

Written Testimonial Statement of

Professor Joel A. Mintz

**Before the Judiciary Committee of the
United States House of Representatives**

April 28, 2016

My name is Joel A. Mintz. I am a Professor of Law at Nova Southeastern University College of Law, where I have taught Environmental Law and related subjects since 1982. Prior to that, for six years, I was an attorney and chief attorney with the U.S. Environmental Protection Agency (EPA) in Chicago and Washington, D.C. I have written or co-written three books and numerous law review articles regarding environmental enforcement, which is the major focus of my academic research.

I am submitting this statement in respectful opposition to the bill titled "Stop Settlement Slush Funds Act of 2016." I believe that this bill, if enacted will severely undercut an immensely valuable environmental and public health protection program, EPA's Supplemental Environmental Program (SEP). It will also interfere unduly with the discretion presently afforded to (and needed by) federal agencies and prosecutors.

A Supplemental Environmental Program (SEP) is defined in EPA's March, 2015 policy on the subject as "an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action." According to the Agency, "SEPs are projects or activities that go beyond what could be legally required in order for the defendant to return to compliance, and secure environmental benefits in addition to those achieved by compliance with applicable laws." Their primary purpose is to encourage and obtain environmental and public health benefits that may not otherwise have occurred in the settlement of an enforcement action. They advance worthy and important goals, including (among others) protecting children's health, preventing pollution, securing the development of innovative pollution control technologies, and ensuring environmental justice.

The *Random House Dictionary of the English Language* defines the phrase "slush fund" as "a sum of money used for illicit or corrupt political purposes, as for buying influence or votes, bribing public officials, or the like." The SEPs permitted by EPA cannot be fairly considered slush funds in any sense. Instead they are limited and prudent exercises of enforcement discretion that benefit the Agency, regulated parties, and local communities alike.

To be acceptable to EPA, all proponents of SEPs projects must establish a “substantial nexus,” i.e. a relationship between the alleged violation and the project proposed. For that reason, SEPs are generally carried out at the site where the violation occurred, at a different site within the same ecosystem, or within the same immediate geographic area. Moreover, to ensure that SEP funds are not used improperly, EPA has established—and enforced—strict limitations on how those funds may be spent.

Thus, for example, SEP monies may not be used in support of general public educational or public environmental awareness projects; as contributions to environmental research at a college or university; as cash donations to community groups, environmental organizations, state local or federal governmental entities or any third parties; to support beneficial projects unrelated to environmental protection; and in conjunction with projects to be undertaken with federal financial assistance. Similarly, SEPs may not provide additional resources to support any specific activities performed by EPA employees or contractors, or for any activity for which EPA receives a specific appropriation. SEPs may also not provide funds to perform work done on any federal property, or for any project performed by a federal agency other than EPA.

To the best of my knowledge, these limitations are taken seriously by EPA when they assess the acceptability of SEP proposals. They establish appropriate, realistic, and effective prohibitions of illicit or corrupt implementation of SEPs in individual case settlements.

At the same time, EPA’s judicious approach to SEPs prevents the possibility that violators will be permitted to benefit too greatly from the performance of a SEP. Thus, the Agency’s SEPs Policy does not alter the obligation of an environmental violator to remedy its violations expeditiously. Nor does it excuse violators from their obligation to pay penalties that recoup the economic benefit that a violator has gained from noncompliance with the law, along with “gravity-based” penalties reflecting the environmental harm caused by the violation. The money from both types of financial penalties must be remitted directly to the United States Treasury.

Notably, SEPs can create “win-win” scenarios for all parties involved, including regulators, regulated companies, and local communities. SEPs demonstrate EPA’s willingness to cooperate with the regulated community, and they create a more flexible regulatory climate. SEPs also benefit environmental violators by reducing some of the civil penalties those parties would otherwise have to pay. They help repair corporate public images that would otherwise be further harmed by negative environmental publicity; and they promote settlements, allowing businesses to avoid the costs and risks of litigation. Finally, SEPs increase the likelihood that communities forced to bear the burden of environmental degradation will benefit directly from enforcement actions against violators.

Regrettably, the proposed Stop Settlement Sludge Funds Act appears likely to prohibit many of the important benefits now provided by EPA’s SEPs program. The bill’s definition of the term “donation” specifically excludes “any payment by a party to provide restitution for or otherwise remedy the actual harm (including to the environment), directly and proximately caused by the alleged conduct of the party that is the basis for the settlement agreement.” This exception is too narrowly drawn to allow for numerous beneficial uses of SEP monies. Thus, for example, the bill would appear to ban the following entirely legitimate, appropriate uses of SEP funds that are currently permitted by EPA:

- 1) Pollution prevention projects that improve plant procedures and technologies, and/or operation and maintenance practices, that will prevent additional pollution at its source;
- 2) Environmental restoration projects including activities that protect local ecosystems from actual or potential harm resulting from the violation;
- 3) Facility assessments and audits, including investigations of local environmental quality, environmental compliance audits, and investigations into opportunities to reduce the use, production and generation of toxic materials;

- 4) Programs that promote environmental compliance by promoting training or technical support to other members of the regulated community; and
- 5) Projects that provide technical assistance or equipment to a responsible state or local emergency response entity for purposes of emergency planning or preparedness.

Each of these types of programs provide important protections of human health and the environment in communities that have been harmed by environmental violations. However, because they are unlikely to be construed as redressing “actual (environmental) harm, directly and proximately caused” by the alleged violator, the bill before this committee would prohibit every one of them.

My other objection to the proposed Stop Settlement Slush Funds Act is more broad. In my view, this bill inappropriately reduces the discretion that federal agencies and prosecutors need to do their jobs in a fair and effective fashion. In its decision in the landmark case of *Heckler v. Chaney*, 470 U.S. 821 (1985), the U.S. Supreme Court took note of the importance of leaving decisions to prosecute or not prosecute in the hands of administrative agency personnel and prosecutors. The Court noted that “an agency decision not to enforce involves a complicated balancing of a number of factors that are peculiarly within its expertise....The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.” *Id.* at 831-832.

This same rationale clearly applies to the terms of the settlement agreements that a federal agency or prosecutor chooses to enter into. Such settlements involve numerous complicated technical issues as well as important judgments respecting the use of limited prosecutorial resources. Their terms are best left in the hands of expert agencies and prosecutors, rather than dictated by Congress or the federal courts.

In sum, the bill before you will harm the interests of Americans who have been the victims of unlawful pollution by arbitrarily and unreasonably

limiting many of the benefits those people may now receive through SEP settlement agreements. This bill will discourage settlement of environmental enforcement cases and place greater burdens on regulated firms and regulators alike. It will inhibit the advancement of technology and the restoration of damaged natural resources. It will also unwisely intrude on the discretion of federal agencies and prosecutors. For these reasons, with respect, I recommend that you vote against this bill.