penalty while taking into consideration the violator's SEP settlement plan.²⁶ EPA's exact calculations are as follows: (1) EPA calculates the minimum dollar amount it would assess for the environmental violation if no SEP was conducted;²⁷ (2) EPA determines how much it would be willing to decrease that penalty if a SEP is conducted; (3) EPA calculates the cost of the SEP through a computer model called PROJECT;²⁸ (4) EPA determines the amount of the SEP cost that will be applied as mitigation;²⁹ and (5) EPA subtracts the maximum mitigation amount from the settlement sum without a SEP.³⁰ Once the calculations are complete, the agency then compares the figure to the minimum penalty amount with a SEP, and the greater dollar value is the minimum final settlement penalty allowable.

To ensure that EPA's authority to use SEPs is not challenged,³¹ the 1998 SEP Policy provides guidelines to ensure a proposed SEP is within EPA's authority and consistent with all statutory and constitutional requirements.³² These guidelines

26. EPA does not use the SEP to *reduce* the penalty amount. Instead, EPA takes the performance of the SEP into account as *mitigation* when setting the penalty. See Droughton, *supra* note 12, at 816. This framing of the procedure is necessary to avoid challenges to EPA's authority over SEPs. Such a challenge may arise if the process were couched in terms of "reducing the penalty" because such an action could be seen as reducing or diverting funds from the U.S. Treasury, which would be a violation of the Miscellaneous Fees Act and is an action only Congress can take. See Miscellaneous Receipts Act, 31 U.S.C. § 3302 (1994).

27. This amount is obtained by calculating the economic benefit of noncompliance using the applicable EPA penalty policy. The gravity component of the penalty is then calculated using applicable EPA penalty policy. Finally, the two sums are added. This is the minimum amount necessary to settle the case without a SEP. See 1998 SEP Policy, *supra* note 1, at 24,801.

28. The cost must be the net present after tax cost. Three costs may be counted: (1) capital costs, (2) one-time non-depreciable costs, and (3) annual operation costs and savings. The computer model PROJECT can be downloaded from U.S. Envtl. Protection Agency, OECA, *PROJECT 1.01 for Windows* (visited Dec. 11, 1998) <<http://www.epa.gov/oeca/models/project.html>>.

29. This is done by calculating the SEP (a) mitigation percentage and then the (b) mitigation amount. In terms of the mitigation percentage, one must determine what percentage of the SEP cost may be applied as mitigation to the penalty. This percentage depends on the ability of the proposed SEP to achieve six factors: benefits to the public/environment at large, innovativeness, environmental justice, community input, multimedia impacts, and pollution prevention. The mitigation percentage should not exceed 80%, except for small businesses, government agencies, non-profit organizations, and outstanding pollution prevention projects, which may reach 100%. In terms of the mitigation amount, the SEP cost is multiplied by the mitigation percentage to obtain the mitigation amount. See 1998 SEP Policy, *supra* note 1, at 24,802.

30. See *id.* at 24,801-02 (explaining the entire calculation process).

31. See *infra* Part I.C for elaboration on an argument against agency use of SEPs.

32. See 1998 SEP Policy, *supra* note 1, at 24,798-99. These guidelines provide

assist those creating a SEP proposal as well as those deciding whether to approve the SEP. Perhaps the most important guideline, discussed in detail below, is the relationship between the SEP and the violation, otherwise known as the "nexus."³³

C. Critiques of the Policy

Since its inception, EPA authority to implement the SEP policy has been debated. The central question is whether EPA is asserting power reserved for Congress by mitigating the statutory penalty in a manner not authorized by statute. The first serious review of these mitigation projects occurred in 1987 during congressional hearings on the proposed Coastal Resources

that: (1) a project cannot be inconsistent with the underlying statutes; (2) all projects must advance at least one objective of the underlying statute and have an adequate "nexus" or relationship between the violation and the proposed project; (3) EPA may not play any role in managing or controlling SEP funds, nor may EPA retain authority to manage or administer the SEP; (4) the type and scope of each project must be defined in the signed settlement agreement; (5)(a) a project cannot be used to satisfy EPA's statutory obligation or another federal agency's obligation to perform a particular activity. Conversely, EPA cannot consider projects appearing to "circumvent" express statutory prohibition of federal resource expenditure on the activity; (b) a project may not provide EPA or any federal agency with additional resources to perform an activity for which Congress has specifically appropriated or earmarked funds; (c) a project may not provide additional resources to support EPA employees or contractors; (d) a project may not provide additional funds to a federal grantee.

33. While the exact basis for the "nexus" requirement is not explained in the Policy, I believe it stems from a report written by the General Accounting Office (GAO) determining that EPA lacked authority to allow certain SEP settlements because of an inadequate relationship between the violation and the project. See Comptroller General Report B-247155.2 to Hon. John D. Dingell, Chairman, Subcomm. on Oversight and Investigations, Comm. on Energy and Commerce, available in 1993 WL 798227 (C.G.) (Mar. 1, 1993). Further, the GAO does not fully explain its rationale for requiring a nexus either. The general purpose behind the requirement appears to be a desire to uphold the separation of powers doctrine. In other words, the GAO considers the EPA's powers to be delegated from Congress. Thus, EPA can use only the power that has been delegated, such as prosecuting environmental regulation violations. The GAO report argues that to allow 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. See *id.*

I believe this theory stems from the general maxim of law that a remedy is the corollary of a right. See THOMAS M. COOLEY, 1 A TREATISE ON THE LAW OF TORTS 24 (D. Avery Haggard ed., 4th ed. 1932). Remedy and right are closely tied. This concept is applicable in the SEP situation as well. If a violation occurs (a law is broken), then the penalty aspect is activated. It would be anathema in our legal system to have the remedy/penalty for a violation be unrelated to the injury. For example, if someone suffers \$10,000 in damages, our legal system would not allow the award of \$10,000,000 to remedy the damages. In a similar vein, the 1998 SEP Policy requires a connection between the SEP and the violation. See *infra* Part II.C for an additional reason why the SEP should be closely related to the violation.

Restoration Act.³⁴ Participants of these hearings discussed EPA's authority to use mitigation projects (now SEPs).³⁵ To quell congressional fears about EPA's authority, the 1998 SEP Policy strengthened the nexus requirement between a SEP and the harm done by the environmental violation. Further, to ensure that SEP projects do not supplant congressional authority to fund environmental remediation projects, EPA is not involved in the implementation phase of any SEP projects.³⁶

II

AN ANALYSIS OF SEP POTENTIAL AND IMPLEMENTATION

In enacting the 1998 SEP Policy, EPA sought to create a clear policy that allows industry to easily calculate the cost and benefits of an SEP. By enabling industry to determine the benefits of implementing a SEP, EPA hoped that more companies would consider conducting a SEP.

This Note argues that while EPA may have met its goal, the SEP policy also has the potential to fill a gap in current environmental regulations. The current environmental regulation scheme of command and control developed as society recognized that private litigation is unable to solve the problems of environmental degradation. Command and control regulation, however, does not provide a direct remedy to those harmed by a violation of the law.³⁷ SEPs provide this remedy by encouraging

34. See *Environmental Credit Projects Under Clean Water Act: Hearing on H.R. 3411 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment and the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 100th Cong. (1987).

35. See *id.* These discussions took place during debate over H.R. 3411, the Coastal Resources Restoration Act, which would have amended the Marine Protection, Research and Sanctuaries Act and the Federal Water Pollution Control Act. See *id.* at 35-37.

36. This Note does not address the details of this debate.

37. Throughout this Note, "harm" is used to refer to substantive harms, such as injury to health, property, and the environment. Other types of "harms," which I will not be focusing on, are often utilized in discussions of environmental litigation, such as procedural harms. For an example of procedural harms, see the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4333 (1994) (requiring conformity of administrative procedures to the National Environmental Policy). See also *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n.*, 449 F.2d 1109, 1112 (1971) (recognizing that NEPA contained procedural provisions that provide a basis for a cause of action when violated). An example of a procedural harm is an inadequate environmental impact statement (EIS). When an agency produces an inadequate EIS, a citizen has the basis for a suit. Since any type of federal suit requires a harm, see U.S. CONST. art. III ("cases and controversies" requirement), a citizen's injury from an inadequate EIS is termed a "procedural harm."

companies to engage in projects that benefit those communities most affected by environmental damage. Thus, this Note argues that EPA should recognize this potential and utilize the SEP policy to fulfill it.

A. *Background on Environmental Regulation*

Until the 1970s, environmental harms were redressed only through private claims of common law tort or property. This system of environmental regulation was ineffective in preventing environmental degradation. Any remedies offered were after the fact and not preventive.³⁸ Many environmental plaintiffs struggled—and often failed—to prove causation, thereby losing in court and leaving them with no remedy.³⁹ Furthermore, because most environmental harms occur on a large scale and diffusely affect many individuals, common law causes of action, which predominately redress discreet harms to individuals, have serious difficulties remedying modern environmental problems. In addition, other elements, such as the complexity of environmental cases⁴⁰ and the expense of litigation,⁴¹ reduce the ability of the common law to alleviate environmental damage because they preclude plaintiffs from even getting into court.

In the 1970s, the public recognized the deficiencies of the common law to prevent environmental damage.⁴² Consequently, environmental law shifted to a new era that focused on statutory enactment and administrative implementation.⁴³ This transformation established comprehensive environmental

38. See Blumm, *supra* note 8, at 311; see also Marcia R. Gelpie, *Organizing Themes of Environmental Law*, 16 WM. MITCHELL L. REV. 897, 899 (1990). While the remedy of the injunction is indeed preventive, the commonly sought remedy of damages can only pay someone money for their loss. It cannot restore the forest or cure the cancer, for example.

39. See Blumm, *supra* note 8, at 311; see also PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986) (discussing, among other things, the trial judge's grant of summary judgment to defendants, based on his conclusion that plaintiffs had failed to establish causation).

40. See N. Williams Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 199 (1966) ("[The] evidence . . . is often highly technical and next to impossible for even the most conscientious and alert judge or layman to assimilate and evaluate.").

41. See Peter S. Menell, *The Limitations of Legal Institutions for Addressing Environmental Risks*, 5 J. ECON. PERSP. 93 (1991).

42. See Blumm, *supra* note 8, at 310.

43. See *id.* In 1970, Congress created the EPA, whose primary mission is to protect the health and viability of the environment. Additionally, several new statutes were passed regulating pollution of the air, surface water, groundwater, as well as the disposal of toxic and hazardous wastes and the cleanup of contaminated toxic sites. See generally *id.*

protection and resulted in command and control regulation.⁴⁴

A crucial part of the command and control enforcement scheme is the civil penalty, which provides both specific and general deterrence against future violations. The most worthwhile penalty, or the penalty that deters many companies from illegal actions, is the disgorgement of profits gained through noncompliance with environmental regulations. By removing any economic benefit a violator might have accrued, the penalty eliminates the financial benefit of noncompliance. Moreover, it protects companies who do adhere to environmental laws from being disadvantaged in the marketplace.

While environmental protection has been reorganized into an administrative structure, private litigation remains important. The majority of private environmental litigation, however, is brought in the form of citizen suits. These suits, brought by private individuals and community groups, are critical in compelling government agencies to act against private actors and in forcing government agencies to require compliance with environmental statutes.⁴⁵ Nevertheless, other types of private legal action, such as common law tort and property actions, remain ineffective in monitoring the environment and often fail to remedy the harm.⁴⁶

B. Problems with the Current System of Environmental Regulation

While the current environmental statutory scheme creates a deterrent for potential violators, it generally does not provide a direct remedy to those injured by a breach of an environmental regulation. EPA actions against violators seek injunctions, civil penalties, and remediation of any harm;⁴⁷ however, none of these remedies compensates those citizens for any injuries caused by the violation. Moreover, while all people are ostensibly "harmed" by environmental degradation, it is the smaller groups, like neighbors of a polluting incinerator or property owners of flood-

44. See *supra* Part I for a discussion and critique of the command and control model.

45. See, e.g., ROBERT V. PERCIVAL, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 664, 665 (noting that Congress has authorized citizen suits as the classic agency-forcing device).

46. See generally James E. Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 UCLA L. REV. 429 (1971) (providing a concise overview of the market's imperfections in allocating environmental resources).

47. See 1998 SEP Policy, *supra* note 1, at 24,796. Such remediation applies solely to environmental degradation and not to injuries suffered by people.

prone lands resulting from nearby wetland destruction, who accrue more damage than the public. Further, all civil penalties are paid into the U.S. Treasury, never to the citizens injured by the violation.

While some injured parties can and do seek private remedies through tort or property actions, the difficulties of proving causation severely hamper the effectiveness of these actions. The difficulties of proving causation and the latency period for most environmental harms still exist. Thus, despite the assistance of the current administrative scheme in preventing environmental harms, it does little, if anything, to provide an adequate remedy to those individuals directly injured. Moreover, those near the violation and those far away receive the same benefit from any remedy offered by the violator.

C. *The SEP Policy can Provide a Remedy not Available in the Current System*

The SEP policy can fill the gap in the environmental enforcement and regulatory scheme to ensure that those close to the harm receive a direct remedy. Under the SEP policy, a violator is required to perform specific actions to improve the environment, such as wetland restoration or installation of pollution reduction equipment. If the project is related to the violation, it should directly benefit those nearby, the people who are most likely to have suffered from the violation. Thus, a SEP settlement allows the benefits to accrue more proportionately to the harm incurred.

This view of the SEP policy has been informed by the goals of the environmental justice movement, which works to ensure a more proportional distribution of environmental burdens across all socioeconomic and racial groups. The environmental justice movement recognizes that a heavier burden of pollution and environmental degradation is borne by racial minorities and poor communities.⁴⁸ Activists focus their efforts to raise awareness of this problem and struggle to change it. The movement has been

48. See generally *id.*; Robert D. Bullard, *Environmental Justice For All: It's the Right Thing to Do*, 9 J. ENVTL. L. & LITIG. 281 (1994); Robert D. Bullard, *Environmental Racism and 'Invisible' Communities*, 96 W. VA. L. REV. 1037 (1994); Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445 (1994); Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921 (1992). But cf. Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994).

very successful in heightening awareness that "[r]isk burdens are localized, yet the benefits are generalized across all segments of society."⁴⁹

By focusing in part on providing relief to the injured community, the environmental justice movement has provided an important critique of environmental regulation.⁵⁰ In fact, specific environmental justice factors are considered in calculating penalties assessed against violators,⁵¹ which proponents hope will help industry evaluate the effects of their environmental transgressions on disadvantaged communities. This benefit of remedying the harm to those most directly injured by the violation is available through the SEP policy. Thus, EPA officials should utilize the policy to achieve this remediation since traditional enforcement practices and common law litigation are insufficient.

III

CASE STUDIES: A LOOK AT SEPS IN PRACTICE

Despite criticism of the 1995 Interim SEP Policy, SEPs are involved in numerous agency settlements. In Fiscal Year (FY) 1996, the number of EPA administrative and civil cases completed containing one or more SEPs was 235 out of a total of 1296 cases (18%), with a value of \$65.8 million. In FY 1997, the number of SEPs was 266 out of a total of 1624 cases (16%) with an estimated value of \$85.4 million.⁵² One can surmise that the clarifications of the 1998 SEP Policy will only help continue such a trend. As this Note argues, despite the success of the SEP, EPA should go beyond merely increasing SEP usage and move toward ensuring that each project provides value to the injured community. Discussed below are two case studies that exemplify how SEPs can benefit local communities and how some SEPs, while promoting valuable environmental goals, fail to remedy the localized harm caused by the environmental violation.

49. Robert D. Bullard, *Introduction*, in *UNEQUAL PROTECTION* xv (Robert D. Bullard ed., 1994).

50. See *supra* note 47.

51. See 1998 SEP Policy, *supra* note 1, at 24,797, for a general discussion regarding environmental justice and SEPs.

52. See Norman W. Spindel, Esq., Update on Supplemental Environmental Projects, Presentation at the American Bar Association and EPA Regional II Office of Regional Counsel and the New York Bar Association Brown Bag Lunch (Aug. 27, 1998) (outline on file with author).

A. Boston University SEP

On October 8, 1997, EPA brought an action against Boston University (B.U.).⁵³ The complaint, filed in the U.S. District Court of Massachusetts, alleged that B.U. was responsible for two oil spills into the Charles River and numerous hazardous waste violations in the laboratories at its medical school.⁵⁴ The oil leak resulted from a slow, chronic leak in an underground storage tank that resulted in oil seeping into the river for many months.

Along with the complaint, EPA filed a consent decree in which B.U., EPA, and DOJ settled the suit for \$771,000 dollars.⁵⁵ The monetary fine assessed to B.U. totaled \$253,000, and the two SEPs, which B.U. agreed to conduct as part of the settlement, cost \$518,000.⁵⁶ In addition to conducting the SEPs, B.U. agreed to correct its alleged violations.⁵⁷

The first SEP attempted to address the problem of oil leakage into the Charles River. In particular, it involved the identification and construction of new storm water control technologies around the B.U. campus to control storm water pollution, a major cause of poor water quality in the Charles River. The SEP is currently being conducted in conjunction with the Charles River Watershed Association (CRWA), a local community group.⁵⁸ John DeVillars, EPA Regional Administrator for Region I,⁵⁹ stated that the project, "will not only end [Boston University's] negative impact on the Charles but will help limit stormwater discharges from on campus locations."⁶⁰

The first SEP project exemplifies a SEP's ability to encourage violators to take actions beyond mere compliance with the minimum requirements of law. B.U.'s construction of the

53. See *Boston University Agrees to Pay Fine and Undertake Environmental Projects to Settle Environmental Lawsuit*, BUSINESS WIRE, Oct. 8, 1997, available in Westlaw 10/8/97 Bus. Wire 19:1600.

54. See *id.*

55. See *id.*

56. See *id.*

57. See *id.*

58. See CRWA, *Streamer: Winter 1997: Project to Curb Stormwater Pollution* (visited Aug. 30, 1999) <<http://crwa.org/streamer/winter97/strmw97p3.htm>> (discussing CRWA's involvement in this project, including monitoring and advising). Roughly \$50,000 from the SEP cost has been earmarked for CRWA's involvement. See CRWA (visited Aug. 30, 1999) <<http://www.crwa.org>> (providing information on the organization).

59. The EPA regions can be found at EPA, *Regions* (visited Aug. 30, 1999) <<http://www.epa.gov/epahome/locate2.htm>>.

60. See *supra* note 53.

treatment project for storm water runoff will reduce oil discharges to the Charles River across the entire campus and will result in a cleaner river than if EPA had sought only standard fines. By implementing a SEP, EPA ensures that the communities along the Charles River will receive the benefit of a cleaner river, something that a higher payment by B.U. into the U.S. Treasury could not guarantee. Moreover, the SEP ensures that B.U. will clean up the contaminated river, a task that the local communities want but potentially are unable to achieve because of limitations in their ability to bring suit. Through the SEP, such a suit becomes unnecessary.

B.U.'s second SEP also directly benefits the surrounding community. This SEP involves the rehabilitation of a community garden located near the medical school that low-income, and minority residents of the area use for subsistence food.⁶¹ Soil testing of the garden indicated that lead levels were above those recommended for growing vegetables, so as part of its settlement, B.U. will pay for a full cleanup of the garden with the help of the South End Lower Roxbury Open Space Land Trust.⁶²

B. Ashland, Inc., SEP

On October 1, 1998, EPA brought an action against Ashland, Inc.⁶³ The complaint alleged illegal discharges and reporting violations at petroleum refineries in Kentucky, Minnesota, and Ohio. The statutes violated included the Clean Air Act (CAA),⁶⁴ the Clean Water Act (CWA),⁶⁵ the Resource Conservation and Recovery Act (RCRA),⁶⁶ the Emergency Planning and Community Right-to-Know Act (EPCRA),⁶⁷ and the Toxic Substances Control Act (TSCA).⁶⁸ The discharges included the release of sulfur dioxide, an air pollutant, and wastewater discharges into the Big Sandy River and the Mississippi River.

Also on October 1, 1998, EPA filed a consent decree in which Ashland, Inc., EPA, and DOJ settled the suit for \$32.5 million

61. *See id.*

62. *See id.*

63. *See* EPA, Region 5 Office of Regional Counsel, *Enforcement Action Database Fiscal Year 1999, October 1998* (visited Aug. 30, 1999) <<http://www.epa.gov/grtlakes/orc/enfactions99/week1098.htm>>.

64. 42 U.S.C. §§ 7401-7671q (1994).

65. 33 U.S.C. §§ 1251-1387 (1994).

66. 42 U.S.C. §§ 6901-6992(k) (1994).

67. 42 U.S.C. §§ 11001-11050 (1994).

68. 15 U.S.C. §§ 2601-2692 (1994).

dollars.⁶⁹ The civil penalties amounted to \$5.8 million. In addition, Ashland will spend \$12 million to correct its violations and spend approximately \$14.9 million to perform several SEPs in the states in which it committed the violations.⁷⁰

Ashland's SEPs include the restoration of 274 acres of rare and ecologically significant prairie grass in Minnesota, which will then be donated to the state of Minnesota for permanent preservation as a scientific and nature area.⁷¹ Second, Ashland will assist the state of Kentucky with air monitoring as part of the Tri-State Initiative, a collaborative effort among the states of Kentucky, Ohio, and West Virginia.⁷² Finally, Ashland will install two hydrofluoric acid release detection and mitigation systems in the Ohio and Minnesota refineries, which will provide protection for the workers and the surrounding communities from possible hydrofluoric acid releases.⁷³

C. *Analysis of the Boston University and Ashland SEPs*

B.U.'s settlement exemplifies the thesis of this Note; SEPs can be used to remedy community injuries that may otherwise go untreated. The SEPs conducted by B.U. provide a most likely unattainable remedy under normal environmental law. While the medical school may not have directly caused the contamination of the community, its discharges affected the adjacent neighborhood in some capacity. Therefore, this SEP will provide a direct benefit to the nearby community.

In particular, the cleanup of the neighborhood garden perfectly illustrates the potential for SEPs to provide localized benefits. Without the SEP, the community surrounding the garden would likely be unable to sue responsible parties to recover for the contamination and restoration of the soil. Difficulties demonstrating causation and the expense of litigation, for example, would likely keep the community out of court.

The Ashland case study also demonstrates why EPA must include a provision in its policy that promotes the use of SEPs to remedy the harm incurred by neighboring communities. Without

69. See *U.S. Announces \$32.5 Million Settlement with Ashland Inc. for Multiple Environmental Law Violations*, ENVTL. NEWS, Oct. 1, 1998, available in 1998 WL 683449 (E.P.A.).

70. See *id.*

71. See *id.*

72. See *id.*

73. See *id.*

such a provision, EPA runs the risk of accepting SEP policies that do nothing to benefit those directly harmed by the environmental violation. For example, Ashland agreed to restore acres of prairie grass in Minnesota, one of the states in which the illegal discharges occurred. While preservation of prairie grass is an important environmental goal, it is unlikely to benefit the communities directly injured by the discharges any more than communities not directly affected by the violation. Thus, the Ashland case study may demonstrate that a tighter nexus requirement is needed to ensure the SEP policy provides a remedy for harms to nearby communities.⁷⁴

In requiring Ashland to add devices to the refineries that exceed current requirements under the law, the Ashland SEP exemplifies how SEPs can be used to help polluters go beyond the pollution prevention techniques required by law. Indeed, the technology of these new devices exceeds that required by applicable laws and thus improves the health and safety of workers and the surrounding community. It is doubtful that the company would have volunteered to expend costs to install these devices absent the SEP agreement.

The B.U. SEPs directly benefited the parties harmed by the environmental violations, whereas the Ashland prairie grass SEP, while providing some benefits, lacked as close a nexus to the harm. However, both case studies indicate how SEPs can be used to require polluters to exceed the minimum required by law. Without SEPs it is unclear whether adjacent communities would have the ability to recover for injuries caused by environmental violations.

IV

REFINING THE SEP POLICY

To ensure SEPs benefit those injured by violations of environmental regulations, the SEP process must contain two key factors. Fortunately, the 1998 policy includes them: (1) any

74. In *United States v. ASARCO, Inc.*, 138 F.3d 382 (8th Cir. 1998), a group of citizens opposed the final consent order containing a SEP from being entered by the court. The primary complaint of the citizen group was that ASARCO's environmental violations were not adequately addressed in the SEP. See *id.* at 385. ASARCO exemplified the need for community input into the process of settlement and acceptance of a SEP proposal. If the community feels that it is a part of the process, it may be less likely to oppose finalization of the outcome. In addition, if the community directly benefits from the SEP, as occurred in the Boston University case study, the citizens may recognize valued added by the SEP, which a mere monetary fine does not provide.

settlement must have a stringent nexus requirement; and, (2) the nearby community should be involved in SEP proposals.⁷⁵

The 1998 SEP Policy defines the nexus requirement as "the relationship between the violation and the proposed project."⁷⁶ This relationship exists when the proposed project either reduces the likelihood of similar future violations, reduces the adverse impact to public health or the environment from the violation, or reduces the overall risk to public health or the environment potentially affected by the violation.⁷⁷ Since projects that reduce the impact of the violation are most likely to benefit directly those injured by the violation, EPA should express a preference for projects that emphasize this particular nexus factor in order to remedy harm to the nearby communities.

EPA recognizes the need for community involvement in environmental enforcement actions as a powerful tool to ensure compliance.⁷⁸ Under the 1998 SEP Policy, the mitigation value given to a SEP is judged in part by community input, which is a factor considered in setting a SEP penalty calculation. Moreover, those concerned with social justice have focused on "demanding a shared role in the decision-making processes that affect their communities."⁷⁹ By encouraging community involvement, EPA can ensure that the choice and nature of the SEP is tailored to benefit injured neighbors. In doing this, EPA will fulfill the goal of providing a previously unavailable remedy to communities injured by pollution.

Any SEP policy should require that the project selected directly assists those injured by the environmental violation. Without a specific requirement, SEP settlements that fail to benefit directly those impacted may become more commonplace. While the Ashland prairie grass SEP provided benefits to the community at large, it failed to redress harms to the injured community, and thus maintained the gap between common law remedies and the administrative regulatory structure. By

75. See 1998 SEP Policy, *supra* note 1, at 24,797 (environmental justice concerns), 24,798 (nexus requirements), and 24,802 (quality of SEP judged in part on community involvement actively solicited and incorporated by violator).

76. *Id.* at 24,798.

77. See *id.*

78. EPA has an Office of Sustainable Ecosystems and Communities (OSEC), whose mission is to foster the implementation of integrated, geographic approaches to environmental protection with an emphasis on ecological integrity, economic sustainability, and quality of life otherwise known as Community-Based Environmental Protection (CBEP). See EPA, OSEC, *Sustainable Ecosystems and Communities* (visited Nov. 10, 1998) <<http://www.epa.gov/ecosystems/osecbak/>>.

79. Bullard, *Introduction*, in *UNEQUAL PROTECTION*, *supra* note 49, at xvii.

focusing the SEP on remedying harms to those most impacted by the environmental violation, environmental justice goals will be promoted as mandated by Executive Order 12,898, regarding Federal Action to Address Environmental Justice in Minority Populations and Low-Income Populations.⁸⁰ Thus, these goals should be a key factor considered by EPA in assessing the quality of a SEP.⁸¹

SEPs are superior to civil penalties alone because they provide for direct relief to those most injured by the action. In implementing the SEP policy, however, EPA should continue to compel disgorgement of unlawfully gained profits because this strongly encourages compliance with environmental laws. For several years, the removal of these unlawful profits has been a factor in EPA assessment of penalties.⁸² In fact, Congress even dictated such a policy to the agency by statute⁸³ and EPA responded by developing policies on civil penalty assessment that eliminate this profit under all major environmental acts.⁸⁴

Finally, SEPs must have a direct nexus with the violation to ensure that those injured receive a direct benefit from the project. In addition, some amount of civil penalty must be paid, to provide both specific and general deterrence, and to *prevent* future harm. At a minimum, any civil penalty must include removal of the profits a violator accumulated through benefits received by violating the law.⁸⁵ This requirement prevents a violator from receiving an advantage over its complying competitors, and it removes an incentive for future violations.

80. See Exec. Order No. 12,898, 3 C.F.R. 859 (1995), amended by Exec. Order No. 12,948 (1995).

81. See 1998 SEP Policy, *supra* note 1, at 24,802 (calculating the mitigation percentage based on the SEP's quality).

82. See EPA Civil Penalty Policy, *supra* note 2 (considering the economic gain from non-compliance as one factor in setting the penalty with the hopes of deterring future violations).

83. See Clean Water Act, 33 U.S.C. § 1319(d) (1994) for civil penalties in the CWA, the factors considered in determining amount include profits earned through noncompliance.

84. See EPA Civil Penalty Policy, *supra* note 2. Generally included among major environmental acts are: Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1994); Toxic Substance Control Act (TSCA), 15 U.S.C. §§ 2601-2692 (1994); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1994); Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994); and CERCLA, 42 U.S.C. §§ 9601-9675 (1994).

85. The 1998 SEP Policy recognizes the importance of civil penalties and disgorgement of profits. Therefore, the policy incorporates these principles into its procedures for fixing the ultimate penalty assessed to a violator. See 1998 SEP Policy, *supra* note 1, at 24,801.

CONCLUSION

EPA's 1998 Final SEP policy has developed over the years as part of an agency-wide effort to reduce pollution. These efforts recognize that statutes alone are insufficient to achieve optimal pollution reduction. The agency's goal in using the SEP policy is to promote environmental projects that would not have occurred otherwise.

These goals are admirable. Nevertheless, the agency should also recognize that SEPs have the potential to help those directly injured by violations and to achieve goals established by the environmental justice movement by providing the most benefit to those most injured. Since traditional administrative enforcement schemes and the common law cannot adequately compensate for environmental injuries, the EPA should focus the SEP policy on filling this gap in the enforcement framework. The tools to achieve this goal are within the current policy, they just need to be utilized and emphasized. In fact, EPA officials themselves have recognized this potential. Ira Leighton, Director of EPA's Office of Environmental Stewardship commented, "The use of SEPs is fast becoming a tool for reinvesting in our communities. . . . [V]iolators will be made to pay fines which . . . will flow back to environmental improvements in the community."⁸⁶

As long as the settlement contains tight nexus requirements, community input, and civil penalties equal to the economic benefit gained from the violation, the SEP policy is an important road for EPA to embark upon.

86. EPA Region 1 Press Release, *EPA Releases 1997: Compliance Assurances Results: Criminal Enforcement and Pollution Prevention Efforts Set Records* (visited Aug. 30, 1999) <<http://www.epa.gov/region01/pr/files/031698.html>>.

