(iii) WGQ Flowing Gas Related Standards (Version 4.0, September 29, 2023);

(iv) WGQ Invoicing Related Standards (Version 4.0, September 29, 2023);

(v) WGQ Invoicing Related Standards Minor Correction/Clarification MC24002, approved by the WGQ on May 2, 2024 (Minor Correction/Clarification MC24002 was implemented on May 17, 2024).

(vi) WGQ Quadrant Electronic Delivery Mechanism Related Standards (Version 4.0, September 29, 2023);

(vii) WGQ Capacity Release Related Standards (Version 4.0, September 29, 2023); and

(viii) WGQ Cybersecurity Related Standards (Version 4.0, September 29, 2023)

(2) The material listed paragraph (a)(1) is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the Federal Energy Regulatory Commission and at the National Archives and Records Administration (NARA). For assistance in viewing the material, contact the Federal Energy Regulatory Commission at: 888 First Street NE, Washington, DC 20426 phone: 202–502–8371; email: *public.referenceroom@ferc.gov;* website: *https://www.ferc.gov.* For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.* The material also may be obtained from the North American Energy Standards Board, 801 Travis Street, Suite 1675, Houston, TX 77002; phone: (713) 356–0060; website: *https://www.naesb.org/.*

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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 50

[Docket No. OAG 177; AG Order No. 6101–2024]

RIN 1105–AB62

Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule adopts without change the interim final rule issued by the Department of Justice (''Department'' or ''DOJ'') on May 10, 2022, that revoked a prohibition on the inclusion of provisions in settlement agreements directing or providing for a payment or loan to a non-governmental person or entity not a party to the dispute, subject to limited exceptions.

DATES: This rule is effective December 9, 2024.

FOR FURTHER INFORMATION CONTACT: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, telephone (202) 514–8059 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department has established a docket for this action on the *www.regulations.gov* site under Docket DOJ–OAG–2022–0001. All documents in the docket are listed on the *http://www.regulations.gov* website.

I. Summary of This Rulemaking

A. Overview of This Rule

On December 16, 2020, the Department issued a regulation prohibiting, subject to limited exceptions, the inclusion of provisions in settlement agreements directing or providing for a payment or loan, in cash or in kind, to any non-governmental person or entity not a party to a dispute. *Prohibition on Settlement Payments to Non-Governmental Third Parties,* 85 FR 81409 (''the December 2020 Rule'') (adding 28 CFR 50.28). On May 10, 2022, DOJ published for public comment an interim final rule (''IFR'') that revoked the December 2020 Rule, *Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties,* 87 FR 27936.

The IFR also solicited public comment on an Attorney General memorandum posted on the DOJ website in conjunction with the IFR, the Memorandum for the Heads of Department Components and United States Attorneys from the Attorney General, *Re: Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties* (May 5, 2022) (the ''May 2022 Memorandum''), *https://www.justice.gov/d9/pages/attachments/2022/05/05/02._ag_guidlines_and_limitations_memorandum_0.pdf* (last visited Oct. 31, 2024).

This preamble responds to comments received on the IFR. As reflected in this preamble, the Department is not making any changes to the rule or to the May 2022 Memorandum.

That said, DOJ is using the opportunity of this final rule to publicly announce that it will add two provisions to the section of the *Justice Manual* (*https://www.justice.gov/jm/justice-manual*) addressing third-party payments, section 1–17.000, *Settlement Agreements Involving Payments to Non-Governmental Third Parties,* as discussed later in this preamble.

B. Background Explanation for This Rule

The Department, as explained in this preamble, has concluded that its action in May 2022 to revoke 28 CFR 50.28 and establish the current policy continues to be appropriate. The Department has authority to settle litigation incident to the Attorney General's power to supervise litigation for the United States. *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion,* 23 Op. O.L.C. 126, 135 (1999) (''*Authority of the United States to Enter Settlements*''). The Department regularly settles civil and criminal matters to compensate victims, redress harms, and punish and deter unlawful conduct without the costs and delay that can accompany trials. For decades and across Administrations, Department components entered into settlement agreements that involved payments to certain third parties as a means of addressing harms arising from violations of Federal law.

It has been the consistent view of the Office of Legal Counsel (''OLC''), acknowledged when the December 2020 Rule was promulgated, that settlements involving payments to non-governmental third parties can comport with the Miscellaneous Receipts Act (''MRA''), 31 U.S.C. 3302(b). *See* Memorandum for William P. Barr, Attorney General, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, *Re: Final Rule Prohibiting Settlement Payments to Non-Governmental Third Parties* at 2 (Dec. 4, 2020) (''December 2020 OLC Memo'') (citing *Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement,* 30 Op. O.L.C. 111, 119 (2006) (''*Softwood Lumber*'')), *https://www.justice.gov/oip/foia-library/foia-processed/general_topics/settlement_guidelines_third_parties_2_14_23/download* (last visited Oct. 31, 2024).

In 2017, the Attorney General issued a memorandum prohibiting Department attorneys from entering into case resolutions in civil and criminal matters providing for certain third-party payments. *See* Memorandum for All Component Heads and United States Attorneys from the Attorney General,

Re: Prohibition on Settlement Payments to Third Parties (June 6, 2017). In 2020, through the December 2020 Rule, the Department amended its regulations to add 28 CFR 50.28, memorializing prohibitions set forth in the 2017 memorandum and additionally expressly prohibiting expenditure of funds ''to provide goods or services to third parties for Supplemental Environmental Projects.'' 85 FR 81410.

In 2022, after considering the views of the Department's components and their experience with 28 CFR 50.28, the Attorney General concluded that the regulations at 28 CFR 50.28 were too restrictive and should be revoked, *see* 87 FR 27937, and issued an IFR revoking 28 CFR 50.28, *see* 87 FR 27936–38. The Attorney General determined that, when properly tailored, agreements providing for payments to third parties are lawful and allow the United States to more fully accomplish the goals of civil and criminal enforcement. *Id.* at 27937. For example, the Department usually seeks a penalty and injunctive relief to resolve violations of Federal environmental statutes. However, the harms caused by these violations, including harms to the communities most directly impacted by them, can be difficult to redress in particular cases. *Id.* For instance, in environmental enforcement cases, the Department may seek a defendant's agreement to make third-party payments in the form of a Supplemental Environmental Project (''SEP'') to counteract some of the downstream effects of a violation, and often as well to prevent future harm. *Id.* A SEP is a type of project or activity that a defendant undertakes as part of the settlement of an environmental enforcement action. As an illustration, a defendant refinery that violated its Clean Air Act permit by emitting excess volatile organic compounds (''VOCs'') agreed to perform a SEP to abate lead-based paint hazards in child-occupied facilities and lower-income residences located within a 50-mile radius of the refinery, in addition to an appropriate penalty and other relief. VOCs can accelerate the weathering and deterioration of lead-based paint, increasing potential lead exposure. The project, therefore, was designed to reduce a downstream harm to local residents, exacerbated by the defendant's conduct.

The May 2022 Memorandum contains important safeguards to ensure that case resolutions containing third-party payments are appropriately tailored. Permissible settlements with third-party payments must satisfy conditions that define with particularity the nature and scope of any third-party project; require a strong connection between the underlying violation(s) and the project; prevent the Federal Government from proposing the selection of a particular third party to receive payments; restrict the Federal Government's role after a settlement is entered; require that such settlements occur before an admission or finding of liability in favor of the United States; prohibit use of such settlements to satisfy existing statutory obligations or to provide additional resources to perform any activity for which a Federal agency receives a specific appropriation; and prohibit certain practices such as unrestricted cash donations. May 2022 Memorandum at 3. Such settlements are also subject to approval by the Deputy Attorney General or the Associate Attorney General. *Id.* at 3–4.

The May 2022 Memorandum also exempts four types of payments from these requirements, including payments providing restitution to non-party victims to directly remedy the harm the lawsuit seeks to redress, as well as payments for legal or professional services undertaken in connection with the case being settled, consistent with pre-2017 practice. *Id.* at 4. (The exception for legal or professional services includes payments to contractors implementing injunctive relief; payments to monitors, arbitrators, mediators, or other neutral third parties; and payments for other categories of legal and professional services.) In developing the new policy, the Department sought to address specific concerns that had been raised over such payments, while preserving the availability of these payments as a potential remedy when appropriate. In 2022, DOJ incorporated the terms of the May 2022 Memorandum in *Justice Manual* section 1–17.000.

C. Justice Manual Revisions

As part of the process of reviewing comments on the IFR and May 2022 Memorandum, the Department has determined that it will add two provisions to the *Justice Manual* section 1–17.000.[1] In particular, the Department is sensitive to the perception that it will ''strong-arm'' defendants to agree to third-party payments by declining to agree to a settlement unless the defendant agrees to make one or more third-party payments. It also recognizes the concern that the lack of public input into the development of third-party payments, and the difficulty of obtaining information on settlements that include such provisions, could lead to a lack of accountability and could give rise to claims of ''cronyism'' or favoritism. As discussed in greater detail below, *see infra* Part II.B.5.1, these concerns do not suggest that third-party payments writ large are unlawful, or that a rule prohibiting third-party payments is the only way to guard against them. Instead (and as also discussed in greater detail throughout this preamble), the Department has concluded that it can respond to these concerns through the more flexible approach of making changes to the *Justice Manual,* a course that preserves the benefits of third-party payments while responding in a more surgical manner to the concerns raised.

Specifically, with respect to concerns that the Department will ''strong-arm'' defendants into agreeing to third-party payments, the forthcoming revisions to the *Justice Manual* will specify that the Department may decline to agree to settle a civil claim in the absence of a particular remedy where the remedy in question would be available relief were the case litigated to judgment; but that if the third-party payment is not within the scope of the remedies the court could order, the Department will negotiate such a payment as part of a settlement only if the defendant expresses interest in doing so. For example, to resolve an antitrust investigation or filed case, the Antitrust Division may condition a settlement on the entity's agreement to divest itself of certain assets, because that is relief the Antitrust Division could receive if it litigated the case to judgment. *See, e.g., United States* v. *E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 331 (1961); *see generally California* v. *Am. Stores Co.,* 495 U.S. 271, 280–81 (1990) (''[I]n Government actions divestiture is the preferred remedy for an illegal merger or acquisition.''). (Because these benefits would go to another unrelated entity, such a condition could potentially have the appearance of a third-party payment.) The Department believes that this division—between relief available if the case were litigated to judgment and relief that would not be—is an appropriate way to guard against concerns that the Department would strong-arm defendants into agreeing to third-party payments. In cases in which a court could order a particular remedy but a defendant is not

[1] The Department will limit these new provisions to civil settlements covered by the May 2022 Memorandum but not exempted under the four circumstances described therein. Plea agreements are always subject to court review and approval, ensuring the protection of the public's interest and the rights of the defendant. The timing and other process requirements of a criminal proceeding also make it less feasible to apply these new requirements in criminal cases.

willing to include it in a settlement, the Department has the option of litigating the case to judgment in order to secure the relief in question without the defendant's consent. In those cases in which a settlement term is not backed by a possible judicial remedy in this way, the Department is sensitive to the concern raised by commenters and views it as preferable (although not legally required) to include this additional safeguard to ensure that the defendant is amenable to the relief in the form of a third-party payment.

As to claims that information about settlements that include third-party payments is not readily available and that such settlements are concluded without adequate participation from the public, the Department will add a provision to the existing *Justice Manual* requirements that would provide additional opportunities for the public to participate in certain civil settlements.[2]

II. Public Comments on the IFR and May 2022 Memorandum

A. Summary of Public Comments

The comment period for the IFR and the May 2022 Memorandum closed on July 11, 2022, and the Department received 16 public comments.[3] The comments express both support for and opposition to the IFR and May 2022 Memorandum. DOJ is exercising its discretion to respond to public comments here.

B. Response to Comments

1. Applicability of the MRA

Comments: According to some commenters, under the 1980 OLC opinion *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General,* 4B Op. O.L.C. 684 (1980) (''*Effect of 31 U.S.C. § 484*''), money available to the United States is constructively received and must be directed to the U.S. Treasury to comply with the MRA. Those commenters argue that any deviation from this result, such as an agency directing settlement money to a non-governmental third party, is a violation of that requirement. In particular, some commenters claim that SEPs are a violation of the MRA because the money used for them is public and the value of the SEP is exchanged, without congressional authorization, for a proportional reduction in the ultimate civil penalty that could have been payable to the U.S. Treasury. And still others contend that private defendants violate 31 U.S.C. 3302(c) by making third-party payments pursuant to settlements.

One commenter states that DOJ fails to explain why it applies the doctrine of constructive receipt from tax law cases (requiring the Government to exercise substantive control over the funds without significant limitation) to this context and argues that the Department has ''cherry-picked a version of constructive receipt in an attempt to thwart equity.''

Several commenters claim that SEPs are illegally diverted penalties except for the two instances in which SEPs are expressly authorized by statute: 42 U.S.C. 16138, which grants the Executive Branch permission to seek SEPs related to diesel emissions reductions; and 42 U.S.C. 7604(g)(2), which gives courts discretion to order that penalties received under the citizens suit provision of the Clean Air Act be used to fund beneficial mitigation projects that are consistent with that Act and enhance the public health or the environment, up to $100,000. Commenters assert that Congress's enactment of these provisions indicates that Congress views these types of payments as otherwise impermissible.

One commenter argues that the 2006 *Softwood Lumber* OLC opinion is not persuasive and, even if it were, the commenter claims that it would not authorize SEPs, which the commenter claims are designed entirely to exchange monetary penalties destined for the Treasury for a particular project. This commenter also suggests that caselaw supporting the legality of these payments cannot be reconciled with subsequent Supreme Court decisions and statutory provisions related to diesel emissions projects and citizens suits under the Clean Air Act, and cites Comptroller General/U.S. Government Accountability Office (''GAO'') opinions as supportive. Commenters further invoke a memorandum authored by then-Assistant Attorney General for ENRD Jeffrey Bossert Clark, *Supplemental Environmental Projects (''SEPs'') in Civil Settlements with Private Defendants* (Mar. 12, 2020) (''Clark Memorandum''), in support of their view that third-party settlements (and SEPs in particular) violate the MRA.

Other commenters cite with approval the OLC view (reflected in the May 2022 Memorandum) that settlement-funded projects do not violate the MRA if they are executed prior to a finding of the defendant's liability and if the United States does not retain control over the projects following settlement except for purposes of oversight of the settlement. Citing *U.S. Environmental Protection Agency Supplemental Environmental Projects Policy 2015 Update* (Mar. 10, 2015) (''*2015 SEP Policy*''), commenters make the point that SEPs are not substitutes for monetary penalties because settlements that include a SEP must always include a settlement penalty that recoups the economic benefit a violator gained from noncompliance with the law, as well as appropriate penalties that reflect the environmental and regulatory harm caused by the violations. These commenters state that SEPs are a factor to consider in making the decision to settle and on what terms to settle. By confusing SEPs with penalties or diversions of Treasury funds, these commenters argue, the previous Administration misconstrued decades of Federal practice.

Response: The Department appreciates commenters' statements that settlement-funded projects do not violate the MRA if they comply with the criteria set forth in *Softwood Lumber;* and that agreeing to SEPs as part of settlement agreements is consistent with those criteria.

The Department disagrees with commenters' contention that any settlement that includes a payment to a non-government third party violates the MRA and continues to conclude that the MRA permits such settlements in certain circumstances. The MRA requires that ''an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.'' 31 U.S.C. 3302(b). The funds paid under these types of settlements, however, are not ''drawn from the Treasury'' and have not been ''receiv[ed] . . . for the Government'' by the United States.

Consistent with authoritative OLC opinions and advice, the Department

[2] Existing laws require public disclosure of settlement terms in certain circumstances. The Antitrust Procedures and Penalties Act, codified at 15 U.S.C. 16(b)–(h), provides for a notice-and-comment process before a consent decree can be finalized in civil antitrust cases. The Clean Air Act includes a similar requirement, 42 U.S.C. 7413(g), as do laws relating to cleanup and control of hazardous materials. *See* 42 U.S.C. 9622(d)(2) and (i); 42 U.S.C. 6973(d); *see also* 28 CFR 50.7 (providing for a notice-and-comment process in civil ''actions to enjoin [the] discharges of pollutants.''). Where legal requirements such as these do not apply, and to minimize disrupting or delaying the resolution of a wide range of routine matters, the Department will limit the *Justice Manual* requirement to cases involving a third-party payment that a court could not order in law or in equity. Where a court could order such relief, the public is already on notice that it might do so.

[3] *Regulations.gov* contains seventeen comments, one of which is a superseded version of a comment omitted from review at the request of the commenter. *FDMS.gov* contains one additional document, which is not a comment on the IFR and May 2022 Memorandum.

has long understood that the MRA applies when an official or agent of the Government either actually or ''constructively'' receives money for the Government. *See Effect of 31 U.S.C. § 484,* 4B Op. O.L.C. at 688. ''The doctrine of constructive receipt will ignore the form of a transaction in order to get to its substance,'' and the Department has accordingly concluded that a Federal agency will be considered to be in ''constructive receipt'' of money ''if a federal agency could have accepted possession and retains discretion to direct the use of the money.'' *Id.*

To ensure that a settlement including payment to a third party does not violate the MRA through constructive receipt, OLC has ''consistently advised that (1) the settlement be executed before an admission or finding of liability in favor of the United States; and (2) the United States not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement.'' *Softwood Lumber,* 30 Op. O.L.C. at 119; *see also id.* at 119–20 (citing past precedent, including *Effect of 31 U.S.C. § 384*). ''If these two criteria are met, then the governmental control over settlement funds is so attenuated that the government cannot be said to be 'receiving money for the Government' '' under the MRA. *Id.*

The May 2022 Memorandum also does not implicate anti-augmentation concerns, which the Comptroller General decisions cited by commenters invoke in addition to the MRA. *See also Applicability of the Miscellaneous Receipts Act to an Arbitral Award of Legal Costs,* 42 Op. OLC 1, 3 (2018) (''[A]n agency may not augment its appropriations from outside sources without statutory authority''). The May 2022 Memorandum specifies that settlements may not ''be used to satisfy the statutory obligation of the Justice Department or any other federal agency to perform a particular activity. Nor shall any such settlement provide the Justice Department or any other federal agency with additional resources to perform a particular activity for which the Justice Department or any other federal agency, respectively, receives a specific appropriation.'' May 2022 Memorandum at 3.

Thus, as stated in the May 2022 Memorandum, ''[i]t has been the consistent view of the Office of Legal Counsel, including in 2020 when the Justice Department's current regulation [now-revoked 28 CFR 50.28] was promulgated, that settlements involving payments to non-governmental third parties, if properly structured, do not violate the Miscellaneous Receipts Act.'' *Id.* at 1. In support of this statement, the May 2022 Memorandum cites the OLC memorandum approving the now-revoked December 2020 Rule for form and legality, which recognized the longstanding position of the Department that properly structured settlement agreements do not violate the MRA. December 2020 OLC Memo at 2. This memorandum stated that the rule was ''consistent with the policy underlying the MRA—that Congress, and not the agency, should determine when government resources may be spent on behalf of third parties.'' *Id.* But it elaborated that the rule ''does not reflect an interpretation of the statute itself and thus prohibits certain payments to third parties that this Office has concluded that the MRA otherwise allows,'' *id.,* as detailed in the cited *Softwood Lumber* OLC opinion. And the May 2022 Memorandum explicitly incorporates the two criteria that *Softwood Lumber* identifies—the ''settlement must be executed before an admission or finding of liability in favor of the United States, and the Justice Department and its client agencies must not retain post-settlement control over the disposition or management of the funds or any projects carried out under any such settlement, except for ensuring that the parties comply with the settlement.'' May 2022 Memorandum at 3.

To the extent that commenters disagree with the *Softwood Lumber* opinion or believe it inapplicable, they do not offer authoritative judicial precedents or similar authoritative sources meaningfully undercutting its reasoning or its support for the current Department policy as set forth in the May 2022 Memorandum. *Softwood Lumber* remains applicable to this context, for several reasons.

First, Comptroller General opinions cited by commenters were addressed in the *Softwood Lumber* opinion itself, which noted that concerns in those matters were ''inapposite'' because the MRA is inapplicable where there has been no constructive receipt of money for the Government. 30 Op. O.L.C. at 121. (The same rationale applies to other GAO documents one commenter cites.)[4] The Department did not depart from that principle in the December 2020 Rule. Moreover, the Department has incorporated in some of the restrictions in the May 2022 Memorandum measures that address some of the other concerns raised in those Comptroller General opinions. The May 2022 Memorandum also explicitly incorporates the two criteria set forth in the *Softwood Lumber* OLC opinion—the ''settlement must be executed before an admission or finding of liability in favor of the United States, and the Justice Department and its client agencies must not retain post-settlement control over the disposition or management of the funds or any projects carried out under any such settlement, except for ensuring that the parties comply with the settlement.'' May 2022 Memorandum at 3. Moreover, in all events, decisions of GAO and the Comptroller General ''are not binding on Executive Branch agencies''; instead, ''the opinions of the Attorney General and th[e] Office [of Legal Counsel] are controlling.'' *Prioritizing Programs to Exempt Small Businesses From Competition in Federal Contracts,* 33 Op. O.L.C. 284, 302 (2009).

Second, the *Softwood Lumber* opinion does not, contrary to commenters' views, limit its understanding of the criteria for consistency with the MRA to its own facts or to the specific examples it cites. It instead articulates the two criteria for compliance broadly and refers to them as ''general principles'' applicable regardless of whether the United States is a plaintiff or defendant. 30 Op. O.L.C. at 120. *See also* December 2020 OLC Memo at 2 (citing *Softwood Lumber* for the principle that the MRA generally permits ''certain payments to third parties'').

Third, it is irrelevant that one commenter deems unpersuasive two circuit-level decisions sometimes invoked to support the legality of settlement payments—*Public Interest Research Group* v. *Powell Duffryn Terminals, Inc.,* 913 F.2d 64, 81 (3d Cir. 1990), and *Sierra Club* v. *Electronic Controls Design,* 909 F.2d 1350, 1354 (1990). *Softwood Lumber* does not rely on these decisions. The commenter, moreover, criticizes these decisions in part on the ground that ''Congress has subsequently indicated that SEPs (and thus all Third-Party Payments) violate

[4] The Department also notes that these Comptroller General decisions did not address the MRA's applicability when the Federal Government does not ''retain post-settlement control over the disposition or management of the funds or any projects carried out under any such settlement, except for ensuring that the parties comply with the settlement.'' *Softwood Lumber,* 30 Op. O.L.C. at 119. Moreover, all those decisions involved administrative agencies with statutory authority to both impose and also settle administrative penalties—a situation distinct from that addressed by the Department's May 2022 Memorandum and IFR. And those decisions focused on concerns raised when agencies enter settlements under which third parties carry out actions within the agencies' own statutory responsibilities, and with no nexus to the underlying violations—concerns that, again, the May 2022 Memorandum and the IFR address.

the MRA'' and the Anti-Deficiency Act (''ADA'') ''absent explicit congressional authorization,'' referring to Congress's express authorization of SEPs in 42 U.S.C. 16138. The Department disagrees with the commenter's reading of that provision, for reasons given below. Finally, the commenter claims that *Kokesh* v. *SEC,* 137 S. Ct. 1635 (2017), clarified that what constitutes a ''penalty'' is a functional inquiry. *Kokesh,* however, held that monetary disgorgement ordered by the SEC constitutes a penalty within the meaning of 28 U.S.C. 2462. *Id.* at 1641–45. *Kokesh* did not involve a settlement, and it is not relevant to when money paid under a settlement is received by the Federal Government under the MRA.

Fourth, when commenters contend that private defendants violate 31 U.S.C. 3302(c) by making third-party payments pursuant to settlements, they assume that funds in the hands of private defendants are ''public money'' subject to the MRA. Under *Softwood Lumber,* however, such funds are not public monies. And the commenters' argument improperly conflates funds in the hands of private litigants, before any determination of liability, with penalties imposed after trial that may in some circumstances constitute public money. *See Pub. Int. Rsch. Grp.,* 913 F.2d at 81 n.32 (noting that section 3302(c)(1) applies to penalties imposed after a trial, but recognizing that outside of penalties, ''a [private] party may compromise its claim however it sees fit''); *United States* v. *Smithfield Foods, Inc.,* 982 F. Supp. 373, 374 (E.D. Va. 1997) (finding with respect to a Clean Water Act penalty imposed after a trial that ''a penalty, which is imposed pursuant to a federal statute, in a suit brought by the federal government, . . . constitutes 'public money.' As such, it must be deposited with the Treasury, in accordance with the Miscellaneous Receipts Act, unless otherwise specified by Congress'').

Fifth, the Attorney General has not ''cherry-picked'' a favorable definition of ''constructive receipt'' to avoid violation of the MRA. To the contrary, the 1980 OLC opinion cited by the commenter applied the doctrine of ''constructive receipt'' as a ''practical'' constraint to guard against elevating form over substance in evaluating whether a settlement violated the MRA. *Effect of 31 U.S.C. 484,* 4B Op. O.L.C. at 688. In addition, as the comment itself acknowledges, there is no definitive version of the constructive receipt doctrine that is clearly applicable to the types of settlements at issue here and that differs from the Department's approach. Moreover, as *Effect of 31 U.S.C. 484* notes, the Department and Federal agencies had previously applied the same definition in other contexts, including to conclude that an individual in some circumstances does not ''accept'' funds when the individual does not retain control over the disposition of those funds. *Id.* at 688 n.11. That further undercuts the argument that the Department has chosen a particular version of the doctrine in order to permit circumvention of the MRA.

The Department also disagrees with the assertion that 42 U.S.C. 16138 (enacted in 2008) undercuts the legality of payments to third parties. That provision addresses EPA's authority to accept diesel emissions reduction SEPs. The commenter broadly states that the ''clear implication'' of this provision is that diesel emission SEPs (and accordingly all third-party payments) violate the MRA and the ADA absent express congressional authorization. But this claim ignores the text, context, and history of section 16138, which make clear that Congress enacted the 2008 provision to address a narrow concern that EPA then believed had newly arisen from Congress's express appropriations for diesel retrofit projects.

As an initial matter, nothing in the text of section 16138 indicates that it broadly prohibits the Federal Government from entering into settlement agreements that include payments to third parties. On the contrary, by its terms, it provides that the EPA ''may accept . . . diesel emissions reduction Supplemental Environmental Projects'' that meet certain criteria ''as part of a settlement of any alleged violates of environmental law.'' 42 U.S.C. 16138. To the extent that the commenter relies on the interpretive cannon *expressio unius est exclusio alterius*—that expressing one item of an associated group or series excludes another—that canon applies ''only when circumstances support a sensible inference that the term left out must have been meant to be excluded.'' *NLRB* v. *SW Gen., Inc.,* 580 U.S. 288, 302 (2017) (quotation marks and brackets omitted). Here, it is not ''sensible'' to ''infer[ ],'' *id.,* that Congress intended to disrupt the Federal Government's long-standing practice of entering into settlement agreements that include third-party payments from a provision that authorizes the Federal Government to agree to one such type of agreement—*i.e.,* those that include ''diesel emissions reduction Supplemental Environmental Projects,'' 42 U.S.C. 16138.

The history and context of section 16138 confirm this conclusion. As the Senate report accompanying the legislation states, SEPs had historically ''been an important funding stream for diesel retrofit projects.'' S. Rep. No. 110–266, at 2 (2008). The report notes that SEPs are ''projects [that] are undertaken by a defendant as part of a settlement in an environmental enforcement action . . . . They specifically do not include actions which a defendant is otherwise legally required to perform. So they generate environmental and public health benefits that would not have occurred without the settlement.'' *Id.* However, after Congress first funded the diesel retrofit program in 2005, the report continues, ''EPA apparently . . . 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.'' *Id.* The Senate report explains that the new provision was ''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.'' *Id.* Rather, ''Congress never intended the Diesel Emissions Reduction Act to limit EPA's ability to negotiate additional diesel retrofit projects as part of enforcement settlements.'' *Id.* at 3.

This history makes clear that Congress enacted the 2008 provision to address the narrow concern that, at the time, EPA believed had arisen from Congress's express appropriations in 2005 for diesel retrofit projects. Congress clarified that it had ''never intended'' to limit EPA's ability to negotiate SEPs when it funded the diesel retrofit program. *Id.* Neither the text nor the history or context of how section 16138 came about suggest that Congress understood SEPs to violate the MRA as a general matter. To the contrary, Congress was aware of EPA's and the Department's practice of using SEPs in environmental enforcement settlements and enacted this provision to support that practice and ensure that diesel retrofit projects would continue to be included. *See* S. Rep. No. 110–266, at 2.[5]

[5] Indeed, as one recent article put it, ''there is no evidence in the text or legislative history of the 2008 . . . amendment to show that Congress intended for the amendment to preclude EPA from accepting SEPs absent clear congressional authorization.'' Daniel Alvarez et al., *Clearing the*

Continued

The Department also disagrees with the same commenter's argument that 42 U.S.C. 7604(g)(2) undercuts the legality of payments to third parties in settlements, including SEPs. That provision allows a court to order that up to $100,000 of a penalty award in a citizen suit brought under the Clean Air Act to be used for ''beneficial mitigation projects which are consistent with'' the Clean Air Act and ''enhance the public health or the environment'' in lieu of being deposited in the U.S. Treasury. 42 U.S.C. 7604(g)(2). Like 42 U.S.C. 16138, nothing in the text of section 7604(g)(2) suggests that, in adopting that provision, Congress intended to upend the practice of agreeing to third-party payments as part of settlement agreements. Nor is that a ''sensible inference,'' *SW Gen.,* 580 U.S. at 302; section 7604(g)(2) is limited to cases brought by private citizens to abate pollution under the Clean Air Act and authorizes courts to order certain environmental projects in lieu of penalties—authority that, absent this provision, courts would lack.

The history of that provision confirms its limited scope. Section 7604(g)(2) was adopted as part of the Clean Air Act Amendments of 1990, Public Law 101–549, tit. VII, sec. 707, 104 Stat. 2399, 2682–83. One provision of that law, codified at 42 U.S.C. 7604(g)(1), created a special fund into which penalties imposed in Clean Air Act citizen suit actions ''shall be deposited''; the very next subsection, section 7604(g)(2), then provided that ''notwithstanding paragraph (1)'' courts had the authority to instead order the use of such civil penalty monies for beneficial mitigation projects. The close connection between these subsections—including the fact that section 7604(g)(2) twice cross-references section 7604(g)(1)—further indicates that section 7604(g)(2) was directed specifically to judicial remedies in citizen litigation under the Clean Air Act.[6] Congress's decision to authorize a court to order certain defined projects in the limited context of these private suits after a court determination of liability and penalty assessment has no bearing on the Government's authority to seek appropriate relief in a settlement.

In addition, the Department disagrees with commenters who contend that a third-party payment in the form of a SEP amounts to an agreement to trade back part of the penalty that would constitute public money subject to the MRA. Such trading back of penalties for third-party payments is not authorized by this rule or the May 2022 Memorandum. To the extent commenters suggest that such trade backs are permissible under the *2015 SEP Policy,* the Department notes that while that policy is beyond the scope of this rulemaking, it also does not authorize such trade backs. Nor does the Government violate the MRA simply because it settles a penalty claim that, if pursued to judgment, would have yielded public money subject to the MRA. Instead, the factors outlined in *Softwood Lumber* identify when the Government has constructively received money under the MRA.

Finally, the Department notes that the Clark Memorandum—which commenters cited in connection with this topic and for purposes of other topics—has been withdrawn and was not adopted more broadly by the Department. *See* Memorandum for ENRD Section Chiefs and Deputy Section Chiefs from Deputy Assistant Attorney General Jean E. Williams, Env't & Nat. Res. Div., U.S. Dep't of Just., *Withdrawal of Memoranda and Policy Documents* (Feb. 4, 2021), *https://www.justice.gov/enrd/page/file/1364716/dl* (last visited Oct. 31, 2024). Any related memoranda to the withdrawn Clark Memorandum and associated litigation filings also were not adopted more broadly by the Department. The Department has also addressed arguments made in the Clark Memorandum (which several commenters have repeated) elsewhere in this document.

2. The Anti-Deficiency Act

Comments: Some commenters state that the ADA, 31 U.S.C. 1341, was enacted to implement the Appropriations Clause of the U.S. Constitution. According to these commenters, it is a violation of the ADA for a settlement agreement to divert any funds from the U.S. Treasury into private hands without congressional authorization.

Other commenters state that there is no violation of the ADA because in these settlements, the Federal Government never received any funds to expend without congressional appropriation.

Response: The Department agrees that settlements that include third-party payments do not violate the ADA. The ADA generally prohibits any expenditure or obligation of public money exceeding an amount ''available in an appropriation or fund for the expenditure or obligation. . . .'' 31 U.S.C. 1341(a)(1)(A). As discussed above, *see supra* Part II.B.1, where a settlement is ''executed before an admission or finding of liability in favor of the United States'' and where the United States does not ''retain post-settlement control over the disposition or management of the funds or any projects carried out under any such settlement, except for ensuring that the parties comply with the settlement,'' the Government has not '' 'received money for the Government.' '' *Softwood Lumber,* 30 Op. O.L.C. at 119 (quoting 31 U.S.C. 3302(b)). In such settlements, no Government official or employee expends public money or creates an obligation of the Government.

3. Constitutionality of the Department's Actions

Comments: Multiple commenters state that the power to tax and the power to spend are granted only to Congress under Article I of the Constitution. They state that under the Appropriations Clause, only Congress has the authority to direct how Federal dollars are spent, and that body enacts annual appropriations measures mandating how Federal agencies do so. These commenters contend that the long-standing practices of the Department reflected in the May 2022 Memorandum circumvent these constitutional obligations. Additionally, commenters argue that through these settlements, DOJ is usurping the role of the legislature, without clear direction from Congress to do so. One commenter also claims that SEPs and similar payments to third parties use ''lawful enforcement authority to extract unlawful settlements,'' which, in the commenters' view, is inconsistent with the requirement in Article II of the Constitution that ''the executive take Care that the Laws be faithfully executed.''

Response: Third-party settlements entered into consistent with *Softwood Lumber* and the May 2022 Memorandum are consistent with the Constitution, as well as the MRA. The Constitution provides that ''[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,'' U.S. Const. art. I, sec. 9, cl. 7, and that ''[t]he Congress shall have

Air on Supplemental Environmental Projects, 54 Env't L. Rep. 10382, 10394 (2024).

[6] The two provisions were closely linked in the legislative history of the 1990 Clean Air Act Amendments. The conference report describes the two provisions together in a single sentence, stating that ''[t]he House amendment establishes a special treasury fund similar to the one created in the Senate bill, and also authorizes courts in citizen suits to order that penalties be used in beneficial mitigation projects'' and noting that ''[t]he conference agreement adopts the House position.'' Congressional Research Service, *A Legislative History of the Clean Air Act Amendments of 1990,* at 946 (1993). Again, nothing here suggests that Congress intended to upend the practice of agreeing to third-party payments as part of settlement agreements.

Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States,'' *id.* art. I, sec. 8, cl. 1. In such settlements, no money is ''drawn from the Treasury.'' Nor does Congress's authority to provide for the ''general Welfare'' preclude the Executive Branch from settling litigation on terms that are otherwise consistent with applicable law.

The MRA helps ''preserve[ ] Congress's constitutional control over the expenditure of public funds.'' *Applicability of the Miscellaneous Receipts Act to an Arbitral Award of Legal Costs,* 42 Op. O.L.C. __, at *3 (Mar. 6, 2018). Similar to how the Framers of the Constitution limited the Appropriations Clause's commands to ''Money . . . drawn from the Treasury,'' Congress limited the MRA to ''money'' ''receiv[ed] . . . for the Government.'' And as discussed above in the responses to commenters, *see supra* Parts II.B.1 and II.B.2, funds paid under settlements that include third-party payments are not ''drawn from the Treasury'' and have not been ''receiv[ed] . . . for the Government'' by the United States. Commenters are also incorrect that the May 2022 Memorandum circumvents the Appropriations Clause and the MRA; on the contrary, the May 2022 Memorandum goes beyond what the Appropriations Clause and the MRA require. *See* May 2022 Memorandum at 2–4. To the extent the constitutional arguments of commenters also rely on their interpretation of the MRA or ADA, the Department addresses those arguments above.

Moreover, appropriately structured third-party payments are consistent with the discretion the Constitution accords the Executive Branch in enforcing the statutes enacted by Congress, which—absent a limitation by Congress—includes the authority to resolve claims by settlement on appropriate terms. *Authority of the United States to Enter Settlements,* 23 Op. O.L.C. at 135 (''The settlement power is sweeping, but the Attorney General must still exercise her discretion in conformity with her obligation to 'enforce the Acts of Congress.' '' (citation omitted)). While the Take Care Clause can impose certain limitations on that power, *see id.* at 138, the commenter offers no explanation for why all third-party settlements violate that provision beyond the conclusory statement that they ''obviously'' do.

4. Revocation of the December 2020 Rule and Issuance of the May 2022 Memorandum as Arbitrary and Capricious

Comments: Several commenters argue that the revocation of the December 2020 Rule is arbitrary and capricious or not grounded in law, or otherwise claim that DOJ lacks sufficient bases to justify the action. They argue that DOJ's conclusion that the December 2020 Rule is ''more restrictive and less tailored than necessary,'' 87 FR 27937, does not support repealing the entire rule. They further argue that the Department's statement that settlement policies ''have traditionally been addressed through memoranda,'' *id.,* is not sufficient to justify repeal.

Commenters assert that the Department placed the prior policy in regulations and that failing to do so here is a ''bad system of management'' because there is ''no central repository'' where the public and officials could locate memos governing the agency. One commenter states further that the May 2022 Memorandum describing the Department's new policy cites to an OLC memorandum that has not been produced via a Freedom of Information Act (''FOIA'') request and so itself is not available to the public.

Response: It is well-established that ''[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'' *Encino Motorcars, LLC* v. *Navarro,* 579 U.S. 211, 221 (2016). ''When an agency changes its existing position, it 'need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.' '' *Id.* (quoting *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)). ''But the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.' '' *Id.* (quoting *Fox Television Stations,* 556 U.S. at 515). The IFR and the May 2022 Memorandum describe sound reasons for the revocation of 28 CFR 50.28 and a change in policy. Appropriately tailored ''agreements providing for payments to third parties are lawful and allow the United States to more fully accomplish the primary goals of civil and criminal enforcement: Compensating victims, remedying harm, and punishing and deterring unlawful conduct.'' 87 FR 27937. ''For example, the harms caused by violations of Federal environmental statutes . . . can be difficult to redress directly in particular cases''; and in such circumstances, third-party payments (including SEPs) can ''help achieve an enforcement action's goals.'' *Id.* Please see the other responses in this document to comments raising specific legal and policy concerns, especially Parts II.B.1 and 5, that underscore the reasons the Department changed policy.

Turning to the question of the form of the new policy, the Department observes that the previous Administration itself recognized that 28 CFR 50.28 was '' 'limited to agency organization, management, or personnel matters'. . . .'' 85 FR 81410 (citing 5 U.S.C. 553(a)(2), (b), and (d)). The same is true with respect to the IFR and with respect to this final rule. In such areas, Federal agencies have flexibility as to how they act and memorialize their actions. *Cf. Perez* v. *Mortg. Bankers Ass'n,* 575 U.S. 92, 101 (2015) (''Because an agency is not required to use notice-and-comment procedures [under the APA] to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.''). Moreover, as the IFR states in announcing the revocation of 28 CFR 50.28, DOJ policies addressing the goals of settlements have ''traditionally'' been announced in memoranda. 87 FR 27937. Also of note, the previous Administration did not undertake a notice-and-comment rulemaking process; instead, it promulgated 28 CFR 50.28 as an immediately effective final rule. Likewise, in 2022, DOJ revoked this provision as an interim final rule and released simultaneously the May 2022 Memorandum and posted it to the DOJ website. *See https://www.justice.gov/media/1221546/dl?inline=* (last visited Oct. 31, 2024). At its discretion, the Department took the further step of requesting public comment as to those actions and is responding to significant submitted public comments in this final rule.

In response to the commenter who suggests that a memorandum is not appropriate because of the lack of a ''central repository'' for Department policy and states that the policy should be in the *Justice Manual* or *Code of Federal Regulations,* the Department notes that the memorandum is reflected in the *Justice Manual,* which is publicly available on the Justice.gov website. *See Settlement Agreements Involving Payments to Non-Governmental Third Parties,* section 1–17.000. Including these provisions in the *Justice Manual* is preferable because *Justice Manual* provisions can be readily amended, allowing the Department to adjust the guidance governing additional circumstances and fact patterns as needed. The *Justice Manual* governs the litigation practices of the Department

and is followed by Department litigators; a regulation is not needed for this purpose. Further, the Department has announced with this notice that it will make changes to these *Justice Manual* provisions, demonstrating the benefits of this approach.

Finally, as to the question of the release under FOIA of December 2020 OLC Memo, which is referenced in footnote two of the May 2022 Memorandum, DOJ did release this document (posted on February 16, 2023) and it is available in the FOIA Reading Room at *https://www.justice.gov/oip/foia-library/foia-processed/general_topics/settlement_guidelines_third_parties_2_14_23/download* (last visited Oct. 31, 2024).

5. The Attorney General's Guidelines and Limitations as Public Policy

5.1. Examples of Past Department of Justice Conduct as a Basis for Not Revoking the December 2020 Rule and Issuing the May 2022 Memorandum

Comments: Some commenters state that during the Clinton, Bush, and Obama Administrations, the Department entered into settlement agreements containing third-party payments that violated the statutory and constitutional provisions discussed in the previous topics; and further stated that these settlement agreements reflect bad public policy. Examples offered include settlements with financial institutions following the 2008–09 financial crisis; settlements addressing ''housing counseling assistance'' programs; cy pres settlements in other consumer and civil rights cases; and settlements in environmental cases. Commenters argued that these settlements demonstrate that case resolutions will lead to favoritism or ''cronyism.'' Several commenters further asserted that Congress declined to enact funding for some programs where similar activities were subsequently at least partially funded through third-party payments. Commenters also alleged that the Federal Government ''strong-armed'' defendants in some of these settlements to make payments to politically favored entities. Requiring defendants to donate to activist groups selected by the Department, they argue, raises serious legal and ethical issues, erodes public trust, and is analogous to ''corruption.'' Commenters also expressed concern about the ''lack of transparency'' surrounding third-party payments, and about decisions made by ''unaccountable bureaucrats.''

Response: Some of the points raised by commenters do not relate to the substance of the action on which the Department is seeking comment. For example, cy pres class action settlements are expressly outside the scope of the Department's action. *See* May 2022 Memorandum at 1 n.2.

A general prohibition by rule on third-party payments is unnecessary for several reasons. First, with respect to conflict-of-interest concerns, Department attorneys are subject to strict conflict of interest rules imposed by the Department and their respective State bars that apply in the context of litigation, including the settlement of claims. Second, the Department has concluded that, although the commenters' concerns are unfounded based on past settlements, it can best proactively address such concerns through the use of policies like the May 2022 Memorandum, or changes to the *Justice Manual,* rather than a less flexible rulemaking process. Indeed, the May 2022 Memorandum sets forth guidelines designed to ensure that third-party settlements are not used for improper purposes, including a requirement that projects ''have a strong connection to the underlying violation or violations of federal law at issue'' and a provision barring the Department and its client agencies from ''propos[ing] the selection of any particular third party to receive payments to implement any project carried out under any such settlement.'' May 2022 Memorandum at 3. These guidelines adequately guard against cronyism and political favoritism while preserving the benefits of third-party payments. Third (and relatedly), the Department notes that allowing for third-party payments can increase trust in the judicial process by, for example, allowing settlements to be more responsive to affected communities.

For similar reasons, the Department disagrees that a rule prohibiting third-party payments is necessary to ensure transparency. As detailed earlier in this preamble, *see supra* Part I.C, transparency concerns can be addressed through other means, including the revisions to the *Justice Manual* described there. Those revisions appropriately balance concerns of transparency and efficiency with the benefits that can accrue from third-party settlements in a way that a rule banning third-party settlements would not. Nor is a rule necessary to ensure that unaccountable actors are not making important settlement decisions. Rather, the Department can ensure accountability through other means, such as subjecting settlements that include third-party payments to approval requirements similar to those required for other significant departmental actions. *See* May 2022 Memorandum at 3–4 (settlements involving a payment to a non-governmental third party must obtain the approval of the Deputy Attorney General or the Associate Attorney General, with certain exceptions).

To the extent that commenters suggest that Congress's decision not to fund certain activities is evidence that it is improper for the Department to agree to third-party payments that would fund such activities, they have not provided any reason to draw an inference that Congress's inaction evinces an intent to affirmatively disapprove such settlements.

Some commenters identified particular past payments to third-party organizations that they view as inappropriate, including settlements involving allegations of lending discrimination that required the defendant to make payments to third-party organizations to conduct general public education and awareness projects and a 2006 environmental non-prosecution agreement requiring a third-party payment in the form of ''$1 million to the Alumni Association for the United States Coast Guard Academy, New London, Connecticut to fund an Endowed Chair of Environmental Studies.'' The Department, while not conceding to the commenters' characterizations of these settlements, is sensitive to the need to give the public confidence that settlements providing for payments to third parties are appropriately tailored. In that vein, the May 2022 Memorandum provides that ''[n]o such settlement shall require payments to non-governmental third parties solely for general public educational or awareness projects; solely in the form of contributions to generalized research, including at a college or university; or in the form of unrestricted cash donations.''

5.2. Selection of Third-Party Recipients

Comments: One commenter would revise the May 2022 Memorandum to allow DOJ and EPA to work with affected community members in two respects: to devise appropriate SEPs and to suggest appropriate third-party recipients. The commenter says that the May 2022 Memorandum can be read to give defendants ''sole control'' in selecting projects because it prohibits Department selection of a specific third party and allows the defendant to propose projects. The commenter argues that impacted communities may know how best to remedy harm done to them, and they should not be required to work directly with the party causing the harm. Such revisions, the comment

continues, would also help to prevent funding of organizations improperly favored by defendants.

Several commenters argue that under the May 2022 Memorandum, DOJ has too great a role in the selection of the recipients of third-party payments, which will lead to the funding of ''political allies.'' Other commenters similarly express concerns about ''steer[ing] settlement funds to political allies,'' ''picking winners,'' or funneling funds to ''advocacy groups'' for ''favored programs.''

Response: The Department acknowledges the concerns with allowing defendants sole authority to select third-party recipients, but in order to avoid the appearance that the Department is directing the inclusion of particular projects or third parties into a settlement, declines to adopt a policy under which the Department would make such selections. And the Department has addressed these concerns through other means to help ensure appropriate project selection. For example, under the May 2022 Memorandum, ''projects must have a strong connection to the underlying violation,'' ''be consistent with the underlying statute,'' and ''advance at least one of [the statute's] objectives.'' May 2022 Memorandum at 3. ''The project should also be designed to reduce the detrimental effects of the underlying violation . . . to the extent feasible and reduce the likelihood of similar violations in the future.'' *Id.* Moreover, the Department and its client agencies ''may specify the type of entity'' to be the beneficiary of any projects carried out, *id.,* and may ''disapprove of any third-party implementer or beneficiary that the defendant proposes'' provided that the disapproval is based upon objective criteria for assessing qualifications and fitness outlined in the settlement agreement. *Id.* The May 2022 Memorandum also expressly precludes certain payments that would ordinarily be too broad to satisfy the criteria above: Settlements may not ''require payments to non-governmental third parties solely for general public educational or awareness projects; solely in the form of contributions to generalized research . . . or in the form of unrestricted cash donations.'' *Id.* Thus, these provisions rule out Federal selection of any particular recipient but permit the United States to disapprove a particular recipient based on objective grounds laid out in the settlement agreement.

In addition, the Department can address the concerns about defendants selecting projects in other ways. The May 2022 Memorandum ''provides internal Justice Department guidance only.'' May 2022 Memorandum at 2. Nothing prevents a community from engaging with the defendant at any time, including regarding potential SEPs. Moreover, once a defendant expresses interest in or proposes a third-party payment as part of a judicial settlement, Department attorneys and their client agencies may encourage the defendant to seek input from affected communities on their proposal. Defendants may choose to consult with the community to identify the community's needs and concerns in advance of agreeing to a settlement, which would help satisfy the Department's requirement that third-party payments have a strong connection to the allegations and advance the underlying statutory purpose. The Department will also add a provision to *Justice Manual* section 1–17.000 that provides for public comment on certain settlements that include these types of payments, *see supra* Part I.C, so the public will be able to provide input on the particular remedies identified in the settlement.

Finally, with respect to concerns that the Department would steer settlement funds to political allies, pick winners, or funnel funds to favored groups and programs, the requirements detailed above operate to ensure, as stated in the May 2022 Memorandum, that third-party payments function properly as ''critical tools for addressing violations of federal law and remedying the harms those violations cause.'' May 2022 Memorandum at 2. The Department would not support the use of partisan or viewpoint-based criteria in determining how to implement a third-party payment, as those would not be ''objective criteria,'' *id.* at 3; such criteria could give rise to an inference that a potential recipient of a third-party payment was rejected based on the Department's disfavoring of that particular partisan characteristic or viewpoint.

5.3. Guidelines and Limitations: Adequacy To Constrain Settlement Discretion

Comment: One commenter views the May 2022 Memorandum as ''window-dressing that will reopen avenues of past abuse'' of the Department's settlement discretion. In this commenter's view, the guidelines still permit the Department to indicate the category of recipient of third-party payments and to disapprove specific recipients based on criteria the Department itself selects, and even the express prohibition of certain types of third-party payments can be circumvented by allowing some minimal funding of another type of activity or minimal statement of conditions for cash donations. The commenter made several further similar criticisms addressed below.

Response: The Department disagrees with the characterization that the May 2022 Memorandum does not sufficiently constrain its settlement discretion. On the contrary, the memorandum's provisions impose significant and appropriate constraints on the use of this tool. The guidelines and limitations operate together to ensure that settlement agreements providing for payments to non-governmental third parties are structured properly, and are consistent with applicable law. *See* May 2022 Memorandum at 2–3. The requirement that the Deputy Attorney General or Associate Attorney General approve a settlement containing a third-party payment also promotes consistency in application of the May 2022 Memorandum's terms. *See id.* at 3–4.

The commenter states that the prohibition on third-party payments ''solely'' for general public educational or awareness projects or generalized research is not constraining because a settlement could ''allocate *any* amount of the settlement money to some other activity that is not public education, awareness, or generalized research'' in order to ''skirt this limitation.'' That misunderstands the relevant limitation. The term ''solely'' is intended to recognize that a project that otherwise complies with the guidelines set forth in the May 2022 Memorandum could also have an incidental effect of public education or awareness or could have incidental benefits to generalized research. The Department now clarifies that no portion of a settlement may be directed at these prohibited purposes. For example, a settlement addressing the lead-based-paint violations of a commercial renovator may include a third-party payment in the form of a project to remediate lead-based paint in a nearby school. The settlement may have the incidental effect of educating school attendees, their families, and the local community about the dangers of lead paint, but no portion of the third-party project could be directly used for a public awareness campaign.

The commenter further argues that the requirement of a ''strong connection to the underlying violation or violations of federal law at issue in the enforcement action,'' May 2022 Memorandum at 3, is not a significant constraint. The commenter suggests that this provision requires only a connection to the broad purposes of the underlying statute,

which the commenter states is ''highly subjective.'' The Department disagrees. The same provision of the May 2022 Memorandum states that ''[t]he project should also be designed to reduce the detrimental effects of the violation or violations at issue to the extent feasible and reduce the likelihood of similar violations in the future.'' May 2022 Memorandum at 3. Linking the project to the detrimental effects of the violation (and preventing recurrence) requires a strong connection to the harms associated with the underlying violation; for violations that affect a particular geographic area, this requirement will also mandate that the project be linked to that area.

The commenter describes the limitation that a project ''should also be designed to reduce the detrimental effects of the underlying violation or violations at issue to the extent feasible and reduce the likelihood of similar violations in the future,'' *id.,* as expressing an ''aspirational preference, not a requirement of agency settlements.'' This is incorrect. The May 2022 Memorandum requires that a properly structured settlement must address this factor ''to the extent feasible.'' May 2022 Memorandum at 3. This qualification recognizes that, in some instances, it may be difficult to reduce the detrimental effects of a past violation of law where those effects are widely shared.

The commenter states that the provision limiting third-party payments for activities for which an agency receives a specific appropriation will not be effective, stating that ''[t]o sidestep these guidelines, an outside group need only describe the project for which it may receive settlement funds in a manner that differentiates the project from an agency's appropriations or statutory obligations.'' This is also incorrect. The Department will review any proposals for overlap between a project and appropriations that an agency receives and will not rely solely on the description of the project by the defendant or any other party.

The commenter also questions the benefits of the provisions of the May 2022 Memorandum providing for review and approval by the Deputy Attorney General or Associate Attorney General of settlements that include payments to non-governmental third parties. The Department has long required that certain significant settlements be approved by the Deputy Attorney General or Associate Attorney General. 28 CFR 0.160, 0.161. These requirements ensure that certain types of case resolution receive appropriate review and attention within the Department. The provisions of the May 2022 Memorandum requiring such approval for settlements including payments to non-governmental third parties are consistent with these longstanding provisions and will similarly ensure that the memorandum's provisions are applied consistently and uniformly.

The commenter also appears to presume that DOJ controls the development of third-party payment provisions. The Department will adopt a provision in *Justice Manual* section 1–17.000 clarifying that in negotiating a civil case resolution, the Department and its client agencies may condition a settlement on the inclusion of a third-party payment if the third-party payment constitutes relief that a court would have authority to order under applicable law or in equity, but that otherwise such provisions may only be included if the defendant expresses interest in doing so. Outside the context of relief that a court could order, then, these provisions will be included only where the defendant expresses interest in doing so. Second, the defendant has the lead on developing the proposed project, which must have a ''strong connection'' to the violation of Federal law underlying the case.

In addition, in many civil cases, following the conclusion of settlement negotiations, there is a public process for entry of a proposed Federal consent decree. 15 U.S.C. 16(b)–(h); 28 CFR 50.7. Once the United States files the proposed consent decree in Federal court, there is typically a period in which the general public may comment, including on any provisions addressing third-party payments. The Federal court then considers any resulting comments and exercises its own independent judgment in deciding whether to approve such a decree. The Department will add a provision to *Justice Manual* section 1–17.000 requiring a public comment process for certain civil third-party payments subject to the May 2022 Memorandum, so that the public will have additional opportunities for input on such provisions. This requirement will afford additional transparency for settlements including such remedies.

5.4. Guidelines and Limitations: Prohibition on Post-Settlement Control

Comment: According to one commenter, the recipients of third-party payments under the May 2022 Memorandum are not subject to reporting obligations to ensure oversight and accountability because DOJ and its client agencies cannot '' 'retai[n] post-settlement control over the disposition or management of the funds or any projects carried out under any such settlement.' ''

Response: The prohibition against post-settlement control is designed to address the requirements of the MRA. *See supra* Part II.B.1. This does not mean, however, that DOJ will not oversee the settlement and ensure the defendant's compliance with it. In fact, the fourth guideline in the May 2022 Memorandum specifically allows for this:

> Any such settlement must be executed before an admission or finding of liability in favor of the United States, and the Justice Department and its client agencies must not retain post-settlement control over the disposition or management of the funds or any projects carried out under any such settlement, *except for ensuring that the parties comply with the settlement.*

May 2022 Memorandum at 3 (emphasis added) (citing *Softwood Lumber,* 30 Op. O.L.C. at 119).

In addition, Federal consent decrees and settlements in civil cases contain standard provisions to ensure compliance, typically including stipulated penalties for failure to complete required actions spelled out in the agreement. Settlement agreements including a third-party payment may also contain specific terms addressing implementation and compliance. The Government can seek enforcement of these provisions to ensure compliance with the terms of the settlement or consent decree. Furthermore, following the conclusion of settlement negotiations, the Department will require opportunity for public comment on certain settlements that incorporate third-party payments in *Justice Manual* section 1–17.000, which will provide a mechanism for additional accountability on such terms. *See supra* Part I.C. (Such a public process is often already required by law, 15 U.S.C. 16(b)–(h), 28 CFR 50.7.)

6. Comments Regarding SEPs

6.1. Characterization of SEPs in the May 2022 Memorandum

Comment: One commenter states that the May 2022 Memorandum and IFR appear to ''fundamentally misunderstan[d] what SEPs are and how they are designed to function'' by treating them as ''a remedy for the underlying violation.'' The commenter goes on to provide his understanding of what a SEP is by reference to EPA's *2015 SEP Policy* and in contrast to the remedy the commenter identifies as mitigation. The commenter made several further similar criticisms addressed below.

Response: This comment discusses one potential type of third-party

payment used in the environmental context, ''Supplemental Environmental Projects.'' EPA's *2015 SEP Policy* specifically addresses such projects. The Department's May 2022 Memorandum is distinct from EPA's *2015 SEP Policy,* and comments on EPA's policy are outside the scope of the Department's request for comments, although the Department notes in this respect that the EPA policy never characterizes, as the comment suggests, SEPs as projects undertaken ''in exchange for a lower civil penalty.'' Similarly, the May 2022 Memorandum does not authorize third-party payments in any context to be made ''in exchange for a lower civil penalty.''

The Department's memorandum does reference SEPs as one potential category of third-party payment that can be an appropriate remedy in a Department settlement. (Note that not all SEPs necessarily involve third-party payments, however.) The Department will respond to this comment to the extent that it addresses aspects of the May 2022 Memorandum, as distinct from EPA's *2015 SEP Policy.*

This commenter asks why ''[t]he May [2022] Memo and the Interim Final Rule do not explain why courts' equitable authority is insufficient to remedy the harms from violations of federal environmental law.'' At the outset, remedying harm is not the only purpose of these types of third-party payments; they also operate to ''punish and deter future violations.'' May 2022 Memorandum at 1. As to their function in remedying harm, the May 2022 Memorandum states that some categories of harms, including in environmental cases, ''can be difficult to redress directly in particular cases.'' *Id.* at 1–2. Where a violation has attenuated or indirect effects (such as the example where excess air pollution accelerated weathering and increased lead exposure from deteriorating lead-based paint), it may not be feasible to identify the scope of those affected with precision. In settling a case, litigants are not subject to the same limitations that apply to judicial remedies and can agree to remedies that may go beyond those that a court would typically order. *See, e.g., Frew* v. *Hawkins,* 540 U.S. 431 (2004); *Local No. 93, Int'l Ass'n of Firefighters, AFL–CIO* v. *City of Cleveland,* 478 U.S. 501 (1986); *United States* v. *Charles George Trucking,* 34 F.3d 1081 (1st Cir. 1994); *United States* v. *BP Prods. N. Am., Inc.,* No. 2:23–CV–166, 2023 WL 5125148 (N.D. Ill. Aug. 9, 2023). In *Firefighters,* the Supreme Court stated that when considering a consent decree that would resolve a matter within its jurisdiction and within the general scope of the case pleadings and would ''further the objectives of the law upon which the complaint was based,'' ''a federal court is not necessarily barred from entering [that] consent decree merely because the decree provides broader relief than the court could have awarded after a trial.'' 478 U.S. at 525.

The remedies that theoretically a court could order can require more precise accounting of effects and injuries than may be practicable in some instances. Further, to fully remedy the underlying harm caused by the violation(s) might require more remedial action than a court may order in a particular statutory scheme. The May 2022 Memorandum requires that any project funded by a defendant ''be consistent with the underlying statute being enforced and advance at least one of the objectives of that statute,'' ensuring that the project will be consistent with congressional intent in enacting the applicable statutory framework. May 2022 Memorandum at 3.

Indeed, some of the other commenters provided examples of types of harms that cannot be adequately addressed without remedies of this type. *See infra* Part II.B.6.2. These harms can arise over long time scales, in circumstances in which there are multiple sources of exposure; in addition, it may be apparent that a particular area or community has experienced unusual environmental harms, but difficult to apportion causation from any individual source. For example, in 2015, the United States, the State of Michigan, and AK Steel Corporation agreed to a settlement to resolve claims for particulate matter violations of the Clean Air Act at AK Steel's Dearborn, Michigan steel plant, which is located in a mixed industrial area with multiple sources of pollution affecting neighboring communities. The settlement required AK Steel to pay a $1.35 million civil penalty and implement injunctive relief to address the violations. The settlement also required AK Steel to perform a SEP, consisting of the purchase and installation of dynamic air filters in the air conditioning systems at the Salina elementary and middle schools. The projects, which cost $337,000, reduced students' exposure to fine particulates—from the steel plant but commingled with pollution from other sources in the airshed—while in school. Examples like this illustrate why the Department concluded that ''[w]hen used appropriately, these agreements allow the government to more fully compensate victims, remedy harm, and punish and deter future violations.'' May 2022 Memorandum at 1.

6.2. SEPs as Public Policy

Comments: A number of commenters express support for the IFR's restoration of the use of third-party payments in the form of SEPs in judicial environmental enforcement settlements. In the view of these commenters, SEPs serve to provide fuller mitigation for harm caused by violations and are a tailored approach to address challenges for communities who routinely face noncompliance from industries. As one commenter states, ''SEPs represent a unique opportunity in the environmental enforcement context to secure some form of restitution for communities harmed by violations given the difficulty of identifying and quantifying full individual harm from a violating pollution source to support adequate direct mitigation. It is often difficult, if not impossible, to fully trace all human ailments or natural problems to a particular pollution source, especially over long periods of time.'' Absent the availability of this settlement tool, another commenter notes, ''enforcement actions are less able to reduce or offset the detrimental effects that the unlawful behavior has already had on affected communities.'' Some commenters state that the Department's changes will support State efforts to address equity, public health, and welfare issues in communities adversely affected by environmental violations and at no additional cost to the taxpayer, and note that 37 States have SEP policies allowing such projects in settlements.

The Department received multiple comments discussing the benefits of the changes in policy reflected in the Department's May 2022 Memorandum for communities and others affected by violations of law. Commenters describe how third-party payments in the form of SEPs have been used to provide more complete relief for communities affected by environmental pollution, particularly overburdened communities. Some of these comments specifically note that environmental violations can cause harms that cannot be adequately addressed without this type of remedy.

Some commenters, however, view third-party payments, including SEPs, as ''corrupt'' tools inadequate to remedy public rights or deter violators, arguing that SEPs and third-party payments undercut deterrence, do not prevent pollution in the case of environmental enforcement, and incentivize ''corrupt'' actions by officials to reward favored entities with payments. Similarly, another commenter questions the

deterrent effect of settlement agreements containing third-party payments in the form of SEPs and characterizes SEPs as ''ad hoc'' and as presenting ''likely inefficient ways to combat pollution.''

Response: These comments discuss one particular type of settlement instrument, SEPs. As noted in DOJ's response to topic 6.1 above, *see supra* Part II.B.6.1, comments on the terms of the *2015 SEP Policy* are outside the scope of the Department's request for public comment.

That said, the Department agrees with commenters that SEPs can provide benefits. Federal environmental statutes seek to protect public health writ large but, as applied in the context of a violating facility, it is often the people who live near and downwind of that facility who bear more of the harm. These harms can arise over long time scales, in circumstances in which there are multiple sources of exposure; in addition, it may be apparent that a particular area or community has experienced unusual environmental harms, but difficult to show causation from any individual source, as discussed. Third-party payments may be crafted to ensure that the case resolution accounts for the reality on the ground.

The Department disagrees that SEPs decrease the deterrent effect of Federal law and that they are inefficient ways to combat pollution. The commenter does not provide data to support these statements. In fact, the ability to include third-party payments in case resolution—in addition to a civil penalty and injunctive relief—increases the deterrent value of the Department's enforcement actions by expediting and facilitating settlement, enabling the Department to prosecute more violators and ensuring that violators are held accountable for all harms, including those harms that may be intangible or difficult to quantify, or where victims are no longer available to pursue individual claims. Certain third-party payments may also serve to deter and prevent violations, such as providing air-monitoring equipment to a surrounding community in a Clean Air Act enforcement case.

In addition, the Department does not depend solely upon third-party payments to accomplish its litigation objectives. Resolving violations of environmental laws by settlement is a complicated task, involving the weighing of a variety of factors, which the Department undertakes in accordance with applicable law and Departmental policy. Key considerations for the Department include compensating victims, redressing harms, and punishing and deterring unlawful conduct without the costs and delay of trial. The Department assesses that third-party payments can support these goals, and the Department disagrees with some commenters' suggestion that limiting the Department's enforcement tools to civil penalties after judgment will maximize deterrence, much less optimally serve the many goals of the Department's enforcement activities.

Whether a third-party payment is appropriate as part of case resolution is only one consideration for the Department when negotiating a settlement but including such a payment may contribute to a resolution. Such settlement agreements can be significantly more efficient than litigating every case to judgment because they save agencies and taxpayers significant time and expense. Those savings allow the Department to pursue more cases that will deter more violators from more future unlawful conduct. With respect to the commenters' claims of favoritism, see the discussion in topics 5.1 and 5.2 above of such claims and of constraints on selection of third parties and projects. *See supra* Part II.B.5.1 and II.B.5.2.

Finally, the Department notes that courts have entered Federal consent decrees containing SEPs for decades. As one court stated when approving a settlement with U.S. Steel involving SEPs at a value of $1.9 million and a $2.2 million civil penalty:

> Could the agreement be different? Of course. Could it demand more from U.S. Steel by way of a fine, for example? Again, of course it could. But making such a demand may have caused U.S. Steel to walk away from the bargaining table and set the parties on a course of protracted litigation. This is to say that there is no single fair and reasonable resolution, but rather a range of them. And, in my judgment, the Consent Decree proposed in this case is plainly within that range.

United States v. *U.S. Steel Corp.,* No. 12–CV–304–PPS–APR, 2017 WL 1190953, at *3 (N.D. Ind. Mar. 30, 2017).

7. Implementation of the May 2022 Memorandum

7.1. Publication of Future Memoranda

Comment: One commenter requests that DOJ make publicly available all future memoranda addressing third-party payments in settlements because they have been ''highly controversial and problematic.''

Response: DOJ recognizes the importance of and greatly values transparency and public participation in enforcement matters where it is possible given the sensitivity of bringing specific litigation. The Department published the May 2022 Memorandum (see response to topic 4 above, *supra* Part II.B.4) and voluntarily sought public comment on it. The requirements of the May 2022 Memorandum are publicly available in *Justice Manual* section 1–17.000, as will be the Department's revisions to that section. The Department will provide in the new *Justice Manual* provision for a public process on certain civil settlements that incorporate third-party payments. *See supra* Part I.C. The Department is aware of the public interest in this topic and will seek to make future memoranda in this area public to the extent it is feasible to do so.

7.2. Including Affected Communities

Comments: Multiple commenters address ways in which impacted communities and individuals should participate more fully in the settlement process and be better supported in doing so. Several commenters asked DOJ and EPA specifically to affirm the continued validity of EPA's *2015 SEP* Policy and to update EPA's 2003 community engagement guidance with ''meaningful'' engagement practices or made similar suggestions on ways to increase engagement. *See* U.S. Environmental Protection Agency, *Interim Guidance for Community Involvement in Supplemental Environmental Projects* (2003). Several commenters also encourage continued implementation of the training and outreach practices in a recently issued Department memorandum.

Response: Commenters suggest a variety of mechanisms to increase the role of communities in selecting and implementing SEPs. DOJ recognizes the importance of remedying the harms to the communities most directly impacted by violations of the Federal environmental laws. As noted above, comments that relate to the details of the *2015 SEP Policy* or other EPA policies are outside the scope of this request for public comment.

The Department recently addressed the need for meaningful engagement with at least a subset of impacted communities in a memorandum entitled *Comprehensive Environmental Justice Enforcement Strategy. See* Memorandum for Heads of Department Components, United States Attorneys from the Associate Attorney General, *Comprehensive Environmental Justice Enforcement Strategy* (May 5, 2022) (''*Comprehensive Environmental Justice Enforcement Strategy* Memorandum''), *https://www.justice.gov/asg/file/1217741-0/dl?inline* (last visited Oct. 31, 2024). Pursuant to the strategy, all

litigating components at DOJ shall consider appropriate outreach efforts to identify areas of environmental justice concern in relevant communities. *Id.* at 6–7. As the commenter suggested, designated environmental justice coordinators in each U.S. Attorney's Office have been trained to serve as point people for community outreach. *Id.* at 3 and 6. And cases initiated under the strategy will include the development of case-specific community outreach plans to obtain input on community concerns or potential case remedies. *Id.* at 6–7.

Regarding comments addressing consideration of community input in the development of SEPs in enforcement actions, comments on EPA's policy are outside the scope of the Department's request for comments. But DOJ notes that in December 2023 EPA began piloting the use of an email inbox to receive ideas from the public concerning potential projects for settlement negotiations. Further information is available at U.S. Environmental Protection Agency, *Supplemental Environmental Projects (SEPs), https://www.epa.gov/enforcement/supplemental-environmental-projects-seps#sepidea* (''USEPA SEPs website'') (last visited Oct. 31, 2024).

The Department appreciates commenters' suggestions for potential assistance to impacted communities from the DOJ Environmental Crime Victim Assistance program, and for funding streams from DOJ and EPA to compensate community-based organizations for their expertise. However, these comments are outside the scope of the IFR.

7.3. Working With Tribal Governments

Comment: One commenter expresses general support for SEPs, urges DOJ and EPA to address the aspects of SEPs that are relevant to Federally recognized Indian Tribes (''Tribes'') in Indian country, and offers recommendations to the Department based on previous experiences with SEPs. The commenter suggests working with Tribes early to avoid SEPs that are ''rigid'' or ''unworkable,'' and to achieve environmental justice.

Response: The Department has a policy on *Tribal Consultation* (Nov. 30, 2022), which can be found at *https://www.justice.gov/d9/2022-12/doj-memorandum-tribal-consultation.pdf* (last visited Oct. 31, 2024). Consistent with this policy, DOJ is committed to engaging in ongoing communication with Tribes. While settlement negotiations fall outside of our formal consultation policy, DOJ engages in communication with Tribes beyond consultation such as listening sessions, meetings with individual Tribes, and informal discussions with Tribal leaders.

The Department is a co-plaintiff with Tribes in a number of environmental enforcement matters. In such cases, the co-plaintiff Tribe is an active participant in settlement negotiations and able to discuss SEPs as an element of relief for the claims the Tribe advances.

As noted in DOJ's previous response, *see supra* Part II.B.7.2, the Department recently addressed the need for meaningful engagement with impacted communities in its *Comprehensive Environmental Justice Enforcement Strategy* Memorandum. Consistent with the strategy, all parts of the Department shall consider appropriate outreach efforts to identify areas of environmental justice concern, including each U.S. Attorney's Office in communities within its district. Designated environmental justice coordinators in each U.S. Attorney's Office have been trained to serve as point people for community outreach. And cases initiated under the strategy will include the development of case-specific community outreach plan. In addition, the strategy requires certain Department components to consider how to: ''(1) facilitate consideration of these unique [Tribal environmental justice] issues in cases brought pursuant to this Strategy; (2) identify opportunities to work with the governments of Federally recognized Tribes, including consortia of such Tribes; (3) work with other Federal agencies to coordinate investigative resources and enforcement authorities; and (4) recommend ways to address and incorporate Tribal concerns into the Department's enforcement work.'' *Comprehensive Environmental Justice Enforcement Strategy* Memorandum at 3.

The Department appreciates the commenter's suggestions for Tribal set-asides, whether in the context of mitigation or a third-party payment, depending on the particular case, and greater transparency regarding the impact of emissions on tribal communities. These comments are outside the scope of the IFR, and the Department does not address them further.

7.4. Effectiveness of the 2015 SEP Policy

Comment: One commenter asks DOJ and EPA to affirm that EPA's *2015 SEP Policy* remains in effect or to readopt it if does not. The commenter indicates that even if it was never withdrawn or replaced, having administrative procedural clarity would be beneficial.

Response: Where DOJ is working with EPA as a client agency, the Department certainly discusses case resolution with it by reference to relevant EPA policy documents. Whether EPA continues to apply a particular policy, including its *2015 SEP Policy,* is within that agency's purview and beyond the scope of this action. DOJ understands the 2015 policy to be in effect as reflected in several responses to comments and points commenters to EPA's website, which itself cites the *2015 SEP Policy. See* USEPA SEPs website.

IV. Regulatory Certifications

A. Administrative Procedure Act

This rule relates to a matter of agency management or personnel and is a rule of agency organization, procedure, or practice. As such, this rule is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date. *See* 5 U.S.C. 553(a)(2), (b), and (d). The rule is effective upon signature. In its discretion, the Department sought post-promulgation public comment on the IFR and is responding to public comment.

B. Regulatory Flexibility Act

An analysis under the Regulatory Flexibility Act was not required for this rule because the Department was not required to publish a general notice of proposed rulemaking for this matter. *See* 5 U.S.C. 601(2), 604(a).

C. Executive Orders 12866, 13563, and 14094—Regulatory Review

This rule has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866, ''Regulatory Planning and Review,'' section 1(b) of Executive Order 13563, ''Improving Regulation and Regulatory Review,'' and Executive Order 14094, ''Modernizing Regulatory Review.''

This rule is ''limited to agency organization, management, or personnel matters'' and thus is not a ''rule'' for purposes of review by the Office of Management and Budget under section 3(d)(3) of Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget.

D. Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform.''

E. Executive Order 13132—Federalism

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. It is a rule of internal agency practice and procedure. Therefore, in accordance with Executive Order 13132, ''Federalism,'' the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

G. Congressional Review Act

This rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a ''rule'' as that term is used in the Congressional Review Act, 5 U.S.C. 804(3)(B), (C), and the reporting requirements of 5 U.S.C. 801 do not apply.

H. Paperwork Reduction Act of 1995

This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

List of Subjects in 28 CFR Part 50

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, the interim final rule amending 28 CFR part 50, which published at 87 FR 27936 on May 10, 2022, is adopted as final without change.

Dated: December 3, 2024.

Merrick B. Garland,

Attorney General.

[FR Doc. 2024–28866 Filed 12–6–24; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2024–0999]

Special Local Regulations; Marine Events Within the Eleventh Coast Guard District

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulations.

SUMMARY: The Coast Guard will enforce multiple special local regulations codified in federal regulations for recurring marine events taking place in December 2024 located in the Los Angeles Long Beach Captain of the Port Area. This action is necessary and intended to provide for the safety of life and property on navigable waterways during these events. During the enforcement periods, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander or any official patrol vessel displaying a Coast Guard ensign.

DATES: The Coast Guard will enforce the regulations listed in 33 CFR 100.1104, for the locations described in event entries (5) through (16) in Table 1 to § 100.1104 during December 2024, according to the schedule listed in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email LCDR Kevin Kinsella, U.S. Coast Guard Sector Los Angeles—Long Beach; telephone (310) 521–3860, email *D11-SMB-SectorLALB-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce multiple special local regulations for annual events in the Captain of the Port Los Angeles Long Beach Zone listed in 33 CFR 100.1104 Table 1 to § 100.1104 for events occurring in the month of December as listed.

1. Entry (5) Morro Bay Holiday Boat Parade (also known as (a.k.a.) Morro Bay Lighted Boat Parade). From 4 p.m. to 9 p.m. on December 7, 2024.

2. Entry (6) Santa Barbara Holiday Boat Parade (a.k.a. Santa Barbara Annual Boat Parade of Lights). From 5:30 p.m. to 9 p.m. on December 8, 2024.

3. Entry (7) Ventura Harbor Holiday Boat Parade (a.k.a. Ventura Harbor Parade of Lights). From 6:30 p.m. to 8 p.m. daily on December 13, 2024 and on December 14, 2024.

4. Entry (8) Channel Islands Harbor Holiday Boat Parade (a.k.a. Channel Islands Harbor Parade of Lights). From 7 p.m. to 9 p.m. on December 14, 2024.

5. Entry (9) Marina del Rey Holiday Boat Parade. From 5:30 p.m. to 10 p.m. on December 14, 2024.

6. Entry (10) King Harbor Holiday Boat Parade. From 4:30 p.m. to 10 p.m. on December 14, 2024.

7. Entry (11) Port of Los Angeles Holiday Boat Parade (a.k.a. LA Harbor Holiday Afloat Parade). From 5:30 p.m. to 9:30 p.m. on December 7, 2024.

8. Entry (12) Parade of 1,000 Lights (a.k.a. Shoreline Yacht Club Annual Christmas Boat Parade). From 5:30 p.m. to 7:30 p.m. on December 14, 2024.

9. Entry (13) Naples Island Holiday Boat Parade (a.k.a. Naples Boat Parade). From 6:30 p.m. to 7:30 p.m. on December 21, 2024.

10. Entry (14) Huntington Harbor Holiday Boat Parade (a.k.a. 62nd Annual Huntington Harbour Boat Parade). From 5 p.m. to 9 p.m. daily on December 14, 2024, and on December 15, 2024.

11. Entry (15) Newport Beach Holiday Boat Parade (a.k.a. 126th Annual Christmas Boat Parade). From 6:30 p.m. to 9 p.m. daily on December 18, 2024, and on December 22, 2024.

12. Entry (16) Dana Point Holiday in the Harbor (a.k.a. 49th Annual Dana Point Harbor Boat Parade of Lights). From 6:30 p.m. to 8:30 p.m. daily on December 13, 2024, December 14, 2024, and December 15, 2024.

Pursuant to 33 CFR 100.1104, all persons and vessels not registered with the sponsor as participants or as official patrol vessels are considered spectators. The ''official patrol'' consists of any Coast Guard; other Federal, state, or local law enforcement; and any public or sponsor-provided vessels assigned or approved by the cognizant Coast Guard Sector Commander to patrol each event. No spectator shall anchor, block, loiter, nor impede the through transit of participants or official patrol vessels in the regulated areas during all applicable effective dates and times unless cleared to do so by or through an official patrol vessel. When hailed and/or signaled by an official patrol vessel, any spectator located within a regulated area during all applicable effective dates and times shall come to an immediate stop. The Patrol Commander (PATCOM) is empowered to control the movement of all vessels in the regulated area or to restrict vessels from entering the regulated area. The Patrol Commander shall be designated by the cognizant Coast Guard Sector Commander; will be a U.S. Coast Guard commissioned officer, warrant officer, or petty officer