

REMEDIAL PAYMENTS IN AGENCY ENFORCEMENT

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During the Obama Administration, the government settled many enforcement cases involving alleged violations of the nation's federal statutes. The settlements have several requirements, including that the defendants pay money for beneficial projects to mitigate or offset harm directly or indirectly caused by defendants' actions. For example, the government settled an environmental enforcement case against Volkswagen that included payments for environmental projects, and a mortgage enforcement case against Bank of America that included payments for housing education projects. These payments have spawned renewed criticism amongst conservative groups who have long claimed that payments for projects are mechanisms for agencies to get vulnerable defendant corporations to fund pet projects, outside of available agency statutory authority and the Congressional budget appropriations process. This Article examines payments for projects in agency settlements, using Clean Air Act enforcement as an example, and argues for additional clarity and transparency surrounding the purpose of such payments. The law most clearly allows for payments for projects in statutory enforcement cases when they serve a clear remedial purpose. Yet payments for projects have often tried to achieve multiple goals at the same time, including deterrence and compensation. As a result, it is sometimes difficult to see the remedial purpose of payments for projects, particularly in a settlement where the process of resolution is not as apparent as in litigation. A legislative solution could provide for obvious legal authority for payments for projects. However, in the absence of such a legislative fix, agencies should focus on better identification of harm earlier in the enforcement process, and better articulation of the connection between harm and projects in the settlement process. Payments for projects serve a key role in making the public whole from statutory violations. Clarity and transparency on the purpose of projects can help alleviate the concerns surrounding authority and appropriations, and ultimately strengthen the review of projects by courts.

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INTRODUCTION

When a company violates the nation's federal environmental laws, there should be a remedy. A remedy, however, is rarely one thing. Instead, resolutions for environmental enforcement cases involve multiple remedies with multiple goals. Remedies should address the compliance problem by providing prospective injunctive relief. Remedies should also impose civil penalties to deter future misconduct and punish defendants. However, neither prospective injunctive relief nor civil penalties provide a complete remedy for all violations because they do not undo the existing harm. The public remains worse off than they would be without the violation.

One part of a remedy should account for the impact of the violation on the public. In the environmental context, if a company violated the law by failing to install a filter when it upgraded its manufacturing facility, a remedy for such violation should not only consist of installing the filter and paying a civil penalty. The remedy should also require the company to address the impact to the environment from operating without the requisite filter. If a company violated the law by installing a computer chip in its cars that automatically turns off filters when the cars are driving, a remedy should not only consist of removing the cars and paying a civil penalty. The remedy should also require the company to address the impact to the environment from the cars that have already been on the road driving without filters. Stopping the violation and paying a penalty are forward-looking remedies that alone do not actually help undo the harm to the public from the past.

Plaintiffs in enforcement cases—both government and citizen groups—have sought remedies requiring that defendants pay for projects that mitigate or offset past harm. Cases involving regulatory enforcement are different from

other kinds of cases. Unlike tort cases, there is not always an identifiable victim to compensate for the loss. Thus, in cases involving enforcement of environmental statutes, it is difficult to figure out *how* to remedy for past harm from a violation. In the environmental context, the harm is to the public at large, including the overall health of communities and natural resources. Payments for projects provide the mechanism to address past harm in environmental enforcement cases. The idea is that if a defendant cannot remove pollution emitted in excess of standards, it should pay to offset or mitigate against it. The payment then should go towards projects that reduce future additional pollution beyond what would otherwise occur, or help restore communities and resources impacted by the excess pollution.

Yet payments for projects as remedies in regulatory enforcement cases have been controversial for decades. The controversy is particularly acute in settlement of government enforcement cases. Environmental interests criticize agencies as selecting payments for projects in an ad hoc manner,¹ and devaluing or excluding the participation of community members.² They also argue that agencies fail to prioritize the right kinds of projects, such as those that could affect vulnerable populations.³ Conservative groups and defendants contest the existence of a causal link between the violation and the alleged harm, and between the alleged harm and the projects.⁴ They also assert that such payments belong in the U.S. Treasury for Congress to appropriate, rather than being left to executive branch agencies to decide what projects to fund.⁵ In addition, scholars have expressed concern that for settlements in particular, payments for projects may allow agencies to use litigation as a way to impose regulatory requirements on companies without the benefit of notice and comment rulemaking processes.⁶

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1. Charles H.W. Foster & Frances H. Foster, *The Massachusetts Environmental Trust*, 41 *ECOLOGY L.Q.* 751, 759–60 (2014).
 2. See Steven Bonnoris et al., *Environmental Enforcement in the Fifty States: The Promise and Pitfalls of Supplemental Environmental Projects*, 11 *HASTINGS WEST-NORTHWEST J. ENVTL. L. & POL'Y* 185, 188 (2005) (“This report argues against leaving the negotiation of SEPs to the unfettered discretion of enforcement personnel, because of the lack of transparency and equity to both violators and affected communities.”); Patrice Simms, *Leveraging Supplemental Environmental Projects: Towards an Integrated Strategy for Empowering Environmental Justice Communities*, 47 *ENVTL. L. REP.* 10,511, 10,525 (2017).
 3. See Simms, *supra* note 2, at 10,523–25.
 4. See *Stop Settlement Slush Funds Act of 2016: Hearing on H.R. 5063 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2016) (statement of Paul Figley, Prof., Associate Director of Legal Rhetoric at American University Washington College of Law); WILLIAM YEATMAN, *COMPETITIVE ENTER. INST.*, *ONPOINT* No. 232, *ENDING THE EPA’S BILLION-DOLLAR GREEN ENERGY RIP-OFF* 4–5 (2017).
 5. See YEATMAN, *supra* note 4, at 1.
 6. See Andrew P. Morriss, Bruce Yandle, & Andrew Dorchak, *Choosing How to Regulate*, 29 *HARV. ENVTL. L. REV.* 179, 240–43 (2005).

Payments for projects have recently garnered renewed attention in the Trump Administration. Guidance issued by the U.S. Department of Justice (“DOJ”) in 2017, 2018, and 2019 now limit the ability of federal agencies to seek payments for projects in enforcement case settlements.⁷ The guidance applies not only to federal environmental enforcement but to other areas of regulatory enforcement as well.⁸ Agencies have always faced some limits, but the new limits are arguably more stringent, and as a result they revive the long standing conversation and controversy surrounding legal authority, congressional appropriations, and transparency, in settlement.⁹ In addition, state agencies and citizen-group plaintiffs that may be increasing enforcement activity under enforcement statutes will need to sort out how to handle remedies for past harm.¹⁰ Therefore, payments for projects are a particularly timely topic.

Using environmental enforcement as an example, this Article makes several points regarding payments for projects in regulatory enforcement actions. It asserts that many environmental statutes, such as the Clean Air Act (“CAA”), provide authority for both civil penalties and injunctive relief. It asserts further that the government has a strong policy rationale and legal basis for pursuing payments for projects under both authorities. It provides analysis of the benefits and disadvantages of using each authority, reflecting the fact that over time, payments for projects have gone through a kind of conflation with traditionally recognized remedies, such as compensation, deterrence, and restitution. It makes some suggestions for legislative changes, but focuses primarily on how to solidify the remedial purpose and use of such payments within the existing authorities and settlement processes. To that end, it promotes the use of scientific research, experts, and modeling of excess pollution early in the enforcement process, as a way to help identify harm from violations and inform project options. In addition, it asserts that a better explanation in settlement documents of how payments for projects connect to harm can provide transparency and clarity to defendants, the public, and the courts. Specifically, it argues that agencies should more effectively utilize the motion to enter a judicial decree, public comment, and court approval processes. Finally, it proposes inter-agency dialogue among multiple enforcement agencies working with similar statutes regarding how to explain remedial purpose in settlement.

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7. Memorandum from Jeff Sessions, U.S. Att’y Gen., to All Component Heads and U.S. Att’y’s, Prohibition on Settlement Payments to Third Parties (June 5, 2017) [hereinafter DOJ 2017 Guidance], <https://perma.cc/4MS6-AHYK>; Memorandum from Jeffrey H. Wood, Acting Assistant Att’y Gen., to ENRD Deputy Assistant Att’y’s Gen. and Section Chiefs, Settlement Payments to Third Parties in ENRD Cases (Jan. 9, 2018) [hereinafter DOJ 2018 Guidance], <https://perma.cc/4PLY-S5L6>.
 8. See DOJ 2017 Guidance, *supra* note 7; DOJ 2018 Guidance, *supra* note 7.
 9. See DOJ 2017 Guidance, *supra* note 7; DOJ 2018 Guidance, *supra* note 7.
 10. Stephen Cohen, *Can State Environmental Agencies Fill in for a Failing EPA?*, HUFFINGTON POST (Apr. 10, 2017), <https://perma.cc/4PXP-KD25>.

In making its points, this Article focuses on the CAA and proceeds in four parts. Part I provides background and context for CAA enforcement generally, including the role of settlement. Part II describes the evolution of payments for projects in CAA enforcement cases as part of penalty and injunctive relief statutory authorities. Part III analyzes the purpose of payments for projects in CAA enforcement cases within the context of traditional remedies available at law and in equity. Part IV describes the current controversy surrounding payments for projects, specifically new guidance issued in 2017, 2018, and 2019 by the Trump Administration, which limited agencies' ability to seek such payments in CAA enforcement case resolutions. Part V explains why, in the absence of a larger legislative fix, it is important to identify the purpose and use of payments for projects, and makes suggestions for how to do so in the enforcement investigation and settlement approval process.

I. BACKGROUND AND CONTEXT

This Part provides background and context on the issues that are central to the confusion and controversy over payments for projects in regulatory enforcement cases. Specifically, this Part discusses why it may be difficult to understand the need for such payments, the divergent liability structures of environmental statutes, and the uncertainty that exists in settlement.

A. Harm to the Public

We all need and want a clean environment. We need clean air to breathe, water to drink, and land to build on. In addition, we all desire clean air, water, and land. We value scenic vistas unburdened by smog and we enjoy recreational pursuits in natural areas with healthy soils and waters. A clean environment influences our lives every minute of every day.

Pollution, however, is complicated. It is often invisible. It does not stay in one spot. Instead, pollution travels, disperses, and sometimes evaporates. Some pollutants regulated by the CAA are hazardous air pollutants ("HAPs"), such as mercury, lead, and asbestos, which have impacts near an emitting facility.¹¹ Other air pollutants, like some of the National Ambient Air Quality Standards ("NAAQS") pollutants, can travel long distances.¹² As a result, it is difficult to keep track of where pollution goes, and what it affects.

This difficulty of assessing the exact impact of pollution often feeds into the argument that there is no impact, and that therefore a remedy is not necessary when companies violate standards. Yet pollution has a significant impact on public health and natural resources. A variety of air pollutants pose multiple

11. See *Hazardous Air Pollutants: Sources and Exposure*, EPA, <https://perma.cc/6LLD-CGWV>.

12. See *Ground-Level Ozone Basics*, EPA, <https://perma.cc/DN3Z-L52C>.

kinds of harm to the public. For instance, nitrogen oxides (“NO_x”), the primary NAAQS pollutants at issue in the Volkswagen settlement, react with other chemicals in the air to form new pollutants like particulate matter (“PM”) and ground-level ozone, which often cause harm farther away from the source. Some harm is to public health, some to natural resources, and some to recreational opportunities. PM and ozone, for example, both have tremendous impacts on respiratory and cardiovascular functioning, and particularly affect children, the elderly, and those with pre-existing conditions, like asthma.¹³ Acidic pollutants like NO_x mix with rain in the atmosphere and return to the earth’s surface as acid rain.¹⁴ Scientists for many years have identified acid rain as a significant contributor to damaged forests and waterbodies. Furthermore, smog, which is a mix of NO_x and volatile organic compounds (“VOCs”), reduces visibility in places of recreation.¹⁵

That is not to say that it is easy to attribute harm to public health and natural resources in individual enforcement actions. Sometimes the link is clear, such as when a community or neighborhood experiences health symptoms immediately after an illegal release of air pollution. Sometimes violators emit huge amounts of pollution that dwarf other sources in the area. However, it can be difficult in some cases to pinpoint one violating source as a contributor. The amount of pollution from one violating source may not be large, and may be swallowed by other sources, particularly in urban areas. These circumstances can raise proximate cause issues, because it is difficult to demonstrate that the harm sufficiently connects to the violation.

Because harm from a violation is not always traceable or quantifiable, remedies involve payments for projects to mitigate or offset the general harm associated with the violation. Defendants have paid money for projects to extract invasive species and restore native species in forests damaged by acid rain,¹⁶ and to install electric charging stations in heavily trafficked corridors.¹⁷ Sometimes the defendant company completes the projects on its own. Sometimes the defendant company outsources the work to third-party organizations for implementation. For example, when defendants have paid to swap out old wood-burning stoves in residential homes with newer, cleaner stoves, they have used

13. *Health and Environmental Effects of Particulate Matter (PM)*, EPA, <https://perma.cc/7JEE-9DLQ>; *Health Effects of Ozone and Particle Pollution*, AM. LUNG ASS'N, <https://perma.cc/KAQ9-TRBG>.

14. *See Effects of Acid Rain*, EPA, <https://perma.cc/NW36-VJQK>.

15. *See Ground-Level Ozone Basics*, *supra* note 12.

16. *See, e.g.*, Consent Decree at app. 6–7, *United States v. N. Ind. Pub. Serv. Co.*, No. 2:11-cv-00016-JVB-APR (N.D. Ind. July 22, 2011), <https://perma.cc/74VN-A5H5>.

17. *See, e.g., id.* at app. 9 (allowing NIPSCO to meet its emission reductions under the consent decree by investing in electric vehicle infrastructure); Melissa Roberts, *Release: NIPSCO Unveils Electric Vehicle Program*, ENERGY SYS. NETWORK (Apr. 5, 2012), <https://perma.cc/4UUW-ZTMY> (“This program is being offered as part of a Supplemental Environmental Project under the NIPSCO . . . settlement.”).

organizations such as the American Lung Association.¹⁸ Defendants have also agreed to spend money to achieve “beyond compliance” projects at their own facilities.¹⁹ For example, a defendant company may agree to meet a more stringent emissions limit at another factory located within the same airshed. In all such payments, the goal is to reduce pollution in the future beyond what would otherwise occur as a way to mitigate or offset the excess pollution from the past. Such payments for projects are the key method of addressing the overall health and natural resource impact which results from a defendant’s violation.

B. Federal Environmental Statutes

The controversy over payments for projects has also surrounded whether, when, and how existing environmental statutory frameworks allow for such payments. Enforcement necessarily begins with allegations of wrongdoing. Yet not all environmental statutes have the same structure for imposing liability. Some environmental statutes, like the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), provide that potentially responsible parties are liable for the cleanup of sites where there has already been a release of a listed hazardous substance onto surface or water, and for the restoration of any resulting damaged natural resources.²⁰ Other statutes, like the CAA, or the Resource Conservation and Recovery Act (“RCRA”), however, are forward-looking in nature. These statutes seek to protect the public from ongoing or future pollution through a “command and control” approach whereby a government body either requires or prohibits actions by regulated entities.²¹ A typical command-and-control approach to environmental law does not focus on imposing liability for remediation and restoration of pollution that has already occurred. Instead, the approach involves setting allowa-

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18. See, e.g., *Implementing Wood-Burning Change out Campaigns and Examples of Programs*, EPA, <https://perma.cc/D7AE-254M> (“The Northeast American Lung Association conducted a tri-state changeout program as a result of a settlement between EPA and Dominion Energy for violations of the Clean Air Act.”).
 19. See, e.g., Morriss et al., *supra* note 6, at 241 (noting that in several defeat device case settlements in the late 1990s, defendants agreed to “pull ahead” requirements which would require defendants to meet upcoming regulations at an earlier date); *Essroc Cement Company Settlement*, EPA, <https://perma.cc/2Q3S-M5ZL> (“This settlement also requires Essroc to spend \$745,000 in mitigation dollars to replace old engines in several off-road vehicles at its plant sites.”).
 20. Any potentially responsible party (“PRP”) associated with a facility from which there is a release or a threatened release of a hazardous substance, “shall be liable for . . . [any] necessary costs of response incurred by any other person consistent with the national contingency plan.” 42 U.S.C. § 9607(a)(4)(B) (2018).
 21. See, e.g., Expert Report of Michael B. Gerrard at 8, *La. Generating LLC v. Ill. Union Ins. Co.*, No. 3:10-cv-00516, 2015 WL 10552014 (M.D. La. Feb. 22, 2015).

ble pollution standards that regulated entities must meet in the future, through operational and technological requirements.

Because the liability structures vary among environmental statutes, so do the enforcement provisions. Statutes like CERCLA that are inherently backward-looking explicitly provide for environmental cleanup and restoration projects from any liable party.²² Thus, the entire CERCLA process contemplates a remedial and restorative purpose of making the environment and public whole.²³ Statutes like the CAA, however, allow for two explicit remedies against regulated entities for failing to comply with standards and regulations.²⁴ First, the CAA allows for civil penalties as legal remedies.²⁵ Second, the CAA allows for the restraint of violations, typically through injunctive relief, as equitable remedies.²⁶ For some violations, the CAA also allows for “any other appropriate relief.”²⁷ Payments for projects have been part of both civil penalty and injunctive relief in CAA enforcement cases, but not without questions and concerns from legal scholars and practitioners.

A central concern over CAA authority for payments for projects, as part of civil penalty, has been whether agencies are inappropriately circumventing Congress’ power of the purse.²⁸ Pursuant to federal appropriations law, all civil penalty monies received by the government, including those from agency enforcement actions, belong in the U.S. Treasury.²⁹ In addition, most environmental statutes require that civil penalty monies received by citizen-group plaintiffs in enforcement also go to the U.S. Treasury.³⁰ Thus, payments for projects as components of civil penalty authority in forward-looking statutes like the CAA have raised significant concerns surrounding federal appropriations law. As described further in Part II of this Article, opponents of payments for projects argue that such payments belong in the U.S. Treasury for Congress

22. *See id.*

23. *Id.* at 8–9.

24. The enforcement provisions of the CAA also allow for administrative enforcement, but this Article focuses on judicial enforcement of the CAA involving the federal government as plaintiffs, since that is the source of the recent guidance by the federal government limiting payments for projects.

25. 42 U.S.C. §§ 7413(b), 7524(a) (2018).

26. *Id.* §§ 7431(b), 7523(a).

27. *Id.* § 7413(b).

28. Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 351–52.

29. *Id.* at 329; *see also* 31 U.S.C. § 3302(b) (2018).

30. *See, e.g.*, 42 U.S.C. § 7604(a) (2018). But note that Congress added, as part of the 1990 CAA amendments, a provision allowing that a certain amount of civil penalty money received by citizen groups in enforcement cases could bypass the U.S. Treasury and instead go to EPA to “finance air compliance and enforcement activities.” Pub. L. No. 101-549, § 707(b), 104 Stat. 2399, 2682 (codified as amended at 42 U.S.C. § 7604).

to appropriate, rather than on projects selected by agency officials and defendants in settlement negotiations.

Furthermore, it is not always clear which authorities allow courts to order monetary remedies. On one hand, monetary remedies are typically legal in nature; that is, such remedies represent a penalty.³¹ Yet such monetary remedies can also represent a way to address damage caused to the harmed parties by the defendant's actions, and in such instances, the monetary remedy is equitable, and comes in the form of an injunction.³² Injunctions are typically requirements to act or refrain from acting.³³ Judges typically look at several factors in deciding whether to grant injunctive relief, including whether there is irreparable injury, whether remedies available at law—monetary damages—are inadequate to compensate for that injury, and whether a balance of the hardships warrants a remedy in equity.³⁴ The question has been whether payments for specific projects are more like a penalty or more like an injunction.

C. CAA Enforcement Process

The role of settlement has further complicated payments for projects in CAA enforcement cases. In settlement of CAA enforcement actions, the government plaintiffs and defendant regulated entity agree to resolve alleged violations. There has been no proof of harm from the violation—merely an allegation of harm. Thus, negotiators may resolve allegations of harm in a vacuum, with little information about the amount of excess emissions from the source and about where those excess emissions traveled. Such information typically comes later in the enforcement process, in civil discovery.

Despite not knowing the exact amount of harm connected to a defendant's alleged violation, settlements often include payments for projects to remedy such harm. Critics of payments for projects and some legal scholars argue that such payments are simply mechanisms for the executive branch to extract remedies in negotiations that fit general policy goals.³⁵ They argue that there is enormous pressure on defendants to simply agree to such payments and settle cases.³⁶ However, proponents for such payments and other legal scholars have

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31. *United States v. Ameren*, 372 F. Supp. 3d 868, 875 (E.D. Mo. 2019) (“Ameren argues that emissions reductions at Labadie would represent a penalty, and therefore a legal remedy.”).
 32. *Id.* at 876; *see also* *United States v. Westvaco*, No. MJG-00-2602, 2015 WL 10323214 (D. Md. Feb. 26, 2015); *United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055, 1061 (S.D. Ind. 2008).
 33. *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1070 (2018).
 34. *See, e.g.*, *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).
 35. Michael Patrick Wilt, *Evaluating Consumer Relief Payments in Recent Bank Settlement Agreements*, 17 J. BUS. & SEC. L. 253, 284–85 (2017).
 36. *See* Jerry W. Markham, *Regulating the “Too Big to Jail” Financial Institutions*, 83 BROOK. L. REV. 517, 568 (2018) (“Why do the banks so readily accede to these settlement demands?”).

long recognized the benefits of settlement in resolving disputes.³⁷ Settlement is often better for litigating parties. Settlement is faster than proceeding to trial, saves resources, and allows parties to better control outcomes.³⁸ Settlement can also produce positive results for the public, particularly on environmental and public health protection.³⁹ Quicker resolutions force sources to come back into compliance sooner.⁴⁰ Lastly, settlement allows agency resources to spend time investigating and developing cases on new violations.⁴¹ Regardless of the normative considerations, settlement is a common way to resolve environmental enforcement matters. Environmental enforcement involves a multi-step process.⁴²

Federal environmental enforcement actions begin with an investigation of a potential violation, often with sources that are the subject of national enforcement initiatives (“NEI”).⁴³ The CAA authorizes EPA to collect information, inspect facilities, and require monitoring for the purposes of determining whether a violation has occurred.⁴⁴ The next step is the issuance of a notice of violation, which depending on the violation might be a required step under the CAA before commencing an action.⁴⁵ Finally, plaintiffs will file a judicial complaint, starting the process of civil discovery leading to trial.⁴⁶ CAA enforcement cases have settled as early as the investigation stage and as late as the

Senior executives at the large banks want to avoid career-ending indictments, years of litigation, and incarceration if charged and convicted. The large banks also face the loss of their franchise—through the revocation of their charters—if they are actually convicted of crimes, as was the case for Arthur Andersen. A settlement avoids those problems.”); Wilt, *supra* note 35, at 258 (“Settlement pressure on the financial institutions is intense.”).

37. See, e.g., Courtney R. McVean & Justin Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENVTL. L. REV. 191, 194–96 (2015).
38. See Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1353 (1994) (“Settlements [offer] . . . greater party participation and control, [and have] the possibility of individualizing outcomes to suit the needs of the parties.”); Robert Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policymaking*, 1987 U. CHI. LEGAL F. 327, 330 (describing distinct advantages of settlement, including efficiency).
39. See, e.g., *United States v. Georgia-Pacific Corp.*, 960 F. Supp. 298, 299 (N.D. Ga. 1996) (“[T]he Court recognizes the benefits of an early settlement, in particular the environmental benefits that will accrue from G–P’s immediate implementation of the injunctive measures contained in the Decree”).
40. *Id.*
41. Percival, *supra* note 38, at 329–30.
42. John C. Cruden & Bruce S. Gelber, *Federal Civil Environmental Enforcement: Process, Actors, and Trends*, 18 NAT. RESOURCES & ENV’T 10, 10 (2004).
43. The Trump Administration renamed NEIs “national compliance initiatives.” See *National Compliance Initiatives*, EPA, <https://perma.cc/DZA7-CRKB>.
44. 42 U.S.C. §§ 7414(a), 7542 (2018).
45. See, e.g., *id.* § 7413(a).
46. See Cruden & Gelber, *supra* note 42, at 14 (“Once a case is filed, government counsel focus first on meeting their initial obligations under the Federal Rules of Civil Procedure and any

beginning of trial.⁴⁷ Therefore, what happens in the settlement process is important.

While courts have certainly addressed authority for payments for projects in adjudicated orders post-trial, a much larger number of courts have sanctioned payments for projects through settlement approval.⁴⁸ Indeed, the vast majority of enforcement cases settle.⁴⁹ Judicial enforcement cases memorialize settlements through consent decrees, a negotiated agreement that a court enters as a judgment.⁵⁰ Before a court approves a settlement it will evaluate the settlement as a proposal, usually upon motion to enter a proposed consent decree. Courts evaluate a proposed consent decree based on whether it is “fundamentally fair, adequate, reasonable, and in the public interest.”⁵¹ DOJ regulations require that department lawyers provide an opportunity to persons not named as parties to an action to comment on a proposed consent decree in environmental enforcement matters.⁵² Sometimes courts require hearings on motions to enter, particularly if there has been significant public comment.

The concern with settlement is that agencies and defendants negotiate the terms of the consent decree—such as inclusion of payments for projects—behind closed doors.⁵³ As a result, the perception is that negotiators select projects

applicable local rules concerning mandatory disclosures, meeting with counsel, and organizing discovery.”).

47. For example, the 2013 CAA consent decree between the government and Ash Grove Cement Company was filed simultaneously with the filing of the judicial complaint. Consent Decree at 1, *United States v. Ash Grove Cement Co.*, No. 2:13-cv-0299 (D. Kan. June 19, 2013). The 2012 CAA consent decree between the government and Louisiana Generating, however, was lodged after the government won a key summary judgment motion, just before trial was set to begin. *See United States v. La. Dep’t of Env’tl. Quality*, No. 09-100-JJB-CN (M.D. La. Sept. 19, 2012); Consent Decree, *La. DEQ*, No. 09-100-JJB-DLD (M.D. La. Mar. 5, 2013).
48. A look at EPA’s website for nationally significant CAA enforcement cases reveals that from 2007 to 2017, EPA settled about seventy CAA violations through judicial consent decrees, and about forty involved payments for projects as components of injunctive relief. This does not even include the number that involved payments as components of civil penalty. *See Civil Cases and Settlements*, EPA, <https://perma.cc/NLK6-ZPB4>.
49. *Id.*; *see also* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (noting that the percentage of “federal civil cases resolved by trial” had fallen to 1.8% in 2002). The Administrative Office of the U.S. Courts reports that 0.5% of United States cases reached trial in the twelve-month period ending in September 2018. *See Table C-4, U.S. District Courts—Civil Judicial Business, Civil Cases Terminated, by Nature of Suit and Action Taken—During the 12-Month Period Ending September 30, 2017 and 2018*, U.S. CTS. (2018), <https://perma.cc/YFZ5-GZ5H>.
50. *See* McVean & Pidot, *supra* note 37, at 199–201; *see also, e.g.*, *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986).
51. *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990).
52. 28 C.F.R. § 50.7(a) (2019).
53. *See* Foster & Foster, *supra* note 1, at 812–13.

in favor of either the agency or the defendant, and not for the true purpose of remediating harm. For example, an agency may attempt to seek payments for projects in program areas where there is a shortfall in the agency's budget.⁵⁴ Alternatively, a defendant may seek a project that otherwise fits the defendant's business plan. Without an actual finding by a court of liability and past harm, it remains uncertain as to whether a defendant's alleged violation caused harm, how much harm, when, and where.

II. EVOLUTION OF ENVIRONMENTAL PROJECTS

This Part takes a closer look at the historical evolution of payments for projects across court decisions and EPA guidance. The purpose is to highlight the way in which the issues discussed above—harm, statutory authority, and settlement—have interacted over time to produce the current opposition to payments for projects in the Trump Administration.

A. Civil Penalty Authority

While the focus of this Article is not on federal appropriations, it is important to acknowledge the role of federal appropriations in the ongoing and current controversy on the use of civil penalty authority for payments for projects. Agencies must have authority from Congress to impose civil penalties, and in granting this authority Congress often directs agencies to consider specific factors in determining civil penalties in any individual enforcement action. For example, the CAA includes a statutory maximum for civil penalties, and further directs consideration of a variety of factors, including the size of the business, the violator's compliance history, the gravity of the violation, and the duration of the violation.⁵⁵ EPA further issues policies describing how it will apply the relevant statutory factors, considering the gravity of the violation, cooperation of the defendant, and self-disclosure by the defendant.⁵⁶ However a penalty is decided, the Miscellaneous Receipts Act ("MRA") requires that all monies "received" by the government be deposited in the General Treasury Account and not be spent until appropriated by Congress.⁵⁷ Furthermore, the Anti-Deficiency Act ("ADA") explicitly prohibits an officer or employee of the United States from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure

54. See *Stop Settlement Slush Funds Act of 2016: Hearing on H.R. 5063*, *supra* note 4.

55. 42 U.S.C. § 7413(e) (2018).

56. See, e.g., EPA, 450R91101, CLEAN AIR ACT STATIONARY SOURCE CIVIL PENALTY POLICY (1991), <https://perma.cc/F7X6-NCSS>; EPA, CLEAN AIR ACT MOBILE SOURCE CIVIL PENALTY POLICY (2009), <https://perma.cc/CHK3-4E2G>.

57. 31 U.S.C. § 3302(b) (2018).

or obligation.”⁵⁸ Therefore, EPA cannot take payments in enforcement case settlements and put the monies towards existing pollution reduction programs that the agency operates.

The origins of payment for projects in environmental enforcement arose in the 1980s with the issuance of EPA’s CAA and Clean Water Act (“CWA”) penalty policy. This combined policy stated: “[O]ccasions have arisen in enforcement actions where violators have offered to make expenditures for environmentally beneficial purposes above and beyond expenditures made to comply with all existing legal requirements, in lieu of paying penalties to the treasury of the enforcing government.”⁵⁹ As one factor in its penalty calculation, EPA began to provide discounts on the penalty if the defendant voluntarily agreed, in a settlement, to complete a “supplemental environmental project” (“SEP”).⁶⁰

Soon after, in the early 1990s, members of Congress began to question the legality of SEPs. In 1991, Representative John Dingell requested an opinion from the Government Accountability Office’s (“GAO’s”) Comptroller General on whether EPA could enter into a CAA settlement that allowed defendants to “fund public awareness and other projects relating to vehicle air pollution in exchange for reductions of the civil penalties assessed against them.”⁶¹ The Comptroller General in 1992 found that:

[A]n 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.⁶²

The Comptroller General further elaborated on its decision in a 1993 opinion, stating that EPA’s authority did “not extend to remedies *unrelated* to the correction of the violation in question.”⁶³

58. *Id.* § 1341.

59. CIVIL PENALTY POLICY – CLEAN WATER ACT VIOLATORS AND SECONDARY SOURCE VIOLATORS OF THE CLEAN AIR ACT 15 (1980), EPA, <https://perma.cc/TA96-Z583>; see also Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations as Well as to Achieve Significant Additional Environmental Benefit*, 10 WIDENER L. REV. 413, 415–16 (2004).

60. Lloyd, *supra* note 59, at 414.

61. See generally U.S. Gov’t Accountability Office, B-247155, Opinion Letter on EPA Settlement Authority Under 42 U.S.C. § 7524, 1992 U.S. Comp. Gen. LEXIS 1319 (July 7, 1992) (finding EPA lacks authority to settle actions over air pollution from a mobile source pursuant to 42 U.S.C. § 7524); Peterson, *supra* note 28, at 353.

62. U.S. Gov’t Accountability Office, B-247155.2, Opinion Letter Addressing EPA’s Response to GAO Opinion Letter B-247155 at 2–3, 1993 WL 798227 (Mar. 1, 1993).

63. *Id.* at 1 (emphasis added).

Several scholars and practitioners have engaged in debate over the applicability of the MRA and ADA to payments for projects. Some scholars, including Professors Kenneth Kristl and Andy Spalding, have argued that monies received in environmental enforcement matters as part of an environmental project, because they go from the defendant to a third-party non-profit organization or entity rather than to the government, are not monies “received” by the government, and thus do not trigger the MRA and ADA.⁶⁴ Other scholars and legal researchers and commentators, however, have argued that payments for projects in enforcement cases are simply a ruse for payments that should have been part of the civil penalty in the first place. Professor Todd Peterson explains that because DOJ has the power to litigate and resolve enforcement cases, it also has the power to “short circuit the [MRA] requirements by agreeing to settlement terms that require the violator of a federal statute to undertake certain responsibilities or actions that might inure to the benefit of the executive branch.”⁶⁵ Peterson suggests as an example that DOJ might require a violator to agree to take an action that DOJ would normally have to do itself, thereby freeing up funds, outside of appropriations, that could be used in some other way.⁶⁶ Several legal commentators with groups such as the Charles Koch Foundation, the Competitive Enterprise Institute, and the Heritage Foundation have argued that the government is the only legitimate recipient of money in the settlement of enforcement actions.⁶⁷

The ongoing debate over appropriations has made it a central element of EPA’s penalty policies. EPA’s SEP policies since the early 1990s have attempted to address concerns over appropriations and augmentation.⁶⁸ For example, the SEP policies emphasize that SEPs are the product of settlement and

64. See Kenneth T. Kristl, *Making a Good Idea Even Better: Rethinking the Limits on Supplemental Environmental Projects*, 31 VT. L. REV. 217, 255–56 (2007); see also Andy Spalding, *The Much Misunderstood Miscellaneous Receipts Act (Part 2)*, FCPA BLOG (Sept. 30, 2014), <https://perma.cc/WFH8-S8SU>.

65. Peterson, *supra* note 28, at 347–48.

66. *Id.*

67. See *Stop Settlement Slush Funds Act of 2016: Hearing on H.R. 5063*, *supra* note 4 (testimony of Paul Figley, Professor, Associate Director of Legal Rhetoric at American University Washington College of Law); YEATMAN, *supra* note 4; Wilt, *supra* note 35, at 289; Benjamin Zycher, *How Jeff Sessions Is Stopping the EPA’s Slush Fund*, THE HILL (Aug. 20, 2017), <https://perma.cc/YR98-QSDH> (“[T]he appropriate recipient of the funds is the U.S. Treasury rather than some firm, industry or interest group that executive branch officials happen to view with favor.”).

68. See EPA, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY (May 1, 1998), <https://perma.cc/3EG7-B7EY>; EPA, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 2015 UPDATE (2015) [hereinafter EPA, 2015 UPDATED SEP POLICY], <https://perma.cc/2KLV-XQKL>; Sylvia K. Lowrance, Acting Ass’t Admin. EPA, Memorandum to Regional Administrators, Supplemental Environmental Projects (SEP) Policy (Mar. 22, 2002), <https://perma.cc/4RUG-JSG2>.

are purely voluntary.⁶⁹ The SEP policies also describe several legal guidelines for SEPs. SEPs must have a “nexus” to the underlying harm.⁷⁰ In addition, EPA must not control the funds in any way or recommend a particular recipient of project funds, and may not support or provide additional resources for EPA or other federal programs.⁷¹ Such restrictions undoubtedly limit options for payments for projects as SEPs.⁷²

B. Injunctive Relief Authority

Payments for projects as components of injunctive relief raise a new set of concerns. To be sure, the need for an appropriate nexus and conflicts with appropriations and augmentation remain concerns in cases of payments for projects as components of injunctive relief. However, injunctive relief raises additional questions regarding whether such relief can only be prospective in nature, or whether it can also be retrospective.⁷³ Furthermore, payments for projects as components of injunctive relief raise concerns over quantification of harm.

In the early 1990s, two CWA cases, *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*⁷⁴ and *United States v. Roll Coater, Inc.*,⁷⁵ addressed whether a court could use its equitable authority to order a payment for a project by a defendant as part of injunctive relief. In *Powell Duffryn*, a case brought by a citizen group against a liquid storage facility, the district court determined that paying civil penalties into the U.S. Treasury would not satisfy the purposes of the CWA and instead ordered that defendants pay the penalties into a trust fund to pay for projects that could directly affect environmental problems in New Jersey.⁷⁶ EPA, however, was concerned about the MRA, and intervened in the case to argue that penalties could not be so diverted.⁷⁷ The citizen group in *Powell Duffryn* argued that the court could use its equitable discretion to order the payment.⁷⁸ On review, the Third Circuit agreed with the citizen group, noting: “[A] court may fashion injunctive relief

69. See, e.g., EPA, 2015 UPDATED SEP POLICY, *supra* note 68, at 2 (“This is a *settlement* policy and thus is not intended for use by the EPA, defendants, courts, or administrative law judges at a hearing or in a trial.” (emphasis in original)).

70. *Id.* at 7.

71. *Id.* at 8–9.

72. Kristl, *supra* note 64, at 257; Lloyd, *supra* note 59, at 413.

73. Lloyd, *supra* note 59, at 413.

74. 913 F.2d 64, 81 (3d Cir. 1990).

75. 21 Env'tl. L. Rep. 21,073 (S.D. Ind. Mar. 22, 1991).

76. *Powell Duffryn*, 913 F.2d at 68.

77. *Id.* at 81.

78. *Id.*

requiring a defendant to pay monies into a remedial fund, if there is a nexus between the harm and the remedy.”⁷⁹

In *Roll Coater*, too, the court grappled with whether its equitable authority could allow payments for projects. In *Roll Coater*, EPA won a case against a coil coating company for violations of the CWA, including a \$2 million penalty, and the defendant company requested that the court allow the penalty to be used for an environmental research project and the creation of a center for environmental responsibility.⁸⁰ In support of its request, the defendant argued that equitable discretion allowed alternative forms of restitution, and the legislative history of the CWA supported alternative projects to settle citizen suits.⁸¹ As in *Powell Duffryn*, EPA argued that all penalties must go to the U.S. Treasury, pursuant to the MRA. Judge McKinney rejected *Roll Coater*'s arguments, but not because of a lack of authority. Indeed, the court, citing to *Powell Duffryn*, stated that “if there is a nexus between the harm and the remedy,” a court may fashion injunctive relief to require payment for projects.⁸² However, the court did not use its equitable discretion to issue injunctive relief for allegations of past harm in the case because there was no longer an equitable claim: plaintiffs had already dismissed all claims for injunctive relief.⁸³

Since the 1990s, the federal government has brought environmental enforcement claims specifically seeking injunctive relief to address past harm from alleged violations. For example, in several CAA cases, such as *United States v. Cinergy*⁸⁴ and *United States v. Westvaco*,⁸⁵ government plaintiffs alleged that plants owned by defendants produced excess emissions above what they would have produced at the source had it complied with the relevant new source review (“NSR”) permitting program and installed requisite pollution-control equipment.⁸⁶ That is, plaintiffs claimed that they were entitled to two kinds of injunctive relief. First, plaintiffs argued for prospective relief: actions to require defendants to comply with the law and actually install the pollution control equipment.⁸⁷ Second, plaintiffs argued for retrospective relief: specific measures

79. *Id.* at 82. However, the Third Circuit ultimately overturned the district court's decision; because the district court had labeled the money as a “civil penalty,” the funds had to go to the U.S. Treasury. *See id.*

80. *See Roll Coater*, 21 *Env'tl. L. Rep.* at 21,077.

81. *See id.*

82. *See id.* at 21,077–78.

83. *See id.* at 21,074, 21,077–78; *see also* Lloyd, *supra* note 59.

84. 582 F. Supp. 2d 1055 (S.D. Ind. 2008).

85. No. MJG-00-2602, 2015 WL 10323214 (D. Md. Feb. 26, 2015).

86. *Westvaco*, 2015 WL 10323214 at *5 (“The Government seeks to have the Court issue an injunction ordering Westvaco to . . . mitigate the harm”); *Cinergy*, 582 F. Supp. 2d at 1057–58 (“[T]hey seek retrospective relief, through specific measures to reduce pollution at Wabash River beyond what is required for prospective compliance to make up for the nearly two decades of illegal pollution.” (internal citation omitted)).

87. *See Cinergy*, 582 F. Supp. 2d at 1057–58; *Westvaco*, 2015 WL 10323214 at *5.

for the defendant to reduce pollution beyond what would be required for prospective compliance, in order to make up for the excess emissions.⁸⁸

Defendants in *Cinergy* and *Westvaco* argued that it was not possible to isolate the harm from any excess emissions produced by the violating sources. In *Westvaco*, for example, defendants argued against an injunction to remedy generalized harm because all plaintiffs had done was establish that there had been “some non-zero” increase in emissions from the stationary source.⁸⁹ They argued that in order to receive an injunction, plaintiffs “must quantify those ‘excess emissions’ to a reasonable degree of certainty, and must tie those ‘excess emissions’ to actual harm that is more than trivial or de minimis.”⁹⁰ In this case, the court held that although “a precise determination of the adverse environmental effect is impossible . . . the evidence has proven that, at a minimum, the excess emissions from the Luke Mill caused [harm].”⁹¹

While some CAA cases seeking injunctive relief for past harm, like *Cinergy* and *Westvaco*, have gone to trial, most have settled with payments for projects, referred to as “mitigation projects,” or “other injunctive relief” as the remedy.⁹² One practitioner notes, for example, that “[a] review of EPA settlements through 2014 reveals at least 60 settlements that included mitigation.”⁹³ In 2012, EPA issued guidance to staff on securing mitigation projects as injunctive relief in civil enforcement settlements.⁹⁴ The 2012 guidance encouraged case teams to seek mitigation projects, where appropriate, as components of the injunctive relief sought in civil judicial enforcement cases.⁹⁵ The 2012 guidance distinguished mitigation projects from SEPs, stating that because the purpose of mitigation is to restore the status quo ante as nearly as possible, there must be a closer connection between a mitigation project and the harm it redresses than the nexus required by a SEP.⁹⁶ The guidance also notes

88. See *Cinergy*, 582 F. Supp. 2d at 1057–58.

89. Defendant Westvaco Corporation’s Response to the Government’s and to Luke Paper Company’s Proposed Findings of Fact and Proposed Conclusions of Law for Remedy Phase Trial at 8, *United States v. Westvaco Corp.*, No. MJG-00-2602, 2015 WL 10323214 (D. Md. Apr. 12, 2013).

90. *Id.*

91. Memorandum of Decision–Remedy Phase at 24, *United States v. Westvaco Corp.*, No. MJG-00-2602, 2015 WL 10323214 (D. Md. Feb. 26, 2015).

92. See David Markell, *EPA Enforcement: A Heightened Emphasis on Mitigation Relief*, ABA TRENDS (Mar. 1, 2014), <https://perma.cc/9D5L-W9GJ>.

93. Carrick Brooke-Davidson, *EPA’s Mitigation Memorandum: New Challenges in Civil Enforcement*, 2016 ABA ENVTL. ENFORCEMENT & CRIMES COMMITTEE NEWSL. 4, 5.

94. Memorandum from Susan Shinkman, Dir., EPA Office of Civil Enforcement, to Reg’l Counsels et al., *Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements* (Nov. 14, 2012), <https://perma.cc/R2QH-UPYV>.

95. *Id.* at 1.

96. *Id.* at 4.

that the distinction may be difficult to grasp in practice.⁹⁷ For the most part, however, throughout the end of the Bush Administration and the Obama Administration, many environmental enforcement cases settled with mitigation projects.

Mitigation projects took a sharp turn, however, after the Volkswagen CAA enforcement settlement as part of the “diesel gate” scandal in 2016, corresponding with the incoming new Trump Administration. In September 2015, Volkswagen Group of America (“Volkswagen”) made the phrase “defeat device” ubiquitous across the world, as part of the “diesel gate” or “diesel dupe” scandal. Volkswagen admitted to EPA and the California Air Resources Board that its diesel cars were equipped with defeat device software that detects when emissions tests are taking place by inspectors on a dynamometer, a stationary laboratory test.⁹⁸ When inspectors were testing the cars, pollution controls turned on, and the rest of the time, when cars were in use on the road, pollution controls turned off. Shortly after Volkswagen’s admission, major newspapers around the world featured headline stories of the cheating scheme and Volkswagen’s stock price took a significant hit.⁹⁹

In December 2015, DOJ filed a complaint against Volkswagen, alleging violations of the CAA in federal court.¹⁰⁰ The complaint sought civil penalties as well as injunctive relief. As prospective injunctive relief, the complaint asked the court to require Volkswagen to require actions to bring the company back into compliance.¹⁰¹ The complaint also alleged harm to the environment from Volkswagen’s excess emissions, and asked for the court to use its equitable authority to require mitigation.¹⁰² In June 2016, the parties reached settlement on claims for both prospective and retrospective injunctive relief, and filed a proposed judicial consent decree.¹⁰³ The first part of the proposed partial consent decree required Volkswagen to remove at least eighty-five percent of the violating vehicles from the road by June 2019, as prospective injunctive relief aimed at stopping the violation.¹⁰⁴

97. *Id.* at 8 (discussing generally the timing of discussions with defendants so as to not confuse SEPs and mitigation).

98. Jack Ewing, *Engineering a Deception: What Led to Volkswagen’s Diesel Scandal*, N.Y. TIMES (Mar. 16, 2017), <https://perma.cc/J9S6-E4YH>; Jeff S. Bartlett, Michelle Naranjo & Jeff Plungis, *Guide to the Volkswagen Emission Recall*, CONSUMER REPORTS (Oct. 23, 2017) (discussing “on-road” and “dyno” modes), <https://perma.cc/A8V2-FRMY>.

99. Ewing, *supra* note 98.

100. Complaint, *In re Volkswagen AG*, No. 2:16-cv-10006 (E.D. Mich. Jan. 4, 2016).

101. *Id.*

102. *Id.*

103. See *Volkswagen Clean Air Act Settlement*, EPA, <https://perma.cc/W3LU-68TD>.

104. Volkswagen may meet the eighty-five percent removal requirement by buying back violating vehicles from owners and lessees and scrapping the vehicles. Volkswagen may also meet the eighty-five percent removal requirement by offering to vehicle owners and lessees, an EPA-approved emissions partial fix that substantially reduces the NOx emissions of the violating

The second and third parts of the proposed partial consent decree focused on two different kinds of retrospective injunctive relief. The proposed partial consent decree required Volkswagen to establish a \$2.7 billion Environmental Mitigation Trust (the “Trust”) for states and tribes to use for specified actions aimed at reducing diesel emissions from a variety of sources in the transportation sector.¹⁰⁵ In addition, the proposed partial consent decree required Volkswagen to invest \$2 billion in zero-emission vehicle (“ZEV”) charging infrastructure in order to undo the harm posed by “consumers’ unwitting purchase of vehicles” that they mistakenly thought were environmentally friendly.¹⁰⁶ The partial consent decree released Volkswagen from liability associated with claims for injunctive relief, including allegations of generalized harm.¹⁰⁷ The partial consent decree specifically did not release Volkswagen from civil penalty as the projects were not SEPs.¹⁰⁸

As required by regulation, the federal government took public comment on the proposed consent decree.¹⁰⁹ DOJ received twelve hundred public comments during the public comment period, and while most involved the buyback provisions, several addressed payments for projects in the Trust and the ZEV commitment.¹¹⁰ Commenters questioned whether the language of Section 204 of the CAA to “restrain violations” provided the court with the authority to approve a settlement with mitigation requirements or only allowed for prospective injunctive relief.¹¹¹ Commenters also expressed concern that the money defendants were required to spend on mitigation obligations illegally diverted civil penalty funds that should go to the U.S. Treasury.¹¹² Still others commented that certain projects not listed as eligible project options in the partial consent decree—like projects aimed at stopping trucks from idling at rest areas¹¹³—

vehicles. See Third Partial and 3.0L Second Partial and 2.0L Partial and Amended Consent Decrees, *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Prods. Liab. Litig.* (N.D. Cal. June 28, 2016, Sept. 30, 2016, Dec. 20, 2016, and Jan. 11, 2017), <https://perma.cc/7DVM-BYE2>.

105. *Volkswagen Clean Air Act Settlement*, *supra* note 103.

106. United States’ Notice of Motion, Motion, and Memorandum in Support of Entry of Partial Consent Decree at 20, *In re Volkswagen*, No. 3:16-cv-00295, 2016 WL 6460404 (E.D. Mich. Sept. 30, 2016), [hereinafter United States Motion to Enter, *In re Volkswagen*].

107. Amended 2.0L Partial Consent Decree ¶¶ 74–83, *In re Volkswagen* (E.D. Mich. Dec. 20, 2016) (No. 2:16-cv-10006).

108. See *id.* ¶ 75.

109. See 40 C.F.R. § 300.430(c)(5)(ii) (2019).

110. See United States Motion to Enter, *In re Volkswagen*, *supra* note 106, at 21.

111. United States Motion to Enter, *In re Volkswagen*, *supra* note 106, Ex. 5: Department of Justice Response to Comments, at 14.

112. See *id.* at 15.

113. See *id.* at 20.

would also reduce NO_x, and therefore should be added.¹¹⁴ The court approved a judicial consent decree between the parties in October 2016.¹¹⁵

III. THE PURPOSE OF ENVIRONMENTAL PROJECTS

It is time to take a step back from the federal appropriations and legal authority questions surrounding payments for projects to examine the purpose of such payments and projects. Payments for projects are valuable elements of enforcement case resolutions to address harm from violations. However, because payments for projects have been elements of both civil penalty and injunctive relief authorities, they have served multiple enforcement goals at the same time, beyond addressing harm from violations. The remedial purpose of payments for projects has intermixed with deterrence, restitution, and compensation purposes.

A. Deterrence and Punishment

Environmental advocates and scholars often decry the “nexus” requirement that EPA has imposed on SEPs, and argue that EPA has not utilized SEPs enough or for the right kinds of projects.¹¹⁶ They argue, for instance, that SEPs tend to tailor too close to punishing the defendant rather than broader goals of benefiting the public at large.¹¹⁷ Community input is severely lacking in selection decisions about SEPs in individual enforcement cases.¹¹⁸ In addition, environmental advocates and scholars argue that payments for projects in enforcement cases have been “ad hoc.”¹¹⁹ They have noted, for example, that negotiations about projects in enforcement case resolutions seem to happen behind closed doors and as a result, non-profit groups and government agencies have little ability to raise concerns about specific impacts or suggest potential projects.¹²⁰

One barrier to addressing this problem is the fact that the very authority on which SEPs rest, civil penalty, is one of the key reasons for the weakness of SEPs. Courts have found that civil penalties are primarily legal, rather than equitable, in nature. While the Supreme Court has held that sanctions or civil penalties frequently serve more than one purpose, “a civil sanction that cannot

114. *See id.* at 17.

115. *Volkswagen Clean Air Act Settlement*, *supra* note 103.

116. *See* Kristl, *supra* note 64, at 259–61; David Markell, *Is There a Possible Role for Regulatory Enforcement in the Effort to Value, Protect, and Restore Ecosystem Services?*, 22 J. LAND USE & ENVTL. L. 549, 589–93 (2007).

117. Foster & Foster, *supra* note 1, at 819.

118. *Id.* at 812–14; Simms, *supra* note 2, at 10,525.

119. Foster & Foster, *supra* note 1, at 811.

120. *Id.* at 812–14; Simms, *supra* note 2, at 10,525.

fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.”¹²¹ The primary purpose of civil penalties issued by agencies is to punish defendants and deter future misconduct. Thus, although using SEPs to serve remedial purposes is possible, such use is somewhat like fitting the proverbial square peg inside of a round hole.

In addition, the voluntary nature of SEPs contributes to the weakness of using civil penalty authority to address past harm from violations. SEPs are merely one factor in a list of other factors available for discounting civil penalty. As a result, SEPs may simply not be worth it for defendants, particularly in small penalty cases or where other methods of decreasing the penalty, such as cooperation, are available. It is true that defendants may receive intangible benefits from SEPs separate and apart from any penalty reduction, such as improvement of public relations with local communities after a violation.¹²² However, SEPs can also take a lot of work to implement for defendants whose primary mission is manufacturing goods or services, not organizing and coordinating environmental projects. Even where defendants do not conduct SEPs, but rather pay a third party to do so, there are often significant administrative hassles to deal with, such as choosing the right third-party organization, and reporting to the agency under the settlement terms.

Thus, while some scholars may like to see more SEPs and think that SEPs should be the rule not the exception, SEPs are a product of a negotiated settlement only, and there is no legal authority or “hook” to require a defendant to conduct a SEP. While EPA policy encourages case teams to negotiate SEPs, it remains up to the defendant to agree.

Even when agencies attempt to achieve a redress goal for harm through SEPs, courts may focus on the punitive and deterrence goals first. For example, in *United States v. Lexington-Fayette Urban County Government*,¹²³ after a district court blocked a proposed consent decree involving CWA violations brought against the city of Lexington, having found that some of the penalty money would have been better off as SEP, the Sixth Circuit remanded the district court’s decision. Commenters on the proposed consent decree had remarked that the \$425,000 penalty was too high and that the money should have gone to address a neglected sewer problem.¹²⁴ In its motion to enter the settlement filed with the district court, meanwhile, the government had explained

121. *Kokesh v. SEC*, 137 S. Ct. 1635, 1645 (2017) (quoting *United States v. Bajakajian*, 524 U.S. 321, 331 (1998)).

122. Eileen D. Millett, *A Step Too Far from a “SEP” in the Right Direction*, 33 THE PRACTICAL REAL ESTATE LAWYER 5 (2017) (“Corporations will willingly implement SEPs rather than pay money in penalties because they believe the money is well spent on a SEP, or they believe that they will receive a public relations benefit.”).

123. 591 F.3d 484 (6th Cir. 2010).

124. *Id.* at 486.

the importance of high civil penalties to operate as a “deterrent to future non-compliance by the defendant and by others.”¹²⁵ The district court had agreed with the commenters, finding that a large part of the penalty money could be better utilized by additional SEPs or by application of a portion of the penalty money to remedial work required by the consent decree.¹²⁶ However, the Sixth Circuit reversed and remanded, relying heavily on the importance of deterrence in enforcement.¹²⁷ The Sixth Circuit found that “rejecting a civil penalty as too high because of the greater seriousness of the violation, or because the penalty money could be used for remediation, is in tension with, rather than in accordance with, the statutory purpose behind civil penalties.”¹²⁸ The court acknowledged that remediation might be better, but found that if Congress had thought that a violator’s civil penalty money should go towards a remedial goal, it would not have provided for civil penalties.¹²⁹

To be clear, SEPs can serve a remedial purpose. Arguably, a tighter nexus requirement actually does more to remediate the actual harm from a violation. In some situations, the nexus is clear. Other times, however, the nexus may not be clear, or more likely, the SEP focuses more on punishing the defendant than remedying harm to the environment or public health. As described by Professors Charles Foster and Frances Foster,

reform-minded judges, legislators, enforcement officials, parties, and scholars have called attention to the need to apply some portion of settlement funds to credit projects and have explored innovative ways to do so. Yet, these approaches have ultimately failed to achieve their potential because they are at best supplementary and remain “subservient to the deterrence policy served by [monetary] penalties.”¹³⁰

Thus, even though SEPs can serve a remedial purpose, it is difficult to make remedial purpose a primary goal.

B. Restitution and Prevention

The federal government has also argued in enforcement cases that payments for projects are akin to the equitable remedy of restitution.¹³¹ The theory behind restitution is to deprive defendant wrongdoers by recovering funds that

125. *Id.* at 487.

126. *Id.*

127. *Id.* at 488–91.

128. *Id.* at 487.

129. *Id.* at 487–88.

130. Foster & Foster, *supra* note 1, at 786.

131. Wilt, *supra* note 35, at 295 (“Proponents of the consumer relief provisions claim that the provisions constitute a kind of ‘restitution’ or ‘remediation’ of harm.”).

are equivalent to the defendant's ill-gotten gain.¹³² Restitution allows such recovered funds to return to plaintiffs, placing a victim in the same position she would have occupied without the defendant's act.¹³³ That is, restitution refers both to "disgorgement," taking a benefit away, and to restoring the status quo.¹³⁴

The question in environmental enforcement cases has been whether principles of restitution can provide for payments for cleanup of past harm. The Supreme Court loosely addressed this question in a RCRA case, *Meghrig v. KFC Western, Inc.*¹³⁵ In *Meghrig*, the Court found that individual plaintiffs could not recover costs already paid for in remediation under RCRA, because the relevant RCRA provision did not provide compensation for past cleanup efforts like CERCLA did.¹³⁶ The plaintiff in *Meghrig*, a restaurant company, had purchased a site to build a restaurant franchise and learned during the construction process that the site contained hazardous waste.¹³⁷ The county government ordered the restaurant company to pay for remediation, and in *Meghrig*, the company sought recovery of such payments from the previous owners.¹³⁸ The district court in *Meghrig* held that RCRA "does not permit recovery of past cleanup costs and that [RCRA generally] does not authorize a cause of action for the remediation of toxic waste."¹³⁹ The Ninth Circuit reversed, finding that the "district court had authority under [RCRA] to award restitution of past cleanup costs."¹⁴⁰ The Supreme Court reversed the Ninth Circuit, distinguishing CERCLA from RCRA in the remedies each provides.¹⁴¹

The federal government filed an amicus brief in the *Meghrig* case, arguing that RCRA does not preclude an award of past cleanup costs.¹⁴² Instead of relying on the remedies expressly provided in RCRA, the federal government argued that because district courts retain inherent authority to award any equitable remedy not expressly taken away from them by Congress, a plaintiff could seek recovery of costs while the waste at issue continues.¹⁴³ Equitable restitution

132. George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 *FORDHAM J. CORP. & FIN. L.* 1, 7 (2007).

133. *Randall v. Loftsgaarden*, 478 U.S. 647, 671–72 (1986).

134. *See Restitution*, CORNELL L. SCH. LEGAL INFO. INST.: WEX, <https://perma.cc/SWV2-A4YB>.

135. 516 U.S. 479 (1996).

136. *Id.* at 484–88.

137. *Id.* at 481.

138. *Id.* at 481–82.

139. *Id.* at 482.

140. *Id.*

141. *Id.* at 484–85.

142. Brief for the United States as Amicus Curiae Supporting Petitioners, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996) (No. 95-83), 1995 WL 702807 (citing *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)).

143. *Id.*

would allow recovery of money previously spent on cleanup efforts.¹⁴⁴ The Supreme Court in *Meghrig* declined to opine on the government's argument regarding RCRA equitable restitution, but it did suggest a potential comparison of such a concept to a Third Circuit case involving a request for an injunction to require the funding of certain projects in response to water contamination: *United States v. Price*.¹⁴⁵

Price involved a landfill that for years accepted hazardous waste without proper authorization, and mismanaged the handling of the waste in such a way as to cause significant threats of leaking into the local public water system.¹⁴⁶ The federal government brought an action requesting an injunction that would require owners of the contaminated site to pay for, among other things, a diagnostic study of the area surrounding the landfill.¹⁴⁷ The district court decided that such a diagnostic study was "an inappropriate form of preliminary equitable relief" because it "would have required monetary payments."¹⁴⁸ As described by the Third Circuit, "in the eyes of the district court, it was an attempt to transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money."¹⁴⁹ The Third Circuit however, overturned the district court, finding that damages are a form of substitutional redress, but a "request for funds for a diagnostic study of the public health threat posed by the continuing contamination and its abatement is not, in any sense, a traditional form of damages."¹⁵⁰ The Third Circuit further held that "the funding of a diagnostic study in the present case, though it would require monetary payments, would be preventive rather than compensatory."¹⁵¹ The study was a step in the remedial process of abating an existing but growing toxic hazard.

Courts have similarly used equitable authority to allow for payments for remedial purposes under the CAA. In *United States v. Cinergy*, defendants argued that unlike CERCLA, the CAA did not contemplate remedial measures.¹⁵² The defendants in *Cinergy* distinguished the CAA as a forward-looking pollution prevention statute that does not include expansive equitable powers for courts.¹⁵³ The government plaintiffs acknowledged that "it is impossible to scrub from the environment the pollution that Cinergy has already

144. *Id.* at 22–28 (discussing *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)).

145. *Meghrig*, 516 U.S. at 488 (citing *United States v. Price*, 688 F.2d 204, 211–13 (3d Cir. 1982)).

146. *Price*, 688 F.2d at 208–09.

147. *Id.* at 207–08.

148. *Id.* at 211.

149. *Id.*

150. *Id.* at 212.

151. *Id.*

152. *See United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055, 1064–65 (S.D. Ind. 2008).

153. *Id.*

emitted or bring back the good health of those harmed by these illegal emissions.”¹⁵⁴ Instead, the government plaintiffs argued that the best possible method to redress the illegal emissions is to order future pollution reductions, and that such an order would be “analogous to the traditional remedy of disgorgement of ill-gotten gains.”¹⁵⁵ The district court agreed, finding that

an order requiring [defendants] to take actions that remedy, mitigate, and offset harms caused to the public and the environment by [its] past CAA violations would seem to give effect to the CAA’s purpose “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare.”¹⁵⁶

Furthermore, the court concluded, “its equitable authority granted by [the CAA] includes the authority to order relief aimed at redressing the harms caused by [defendant’s] established violations of the CAA. In other words, this Court’s equitable authority is not limited to providing prospective relief only.”¹⁵⁷

In particular, in CAA cases, the courts have been willing to use equitable authorities to allow for payments for remedial purposes where the payment goes to a preventative project. In the remedy phase of trial for both the *Cinergy* case and in *Westvaco*, the respective district courts required the submission of “remediation” proposals. The courts analyzed the remediation proposals by looking at whether the proposed projects would confer maximum environmental benefits, were achievable as a practical matter, bore an equitable relationship to the degree and kind of wrong they are intended to remedy, and were not punitive in nature.¹⁵⁸ In both *Cinergy* and *Westvaco*, the courts first evaluated projects that would involve “beyond compliance” activities. Such projects would involve no third-party payment whatsoever. Both courts, failing to find adequate projects at the source, turned towards projects that would reduce the relevant emissions somewhere in the same airshed.¹⁵⁹ However, in the end, the

154. Plaintiffs’ Trial Brief at 14, *United States v. Cinergy Corp.*, 618 F. Supp. 2d 942 (S.D. Ind. Jan. 9, 2009) (No. 1:99-cv-01693-LJM-JMS).

155. *Id.* at 14–15.

156. *Cinergy*, 582 F. Supp. 2d at 1061 (quoting 42 U.S.C. § 7401 (2018)).

157. *Id.* at 1062. In addition, in a 1985 decision, *United States v. Holtzman*, 762 F.2d 720 (9th Cir. 1985), the district court held that its authority under CAA Title II to “restrain” violations includes both the power to enjoin otherwise lawful activity and to “correct or dissipate” the harmful effects of past violations, *id.* at 724.

158. See *United States v. Cumberland Farms of Conn., Inc.*, 826 F.2d 1151, 1164 (1st Cir. 1987); *United States v. Cinergy Corp.*, 618 F. Supp. 2d 942, 967 (S.D. Ind. 2008) (quoting *United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003)); Memorandum of Decision – Remedy Phase at 34, *United States v. Westvaco*, No. MJG-00-2602 (D. Md. Feb. 26, 2015).

159. The court in *Cinergy* considered whether the defendant company could mitigate or offset past harm by installing pollution control at non-violating units located at the same plant. *Cinergy*, 618 F. Supp. 2d at 967. However, because the emissions at the non-violating units

Seventh Circuit overturned the *Cinergy* case on other grounds before the district court ever issued an order requiring mitigation projects, and the *Westvaco* case settled.¹⁶⁰

While no court has yet had occasion to award payments for preventative projects as equitable restitution under the CAA, many courts have approved settlements with such payments. Funds recovered from claims of retrospective injunctive relief in CAA enforcement case settlements have gone towards a variety of projects seeking to prevent future harm, including those projects involving “beyond compliance”, as in the *Cinergy* and *Westvaco* litigation, which are arguably most akin to restitution. For example, in *United States v. Mosaic Fertilizer, LLC*,¹⁶¹ the approved CAA enforcement settlement involved a mitigation project requiring defendants to upgrade “the catalyst on the E Train to lower emissions well below its currently permitted level,” where the complaint alleged violations at the A and D trains of the facility. Yet courts have also approved projects that do not involve “beyond compliance” at a defendant’s site, but instead abate an existing air pollution problem in the air generally.¹⁶² Mobile source cases like *Volkswagen*, involving payments for projects to reduce NOx emissions in the future, are examples.

C. Compensation and Damages

Traditional notions of compensatory damages in environmental cases usually do not come up in statutory environmental enforcement cases. Damages are more likely to occur in environmental tort cases.¹⁶³ However, federal district courts have held that natural resource damages under statutes like CERCLA

were significantly greater than those from the violating units, the court in *Cinergy* held that for the court to require pollution control technology at the non-violating units would exceed any mitigation remedy justified by plaintiff’s evidence of irreparable harm. *Id.* The court in *Westvaco* looked at similar project proposals for “beyond compliance” projects, but found that requirements to install pollution control technology would not be achievable as a practical matter because defendants had transferred ownership of the stationary source to a new owner. Memorandum of Decision – Remedy Phase, *supra* note 158, at 31. The court reasoned that a new owner, one that did not cause the violation, would have to install the pollution control technology at both boilers, and there would be insurmountable conflicts between the current owner and the former owner. *Id.*

160. See *United States v. Cinergy Corp.*, 623 F.3d 455, 460–61 (7th Cir. 2010); Memorandum and Order Approving Consent Decree, *Westvaco*, No. MJG-00-2602 (D. Md. Aug. 26, 2016).
161. *Mosaic Fertilizer, LLC Information Air Act Settlement*, EPA (Oct. 5, 2009), <https://perma.cc/C8JB-3BEU>.
162. See generally *Volkswagen Clean Air Act Settlement*, *supra* note 103.
163. See, e.g., *Tiongco v. Sw. Energy Prod. Co.*, 214 F. Supp. 3d 279, 282–83 (W.D. Pa. 2016) (finding that a plaintiff individual may recover money from a defendant’s drilling activities near her property that she demonstrates caused dust, and that the compensation is likely to mirror the cost of cleaning the dust and repairing any damage to her home).

are fundamentally legal in nature; that is, such damages are akin to compensating the plaintiff for injury to its property, much like damages recovered in nuisance or trespass.¹⁶⁴ CERCLA provides for plaintiff government agencies to seek compensation for damages resulting from both direct and indirect injury, destruction, and loss.¹⁶⁵ The appropriate amount of compensation considers replacement value, use value, and the ability of the ecosystem or resource to recover.¹⁶⁶ The process for determining the amount of damages for compensating the loss of the natural resource is lengthy and complex. Trustees conduct natural resource damage assessments (“NRDAs”) to identify what resource was injured, how much it was injured, and how much it will cost to restore it to its “baseline” condition.¹⁶⁷ NRDAs then form the basis for calculating damages assessed against potentially responsible parties (“PRPs”) in court actions.

No provision under the CAA, however, allows for compensatory damages for loss to natural resources or public health from injurious conduct. There is no sanctioned NRDA process to examine the impact of CAA or CWA violations on natural resources. There is no “public health damage assessment” process to examine the impact of CAA or CWA violations on public health. Such a process could allow for an understanding of the impact on the public from air or water violations, akin to what CERCLA provides for the study of the impact on the public from releases of hazardous substances. Unfortunately, it does not exist within the CAA or CWA.

However, CAA enforcement violations can cause damage to natural resources, and courts have approved CAA enforcement settlements with payments for projects to restore such resources. In addition to natural resource damage authorizing statutes involving oil spills or chemical releases, like CERCLA and the Oil Pollution Act, some federal agencies have authority to seek damages resulting from injuries to federal lands. The U.S. Forest Service (“USFS”), under the Restoration of National Forest Lands and Improvements

164. *See In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 994, 1000 (D. Mass. 1989) (stating action for compensatory restoration damages “sounds basically in tort,” presents fundamentally legal issues, and “must be tried to a jury as a matter of right”); *see also* *United States v. Viking Res.*, 607 F. Supp. 2d 808, 832 (S.D. Tex. 2009) (“[A]t least one component of natural resource damages—the diminution in value of those natural resources pending restoration—is legal in nature. It amounts to compensating the plaintiff for injury to its property, much like damages recovered in nuisance or trespass—both classic *legal* causes of action.”).

165. 42 U.S.C. § 9607(c) (2018); *see also id.* § 9651(c) (“Such regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.”) In addition, § 9607(f) elaborates: “the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources.”

166. 42 U.S.C. § 9607(c).

167. 15 C.F.R. § 990 (2019); 43 C.F.R. § 11 (2019).

Act, has the authority to accept any monies outside of appropriations received by the United States as a result of a judgment, compromise, or settlement of *any* claim, involving present or potential damage to USFS lands.¹⁶⁸ The National Park Service (“NPS”), under the Park System Resource Protection Act (“PSRPA”), has similarly broad authority to pursue claims involving damage to federal lands. The PSRPA requires that any monies recovered by the federal government under *any* federal, state, or local law or regulation or otherwise, as a result of injury to NPS lands, be available to the NPS, outside of appropriations.¹⁶⁹ Typically, the USFS and the NPS have used these authorities to address damages resulting from wildfires, car accidents, vessel groundings, and other similar events.¹⁷⁰

Several NSR enforcement cases too have alleged claims of damage to federal lands, primarily from acid rain.¹⁷¹ In *Westvaco*, plaintiffs alleged specific damage to nearby federal lands from excess emissions from the large stationary sources at issue.¹⁷² During the *Westvaco* trial, the superintendent of Shenandoah National Park testified about the natural resources within the park at risk by the air pollution from the defendant’s plant.¹⁷³ Additional NPS and USFS scientists testified about how acidic deposition had affected both Shenandoah National Park and Monongahela National Forest.¹⁷⁴ The settlement in *Westvaco* then included payments to the NPS and USFS, under each agency’s authority, to accept funds from claims involving damage to public lands for restoration

168. Pub. L. No. 85-464, 72 Stat. 216, 216–17 (codified at 16 U.S.C. § 579c (2018)) (“An act to facilitate and simplify the work of the Forest Service, and for other purposes.”); Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, tit. III, § 305, 90 Stat. 2743, 2765 (codified at 43 U.S.C. § 1735 (2018)). There is little legislative history on the RN-FLA, but the legislative history on the PSRPA indicates a clear intent to authorize NPS to use recovered funds outside of the normal appropriations process. In December 1986, a freighter ran aground on a coral reef in Biscayne National Park in Florida, damaging over 6,000 square feet of coral. The company owning the freighter subsequently settled with the DOJ for \$40,000, which the DOJ deposited as miscellaneous funds in the U.S. Treasury. *See* S. REP. NO. 101-328, at 603 (1990).

169. 54 U.S.C. § 100724 (2018) (formerly codified at 16 U.S.C. § 19jj-3). Interestingly, as of the date of this Article, the Fish and Wildlife Service Resource Protection Act (“FWSRPA”), currently pending in Congress, would provide authority to the FWS to also accept any monies outside of appropriations received by the United States as a result of a judgment, compromise, or settlement of *any* claim, involving present or potential damage to FWS lands. *See* H.R. 1326, 116th Cong. (2019).

170. Karen Bradshaw, *Settling for Natural Resource Damages*, 40 HARV. ENVTL. L. REV. 211, 238–39 (2016).

171. *See generally Nitrogen and Sulfur Pollution in Parks*, U.S. NAT’L PARK SERV., <https://perma.cc/UZ57-VXMQ>.

172. Plaintiff’s Pretrial Brief at 21, *United States v. Westvaco Corp.*, No. MJG-00-2602 (D. Md. Nov. 28, 2012).

173. *United States’ Proposed Findings of Fact (Remedy Phase)* at 72, 2015 U.S. Dist. LEXIS 176166, *Westvaco*, No. MJG-00-2602 (D. Md. Mar. 15, 2013).

174. *Id.* at 77–82.

projects, such as watershed limestone lining, and revegetation and reforestation to improve natural abilities to buffer acid impacts.¹⁷⁵

Courts have approved several other CAA enforcement case settlements with payments to NPS and USFS, beyond *Cinergy* and *Westvaco*. For example, the 2003 *VEPCO* settlement included requirements for defendants to pay \$1 million to NPS to implement a project “intended to reduce damage to those resources caused by air pollution suffered by [Shenandoah National] Park.”¹⁷⁶ In addition, the 2007 *American Electric Power* settlement included requirements for defendants to pay \$2 million to NPS for the restoration of land, watersheds, vegetation, and forests in one of several areas alleged in the underlying action to have been injured by emissions from defendants’ facilities, including Shenandoah National Park, Mammoth Cave National Park, and Great Smoky Mountains National Park.¹⁷⁷ The 2012 *Louisiana Generating* case,¹⁷⁸ which settled only a few days before the start of a scheduled liability trial, also included requirements for defendants to pay \$1 million total to the NPS and USFS for restoration projects on Jean Lafitte National Historical Park and Preserve, Vicksburg National Military Park, the Natchez Trace Parkway, and Kisatchie National Forest.¹⁷⁹ Lastly, under the *Volkswagen* partial consent decree, the Trustee is required, at the end of the life of the Trust, to give any remaining funds in the Trust to federal land agencies.¹⁸⁰ The agencies must use such funds to pay for diesel-emission reduction projects, but since the harm in Volkswagen was nationwide, the projects can be located on *any* federal lands impacted by NOx emissions.¹⁸¹

Courts have also found that payments for projects in CAA enforcement cases qualify as remediation costs under defendants’ insurance contracts, akin to costs associated with CERCLA. For example, in the *Louisiana Generating* CAA settlement, the defendant company agreed to pay for several projects, specifically to resolve alleged equitable claims for retrospective injunctive relief.¹⁸² Such projects included payments for electric vehicle-charging infrastructure in southern Louisiana, solar panel installation at schools, and restoration of

175. Memorandum and Order Approving Consent Decree, 2015 U.S. Dist. LEXIS 114691, at *17, *Westvaco*, No. MJG-00-2602, (D. Md. Aug. 26, 2016).

176. Consent Decree at 7, app. B, *United States v. Va. Elec. & Power Co.*, No. 1:03-cv-00517 (E.D. Va. Oct. 3, 2003).

177. Consent Decree, 2007 U.S. Dist. LEXIS 104330, at *129, *United States v. Am. Elec. Power Serv. Corp.*, No. C2-99-1250 (S.D. Ohio Oct. 9, 2007).

178. *United States v. La. Generating LLC*, No. 09-100-JJB-RLB, 2012 U.S. Dist. LEXIS 142349 (M.D. La. Mar. 5, 2012).

179. Consent Decree at 67, *United States v. La. Generating LLC*, No. 09-100-JJB-RLB, 2012 U.S. Dist. LEXIS 142349 (M.D. La. Mar. 5, 2012).

180. Partial Consent Decree at 20, app. D, *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, and Prods. Liability Litig.*, No. 2672 CRN (JSC) (N.D. Cal. Sept. 30, 2016).

181. *Id.*

182. *Louisiana Generating Settlement*, EPA (Nov. 21, 2012), <https://perma.cc/HC2B-MEY9>.

lands at nearby national parks.¹⁸³ The company later sought coverage for the projects under its insurance policy, which covered “remediation costs” defined as “reasonable expenses incurred to investigate, quantify, monitor, mitigate, abate, remove, dispose, treat, neutralize, or immobilize pollution conditions to the extent required by environmental law.”¹⁸⁴ The insurance company argued that the actions required under the consent decree did not clean up the residue from past emissions, and therefore were not remediation costs.¹⁸⁵ The insurance company’s expert specifically argued, “[o]nce air pollution has settled on the ground or the water, people no longer breathe it, and it no longer poses a threat through inhalation.”¹⁸⁶ Similar to arguments made in the *Cinergy* case, the insurance company further asserted that the CAA handles ongoing or future pollution, and it is the squarely remedial statutes, such as CERCLA, that should handle any past air pollution that may leave a toxic residue, like lead or mercury.¹⁸⁷ The Fifth Circuit however, disagreed with the insurance company, finding: “Because of the [company’s] past emissions, there [are] more pollutants and pollutant byproducts in the air, and more pollution-related damage to natural resources, than there would have been absent the past emissions. Future emissions contribute to this geographically diffuse, intermingled body of harm exactly the same way.”¹⁸⁸

IV. CURRENT CONTROVERSY

Despite the multiple purposes served by payments for projects, they are once again causing controversy in the Trump Administration. The same concerns over appropriations, equitable authority, quantification of harm, and settlement have resurfaced. As this Part discusses, the concerns have resulted in multiple guidance documents from DOJ limiting the scope of both SEPs and mitigation dramatically. Furthermore, the guidance documents have been used to justify the government entering into settlements of enforcement violations without any remedy for past harm to the environment and public health.

A. *New Guidance*

The payments for projects in the *Volkswagen* partial consent decree immediately raised appropriations and legal authority concerns in Congress and the newly elected Trump Administration. In 2016, members of Congress introduced a bill, the Stop Settlement Slush Funds Act, which would bar mandatory

183. *Id.*

184. Expert Report of Michael B. Gerrard, *supra* note 21, at 17.

185. *See id.* at 5.

186. *Id.*

187. *Id.* at 8–9.

188. *La. Generating LLC v. Ill. Union Ins. Co.*, 831 F.3d 618, 630 (5th Cir. 2016).

donation terms in federal government settlements unless they “provide restitution for or otherwise remedy the actual harm (including to the environment) directly and proximately caused by the alleged conduct of the party, that is the basis for the settlement agreement.”¹⁸⁹ In addition, the Trump Administration’s 2017 guidance mirrors the Slush Funds Act.¹⁹⁰ The 2017 guidance prohibits DOJ attorneys from entering “into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation . . . that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute.”¹⁹¹ The 2017 guidance further provides that “the policy does not apply to an otherwise lawful payment or loan that provides restitution to victim or that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment.”¹⁹² The 2017 guidance, later clarified in a 2018 guidance specific to payments in environmental settlement agreements (“2018 guidance”) further refined what a “direct” remedy means.¹⁹³ The 2018 guidance specifies that payments must go towards projects that reduce the same type of harm that resulted from the unlawful conduct, at the source itself, or in the same airshed as the source.¹⁹⁴ The payment may not be out of proportion with the harm that resulted from the unlawful conduct.¹⁹⁵ In addition, if the harm is pervasive, government attorneys must consider projects that reduce the harm in all areas.¹⁹⁶

The 2017 guidance, particularly in the aftermath of mitigation requirements in the *Volkswagen* partial consent decree, and the pending Slush Funds Act, received significant attention in the news media.¹⁹⁷ Environmental groups expressed concern that the payment prohibition would effectively eliminate critical environmental projects. In particular, states and environmental groups expressed concern that the third-party payment ban could upend natural resource damage settlements like those achieved in the British Petroleum oil spill settlement allowing \$2.5 billion to be directed to the National Fish and Wildlife Foundation, a congressionally chartered non-profit, to fund projects benefiting natural resources on the gulf coast.¹⁹⁸ At least one scholar commented

189. Stop Settlement Slush Funds Act of 2016, H.R. 5063, 114th Cong. (2016).

190. DOJ 2017 Guidance, *supra* note 7.

191. *Id.*

192. *Id.*

193. DOJ 2018 Guidance, *supra* note 7.

194. *Id.* at 3.

195. *Id.* at 4.

196. *Id.*

197. Tatiana Schlossberg & Hiroko Tabuchi, *Settlements for Company Sins Can No Longer Aid Other Projects, Sessions Says*, N.Y. TIMES (June 9, 2017), <https://perma.cc/S7EK-QK3J>.

198. Suzanne Yohannan, *DOJ Official Affirms NRD Deals’ Exemption from Third-Party Payments Ban*, INSIDE EPA (Mar. 19, 2018), <https://perma.cc/UW76-BQ3H>.

that such actions would prevent the government from addressing generalized harm, and were not a necessary measure to address separation-of-powers concerns.¹⁹⁹ Industry attorneys worried that the ban would “upend industry’s ability to enter settlement agreements because of concerns about how they pay for the remedies they agree to.”²⁰⁰ As described below, such concerns eventually came to fruition in the CAA *Harley Davidson* proposed consent decree.

B. *Ramifications of New Guidance*

In August 2016, the DOJ filed a complaint against Harley-Davidson, Inc. (“Harley”), and simultaneously lodged a proposed consent decree with the court, resolving violations of the CAA’s mobile source defeat device and tampering provisions.²⁰¹ The 2016 proposed consent decree included injunctive relief provisions requiring Harley to include a complete ban on the sale of “Tuning Products” that were not certified, deny and instruct dealers to deny warranty claims where the dealer had any information that motorcycles were tuned by tuning devices, and buy back any illegal tuners that remained in dealers’ inventories.²⁰² The 2016 proposed consent decree also included a mitigation obligation: specifically, a requirement for defendants to pay a third-party organization \$3 million to replace old woodstoves with emissions-certified woodstoves.²⁰³

In November 2016, the Chairman of the House Committee on Oversight and Government Reform inquired about the woodstove changeout “penalty.”²⁰⁴ The Chairman specifically asked for an opinion from the Government Accountability Office (“GAO”) on whether “financial penalties like this run the risk of creating the perception that the Justice Department and EPA may be using this consent decree to augment their appropriations and circumvent the appropriations process.”²⁰⁵ DOJ never moved to enter the proposed consent de-

199. Andrew Brady Spalding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L.J. 357, 394–95 (2015) (saying such payments are “within the Executive’s legitimate enforcement authority and [do] not run afoul of either Congress’s Article I power of the purse or the MRA”); see also *Stop Settlement Slush Funds Act of 2016: Hearing on H.R. 5063 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2016) (testimony of David Min, Professor at U.C. Irvine School of Law).

200. Dawn Reeves, *DOJ Allows Environmental Exceptions to Third-Party Settlement Payment Ban*, INSIDE EPA (Jan. 29, 2018), <https://perma.cc/24CL-4CWY>.

201. *Harley Davidson Clean Air Act Settlement*, EPA, <https://perma.cc/HLF7-K4HU>.

202. *Id.*

203. Press Release, U.S. Dep’t of Justice, *Harley-Davidson to Stop Sales of Illegal Devices that Increased Air Pollution from the Company’s Motorcycles* (Aug. 18, 2016), <https://perma.cc/T83J-Z58B>.

204. Letter from Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov’t Reform, to Gene L. Dodaro, Comptroller Gen. of the U.S. (Nov. 17, 2016), <https://perma.cc/LC32-PPRS>.

205. *Id.*

cree. Instead, in July 2017, after the Trump Administration issued the 2017 Policy, DOJ filed a substitute consent decree identical to the originally proposed consent decree, except without the mitigation obligation.²⁰⁶

In December 2017, DOJ moved to enter the new substitute consent decree.²⁰⁷ In its motion, DOJ stated: “[T]he original consent decree would have required defendants to pay a nongovernmental third-party organization to carry out the mitigation project. Questions exist as to whether this mitigation project is consistent with the new [June 5, 2017] policy.”²⁰⁸ In early 2018, several states and one local government filed a motion in opposition to the court’s entry of the substitute consent decree.²⁰⁹ Several environmental groups filed amici briefs in support of the opposition. The core of the arguments by plaintiffs, defendants, and opponents to the Harley substitute consent decree centered on whether the substitute consent decree met the standard of “fair, reasonable, and in the public interest” *without* the woodstove mitigation project.²¹⁰

Harley, DOJ, and the State of Wyoming urged the court to approve the substitute consent decree. Wyoming argued in public comment that while the substitute consent decree should not have deleted the mitigation requirement, the original consent decree did not go far enough to mitigate the harmful effects on Harley’s violations.²¹¹ Wyoming, in its comments on the *Harley* proposed substitute consent decree, stated, “although the [Wyoming] Department [of Environmental Quality] cannot yet quantify the extent of illegal emissions, the agency knows that they have impacted and continue to impact Wyoming. It also seems highly probable that subject defeat devices were sold and installed in Wyoming.”²¹² Wyoming specifically referenced the *Volkswagen* partial consent decree to argue that the Harley original consent decree only required Harley to mitigate excess emissions in the New England area, and should have, like the *Volkswagen* partial consent decree, included a nationwide effort to reduce excess emissions.²¹³

206. Notice of Lodging of Proposed Consent Decree Under the Clean Air Act, 82 Fed. Reg. 34,977 (July 27, 2017); see also David Shepardson, *10 U.S. States Object to EPA Reducing Harley-Davidson Emissions Penalty*, REUTERS (Feb. 1, 2018), <https://perma.cc/9T2J-W4ZY>.

207. United States Motion to Enter Consent Decree, United States v. Harley-Davidson, No. 1:16-cv-01687 (D.D.C. Dec. 11, 2017) [hereinafter U.S. Motion to Enter, *Harley-Davidson*]; Notice of Lodging of Proposed Consent Decree Under the Clean Air Act, 82 Fed. Reg. at 34,977.

208. Notice of Lodging of Proposed Consent Decree Under the Clean Air Act, 82 Fed. Reg. at 34,978.

209. Shepardson, *supra* note 206.

210. U.S. Motion to Enter, *Harley-Davidson*, *supra* note 207, ex. 2 at 7.

211. *Id.* ex. 1-A at 3.

212. *Id.*

213. *Id.*

Harley and DOJ focused arguments on uncertainty in quantifying the exact amount of excess emissions in settlement of alleged CAA violations.²¹⁴ Harley argued that the case only alleged excess harm, nothing more.²¹⁵ Since a court did not adjudicate Harley's defenses, there was no way to resolve whether there was a violation at all, and certainly not whether an alleged violation caused excess emissions.²¹⁶ Harley also argued that the injunctive relief requirements regarding the tuners were more than enough to account for any alleged excess harm to the environment and public health.²¹⁷ DOJ also noted uncertainty regarding how the Court would ultimately analyze factors such as "the amount of excess emissions the United States would be able to prove, and whether a court would hold Harley-Davidson responsible for all of them, or just a portion of them."²¹⁸ DOJ also argued that the woodstove project in the proposed consent decree did not meet the requirements of the DOJ 2018 policy for a limited exception for payments that directly remedy the harm, because it did not adequately address emissions nationwide.²¹⁹

Several environmental groups, and local and state governments, urged the court to disapprove the substitute consent decree. The Sierra Club noted that mitigation obligations need not remedy all of the alleged excess harm. Otherwise, every project would fail to offset every particle of pollution stemming from an environmental violation.²²⁰ Local and state governments argued that the substitute consent decree, without the mitigation project, could not be reasonable because the federal government argued that the original consent decree *with* the mitigation project was reasonable.²²¹ At the time this Article was written, the district court had not made a decision on approval of the *Harley* substitute consent decree.

In addition, in September 2018 and January 2019, the federal government announced two new CAA settlements with defendants on allegations of defeat devices, Derive Systems, Inc. ("Derive"), and Fiat Chrysler Automobiles ("FCA").²²² The Derive settlement, as noted by Sierra Club in its comment during the public comment period, does not include requirements that defend-

214. U.S. Motion to Enter, *Harley-Davidson*, *supra* note 207, at 25.

215. Response of Harley-Davidson to Amici Curiae at 2–3, *United States v. Harley-Davidson*, No. 1:16-cv-01687 (D.D.C. Dec. 11, 2017).

216. *Id.*

217. *Id.* at 4–5.

218. U.S. Motion to Enter, *Harley-Davidson*, *supra* note 207, at 24–25.

219. *Id.* at 29–30.

220. *Id.* at 18–31.

221. *Id.* ex. 1 at 50.

222. *Derive Systems Clean Air Act Settlement*, EPA (Sept. 24, 2018), <https://perma.cc/G26D-AH63>; *Fiat Chrysler Automobiles Clean Air Act Settlement Information Sheet*, EPA (Jan. 10, 2019), <https://perma.cc/HN3P-C8AQ>.

ants mitigate the air pollution impacts from the illegal devices.²²³ The FCA settlement includes a payment for a project requiring the defendant to work with third-party vendors of catalytic converters to improve the efficiency of 200,000 converters sold in the forty-seven states that do not already require the use of the more stringent California-mandated catalysts.²²⁴ It remains to be seen whether the inclusion of such payments for projects in the FCA settlement will affect the court's decision in approving the pending proposed settlements in *Harley*. However, it is clear that regardless of the outcome in these case settlements, multiple concerns over payments for projects in enforcement cases will persist.²²⁵

V. MOVING FORWARD

This Part provides concrete suggestions on how agencies can work to reduce the criticism of payments for projects. First, it provides legislative ideas that could create clear authority for payments for projects. Second, it argues that agencies should try to clarify in settlement approval processes that such projects serve a remedial purpose separate from a punitive purpose.

A. Legislative Role

New legislation could significantly reduce, if not alleviate, concerns that payments for projects in enforcement cases violate notions of separation of powers. Indeed, the Trump Administration agrees. In August 2019, in another update to the 2017 and 2018 guidance, DOJ issued a memo restricting SEPs in CWA cases with state and local governments as defendants.²²⁶ The memo specifically cites to SEPs as “miscellaneous-receipt-circumvention-devices” and asserts that SEPs challenge the congressional power of the purse.²²⁷ However, the memo states that clear congressional intent can override any such concerns.²²⁸

223. Memorandum of Law in Support of the Motion of the United States of America to Enter Consent Decree, ex. B at 2, *United States v. Derive Systems, Inc.*, No. 1:18-cv-02201 (D.D.C. Feb. 5, 2019).

224. Press Release, U.S. Dep't of Justice, *In Civil Settlements with the United States and California, Fiat Chrysler Will Resolve Allegations of Cheating on Federal and State Vehicles Emissions Tests* (Jan. 10, 2019), <https://perma.cc/UX44-JKMF>; see Consent Decree at 101-04, *United States v. Fiat*, No. 3:17-cv-3446-EMC (Jan. 10, 2019) (detailing the mitigation program).

225. See, e.g., Stephen Lee & Ellen M. Gilmer, *Justice Department Ponders Nixing Environmental Settlements Tool*, BLOOMBERG L. (Oct. 30, 2019), <https://perma.cc/4Y4U-Q4P7>.

226. Memorandum from Jeffrey Bossert Clark, U.S. Assistant Att'y Gen., to Chiefs of All Remaining ENRD Sections, *Using Supplemental Environmental Projects (“SEPs”) in Settlements with State and Local Governments 8* (Aug. 21, 2019), <https://perma.cc/XS3U-9BN6> [hereinafter DOJ 2019 Guidance].

227. *Id.*

228. *Id.*

Moreover, the memo admits that a multitude of legal and policy arguments support the use of SEPs—among them, bringing benefits to local communities.²²⁹ Indeed, without such payments, the impact to natural resources and public health that often results from violations goes unaddressed. As such, new legislation can provide a clear and balanced approach to addressing both the need for payments for projects, and concerns that the Executive Branch could overstep its authority.

Congress should enact new legislation so that agencies can specifically deal with harm from specific violations. While all monies “received” by agencies must be deposited into the U.S. Treasury for general appropriations, agencies could be granted the statutory authority to retain monies received in enforcement actions.²³⁰ Indeed, the NPS and USFS authorities described in Part III.C of this Article are examples of such an exception to the MRA. In such situations, the MRA requirement to deposit such funds into the general fund of the U.S. Treasury does not apply.²³¹ As described by Professor Todd Peterson, Congress in enacting the MRA sought to close a loophole that allowed executive branch agencies to unconstitutionally interfere with Congress’ appropriations power.²³² For example, after the British Petroleum (“BP”) oil spill, Congress enacted the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act (“RESTORE Act”) establishing the Gulf Coast Restoration Trust Fund (“BP Trust”) in the Treasury Department.²³³ The BP Trust includes eighty percent of all civil penalties paid by BP after the date of the RESTORE Act for violations of the CWA.²³⁴ The RESTORE Act then gives the Treasury Department the ability to spend such civil penalties, without further appropriation, for certain eligible activities, including providing grants for restoration projects in the Gulf Coast region.²³⁵

Congress could provide authorization for agencies to spend monies received in enforcement cases, for general categories of projects, in anticipation of different types of violations. Congress has done so in discrete instances. For example, in 2008, Congress enacted legislation amending the CAA and grant-

229. *Id.* at 12.

230. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/OGC-92-13, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-108 (1992) (“An agency may retain moneys it receives if it has statutory authority to do so. In other words, 31 U.S.C. § 3302(b) will not apply if there is specific statutory authority for the agency to retain the funds.”).

231. *In re* Availability of Receipts from Synthetic Fuels Projects for Contract Administration Expenses of the Dep’t of Treasury, Office of Synthetic Fuels Projects, 72 Comp. Gen. 164, 165–66 (1993).

232. Peterson, *supra* note 28, at 334.

233. *Restore Act*, U.S. DEP’T OF THE TREASURY, <https://perma.cc/8L2B-WLXD>.

234. *Id.*

235. Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, §§ 1601–1608, 126 Stat. 405, 588 (2012).

ing EPA authority to accept diesel-emissions reduction SEPs, creating an express exception to the prohibition on augmenting appropriations for diesel-emission reduction projects.²³⁶ The legislative history of the provision indicates that Congress wanted to clarify that the use of SEPs for diesel-emission reduction projects did not circumvent the MRA or ADA.²³⁷ Yet Congress would need to provide multiple categories of acceptable SEPs across the CAA, CWA, and other environmental statutes in order to provide a viable solution for remedying harm to the public in all possible environmental enforcement cases.

Without new legislation, there is a strong chance that remedies for public harms in enforcement cases will disappear, given the 2017, 2018, and 2019 DOJ guidance. The champions of these guidance documents have argued that when the purpose of projects is to compensate for diffuse public harms, those funds belong to the public.²³⁸ As a result, agencies should direct the funds into the general treasury for Congress to spend on whatever it chooses.²³⁹ Indeed, the DOJ 2019 guidance states: “Congress may also prefer to spend those funds on, say, a new aircraft carrier or on ending the opioid epidemic.”²⁴⁰ Yet communities and natural resources impacted by violations, particularly violations that are egregious or longstanding, deserve relief, and enforcement should at least attempt to address those impacts.

Furthermore, the current Congressional appropriations process is simply not conducive to ensuring that funds go towards remedies for generalized harm from enforcement violations. Once funds are in the general treasury, communities and natural resources impacted by the underlying violation are unlikely to see those funds go towards specific remedies. For example, instead of requiring a defendant company to pay \$3 million for woodstove replacements, EPA could ask Congress for \$3 million in its annual budget appropriation request to conduct woodstove replacements.²⁴¹ Therefore, in the *Harley* case, for example, the

236. See Pub. L. No. 110-255, § 1, 122 Stat. 2423 (2008); see also EPA, 2015 UPDATED SEP POLICY, *supra* note 68, at 2.

237. S. REP. NO. 110-266, at 2 (2008) (“Following Congressional action to fund the diesel retrofit program, EPA apparently has concluded that the Agency generally should cease funding diesel retrofit projects via SEPs. EPA believes that allowing diesel retrofits to be funded by SEPs once Congress has specifically appropriated monies for that purpose could violate the Miscellaneous Receipts Act. This legislation is intended to clarify that Congress did not intend the funding of the Diesel Emissions Reduction Act to affect EPA’s ability to enter into SEPs that fund diesel retrofit projects.”).

238. U.S. CHAMBER INST. FOR LEGAL REFORM, ENFORCEMENT SLUSH FUNDS: FUNDING FEDERAL AND STATE AGENCIES WITH ENFORCEMENT PROCEEDS 18 (2015), <https://perma.cc/97C8-DFHR>.

239. *Id.*

240. DOJ 2019 Guidance, *supra* note 226, at 13.

241. See, e.g., *Stop Settlement Slush Funds Act of 2016: Hearing on H.R. 5063*, *supra* note 4, at 56 (testimony of David M. Uhlmann, Director, Environmental Law and Policy Program, University of Michigan Law School) (“Professor UHLMANN: But what about the rest of us? I

defendant would pay the \$3 million to the U.S. Treasury, and later, EPA would add a line-item request for \$3 million for woodstoves, in its next legislative budget request. However, there is no guarantee that EPA would actually receive the requested funds. Instead, the \$3 million could easily be diverted to another program, leaving the impacted community without compensation.

Theoretically, instead of EPA asking for funds for woodstove replacements, communities affected by enforcement violations could lobby congressional representatives. Under such a model, potential third parties, such as states, local governments, and non-profit organizations would need to keep track of individual enforcement actions and lobby the legislature for specific funds for use on designated projects. Yet there are a multitude of competing special interests that arise through lobbying efforts in the legislative process, and it does not strain the imagination to think about how difficult it might be for organizations to push for funds to remedy harm from a past enforcement case. As a result, even though opponents assert that monetary penalties deposited into the Treasury are better able to benefit society as a whole than payments directed to specific parties chosen by the defendant under guidelines crafted by the federal government, the realities of the lobbying process suggest otherwise.

Congressional legislation authorizing payments for projects would provide clear benefits for payments for projects. Legislation would alleviate concerns over the MRA. Legislation could also provide advocacy groups and local government agencies with advance notice of approved project ideas, providing advance direction to such groups and agencies on where to develop specific projects for individual enforcement cases that may arise. Furthermore, legislation could also give agencies go-to project categories in instances where cases resolve through last minute pre-trial settlements. Such legislation could amend the key environmental statutes, such as the CAA and CWA, or the MRA.

B. Clarify Remedial Purpose

In the absence of legislative action, however, agencies should focus on strengthening the remedial purpose of payments for projects in the enforcement process. Specifically, agencies should work towards two goals. First, because so many enforcement cases are resolved through settlement, agencies should look towards better identification of specific harm from enforcement violations earlier in the enforcement process. Second, agencies should better explain, in key settlement documents, the connection between identified harm and payments

mean, Volkswagen's conduct—you know, some news reports have suggested that hundreds of people will die because of the nitrogen oxide that Volkswagen cars emitted into the environment. How do we address that harm? Mr. MARINO: I don't dispute that with you. But I believe that's Congress' responsibility. . . . We're going to go through the appropriation process by which any department or agency requests money for its original budget.”).

for projects, including the legal authority for courts to approve such payments. Both these actions can help establish a clearer line between remedial and punitive purpose.

1. Remedial Purpose Matters

Remedies are confusing, particularly because many remedies that seek to serve distinct purposes have one form: money. Traditionally, monetary remedies are legal in nature, and serve the purpose of compensation, or in the context of civil enforcement, deterrence and punishment. Equitable remedies, meanwhile, are typically actions taken by defendants, such as specific performance. Yet as evidenced by some of the cases discussed earlier in this Article, equitable remedies can also take the form of money.

Separating when payments for projects serve a remedial versus punitive purpose can reduce concerns about agency motivations to fund policy objectives. Similar concerns over bias have arisen in the context of cy pres settlements. For example, in the 2019 U.S. Supreme Court case *Frank v. Gaos*,²⁴² some justices expressed concern about third-party organizations receiving payments as a substitute for victims of harm in cy pres settlements.²⁴³ While cy pres is different from regulatory enforcement actions, the concerns associated with involvement of third-party organizations are similar. In *Frank*, the Court issued a holding based on standing of the plaintiffs, but in oral argument, the justices repeatedly discussed concerns about third-party organizations receiving cy pres funds.²⁴⁴ During the oral argument, Justice Alito questioned the likelihood that the class members would support distributions to the named beneficiaries.²⁴⁵ In addition, he asked: “So the parties and the lawyers get together and they choose beneficiaries that they personally would like to subsidize? That’s how it works?”²⁴⁶ Justices Sotomayor and Breyer also seemed to suggest that “full” cy pres settlements, where all the funds go to a third-party organization, instead of a more typical cy pres settlement where only some funds go to a third party, deserve closer scrutiny.²⁴⁷

242. 139 S. Ct. 1041 (2019).

243. *See id.* at 1047 (Thomas, J., dissenting).

244. Ronald Mann, *Argument Analysis: Judges Skeptical of “Cy Pres” Class-Action Settlements*, SCOTUSBLOG (Nov. 1, 2018), <https://perma.cc/R8HZ-E8CD>.

245. Transcript of Oral Argument at 13, *Frank v. Gaos*, 139 S. Ct. 1041 (Oct. 31, 2018) (No. 17-961).

246. *Id.* at 14.

247. *Id.* at 46–47. For example, Justice Breyer also asked whether it would work if the Court obligated lower courts to “scrutinize very carefully” full cy pres cases, stating that “what’s happening in reality is the lawyers are getting paid and they’re making sometimes quite a lot of money for really transferring money from the defendant to people who have nothing to do with it.” *Id.*

In addition, whether payments for projects are remedial versus punitive affects the financial implications of such payments for defendants. In addition to alleviating some of the confusion and controversy, a decision as to whether payments in enforcement cases are legal or equitable in nature has significant practical implications for defendants. For example, while payments for fines, such as SEPs, have not been tax exempt, payments for projects that serve remedial purposes are different.²⁴⁸ Indeed, the new 2018 tax law includes provisions that could expressly allow tax deductions for projects that are associated with restitution, like retrospective injunctive relief.²⁴⁹ In addition, as in the insurance case after the Louisiana Generating CAA NSR settlement, insurance contracts often cover damages or remediation.²⁵⁰ Thus, whether payments for projects in enforcement cases qualify as either damages or remediation can affect a defendant's cost recovery of such payments.

Furthermore, whether payments are remedial versus punitive can help keep such payments dedicated towards mitigation- or offset-oriented uses. For example, the North Carolina Constitution requires that state-imposed penalties go to fund public schools in the counties where the enforcement action associated with the penalties occurred.²⁵¹ In a case heard by the North Carolina Supreme Court, local school board associations sought a declaratory judgment that, among other things, the state Department of Environment and Natural Resources ("DENR"), retained monies in violation of the state's constitutional provision.²⁵² The DENR had attempted to retain monies collected as a SEP from a company in violation of wastewater treatment standards.²⁵³ The DENR argued that "although public education is a very important and sincere use of these funds, the process returns very little to the environment which often suffers as a result of these environmental violations."²⁵⁴ The plaintiff school boards argued that the specific SEP, water resources training, was not remedial in nature, and as such, the money should have gone to schools.²⁵⁵ The court found in favor of the school board, holding that "the money paid under the SEP did not remediate the specific harm or damage caused by the violation even though a

248. See *Tax Treatment of Supplemental (Beneficial) Environmental Projects*, ALSTON & BIRD LLP (Aug. 6, 2008), <https://perma.cc/98W5-CBAY>.

249. John R. Lehrer II et al., *New Tax Law Will Shape Future Environmental Settlements*, BAKERHOSTETLER (Mar. 13, 2018), <https://perma.cc/382J-CUN9>.

250. *La. Generating LLC v. Ill. Union Ins. Co.*, 719 F.3d 328, 335–37 (5th Cir. 2013) (holding that insurance policy covered injunctive relief payments from CAA NSR settlement, exclusion for civil penalties in the insurance policy did not apply).

251. *N.C. Sch. Bd. Ass'n v. Moore*, 614 S.E.2d 504, 508 (2005); see also *CCH, INC., HAZARDOUS WASTE AND HAZARDOUS SUBSTANCE COMPLIANCE SEP FUNDS IN NORTH CAROLINA MUST GO TO PUBLIC SCHOOLS*, P 23-6-3.08, 2015 WL 7375760.

252. *Moore*, 614 S.E.2d at 508–09.

253. *Id.* at 509.

254. *Id.* at 524–25.

255. *Id.* at 511.

nexus may exist between the violation and the program at the community college to train waste water treatment employees.”²⁵⁶ Perhaps if there had been a clearer remedial purpose, the court would have opined differently.

2. Identify Harm Early

The first step in defining a remedial purpose for payments for projects is to identify the specific harm that the projects are designed to mitigate or offset. Not all environmental enforcement cases present issues of harm. For example, some enforcement cases may only allege recordkeeping violations. In such situations, defendants should fix the violation and pay a penalty for the violation to deter future misconduct, but the remedy need not address past harm because the violation itself does not cause harm to the environment or public health. Other cases present issues of harm, but the specific nature of the harm is unclear.

Unfortunately, identification of specific harm from enforcement violations may not happen until late in the enforcement process. Practitioners often think of hiring scientific and technical experts in anticipation of litigation, and typically engage experts in individual cases around the time of filing a complaint or soon after.²⁵⁷ Furthermore, litigants often use research studies by experts to support arguments in civil discovery, motions practice, and at trial itself.²⁵⁸ Yet many enforcement cases never get close to trial. Parties negotiating settlements to resolve claims for injunctive relief through payments for projects, or to receive discounts on civil penalty through payments for projects, are often operating with little information about the specific harm from the alleged violation.

In order to affect settlement, identification of harms should happen earlier in the enforcement process. Early identification can help to inform disputing parties in the negotiation process for settlement. Information is useful for negotiating parties when thinking through the quantity of excess pollution arising from a violation, above relevant standards or requirements, and the impact of such pollution. Information can also then help the negotiating parties select payments for projects in settlement that are closely tailored to the identified harm. Early identification and information may ultimately produce results that are more effective for the environment.

256. *Id.* at 525.

257. Lawyers usually think of experts in the context of testifying or consulting experts. Testifying experts provide expert opinions and reports in litigation, while consulting experts provide general advice, for example, on the strengths and weaknesses of the litigation. *See, e.g.,* Cynthia Bishop, *Foraging Through the Jungle of Expert Discovery and Testimony*, 22 NAT. RESOURCES & ENV'T 3, 3 (2008).

258. For example, plaintiffs in *Cinergy* used the Harvard Six Cities Study in its proof of harm, and one of the authors to the follow-up study, Joel Schwartz, testified at trial. *See* *United States v. Cinergy Corp.*, 618 F. Supp. 2d 942, 949 (S.D. Ind. 2009).

In addition, early identification can help in the development of enforcement as a whole, beyond individual enforcement cases. Agencies often announce environmental enforcement initiatives long before individual cases, and even when there is no specific initiative, individual cases often breed additional cases against similarly situated defendants. For example, a new National Emissions Inventory (“NEI”) announced by EPA for 2017 to 2019 is targeting CAA violations against the energy-extraction industry.²⁵⁹ In addition, while the agency has not announced an NEI in the mobile source sector, it is evident that post *Volkswagen* there will likely be a targeted rise in enforcement activity against car manufacturing companies investigating potential additional cases involving defeat devices.²⁶⁰ As a result, early identification of harm in one case can affect understanding of harm, potential claims, and remedies from other similar violations or similar defendant industries. In order to identify harm early in the enforcement process, however, there needs to be an upfront investment in understanding relevant research, and consulting with scientific and technical experts.

Government agencies should engage with experts at the beginning of enforcement initiatives to help in the development of enforcement theories, ideas, and cases. Using experts and relevant research to identify broad-level public harms associated with potential defendants can allow plaintiffs to understand whether there may be harm to the public associated with violations early on, before pursuing individual cases. For example, there are new research studies on impacts from NO_x to national parks and forests that could be useful in claims of damage to federal lands from upcoming CAA cases. A recent peer-reviewed study sampling NO_x emissions in Grand Canyon National Park, for example, found that roadside concentrations of NO_x were significantly higher than concentrations thirty meters away.²⁶¹ The study found that plants located near roadsides in the park demonstrated higher levels of certain pollutants than the same plants located farther from the roadside.²⁶² In addition, scientists are identifying oil and gas wells as causing significant amounts of NO_x emissions, particularly on a cumulative basis.²⁶³ While oil and gas shale basins are widely

259. *National Compliance Initiative Ensuring Energy Extraction Activities Comply with Environmental Laws, FY 2019 Update*, EPA, <https://perma.cc/2Q6L-TPF8>.

260. Joel Mintz, *Justice Delayed: Mercedes-Benz’s Diesel Pollution Remains Unprosecuted*, CPR-BLOG (Oct. 16, 2018), <https://perma.cc/6PZJ-HT5K>.

261. Julie A. Kenkel et al., *Cars and Canyons: Understanding Roadside Impacts of Automobile Pollution in Grand Canyon National Park*, 30 PARK SCI. 52, 54 (2013).

262. *Id.*

263. T.J. SULLIVAN & T.C. McDONNELL, NAT’L PARK SERV., NATURAL RESOURCES TECHNICAL REPORT NPS/ARD/NRTR–2014/895, MAPPING OF NUTRIENT-NITROGEN CRITICAL LOADS FOR SELECTED NATIONAL PARKS IN THE INTERMOUNTAIN WEST AND GREAT LAKES REGIONS 4 (2014), <https://perma.cc/Q8S9-S3FS> (“Emissions of NO_x from an individual well, CAFO, or industrial source may be insignificant to the broader landscape. However, the cumulative effects of many sources may be substantial.”).

distributed across many parts of the United States, they tend to center around particular regions with a high concentration of federal lands, including in North Dakota, Utah, and Colorado.²⁶⁴ As a result, scientists have expressed concerns that these areas may experience increased visibility and health problems, and higher levels of acid deposition.²⁶⁵ These studies could be important for identifying potential areas of harm from violations of the CAA coming from car manufacturers, like *Volkswagen*, or oil and gas facilities.²⁶⁶

Investment in upfront research in enforcement can also help identify and evaluate specific harm. For example, recent studies are demonstrating harm not just to health and natural resources at national parks, but also to recreational opportunities. Scientists have been able to evaluate NOx and ozone levels from active monitors at several parks, including Mammoth Cave National Park in Kentucky.²⁶⁷ When scientists there find, for example, that ozone levels exceed health standards, or when they predict such exceedances, Mammoth Cave staff post health advisories cautioning visitors of the potential health risks associated with exposures to elevated levels.²⁶⁸ Research has shown that “air quality warnings cause pollution avoidance behavior.”²⁶⁹ A July 2018 study that looked at ozone warnings demonstrates considerable declines in visitation on days with high levels of ozone in national parks.²⁷⁰ In fact, the study found that “from 1990 to 2014, average ozone concentrations in national parks were statistically indistinguishable from the twenty largest U.S. metropolitan areas.”²⁷¹ Furthermore, thirty-five percent of all national park visits occur when ozone levels are unhealthy.²⁷²

Scientists too are often interested in looking for ways to make research usable and applicable. Thus, better communication of federal agency enforcement priorities for both CAA enforcement and NRD enforcement could be

264. *Id.*

265. See, e.g., Phil Taylor, *Bakken Boom Linked to Haze at Theodore Roosevelt Park*, E&E NEWS (Nov. 7, 2013), <https://perma.cc/3REF-XMBH> (discussing the preliminary, unpublished results of a study, attached to the article at <https://perma.cc/TA6R-DWLM>).

266. SULLIVAN & McDONNELL, *supra* note 263, at 9.

267. *Park Air Profiles - Mammoth Cave National Park*, NAT'L PARK SERV., <https://perma.cc/7GLE-SKVN>.

268. See, e.g., *Air Pollution Advisory, Mammoth Cave*, NAT'L PARK SERV. (June 1, 2007), <https://perma.cc/C77W-DNSC>; *Park Air Profiles - Yosemite National Park*, NAT'L PARK SERV., <https://perma.cc/2HHE-P8MD>. (“Ozone is a respiratory irritant, causing coughing, sinus inflammation, chest pains, scratchy throat, lung damage, and reduced immune system functions. Children, the elderly, people with existing health problems, and active adults are most vulnerable.”).

269. David Keiser, Gabriel Lade & Ivan Rudik, *Air Pollution and Visitation at U.S. National Parks*, 4 SCI. ADVANCES EAAT1613 (2018), <https://perma.cc/EN5Q-R787>.

270. *Id.*

271. *Id.*

272. *Id.*

useful in helping produce science that is relevant for agencies to consider in enforcement. EPA announces NEIs every few years through its website, and law firms and news sources will often produce articles on EPA's announcements.²⁷³ While attorneys often read such announcements, it is doubtful that they reach scientists in any meaningful way. Yet enforcement priority announcements send important information that is relevant to the scientific community. A focused scientific study on the impact of specific energy extraction sources to nearby natural resources or communities, for example, could be valuable to plaintiff agencies as they begin to think through claims for damages to federal lands from CAA violations in the mobile source or oil and gas sectors.

In addition, investment in scientific modeling early in the enforcement process can also help with understanding harm that may be attributable to specific sources. In *Cinergy*, for example, plaintiffs' atmospheric chemistry expert used two models to identify the trajectory of specific excess emissions, and the impact of such emissions on overall air pollution in the area.²⁷⁴ The models, CMAQ and CAMx, essentially simulated the atmosphere over a community, identifying all sources of NOx and Sulfur Dioxide ("SO₂") pollution, and then "removed" the excess emissions from the plant to isolate its particular contribution.²⁷⁵ Using models like CMAQ and CAMx can be very expensive, and it is not likely always practical to use these type of models to perform relevant analyses in enforcement cases before the filing of a complaint or even before trial. Yet cheaper or simpler forms of the same models are available and can be useful to inform plaintiff agencies' judgment on what to ask in an information request to a potential defendant and whether to include a claim of damage in a notice of violation, or to increase bargaining positions in settlement negotiations.²⁷⁶

Moreover, upfront investment in working with experts on research and modeling is useful even if cases do not settle. Additional time and resources to conduct modeling, far in advance of trial, may produce stronger evidence at trial if an enforcement case proceeds that far. For example, the court's weighing of evidence on harm in *Cinergy* depended greatly upon the quality of the expert's information and analysis.²⁷⁷ In finding against plaintiffs on the element of irreparable harm for acid rain deposition, the court in *Cinergy* specifically focused on

273. Todd S. Mikolop & Alexander Woo, *Environmental Enforcement: Are There Any Trends?*, NICKEL REPORT (Dec. 14, 2018), <https://perma.cc/RTB7-B98E>; Jonathan S. Martel et al., *EPA Signals More Enforcement Cases for Aftermarket Parks Manufacturers: Advisory*, ARNOLD & PORTER (Apr. 11, 2018), <https://perma.cc/QS4T-42ER>.

274. United States v. *Cinergy Corp.*, 618 F. Supp. 2d 942, 951–53 (S.D. Ind. 2009).

275. *Id.* at 951.

276. See, e.g., *CALPUFF Modeling System*, EXPONENT ENG'G AND SCI. CONSULTING, <https://perma.cc/Y477-EE74>.

277. *Cinergy*, 618 F. Supp. 2d at 964 ("With respect to Plaintiffs' proof of acidic deposition impacts and mercury impacts, the Court concludes that Plaintiffs did not provide sufficient nexus between the relevant excess emissions and the negative environmental and health effects to support a conclusion of irreparable harm.")

the lack of air quality modeling.²⁷⁸ Specifically, the court stated: [expert witness Dr.] “Driscoll purported to analyze the extent to which any measured acid deposition was attributable to emissions from [plant at issue]. Despite having performed environmental quality modeling in the past, Dr. Driscoll did not perform such modeling for the emissions from the Wabash River plant.”²⁷⁹ Perhaps if Dr. Driscoll had more time, he may have been able to perform the helpful modeling.

Investment in identifying harm early in the enforcement process can also lend well to identifying potential projects. As evidenced by the remedy trials in *Cinergy* and *Westvaco*, remedies to help fix identified harm are not always easy to find. Some scholars have proposed that in the SEP context, agencies or community groups should establish project banks so that there are identified options in anticipation of, rather than in reaction to, individual enforcement cases.²⁸⁰ Projects proposed for banks should not only involve projects that community and environmental groups would like to see completed. Instead, projects proposed for banks should identify, with the help of scientific experts, the kinds of public health or natural resource harms that are potentially at issue in a given sector targeted for enforcement. Indeed, the 2018 DOJ guidance requires that payments must go towards projects that reduce the same type of harm that resulted from the unlawful conduct, and that courts in litigation evaluate remediation proposals based in part on whether the proposal bears an equitable relationship to the degree and kind of wrong it is intended to remedy.²⁸¹ Thus, projects that are able to quantify emission reductions of a given pollutant are useful for plaintiffs to match with the quantity of excess emissions in a particular enforcement case.²⁸²

3. Explain Projects

The second step in defining a remedial purpose for payments for projects is to explain the purpose and use of any payments for projects to remedy such harm. There are several enforcement settlement documents where agencies can explain that payments indeed connect to identified harm, and that any third-party organization recipients of payments are legitimate. EPA, for example, uses a variety of documents in settlement beyond the publicly available judicial consent decree itself, to convey both the purpose and use of payments so that

278. *Id.*

279. *Id.* at 954.

280. Simms, *supra* note 2, at 10,526 (suggesting outreach on project ideas in advance of initiating geographically focused or industry-specific enforcement initiatives).

281. DOJ 2018 Guidance, *supra* note 7, at 2–3.

282. Markell, *supra* note 116, at 562 (noting that the Science Advisory Board has suggested quantification or monetization of harm from violations, when present, in order to produce optimal civil penalties).

the public, other potential plaintiffs such as states and citizen groups, legislators, and courts understand the connections between payments and projects.²⁸³ For example, in October 2018, the government settled violations of the CAA against Chevron USA for allegedly failing to implement a risk management program for the potential release of hydrogen sulfide, a regulated HAP, and failing to notify surrounding communities of any releases.²⁸⁴ The settlement included a SEP that required the defendant to spend \$10 million on supplying emergency response equipment to local jurisdictions surrounding the five violating refineries in approximate proportion to the extent of the alleged violations at each refinery.²⁸⁵ EPA stated in its settlement information sheet that “these SEPs will enhance the capabilities of emergency responders located near the refineries and will facilitate quick and efficient response to releases associated with emergency events.”²⁸⁶

Motions to enter proposed consent decrees are also particularly useful for conveying information about payments to remedy harm. To be sure, some scholars argue that the fairness standard courts use to review judicial consent decrees often results in a mere rubber stamp by judges, and that the merits of settlements lack meaningful judicial review.²⁸⁷ Professors Andrew Morriss, Bruce Yandle, and Andrew Dorchak, for example, argue that the traditional notice and comment rulemaking process provides more significant opportunities for public participation than a settlement approval process.²⁸⁸ Yet if interest groups participated more in the settlement approval process, perhaps the transparency and public participation concerns could be mitigated. That is, similar benefits from rulemaking, such as open public comment periods, and holding agencies responsible for addressing public comments, can and do exist in settlement approval as well. Public comments may not change an agency’s proposed consent decree or alter a court’s decision to approve the decree. However, in the rulemaking process too, agencies do not have to adhere to commenters’ concerns, and courts tend to afford agencies substantial deference.²⁸⁹

283. See, e.g., *Coal-Fired Power Plant Enforcement*, EPA, <https://perma.cc/X9KU-YMJW> (providing information sheets, press releases, and other documents for settlements).

284. Consent Decree at 2, *United States v. Chevron USA*, No. 4:18-cv-06506 (N.D. Cal. Oct. 24, 2018).

285. *Chevron Settlement Information Sheet*, EPA, <https://perma.cc/N56X-M823>.

286. *Id.*

287. See, e.g., Adam Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 550 (2011) (“[M]any agency settlements lack meaningful judicial review. In most cases, federal courts review settlement plans with great deference to agency discretion.”); see generally W. Hamilton Jordan, *Calibrating Judicial Scrutiny of Agency Enforcement Decrees*, 34 YALE L. & POL’Y REV. 57 (2015).

288. Morriss, et al., *supra* note 6, at 182–83.

289. See, e.g., *Ohio Valley Envtl. Coal. v. Hurst*, 604 F. Supp. 2d 860, 880–82 (S.D. W. Va. 2009) (describing how and when agencies must respond to public comment).

Even if agencies ignore comments or judges short-change review, motions for entry of judicial consent decrees are important for communication. The motion, comment process, and approval hearing are opportunities to convey information on legal authority, scientific basis, and goals of settlement terms, including payments for projects. For example, in the 2016 Tractor Supply comment period, an individual citizen argued that the proposed CAA enforcement consent decree did not include enough woodstove changeouts to offset the amount of excess emissions from the defendant's violation involving small nonroad engines and motorcycles.²⁹⁰ The government's motion to enter included a detailed response to the citizen's comment.²⁹¹ The motion included a declaration from an EPA engineer that described how EPA, in the absence of direct evidence regarding the extent of excess emissions, used assumed uncontrolled emission rates published in the underlying regulation's impact analysis for nonroad engines and motorcycles to calculate rough excess emissions.²⁹² The declaration was then able to explain that the commenter had used incorrect assumptions regarding the burn rate and lifespan of woodstoves.²⁹³ Such explanation and communication may help diffuse concerns by commenters.

Additionally, in the 2003 Alcoa comment period, local county commissioners in Texas commented that the acquisition of lands for protecting the Houston toad was "not even remotely related to air quality" and that the citizens of the local counties should have had the chance to weigh in on the proposed projects before the lodging of the consent decree.²⁹⁴ The government, in its motion to enter, was able to provide a detailed response to the commissioners, explaining that "setting aside property and habitat that needs to recover from years of enormous power plant emissions, this [project] will keep additional air emissions from harming these same lands with pollution from development."²⁹⁵ Further, the motion explained that although the third-party organization receiving the funds was a national-level organization, the proposed consent decree required that a local land trust would make the actual determination on spending of the funds. Once again, such explanation and communication, if it can diffuse concerns by commenters, may provide a stronger basis for judges to understand the remedial purpose and enter a proposed consent decree.

290. See Unopposed Motion to Enter Consent Decree and Response to Public Comments at 19, *United States v. Tractor Supply Co.*, No. 1:15-cv-01589 (D.D.C. Jan. 17, 2016).

291. *Id.* at 21–22.

292. *Id.* at attach. C ¶¶ 9–12.

293. *Id.* at attach. C ¶¶ 12, 14–17.

294. *United States' Motion to Enter Consent Decree*, attach. A, *United States v. Alcoa*, Nos. a-01-CA-881-SS and A-03-CA-222-SS (W.D. Tex. July 11, 2003).

295. *United States' Motion to Enter Consent Decree* at 23, *United States v. Alcoa*, Nos. a-01-CA-881-SS and A-03-CA-222-SS (W.D. Tex. July 11, 2003).

Clarification of consent decree provisions is also important in the motion-to-enter process, particularly given the preclusion effect of judicial consent decrees. For example, the government's motion to enter the *Volkswagen* partial consent decree specifically pointed out that "once the Trust is established, those same governmental entities may apply to become Beneficiaries of the Trust by making certain certifications to the Court, including a waiver of injunctive claims for mitigation arising from the 2.0 liter vehicles."²⁹⁶ In *Harley*, however, the government's motion to enter does not describe why the revised proposed consent decree includes a release for all claims in the complaint, even with no payment from the defendant to remedy the alleged harm.²⁹⁷ That is, although the *Harley* complaint alleged that the defendant had sold illegal motorcycle tuners that caused bikes to emit higher amounts of NO_x than allowed by EPA emissions standards, the proposed revised consent decree resolves such allegations with no payment for a project to remedy the alleged excess NO_x.²⁹⁸ A court order entering the revised proposed consent decree could then preclude Wyoming, or any other potential plaintiff, from pursuing a claim for retrospective injunctive relief on their own.²⁹⁹ Thus, a critically lacking element of the government's motion to enter the revised proposed consent decree in *Harley* helps explain why the decree resolved all claims for injunctive relief.

C. Inter-Agency Workgroup

In addition to clarifying remedial purpose in individual enforcement matters, federal agencies should also work together to discuss best practices in payments for projects in settlements. Agencies often establish formal working relationships to work on areas with overlapping substantive interests but divergent expertise. When EPA issued the proposed Utility Mercury Air Toxics Standard ("Utility MATS"), public comments revealed concerns over electricity reliability, an area within the expertise of energy agencies.³⁰⁰ As a result, EPA and FERC issued enforcement guidance that described a collaborative review process of potential non-compliance with the Utility MATS associated with

296. See United States Motion to Enter, *In re Volkswagen*, *supra* note 106, at 17.

297. United States Motion to Enter, *Harley-Davidson*, *supra* note 207, ex. 1-A at 4-5.

298. *Id.*

299. See, e.g., *State Water Control Bd. v. Smithfield Foods, Inc.*, 542 S.E.2d 766 (Va. 2001). In *Smithfield*, the Virginia State Water Control Board ("VSWCB") brought an enforcement action against Smithfield for violations of a permit issued pursuant to the CWA. *Id.* at 767. The VSWCB initiated its action following the initiation of an ultimately successful adjudication by EPA before the Fourth Circuit for violations of the same permit. *Id.* at 768. The court dismissed VSWCB's action on res judicata grounds. *Id.* at 771.

300. James E. McCarthy, CONG. RESEARCH SERV., EPA'S UTILITY MACT: WILL THE LIGHTS GO OUT 10-11 (Jan. 9, 2012), <https://perma.cc/EL5C-K5RT>.

needs for electricity.³⁰¹ Similarly, after amendments to the Energy Policy Act in 2005 required coordination of environmental reviews to site electric transmission lines, several agencies responsible for federal lands and siting entered into a memorandum of understanding to establish a framework for cooperation.³⁰² In addition, to help with related retail fraud claims, the Bureau of Consumer Financial Protection and the Securities and Exchange Commission (“SEC”) established a task force, with DOJ, to “facilitate inter-agency cooperation in deterring and prosecuting consumer fraud crimes.”³⁰³ Remedial purpose and payments for projects in civil enforcement settlements is another area that could benefit from cross-agency coordination and continual working relationships.

Numerous agencies enforce violations of statutes that involve harm to the public. Importantly, many of the relevant statutes are similar. For example, the Federal Trade Commission Act (“FTC Act”) allows the FTC to seek a court order requiring civil penalties and injunctive relief from individuals and companies alleged to have engaged in deceptive or unfair practices.³⁰⁴ The Fair Housing Act includes authority for courts to issue a civil penalty and to award such other relief as the court deems appropriate.³⁰⁵ The Sarbanes-Oxley Act, enforced by the SEC, also includes authority for courts to issue a civil penalty and injunctive relief, as well as any equitable relief that may be appropriate.³⁰⁶ The similarity of enforcement authorities begs for inter-agency discussion on how

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301. *Staff White Paper on the Commission’s Role Regarding Environmental Protection Agency’s Mercury and Air Toxics Standards*, FERC (Jan. 30, 2012), <https://perma.cc/M6WZ-NBCV>; *Enforcement Response Policy: Mercury and Air Toxics Standard (MATS)*, EPA, <https://perma.cc/LL8H-YHP9>.
302. U.S. Dep’t of Energy et al., *Memorandum of Understanding on Early Coordination of Federal Authorizations and Related Environmental Reviews Required in Order to Site Electric Transmission Facilities* (2006), <https://perma.cc/FFT8-23KN>.
303. Press Release, U.S. Dep’t of Justice, Department of Justice, Bureau of Consumer Financial Protection, U.S. Securities and Exchange Commission, Federal Trade Commission Announce Task Force on Market Integrity and Consumer Fraud (July 11, 2018), <https://perma.cc/HR2E-HLWM>.
304. 15 U.S.C. § 53(b) (2018); see also *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM’N (July 2008), <https://perma.cc/FU6D-GT73>.
305. 42 U.S.C. § 3614(d)(1)(B) (2018). Note that the Fair Housing Act enforcement provisions also allow courts to “award such preventive relief, including a permanent or temporary injunction, restraining order, or other order.” *Id.* § 3614(d)(1)(A).
306. The Sarbanes-Oxley Act amended the Securities Exchange Act of 1934 (the “Exchange Act”), which has civil penalty and injunctive relief authority to enforce federal securities laws. In 1970, the SEC succeeded in convincing a federal district court to permit the remedy of disgorgement under the premise that the SEC had the “inherent equity power to grant relief ancillary to an injunction.” In 2002, Congress amended the Exchange Act through the Sarbanes-Oxley Act to say that “the Commission may seek, and any federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.” The government continued to seek disgorgement, citing the Sarbanes-Oxley Act as statutory authority for ordering the remedy. See generally Jacqueline Chang, *Kokesh v. SEC: The Demise*

courts interpret the authorities, and potential application to monetary remedies that seek to address past harm from violations.

In some enforcement cases, like those under the CAA, the harm to the public is widespread. For example, as part of the banking mortgage crisis, various federal agencies—including the Federal Housing Administration (“FHA”), the SEC, and the Federal Deposit Insurance Corporation—settled multiple claims with banks, such as Bank of America.³⁰⁷ Bank of America conceded that it originated risky mortgage loans and made misrepresentations about the quality of those loans to Fannie Mae, Freddie Mac, and the FHA.³⁰⁸ Bank of America’s settlement included a requirement that the bank provide \$7 billion in “consumer relief.”³⁰⁹ The consent decree allowed part of the consumer relief payment to be in the form of monies paid to legal aid and housing counseling organizations to assist individuals with foreclosure prevention, and to support community reinvestment and neighborhood stabilization and provide financing for affordable rental housing with a focus on family housing in high-cost areas.³¹⁰ Many experts have discussed the relationship between neighborhood blight, the mortgage-housing crisis, and the need for housing services.³¹¹ Yet the relevant agency settlement documents, such as settlement information sheets, and motions to enter proposed settlement, often do little to discuss the connections.

Even in statutory enforcement cases involving identifiable victims, agencies are grappling with how to define remedial payments in settlement documents. The SEC, for example, seeks to return illegal profits to defrauded

of Disgorgement, 22 N.C. BANKING INST. 309 (2018) (quoting Securities and Exchange Com’n v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 91 (S.D.N.Y. 1970)).

307. Note too, prior to the Obama Administration, the federal government settled similar claims. For example, in an FHA settlement involving the owners of a Florida apartment complex, the federal government alleged that the complex charged African-American residents higher rents than it charged white residents, and that prospective black tenants were falsely informed that there were no apartments available for rent. As part of the settlement, the apartment owners agreed, among many other things, to make payments to a third-party organization, Housing Opportunities Project for Excellence, for future testing of discrimination. *See, e.g.*, Christopher C. Sabis, *Executing the Laws or Executing an Agenda: Usurping of Statutory and Constitutional Rights by the Department of Justice*, 37 U. MICH. J.L. REFORM 257, 260 (2003).
308. Press Release, U.S. Dep’t of Justice, Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading Up to and During the Financial Crisis (Aug. 21, 2014), <https://perma.cc/3SQR-P6RW>.
309. *Id.*
310. Press Release, U.S. Dep’t of Justice, Summary of \$7 Billion in Consumer Relief Provided by Justice Department Settlement with Bank of America, <https://perma.cc/3JH9-LW9S>.
311. *See generally* ERWIN DE LEON & JOSEPH SCHILLING, URBAN INST., URBAN BLIGHT AND PUBLIC HEALTH (2017), <https://perma.cc/AV82-8Y65>; Kermit Lind & Joe Schilling, *Abating Neighborhood Blight with Collaborative Policy Networks—Where Have We Been? Where Are We Going?*, 46 U. MEM. L. REV. 803 (2016).

investors as part of “disgorgement.”³¹² The FTC seeks to return illegal profits to harmed consumers as part of “restitution.”³¹³ When no individual is entitled to the funds or individuals harmed are too dispersed for feasible identification or payment, however, disgorgement or restitution funds go to the U.S. Treasury.³¹⁴ In the 2017 case *Kokesh v. SEC*,³¹⁵ the Supreme Court found that “disgorgement” in the SEC enforcement settlement was not “remedial” but instead “punitive.” While the case was primarily about the statute of limitations, the key takeaway for purposes of this article was that the agency had attempted to define disgorgement as remedial.³¹⁶ The Court acknowledged that payments in enforcement settlements could serve more than one purpose. The Court, however, found that because the purpose of disgorgement was not to compensate a violation committed against an aggrieved individual, but instead served a punitive and deterrence purpose for a violation committed against the United States, it was a penalty.³¹⁷

Greater inter-agency dialogue on enforcement and payment for projects can help agencies work together to advance remedial goals in settlement. To be sure, inter-agency coordination is likely extremely resource-intensive. However, synergies already exist across agencies in non-enforcement programs, and as a result, moving to prioritize inter-agency dialogue on enforcement matters should not be a great leap.³¹⁸ It may be helpful for agencies to connect with each other on relevant research and experts for identifying harm. For example, the NPS and USFS have several air pollution scientists on staff that could provide

312. Steven Peikin, Co-Dir., SEC Div. of Enforcement, *Remedies and Relief in SEC Enforcement Actions*, SEC (Oct. 3, 2018), <https://perma.cc/9DSW-VMFN>.

313. The FTC has argued that the statutory reference to “permanent injunction” entitles it to obtain an order not only permanently barring deceptive practices, but also imposing various kinds of monetary equitable relief (i.e., restitution and rescission of contracts) to remedy past violations. See *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement and Rulemaking Authority*, *supra* note 304.

314. See *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017) (citing *SEC v. Fischbach Corp.*, 133 F.3d 170, 171 (2d Cir. 1997)).

315. *Id.*

316. *Id.* As discussed by the Supreme Court in *Kokesh*, the SEC argued that disgorgement is not a civil penalty, but is instead “remedial” in that it “lessen[s] the effects of a violation” by “restor[ing] the status quo.” Similar to arguments in CAA enforcement cases, the SEC argued that disgorgement comes from a court’s inherent equity power to grant relief “ancillary” to an injunction, intending to add to or supplement the principal relief of an injunction barring future violations of securities laws.

317. The Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002), gave the SEC authority to distribute funds gained as disgorgement through the Fair Funds Act. However, the Supreme Court in *Kokesh* found that the SEC often did not distribute disgorgement funds to victims through the compensation process. See *Kokesh*, 137 S. Ct. at 1638.

318. See Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1010 (2017) (noting that enforcement actions focus on compliance with a particular set of laws, that is, they are piecemeal).

expertise, early in a CAA enforcement case or NEI that involves acidic pollutants. Regulatory agencies often live in silos most typically based on substantive practice areas and statutory enforcement authorities. Yet separate statutes, such as the CAA and the PSRPA, relate to each other, particularly in attempts to achieve the goals of public protection envisioned by the statutes themselves.

CONCLUSION

Payments for projects, as a product of both civil penalty and injunctive relief authorities, have attempted to address past harm from enforcement violations. This Article concludes that both authorities allow for such payments, but that many relevant players in enforcement settlements, including defendants, courts, the public, and the legislature most readily accept such payments when they serve a clear remedial purpose. As a result, Congress should consider adopting legislation that provides clear authority for payments for projects. In addition, agencies should work towards better identifying the kind of harm that may result from an enforcement violation, and developing an explanation of how requirements for payments for projects are an effective remedy for the harm.

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