

**User's Guide To EPA's
Supplemental Environmental Projects Policy**

**Special Litigation and Projects Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. EPA**

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User's Guide to EPA's Supplemental Environmental Projects Policy

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- *Many of these documents are also available on-line at:
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Annotated Guide to SEP Policy Documents

EPA's Final Supplemental Environmental Projects (SEP) Policy was issued May 1, 1998. Since that time, EPA's Office of Enforcement and Compliance Assurance (OECA) has issued a number of guidance documents interpreting and, in some cases, modifying, the SEP Policy. The following index provides information on these guidance documents. It is organized alphabetically by general topic with a brief description of the guidance, and the title/date for the relevant guidance. Please note that the descriptions provided are merely summaries. For a full description of the issue and the guidance please see the referenced documents.

Unless otherwise indicated, the documents listed below can also be found at:

<http://cfpub.epa.gov/compliance/resources/policies/civil/seps/>

Aggregation of SEP Funds - "Guidance Concerning the Use of Third Parties and the Performance of SEPs and the Aggregation of SEP Funds," dated December 15, 2003. (See Tab 11.)

The guidance addresses the question of whether a defendant/respondent can aggregate SEP funds and provides examples of instances when this might be acceptable, and provides recommendations for ensuring that such settlements comport with the Miscellaneous Receipts Act (MRA). Advance consultation with the Special Litigation and Projects Division (SLPD) (formerly Multi-Media Enforcement Division) of the Office of Civil Enforcement (OCE; formerly the Office of Regulatory Enforcement, ORE) is encouraged. Additionally, the guidance discusses why aggregation of SEP funds by EPA is not allowable.

Approvals Required for SEPs - "Revised Approval Procedures for Supplemental Environmental Projects," dated July 21, 1998. (See Tab 2.)

The guidance describes when prior approval is required for certain categories of SEPs and identifies the appropriate approving official.

** Supersedes April 24, 1996 memorandum "Approval Procedures for Supplemental Environmental Projects."*

Community Involvement in SEPs - "Interim Guidance for Community Involvement in Supplemental Environmental Projects," dated June 17, 2003. (See Tab 9.)

This interim guidance is designed to provide information to EPA staff on involving communities in the selection and implementation of SEPs in appropriate cases.

Compliance Audits - "Clarification and Expansion of Environmental Compliance Audits Under the Supplemental Environmental Projects Policy," dated January 10, 2003. (See Tab 6.)

The May 1, 1998 SEP Policy allows compliance audits in the "Audits and Assessments - Environmental Compliance Audits" subcategory as SEPs only for small businesses (employing less than 100 employees) and small communities (containing less than 2,500 persons). This guidance expands the "Environmental Compliance Audits" subcategory to allow all State and local governments, regardless of size, to undertake such audits as SEPs, without prior Headquarter's approval.

Additionally, the guidance provides that in instances where large companies wish to conduct a compliance audit that is exceptional, a case team may propose such a potential project under the "Other Types of Projects" and seek advance approval from the Director, SLPD (formerly MED). Such projects must demonstrate exceptional environmental benefit and be consistent with all other provisions of the SEP Policy.

CWA Municipal Settlements and SEPs - "Clean Water Act Municipal Settlements and Supplemental Environmental Projects (SEPs)," dated November 4, 2005. (See Tab 14.)

This guidance clarifies the interaction between the May 1995 Interim Clean Water Act (CWA) Settlement Penalty Policy (CWA Policy) and the May 1, 1998 SEP Policy. For purposes of settling CWA cases with municipalities, enforcement staff should follow the CWA Policy when considering the appropriate balance between the penalty and SEPs. The guidance reiterates that in CWA municipal cases where the municipal penalty matrix is applied, a minimum of 60% of the number derived from the matrix must be collected as the penalty.

** Supersedes "Clarification of Interaction Between 1995 Clean Water Act Interim Settlement Policy and the 1998 Supplemental Environmental Projects Policy" dated March 22, 2002.*

Environmental Management Systems (EMS) - "Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects," dated June 12, 2003. (See Tab 8.) Also available online at:

<http://cfpub.epa.gov/compliance/resources/publications/incentives/ems/>

This document provides guidance for determining when it is most appropriate to include an EMS in an enforcement settlement as injunctive relief, and when an EMS can be

considered for inclusion as a SEP. Although the May 1, 1998 SEP Policy did not encourage EMSs as SEPs, EMSs could be included as SEPs under the "Other Types of SEPs" category, with advance Headquarter's approval.

This modification to the SEP Policy provides that EMSs by State and local governments and small businesses that meet the criteria in the SEP Policy are now eligible for consideration as SEPs as "Other Types of SEPs" without advance Headquarter's approval. Regions are required to consult with the Office of Planning, Policy Analysis, and Communications (OPPAC) and the Special Litigation and Projects Division (SLPD) (formerly Multi-Media Enforcement Division) of the Office of Civil Enforcement (OCE, formerly the Office of Regulatory Enforcement, ORE) prior to extending SEP credit to the first EMS for either a State or local government or a small business.

Additionally, while the SEP Policy allows up to 100% mitigation credit for States and local governments and small businesses, this guidance provides that the mitigation credit for an EMS should not exceed 80%, unless the defendant/respondent can demonstrate that the EMS is of outstanding quality.

Frequently Asked Questions and Answers - This document addresses many of the most frequently asked questions concerning implementation of the SEP Policy. (See Section B, Tab A.)

Legal Guidelines - "Supplemental Environmental Projects (SEP) Policy," dated March 22, 2002. (See Tab 4.)

This memorandum reiterates several important aspects of EPA's 1998 SEP Policy designed to ensure that projects meet the applicable legal guidelines and are consistent with Agency policy.

Nexus - "Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy," dated October 31, 2002. (See Tab 5.)

The purpose of this memorandum is to emphasize the importance of nexus in evaluating proposed SEPs. The memorandum explains what nexus is and why it is important, with emphasis on avoiding problems relating to the Miscellaneous Receipts Act (MRA).

Penalty Mitigation - "Appropriate Penalty Mitigation Credit Under the SEP Policy," dated April 14, 2000. (See Tab 3.)

This memorandum serves as a reminder to enforcement staff that while the percent of penalty mitigation is within EPA's discretion, the mitigation percentage should not exceed 80% except for the two allowable exceptions. These exceptions allow up to 100% mitigation credit for (1) small businesses, government agencies or entities and non-profit

organizations who can demonstrate that the project is of outstanding quality, and (2) for any defendant/respondent if the SEP implements pollution prevention and the defendant/respondent can demonstrate that the SEP is of outstanding quality.

Requests for waivers to go above 80% mitigation credit for projects not meeting the exceptions above must also demonstrate the outstanding qualities that warrant going above the 80% maximum.

Profitable SEPs - "Guidance for Determining Whether a Project is Profitable and When to Accept Profitable Projects as Supplemental Environmental Projects, " dated June 17, 2003. (See Tab 10.)

The May 1998 SEP Policy stated that SEPs that were profitable to the defendant/respondent were "generally not acceptable." OECA acknowledges that the environmental or public health benefit of certain profitable projects (particularly pollution prevention projects) may outweigh the benefit to the violator. This memorandum provides guidance for determining if a project is profitable, and describes those circumstances in which a profitable project may be an acceptable SEP.

Generally, projects which are profitable within the first five years of implementation are not acceptable as SEPs (within the first three years for small businesses.) Projects which become profitable after the first five years of implementation (three years for small businesses) must meet certain conditions (referred to as the "high hurdles") described in the guidance in order to be considered as a SEP.

Third Parties Used to Implement SEPs on Behalf of Defendants/Respondents - "Guidance Concerning the Use of Third Parties and the Performance of SEPs and the Aggregation of SEP Funds," dated December 15, 2003. (See Tab 11.)

Section II of this guidance describes those circumstances in which a defendant/respondent may use a third party to assist in implementing a SEP. Those circumstances are where (1) the defendant/respondent is obligated under the settlement document to complete the project satisfactorily; (2) the defendant/respondent fully expends the amount of funds agreed to be spent in performance of the SEP; and (3) the project meets all conditions and requirements of the SEP Policy.

Additionally, enforcement staff is reminded that cash donations to third parties are not permissible.

TSCA Section 1018 Administrative Settlements and SEPs - "Supplemental Environmental Projects in Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases," dated November 23, 2004. (See Tab 12.)

This memorandum provides for an exception to the minimum penalty requirements of the SEP Policy for certain public health SEPs performed pursuant to administrative enforcement settlements under Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act. For Section 1018 administrative settlements that include SEPs requiring lead-based paint abatement or blood lead level screening and/or treatment for children where Medicaid coverage is not available, the minimum penalty requirement is reduced from 25% of the gravity-based penalty to 10% of the gravity-based penalty.

Waivers From the SEP Policy Are Required - "Reminders That Waiver is Required for Supplemental Environmental Projects Not Meeting All Conditions of SEP Policy," dated March 21, 2005. (See Tab 13.)

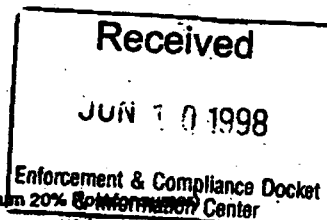
Memo provides a reminder to enforcement personnel that waivers from the Assistant Administrator for OECA are required if a project does not meet all conditions of the SEP Policy, and the case team wants to claim SEP credit for the project in the enforcement databases.

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE**MEMORANDUM****SUBJECT:** Issuance of Final Supplemental Environmental Projects Policy.**FROM:** Steven A. Herman
Assistant Administrator**TO:** Regional Administrators

I am pleased to issue the final Supplemental Environmental Projects (SEP) Policy, the product of almost three years of experience implementing and fine-tuning the 1995 Interim Revised SEP Policy. It is also the product of the cooperative effort of the SEP Workgroup, comprised of representatives of the Regions, various OECA offices, OGC and DOJ. This Policy is effective May 1, 1998, and supersedes the Interim SEP Policy.

Most of the changes made to the Interim SEP Policy are clarifications to the existing language. There are no radical changes and the basic structure and operation of the SEP Policy remains the same. The major changes to the SEP Policy include:

1. **Community Input.** The final SEP Policy contains a new section to encourage the use of community input in developing projects in appropriate cases and there is a new penalty mitigation factor for community input. We are preparing a public pamphlet that explains the Policy in simple terms to facilitate implementation of this new section.
2. **Categories of Acceptable Projects.** The categories of acceptable projects have remained largely the same, with some clarifications and a few substantive changes. There is now a new "other" category under which worthwhile projects that do not fit within any of the defined categories, but are otherwise consistent with all other provisions of the SEP Policy, may qualify as SEPs with advance OECA approval. The site assessment subcategory has been revised and renamed to "environmental quality assessments." The environmental management system subcategory has been eliminated.



3. Use of SEPS to Mitigate Stipulated Penalties. The final SEP Policy prohibits the use of SEPs to mitigate claims for stipulated penalties, but does indicate that in certain defined extraordinary circumstances, I may approve a deviation from this prohibition.
4. Penalty Calculation Methodology. The penalty calculation steps have been better defined and broken into five steps rather than three. A calculation worksheet, keyed to the text of the Policy, has been added. The penalty mitigation guidelines have not been substantively changed, only clarified.
5. Legal Guidelines. The legal guidelines have been revised to improve clarity and provide better guidance. The nexus legal guideline has been revised to make it easier to apply. The fifth legal guideline concerning appropriations has been revised and subdivided into four sections.

Questions regarding the final SEP Policy should be directed to Ann Kline (202-564-0119) in the Multimedia Enforcement Division.

Attachment

cc: (w/attachment,

OECA Office Directors
 Regional Counsels, Regions I-X
 Director, Office of Environmental Stewardship, Region I
 Director, Division of Enforcement and Compliance Assurance, Region II
 Director, Compliance Assurance and Enforcement Division, Region VI
 Director, Office of Enforcement, Compliance and Environmental Justice, Region VIII
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EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY

Effective May 1, 1998

A. INTRODUCTION

1. Background

In settlements of environmental enforcement cases, the U.S. Environmental Protection Agency (EPA) requires the alleged violators to achieve and maintain compliance with Federal environmental laws and regulations and to pay a civil penalty. To further EPA's goals to protect and enhance public health and the environment, in certain instances environmentally beneficial projects, or Supplemental Environmental Projects (SEPs), may be part of the settlement. This Policy sets forth the types of projects that are permissible as SEPs, the penalty mitigation appropriate for a particular SEP, and the terms and conditions under which they may become part of a settlement. The primary purpose of this Policy is to encourage and obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by this Policy.

In settling enforcement actions, EPA requires alleged violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the violations. EPA also seeks substantial monetary penalties in order to deter noncompliance. Without penalties, regulated entities would have an incentive to delay compliance until they are caught and ordered to comply. Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and deterring violations by other members of the regulated community. Penalties help ensure a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Penalties also encourage regulated entities to adopt pollution prevention and recycling techniques in order to minimize their pollutant discharges and reduce their potential liabilities.

Statutes administered by EPA generally contain penalty assessment criteria that a court or administrative law judge must consider in determining an appropriate penalty at trial or a hearing. In the settlement context, EPA generally follows these criteria in exercising its discretion to establish an appropriate settlement penalty. In establishing an appropriate penalty, EPA considers such factors as the economic benefit associated with the violations, the gravity or seriousness of the violations, and prior history of violations. Evidence of a violator's commitment and ability to perform a SEP is also a relevant factor for EPA to consider in establishing an appropriate settlement penalty. All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP compared to the violator who does not agree to perform a SEP.

The Agency encourages the use of SEPs that are consistent with this Policy. SEPs may not be appropriate in settlement of all cases, but they are an important part of EPA's enforcement program. While penalties play an important role in environmental protection by deterring violations and creating a level playing field, SEPs can play an additional role in securing significant environmental or public health protection and improvements. SEPs may be particularly appropriate to further the objectives in the statutes EPA administers and to achieve other policy goals, including promoting pollution prevention and environmental justice.

2. Pollution Prevention and Environmental Justice

The Pollution Prevention Act of 1990 (42 U.S.C. § 13101 et seq., November 5, 1990) identifies an environmental management hierarchy in which pollution "should be prevented or reduced whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort ..." (42 U.S.C. §13103). Selection and evaluation of proposed SEPs should be conducted generally in accordance with this hierarchy of environmental management, i.e., SEPs involving pollution prevention techniques are preferred over other types of reduction or control strategies, and this can be reflected in the degree of consideration accorded to a defendant/respondent before calculation of the final monetary penalty.

Further, there is an acknowledged concern, expressed in Executive Order 12898 on environmental justice, that certain segments of the nation's population, i.e., low-income and/or minority populations, are disproportionately burdened by pollutant exposure. Emphasizing SEPs in communities where environmental justice concerns are present helps ensure that persons who spend significant portions of their time in areas, or depend on food and water sources located near, where the violations occur would be protected. Because environmental justice is not a specific technique or process but an overarching goal, it is not listed as a particular SEP category; but EPA encourages SEPs in communities where environmental justice may be an issue.

3. Using this Policy

In evaluating a proposed project to determine if it qualifies as a SEP and then determining how much penalty mitigation is appropriate, Agency enforcement and compliance personnel should use the following five-step process:

- (1) Ensure that the project meets the basic definition of a SEP. (Section B)
- (2) Ensure that all legal guidelines, including nexus, are satisfied. (Section C)
- (3) Ensure that the project fits within one (or more) of the designated categories of SEPs. (Section D)
- (4) Determine the appropriate amount of penalty mitigation. (Section E)
- (5) Ensure that the project satisfies all of the implementation and other criteria. (Sections F, G, H, I and J)

4. Applicability

This Policy revises and hereby supersedes the February 12, 1991 *Policy on the Use of Supplemental Environmental Projects in EPA Settlements* and the May 1995 *Interim Revised Supplemental Environmental Projects Policy*. This Policy applies to settlements of all civil judicial and administrative actions filed after the effective date of this Policy (May 1, 1998), and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the specific terms of a SEP.

This Policy applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations that EPA administers. It also may be used by EPA and the Department of Justice in reviewing proposed SEPs in settlement of citizen suits. This Policy also applies to federal agencies that are liable for the payment of civil penalties. Claims for stipulated penalties for violations of consent decrees or other settlement agreements may not be mitigated by the use of SEPs.¹

This is a settlement Policy and thus is not intended for use by EPA, defendants, respondents, courts or administrative law judges at a hearing or in a trial. Further, whether the Agency decides to accept a proposed SEP as part of a settlement, and the amount of any penalty mitigation that may be given for a particular SEP, is purely within EPA's discretion. Even though a project appears to satisfy all of the provisions of this Policy, EPA may decide, for one or more reasons, that a SEP is not appropriate (e.g., the cost of reviewing a SEP proposal is excessive, the oversight costs of the SEP may be too high, the defendant/respondent may not have the ability or reliability to complete the proposed SEP, or the deterrent value of the higher penalty amount outweighs the benefits of the proposed SEP).

This Policy establishes a framework for EPA to use in exercising its enforcement discretion in determining appropriate settlements. In some cases, application of this Policy may not be appropriate, in whole or part. In such cases, the litigation team may, with the advance approval of Headquarters, use an alternative or modified approach.

¹ In extraordinary circumstances, the Assistant Administrator may consider mitigating potential stipulated penalty liability using SEPs where: (1) despite the circumstances giving rise to the claim for stipulated penalties, the violator has the ability and intention to comply with a new settlement agreement obligation to implement the SEP; (2) there is no negative impact on the deterrent purposes of stipulated penalties; and (3) the settlement agreement establishes a range for stipulated penalty liability for the violations at issue. For example, if a respondent/defendant has violated a settlement agreement which provides that a violation of X requirement subjects it to a stipulated penalty between \$1,000 and \$5,000, then the Agency may consider SEPs in determining the specific penalty amount that should be demanded.

B. DEFINITION AND KEY CHARACTERISTICS OF A SEP

Supplemental environmental projects are defined as **environmentally beneficial projects** which a defendant/respondent agrees to undertake in **settlement of an enforcement action**, but which the defendant/respondent is **not otherwise legally required to perform**. The three bolded key parts of this definition are elaborated below.

"Environmentally beneficial" means a SEP must improve, protect, or reduce risks to public health, or the environment at large. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health or the environment.

"In settlement of an enforcement action" means: 1) EPA has the opportunity to help shape the scope of the project before it is implemented; and 2) the project is not commenced until after the Agency has identified a violation (e.g., issued a notice of violation, administrative order, or complaint).²

"Not otherwise legally required to perform means" the project or activity is not required by any federal, state or local law or regulation. Further, SEPs cannot include actions which the defendant/respondent is likely to be required to perform:

- (a) as injunctive relief³ in the instant case;
- (b) as injunctive relief in another legal action EPA, or another regulatory agency could bring;
- (c) as part of an existing settlement or order in another legal action; or,
- (d) by a state or local requirement.

SEPs may include activities which the defendant/respondent will become legally obligated to undertake two or more years in the future, if the project will result in the facility coming into compliance earlier than the deadline. Such "accelerated compliance" projects are not allowable,

² Since the primary purpose of this Policy is to obtain environmental or public health benefits that may not have occurred "but for" the settlement, projects which the defendant has previously committed to perform or have been started before the Agency has identified a violation are not eligible as SEPs. Projects which have been committed to or started before the identification of a violation may mitigate the penalty in other ways. Depending on the specifics, if a regulated entity had initiated environmentally beneficial projects before the enforcement process commenced, the initial penalty calculation could be lower due to the absence of recalcitrance, no history of other violations, good faith efforts, less severity of the violations, or a shorter duration of the violations.

³ The statutes EPA administers generally provide a court with broad authority to order a defendant to cease its violations, take necessary steps to prevent future violations, and to remediate any harm caused by the violations. If a court is likely to order a defendant to perform a specific activity in a particular case, such an activity does not qualify as a SEP.

however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the defendant/respondent for early compliance:

Also, the performance of a SEP reduces neither the stringency nor timeliness requirements of Federal environmental statutes and regulations. Of course, performance of a SEP does not alter the defendant/respondent's obligation to remedy a violation expeditiously and return to compliance.

C. LEGAL GUIDELINES

EPA has broad discretion to settle cases, including the discretion to include SEPs as an appropriate part of the settlement. The legal evaluation of whether a proposed SEP is within EPA's authority and consistent with all statutory and Constitutional requirements may be a complex task. Accordingly, this Policy uses five legal guidelines to ensure that our SEPs are within the Agency's and a federal court's authority, and do not run afoul of any Constitutional or statutory requirements.⁴

1. A project cannot be inconsistent with any provision of the underlying statutes.
2. All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action and must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if:
 - a. the project is designed to reduce the likelihood that similar violations will occur in the future; or
 - b. the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
 - c. the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.

Nexus is easier to establish if the primary impact of the project is at the site where the alleged violation occurred or at a different site in the same ecosystem or within the immediate geographic⁵ area. Such SEPs may have sufficient nexus even if the SEP

⁴ These legal guidelines are based on federal law as it applies to EPA; States may have more or less flexibility in the use of SEPs depending on their laws.

⁵ The immediate geographic area will generally be the area within a 50 mile radius of the site on which the violations occurred. Ecosystem or geographic proximity is not by itself a sufficient basis for nexus; a project must always satisfy subparagraph a, b, or c in the definition of nexus. In some cases, a

addresses a different pollutant in a different medium. In limited cases, nexus may exist even though a project will involve activities outside of the United States.⁶ The cost of a project is not relevant to whether there is adequate nexus.

3. EPA may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP. Nor may EPA retain authority to manage or administer the SEP. EPA may, of course, perform oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.

4. The type and scope of each project are defined in the signed settlement agreement. This means the "what, where and when" of a project are defined by the settlement agreement. Settlements in which the defendant/respondent agrees to spend a certain sum of money on a project(s) to be defined later (after EPA or the Department of Justice signs the settlement agreement) are not allowed.

5. a. A project cannot be used to satisfy EPA's statutory obligation or another federal agency's obligation to perform a particular activity. Conversely, if a federal statute prohibits the expenditure of federal resources on a particular activity, EPA cannot consider projects that would appear to circumvent that prohibition

b. A project may not provide EPA or any federal agency with additional resources to perform a particular activity for which Congress has specifically appropriated funds. A project may not provide EPA with additional resources to perform a particular activity for which Congress has earmarked funds in an appropriations committee report.⁷ Further, a project cannot be used to satisfy EPA's statutory or earmark obligation, or another federal agency's statutory obligation, to spend funds on a particular activity. A project, however, may be related to a particular activity for which Congress has specifically appropriated or earmarked funds.

c. A project may not provide additional resources to support specific activities performed by EPA employees or EPA contractors. For example, if EPA has developed a brochure to help a segment of the regulated community comply with

project may be performed at a facility or site not owned by the defendant/respondent.

⁶ All projects which would include activities outside the U.S. must be approved in advance by Headquarters and/or the Department of Justice. See section J.

⁷ Earmarks are instructions for changes to EPA's discretionary budget authority made by appropriations committee in committee reports that the Agency generally honors as a matter of policy.

environmental requirements, a project may not directly, or indirectly, provide additional resources to revise, copy or distribute the brochure.

d. A project may not provide a federal grantee with additional funds to perform a specific task identified within an assistance agreement.

D. CATEGORIES OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

EPA has identified seven specific categories of projects which may qualify as SEPs. In order for a proposed project to be accepted as a SEP, it must satisfy the requirements of at least one category plus all the other requirements established in this Policy.

1. Public Health

A public health project provides diagnostic, preventative and/or remedial components of human health care which is related to the actual or potential damage to human health caused by the violation. This may include epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/ tissue samples, medical treatment and rehabilitation therapy.

Public health SEPs are acceptable only where the primary benefit of the project is the population that was harmed or put at risk by the violations.

2. Pollution Prevention

A pollution prevention project is one which reduces the generation of pollution through "source reduction," i.e., any practice which reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment, prior to recycling, treatment or disposal. (After the pollutant or waste stream has been generated, pollution prevention is no longer possible and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods.)

Source reduction may include equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project which protects natural resources through conservation or increased efficiency in the use of energy, water or other materials. "In-process recycling," wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on site, is considered a pollution prevention project.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution released to the environment.

merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency (conservation) in the use of energy, water or other materials. This is consistent with the Pollution Prevention Act of 1990 and the Administrator's "Pollution Prevention Policy Statement: New Directions for Environmental Protection," dated June 15, 1993

3. Pollution Reduction

If the pollutant or waste stream already has been generated or released, a pollution reduction approach -- which employs recycling, treatment, containment or disposal techniques -- may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as "pollution prevention." This may include the installation of more effective end-of-process control or treatment technology, or improved containment, or safer disposal of an existing pollutant source. Pollution reduction also includes "out-of-process recycling," wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for production off-site.

4. Environmental Restoration and Protection

An environmental restoration and protection project is one which enhances the condition of the ecosystem or immediate geographic area adversely affected.⁸ These projects may be used to restore or protect natural environments (such as ecosystems) and man-made environments, such as facilities and buildings. This category also includes any project which protects the ecosystem from actual or potential damage resulting from the violation or improves the overall condition of the ecosystem.⁹ Examples of such projects include: restoration of a wetland in the same ecosystem along the same avian flyway in which the facility is located; or purchase and management of a watershed area by the defendant/respondent to protect a drinking water supply where the violation (e.g., a reporting violation) did not directly damage the watershed but potentially could lead to damage due to unreported discharges. This category also includes projects which provide for the protection of endangered species (e.g., developing conservation programs or protecting habitat critical to the well-being of a species endangered by the violation).

In some projects where a defendant/respondent has agreed to restore and then protect certain lands, the question arises as to whether the project may include the creation or

⁸ If EPA lacks authority to require repair of the damage caused by the violation, then repair itself may constitute a SEP.

⁹ Simply preventing new discharges into the ecosystem, as opposed to taking affirmative action directly related to preserving existing conditions at a property, would not constitute a restoration and protection project, but may fit into another category such as pollution prevention or pollution reduction.

maintenance of certain recreational improvements, such as hiking and bicycle trails. The costs associated with such recreational improvements may be included in the total SEP cost provided they do not impair the environmentally beneficial purposes of the project and they constitute only an incidental portion of the total resources spent on the project.

In some projects where the parties intend that the property be protected so that the ecological and pollution reduction purposes of the land are maintained in perpetuity, the defendant/respondent may sell or transfer the land to another party with the established resources and expertise to perform this function, such as a state park authority. In some cases, the U.S. Fish and Wildlife Service or the National Park Service may be able to perform this function.¹⁰

With regard to man-made environments, such projects may involve the remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos and lead paint, which are a continuing source of releases and/or threat to individuals.

5. Assessments and Audits

Assessments and audits, if they are not otherwise available as injunctive relief, are potential SEPs under this category. There are three types of projects in this category: a. pollution prevention assessments; b. environmental quality assessments; and c. compliance audits. These assessments and audits are only acceptable as SEPs when the defendant/respondent agrees to provide EPA with a copy of the report. The results may be made available to the public, except to the extent they constitute confidential business information pursuant to 40 CFR Part 2, Subpart B.

a. Pollution prevention assessments are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production, and generation of toxic and hazardous materials and other wastes. To be eligible for SEPs, such assessments must be conducted using a recognized pollution prevention assessment or waste minimization procedure to reduce the likelihood of future violations. Pollution prevention assessments are acceptable as SEPs without an implementation commitment by the defendant/respondent. Implementation is not required because drafting implementation requirements before the results of an assessment are known is difficult. Further, many of the implementation recommendations may constitute activities that are in the defendant/respondent's own economic interest.

b. Environmental quality assessments are investigations of: the condition of the environment at a site not owned or operated by the defendant/respondent; the environment impacted by a site or a facility regardless of whether the site or facility is owned or operated by

¹⁰ These federal agencies have explicit statutory authority to accept gifts of land and money in certain circumstances. All projects with these federal agencies must be reviewed and approved in advance by legal counsel in the agency, usually the Solicitor's Office in the Department of the Interior.

the defendant/respondent; or threats to human health or the environment relating to a site or a facility regardless of whether the site or facility is owned or operated by the defendant/respondent. These include, but are not limited to: investigations of levels or sources of contamination in any environmental media at a site; or monitoring of the air, soil, or water quality surrounding a site or facility. To be eligible as SEPs, such assessments must be conducted in accordance with recognized protocols, if available, applicable to the type of assessment to be undertaken. Expanded sampling or monitoring by a defendant/respondent of its own emissions or operations does not qualify as a SEP to the extent it is ordinarily available as injunctive relief.

Environmental quality assessment SEPs may not be performed on the following types of sites: sites that are on the National Priority List under CERCLA § 105, 40 CFR Part 300, Appendix B; sites that would qualify for an EPA removal action pursuant to CERCLA §104(a) and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 300.415; and sites for which the defendant/respondent or another party would likely be ordered to perform a remediation activity pursuant to CERCLA §106, RCRA §7003, RCRA 3008(h), CWA § 311, or another federal law.

c. Environmental compliance audits are independent evaluations of a defendant/respondent's compliance status with environmental requirements. Credit is only given for the costs associated with conducting the audit. While the SEP should require all violations discovered by the audit to be promptly corrected, no credit is given for remedying the violation since persons are required to achieve and maintain compliance with environmental requirements. In general, compliance audits are acceptable as SEPs only when the defendant/respondent is a small business or small community.^{11 12}

6. Environmental Compliance Promotion

An environmental compliance promotion project provides training or technical support to other members of the regulated community to: 1) identify, achieve and maintain compliance with applicable statutory and regulatory requirements or 2) go beyond compliance by reducing the generation, release or disposal of pollutants beyond legal requirements. For these types of projects, the defendant/respondent may lack the experience, knowledge or ability to implement the project itself, and, if so, the defendant/respondent should be required to contract with an appropriate expert to develop and implement the compliance promotion project. Acceptable

¹¹ For purposes of this Policy, a small business is owned by a person or another entity that employs 100 or fewer individuals. Small businesses could be individuals, privately held corporations, farmers, landowners, partnerships and others. A small community is one comprised of fewer than 2,500 persons.

¹² Since most large companies routinely conduct compliance audits, to mitigate penalties for such audits would reward violators for performing an activity that most companies already do. In contrast, these audits are not commonly done by small businesses, perhaps because such audits may be too expensive.

projects may include, for example, producing a seminar directly related to correcting widespread or prevalent violations within the defendant/ respondent's economic sector.

Environmental compliance promotion SEPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements which were violated and where EPA has reason to believe that compliance in the sector would be significantly advanced by the proposed project. For example, if the alleged violations involved Clean Water Act pretreatment violations, the compliance promotion SEP must be directed at ensuring compliance with pretreatment requirements. Environmental compliance promotion SEPs are subject to special approval requirements per Section J below.

7. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance -- such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training -- to a responsible state or local emergency response or planning entity. This is to enable these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel and to better respond to chemical spills.

EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs) and Local Fire Departments (LFDs). This enables states and local communities to plan for and respond effectively to chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment or ecosystems which could be damaged by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

Emergency planning and preparedness SEPs are acceptable where the primary impact of the project is within the same emergency planning district or state affected by the violations and EPA has not previously provided the entity with financial assistance for the same purposes as the proposed SEP. Further, this type of SEP is allowable only when the SEP involves non-cash assistance and there are violations of EPCRA, or reporting violations under CERCLA § 103, or CAA § 112(r), or violations of other emergency planning, spill or release requirements alleged in the complaint.

8. Other Types of Projects

Projects determined by the case team to have environmental merit which do not fit within at least one of the seven categories above but that are otherwise fully consistent with all other

provisions of this Policy, may be accepted with the advance approval of the Office of Enforcement and Compliance Assurance.

9. Projects Which Are Not Acceptable as SEPs

The following are examples of the types of projects that are not allowable as SEPs:

- a. General public educational or public environmental awareness projects, e.g., sponsoring public seminars, conducting tours of environmental controls at a facility, promoting recycling in a community;
- b. Contributions to environmental research at a college or university;
- c. Conducting a project, which, though beneficial to a community, is unrelated to environmental protection, e.g., making a contribution to a non-profit, public interest, environmental, or other charitable organization, or donating playground equipment;
- d. Studies or assessments without a requirement to address the problems identified in the study (except as provided for in § D.5 above);
- e. Projects which the defendant/respondent will undertake, in whole or part, with low-interest federal loans, federal contracts, federal grants, or other forms of federal financial assistance or non-financial assistance (e.g., loan guarantees).

E. CALCULATION OF THE FINAL PENALTY

Substantial penalties are an important part of any settlement for legal and policy reasons. Without penalties there would be no deterrence, as regulated entities would have little incentive to comply. Additionally, penalties are necessary as a matter of fairness to those regulated entities that make the necessary expenditures to comply on time: violators should not be allowed to obtain an economic advantage over their competitors who complied.

As a general rule, the net costs to be incurred by a violator in performing a SEP may be considered as one factor in determining an appropriate settlement amount. In settlements in which defendant/respondents commit to conduct a SEP, the final settlement penalty must equal or exceed either: a) the economic benefit of noncompliance plus 10 percent of the gravity component; or b) 25 percent of the gravity component only; whichever is greater.

Calculating the final penalty in a settlement which includes a SEP is a five step process. Each of the five steps is explained below. The five steps are also summarized in the penalty calculation worksheet attached to this Policy.

Step 1: Settlement Amount Without a SEP

- a. The applicable EPA penalty policy is used to calculate the economic benefit of noncompliance.
- b. The applicable EPA penalty policy is used to calculate the gravity component of the penalty. The gravity component is all of the penalty other than the identifiable economic benefit amount, after gravity has been adjusted by all other factors in the penalty policy (e.g., audits, good faith, litigation considerations), except for the SEP.
- c. The amounts in steps 1.a and b are added. This sum is the minimum amount that would be necessary to settle the case without a SEP.

Step 2: Minimum Penalty Amount With a SEP

The minimum penalty amount must equal or exceed the economic benefit of noncompliance plus 10 percent of the gravity component, or 25 percent of the gravity component only, whichever is greater. The minimum penalty amount is calculated as follows:

- a. Calculate 10 percent of gravity (multiply amount in step 1.b by 0.1).
- b. Add economic benefit (amount in step 1.a) to amount in step 2.a.
- c. Calculate 25 percent of gravity (multiply amount in step 1.b by 0.25).
- d. Identify the minimum penalty amount: the greater of step 2.c or step 2.b.¹³

Step 3: Calculate the SEP Cost

The net present after-tax cost of the SEP, hereinafter called the "SEP COST," is the maximum amount that EPA may take into consideration in determining an appropriate penalty mitigation for performance of a SEP. In order to facilitate evaluation of the SEP COST of a proposed project, the Agency has developed a computer model called PROJECT.¹⁴ There are three types of costs that may be associated with performance of a SEP (which are entered into the PROJECT model): capital costs (e.g., equipment, buildings); one-time nondepreciable costs (e.g., removing contaminated materials, purchasing land, developing a compliance promotion

¹³ Pursuant to the February 1995 Revised Interim Clean Water Act Settlement Penalty Policy, section V, a smaller minimum penalty amount may be allowed for a municipality.

¹⁴ A copy of the PROJECT computer program software and PROJECT User's Manual may be purchased by calling that National Technology Information Service at (800) 553-6847, and asking for Document #PB 98-500408GEI, or they may be downloaded from the World Wide Web at "<http://www.epa.gov/ocsa/models/>".

seminar); and annual operation costs and savings (e.g., labor, chemicals, water, power, raw materials).¹⁵

To use PROJECT, the Agency needs reliable estimates of the costs associated with a defendant/respondent's performance of a SEP, as well as any savings due to such factors as energy efficiency gains, reduced materials costs, reduced waste disposal costs, or increases in productivity. For example, if the annual expenditures in labor and materials of operating a new waste recycling process is \$100,000 per year, but the new process reduces existing hazardous waste disposal expenditures by \$30,000 per year, the net cost of \$70,000 is entered into the PROJECT model (variable 4).

In order to run the PROJECT model properly (i.e., to produce a reasonable estimate of the net present after-tax cost of the project), the number of years that annual operation costs or savings will be expended in performing the SEP must be specified. At a minimum, the defendant/respondent must be required to implement the project for the same number of years used in the PROJECT model calculation. (For example, if the settlement agreement requires the defendant/respondent to operate the SEP equipment for two years, two years should be entered as the input for number of years of annual expense in the PROJECT model.) If certain costs or savings appear speculative, they should not be entered into the PROJECT model. The PROJECT model is the primary method to determine the SEP COST for purposes of negotiating settlements.¹⁶

EPA does not offer tax advice on whether a regulated entity may deduct SEP expenditures from its income taxes. If a defendant/respondent states that it will not deduct the cost of a SEP from its taxes and it is willing to commit to this in the settlement document, and provide the Agency with certification upon completion of the SEP that it has not deducted the SEP expenditures, the PROJECT model calculation should be adjusted to calculate the SEP Cost without reductions for taxes. This is a simple adjustment to the PROJECT model: just enter a zero for variable 7, the marginal tax rate. If a business is not willing to make this commitment,

¹⁵ The PROJECT calculated SEP Cost is a reasonable estimate, and not an exact after-tax calculation. PROJECT does not evaluate the potential for market benefits which may accrue with the performance of a SEP (e.g., increased sales of a product, improved corporate public image, or improved employee morale). Nor does it consider costs imposed on the government, such as the cost to the Agency for oversight of the SEP, or the burden of a lengthy negotiation with a defendant/respondent who does not propose a SEP until late in the settlement process; such factors may be considered in determining a mitigation percentage rather than in calculating after-tax cost.

¹⁶ See PROJECT User's Manual, January 1995. If the PROJECT model appears inappropriate to a particular fact situation, EPA Headquarters should be consulted to identify an alternative approach. For example, PROJECT does not readily calculate the cost of an accelerated compliance SEP. The cost of such a SEP is only the additional cost associated with doing the project early (ahead of the regulatory requirement) and it needs to be calculated in a slightly different manner. Please consult with the Office Of Regulatory Enforcement for directions on how to calculate the costs of such a project.

the marginal tax rate in variable 7 should not be set to zero; rather the default settings (or a more precise estimate of the business' marginal tax rates) should be used in variable 7.

If the PROJECT model reveals that a project has a negative cost during the period of performance of the SEP, this means that it represents a positive cash flow to the defendant/respondent and is a profitable project. Such a project is generally not acceptable as a SEP. If a project generates a profit, a defendant/respondent should, and probably will, based on its own economic interests, implement the project. While EPA encourages regulated entities to undertake environmentally beneficial projects that are economically profitable, EPA does not believe violators should receive a bonus in the form of penalty mitigation to undertake such projects as part of an enforcement action. EPA does not offer subsidies to complying companies to undertake profitable environmentally beneficial projects and it would thus be inequitable and perverse to provide such subsidies only to violators. In addition, the primary goal of SEPs is to secure a favorable environmental or public health outcome which would not have occurred but for the enforcement case settlement. To allow SEP penalty mitigation for profitable projects would thwart this goal.¹⁷

Step 4: Determine the SEP Mitigation Percentage and then the Mitigation Amount.

Step 4.a: Mitigation Percentage. After the SEP COST has been calculated, EPA should determine what percentage of that cost may be applied as mitigation against the amount EPA would settle for but for the SEP. The quality of the SEP should be examined as to whether and how effectively it achieves each of the following six factors listed below. (The factors are not listed in priority order.)

- **Benefits to the Public or Environment at Large.** While all SEPs benefit public health or the environment, SEPs which perform well on this factor will result in significant and quantifiable reduction in discharges of pollutants to the environment and the reduction in risk to the general public. SEPs also will perform well on this factor to the extent they result in significant and, to the extent possible, measurable progress in protecting and restoring ecosystems (including wetlands and endangered species habitats).
- **Innovativeness.** SEPs which perform well on this factor will further the development, implementation, or dissemination of innovative processes, technologies, or methods which more effectively: reduce the generation, release or disposal of pollutants; conserve natural resources; restore and protect ecosystems; protect endangered species; or promote compliance. This includes "technology forcing" techniques which may establish new regulatory "benchmarks."

¹⁷ The penalty mitigation guidelines provide that the amount of mitigation should not exceed the net cost of the project. To provide penalty mitigation for profitable projects would be providing a credit in excess of net costs.

- **Environmental Justice.** SEPs which perform well on this factor will mitigate damage or reduce risk to minority or low income populations which may have been disproportionately exposed to pollution or are at environmental risk.
- **Community Input.** SEPs which perform well on this factor will have been developed taking into consideration input received from the affected community. No credit should be given for this factor if the defendant/respondent did not actively participate in soliciting and incorporating public input into the SEP.
- **Multimedia Impacts.** SEPs which perform well on this factor will reduce emissions to more than one medium.
- **Pollution Prevention.** SEPs which perform well on this factor will develop and implement pollution prevention techniques and practices.

The better the performance of the SEP under each of these factors, the higher the appropriate mitigation percentage. The percent of penalty mitigation is within EPA's discretion; there is no presumption as to the correct percentage of mitigation. **The mitigation percentage should not exceed 80 percent of the SEP COST, with two exceptions:**

- (1) For small businesses, government agencies or entities, and non-profit organizations, this mitigation percentage of the SEP COST may be set as high as 100 percent if the defendant/respondent can demonstrate the project is of outstanding quality.
- (2) For any defendant/respondent, if the SEP implements pollution prevention, the mitigation percentage of the SEP COST may be set as high as 100 percent if the defendant/respondent can demonstrate that the project is of outstanding quality.

If the government must allocate significant resources to monitoring and reviewing the implementation of a project, a lower mitigation percentage of the SEP COST may be appropriate.

In administrative enforcement actions in which there is a statutory limit (commonly called "caps") on the total maximum penalty that may be sought in a single action, the cash penalty obtained plus the amount of penalty mitigation credit due to the SEPs shall not exceed the limit.

Step 4.b: SEP Mitigation Amount. The SEP COST (calculated pursuant to step 3) is multiplied by the mitigation percentage (step 4.a) to obtain the SEP mitigation amount, which is the amount of the SEP cost that may be used in potentially mitigating the preliminary settlement penalty.

Step 5: Final Settlement Penalty

5.a. The SEP mitigation amount (step 4.b) is then subtracted from the settlement amount without a SEP (step 1.c).

5.b. The greater of step 2.d or step 5.a is the minimum final settlement penalty allowable based on the performance of the SEP.

F. LIABILITY FOR PERFORMANCE

Defendants/respondents (or their successors in interest) are responsible and legally liable for ensuring that a SEP is completed satisfactorily. A defendant/respondent may not transfer this responsibility and liability to someone else, commonly called a third party. Of course, a defendant/respondent may use contractors or consultants to assist it in implementing a SEP.¹⁸

G. OVERSIGHT AND DRAFTING ENFORCEABLE SEPS

The settlement agreement should accurately and completely describe the SEP. (See related legal guideline 4 in § C above.) It should describe the specific actions to be performed by the defendant/respondent and provide for a reliable and objective means to verify that the defendant/respondent has timely completed the project. This may require the defendant/respondent to submit periodic reports to EPA. The defendant/respondent may utilize an outside auditor to verify performance, and the defendant/respondent should be made responsible for the cost of any such activities. The defendant/respondent remains responsible for the quality and timeliness of any actions performed or any reports prepared or submitted by the auditor. A final report certified by an appropriate corporate official, acceptable to EPA, and evidencing completion of the SEP and documenting SEP expenditures, should be required.

To the extent feasible, defendant/respondents should be required to quantify the benefits associated with the project and provide EPA with a report setting forth how the benefits were measured or estimated. The defendant/respondent should agree that whenever it publicizes a SEP or the results of a SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.

The drafting of a SEP will vary depending on whether the SEP is being performed as part of an administrative or judicial enforcement action. SEPs with long implementation schedules (e.g., 18 months or longer), SEPs which require EPA review and comment on interim milestone activities, and other complex SEPs may not be appropriate in administrative enforcement

¹⁸ Non-profit organizations, such as universities and public interest groups, may function as contractors or consultants.

actions. Specific guidance on the proper drafting of settlement documents requiring SEPs is provided in a separate document.

H. FAILURE OF A SEP AND STIPULATED PENALTIES

If a SEP is not completed satisfactorily, the defendant/respondent should be required, pursuant to the terms of the settlement document, to pay stipulated penalties for its failure. Stipulated penalty liability should be established for each of the scenarios set forth below as appropriate to the individual case.

1. Except as provided in paragraph 2 immediately below, if the SEP is not completed satisfactorily, a substantial stipulated penalty should be required. Generally, a substantial stipulated penalty is between 75 and 150 percent of the amount by which the settlement penalty was mitigated on account of the SEP.
2. If the SEP is not completed satisfactorily, but the defendant/respondent:
a) made good faith and timely efforts to complete the project; and b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, no stipulated penalty is necessary.
3. If the SEP is satisfactorily completed, but the defendant/respondent spent less than 90 percent of the amount of money required to be spent for the project, a small stipulated penalty should be required. Generally, a small stipulated penalty is between 10 and 25 percent of the amount by which the settlement penalty was mitigated on account of the SEP.
4. If the SEP is satisfactorily completed, and the defendant/respondent spent at least 90 percent of the amount of money required to be spent for the project, no stipulated penalty is necessary.

The determinations of whether the SEP has been satisfactorily completed (i.e., pursuant to the terms of the agreement) and whether the defendant/respondent has made a good faith, timely effort to implement the SEP should be reserved to the sole discretion of EPA, especially in administrative actions in which there is often no formal dispute resolution process.

I. COMMUNITY INPUT

In appropriate cases, EPA should make special efforts to seek input on project proposals from the local community that may have been adversely impacted by the violations.¹⁹ Soliciting community input into the SEP development process can: result in SEPs that better address the needs of the impacted community; promote environmental justice; produce better community understanding of EPA enforcement; and improve relations between the community and the violating facility. Community involvement in SEPs may be most appropriate in cases where the range of possible SEPs is great and/or multiple SEPs may be negotiated.

When soliciting community input, the EPA negotiating team should follow the four guidelines set forth below.

1. Community input should be sought after EPA knows that the defendant/respondent is interested in doing a SEP and is willing to seek community input, approximately how much money may be available for doing a SEP, and that settlement of the enforcement action is likely. If these conditions are not satisfied, EPA will have very little information to provide communities regarding the scope of possible SEPs.
2. The EPA negotiating team should use both informal and formal methods to contact the local community. Informal methods may involve telephone calls to local community organizations, local churches, local elected leaders, local chambers of commerce, or other groups. Since EPA may not be able to identify all interested community groups, a public notice in a local newspaper may be appropriate.
3. To ensure that communities have a meaningful opportunity to participate, the EPA negotiating team should provide information to communities about what SEPs are, the opportunities and limits of such projects, the confidential nature of settlement negotiations, and the reasonable possibilities and limitations in the current enforcement action. This can be done by holding a public meeting, usually in the evening, at a local school or facility. The EPA negotiating team may wish to use community outreach experts at EPA or the Department of Justice in conducting this meeting. Sometimes the defendant/respondent may play an active role at this meeting and have its own experts assist in the process.
4. After the initial public meeting, the extent of community input and participation in the SEP development process will have to be determined. The amount of input and participation is likely to vary with each case. Except in extraordinary circumstances and with agreement of the parties, representatives of community groups will not participate.

¹⁹ In civil judicial cases, the Department of Justice already seeks public comment on lodged consent decrees through a Federal Register notice. See 28 CFR §50.7. In certain administrative enforcement actions, there are also public notice requirements that are followed before a settlement is finalized. See 40 CFR Part 22.

directly in the settlement negotiations. This restriction is necessary because of the confidential nature of settlement negotiations and because there is often no equitable process to determine which community group should directly participate in the negotiations.

J. EPA PROCEDURES

1. Approvals

The authority of a government official to approve a SEP is included in the official's authority to settle an enforcement case and thus, subject to the exceptions set forth here, no special approvals are required. The special approvals apply to both administrative and judicial enforcement actions as follows:

- a. Regions in which a SEP is proposed for implementation shall be given the opportunity to review and comment on the proposed SEP.
- b. In all cases in which a project may not fully comply with the provisions of this Policy (e.g., see footnote 1), the SEP must be approved by the EPA Assistant Administrator for Enforcement and Compliance Assurance. If a project does not fully comply with all of the legal guidelines in this Policy, the request for approval must set forth a legal analysis supporting the conclusion that the project is within EPA's legal authority and is not otherwise inconsistent with law.
- c. In all cases in which a SEP would involve activities outside the United States, the SEP must be approved in advance by the Assistant Administrator and, for judicial cases only, the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice.
- d. In all cases in which an environmental compliance promotion project (section D.6) or a project in the "other" category (section D.8) is contemplated, the project must be approved in advance by the appropriate office in OECA, unless otherwise delegated.

2. Documentation and Confidentiality

In each case in which a SEP is included as part of a settlement, an explanation of the SEP with supporting materials (including the PROJECT model printout, where applicable) must be included as part of the case file. The explanation of the SEP should explain how the five steps set forth in Section A.3 above have been used to evaluate the project and include a description of the expected benefits associated with the SEP. The explanation must include a description by the enforcement attorney of how nexus and the other legal guidelines are satisfied.

Documentation and explanations of a particular SEP may constitute confidential settlement information that is exempt from disclosure under the Freedom of Information Act, is outside the scope of discovery, and is protected by various privileges, including the attorney-client privilege and the attorney work-product privilege. While individual Agency evaluations of proposed SEPs are confidential, privileged documents, this Policy is a public document and may be released to anyone upon request.

This Policy is primarily for the use of U.S. EPA enforcement personnel in settling cases. EPA reserves the right to change this Policy at any time, without prior notice, or to act at variance to this Policy. This Policy does not create any rights, duties, or obligations, implied or otherwise, in any third parties.

ATTACHMENT

SEP PENALTY CALCULATION WORKSHEET

This worksheet should be used pursuant to section E of the Policy.

Specific Applications of this Worksheet in a Case Are Privileged, Confidential Documents.

STEP	AMOUNT
STEP 1: CALCULATION OF SETTLEMENT AMOUNT WITHOUT A SEP.	
1.a. BENEFIT: The applicable penalty policy is used to calculate the economic benefit of noncompliance.	\$
1.b. GRAVITY: The applicable penalty policy is used to calculate the gravity component of the penalty; this is gravity after all adjustments in the applicable policy.	\$
1.c. SETTLEMENT AMOUNT without a SEP: Sum of step 1.a plus 1.b.	\$
STEP 2: CALCULATION OF THE MINIMUM PENALTY AMOUNT WITH A SEP	
2.a. 10% of GRAVITY: Multiply amount in step 1.b by 0.10	\$
2.b. BENEFIT PLUS 10% of GRAVITY: Sum of step 1.a plus step 2.a.	\$
2.c. 25 % of GRAVITY: Multiply amount in step 1.b by 0.25.	\$
2.d. MINIMUM PENALTY AMOUNT: Select greater of step 2.c or step 2.b.	\$
STEP 3: CALCULATION OF THE SEP COST USING PROJECT MODEL.	\$
STEP 4: CALCULATION OF MITIGATION PERCENTAGE AND MITIGATION AMOUNT.	
4.a. SEP Cost Mitigation Percentage. Evaluate the project pursuant to the 6 mitigation factors in the Policy. Mitigation percentage should not exceed 80 % unless one of the exceptions applies.	%
4.b. SEP Mitigation Amount. Multiply step 3 by step 4.a.	\$
STEP 5: CALCULATION OF THE FINAL SETTLEMENT PENALTY.	
5.a. Subtract step 4.b from step 1.c	\$
5.b. Final Settlement Penalty: Select greater of step 2.d or step 5.a.	\$



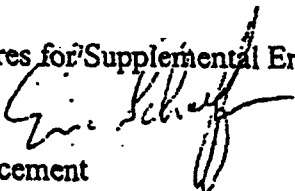
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 21 1998

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Revised Approval Procedures for Supplemental Environmental Projects

FROM: Eric V. Schaeffer, Director 
Office of Regulatory Enforcement

TO: Regional Counsels, Regions I-X
Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Compliance Assurance and Enforcement Division, Region VI
Director, Office of Enforcement, Compliance and Environmental Justice, Region VIII
Regional Enforcement Coordinators, Regions I-X

Through this memorandum, we are revising the implementing procedures for supplemental environmental projects (SEPs) to accommodate changes in the Final SEP Policy, which was effective May 1, 1998. This memorandum supersedes and replaces the April 24, 1996 memorandum entitled "Approval Procedures for Supplemental Environmental Projects," signed by Robert Van Heuvelen.

While most changes are minor, it is worthwhile to note that under the new approval procedures:

a request for approval of a SEP that does not meet all of the legal guidelines must set forth a legal analysis supporting the conclusion that the project is within EPA's legal authority and is not otherwise inconsistent with the law.

Such SEPs may require Assistant Administrator approval. This contrasts with the procedures of the new "other" category. "Other" SEPs are those which fully comply with the Policy (including the legal guidelines), but do not fit within a specific category of SEP. Such SEPs may be

approved by the appropriate office in OECA, unless otherwise delegated, with consultation by the Multimedia Enforcement Division. This division is delegated the authority to determine that a proposed SEP is consistent with the Policy.

Staff who manage implementation of the Policy in the Multimedia Enforcement Division, as well as the other divisions in the Office of Regulatory Enforcement, routinely respond to inquiries from Regional and Department of Justice staff on proper application of the Policy. These inquiries have been useful to us and the Regions, and in many of these consultations we have been able to offer suggestions on how to remedy problematic SEP proposals.

We encourage the Regions to continue to routinely consult with us on an informal and early basis concerning any questions you may have regarding implementation of the SEP Policy. At the same time, we need to clarify the procedures for when formal consultation and approval are necessary. The procedures governing approval of SEPs are set forth in Section J of the Final SEP Policy. This memorandum provides guidelines for how the procedures are to be implemented. These guidelines are consistent with the *Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases*, issued by the Assistant Administrator on July 11, 1994.

Adherence to these procedures ensures consistent, fair and defensible application of the SEP Policy. We appreciate your compliance and look forward to working with you to obtain the best possible results in our enforcement cases.

The new approval procedures are set forth below. The wording in italics is a verbatim reproduction of text in section J of the Final SEP Policy. The implementing procedures are in bold.

.....

- a. *Regions in which a SEP is proposed for implementation shall be given the opportunity to review and comment on the proposed SEP.*

The originating Region should send a short memorandum describing the SEP to each Region with a facility that will be affected by the SEP.

- b. *In all cases in which a project may not fully comply with the provisions of this Policy (e.g., see footnote 1), the SEP must be approved by the EPA Assistant Administrator for Enforcement and Compliance Assurance. If a project does not fully comply with all of the legal guidelines in this Policy, the request for approval must set forth a legal analysis supporting the conclusion that the project is within EPA's legal authority and is not otherwise inconsistent with law.*

If there is an issue or question about whether a proposed SEP is

consistent with the Policy (or how a project can be modified to become consistent), the Region should consult with the appropriate Division in the Office of Regulatory Enforcement (ORE).¹ If there is still an issue after this consultation, the Region should send a memorandum containing a brief description of the SEP and the case to the Director of the Multimedia Enforcement Division in ORE. If MED determines that the SEP is consistent with the Policy, the proposed SEP does not need further review by me or the Assistant Administrator. If the Multimedia Enforcement Division believes a project is inconsistent with the Policy and the Region still wishes to proceed with the project, the Region may then elevate its request to the appropriate OECA Office Director (usually me) or the Assistant Administrator. Please remember that there may be some projects that, although inconsistent with the Policy's guidelines, are nevertheless justifiable and have such compelling environmental benefits that they could be approved as exceptions to the Policy.

- c. *In all cases in which a SEP would involve activities outside the United States, the SEP must be approved in advance by the Assistant Administrator and, for judicial cases only, the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice.*

Memoranda requesting approval for such projects should be sent to the Assistant Administrator, with a copy to ORE's Multimedia Enforcement Division. (The Multimedia Enforcement Division will provide copies to the appropriate media divisions in ORE.)

- d. *In all cases in which an environmental compliance promotion project (section D.6) or a project in the "other" category (section D.8) is contemplated, the project must be approved in advance by the appropriate office in OECA, unless otherwise delegated.*

Requests for such approval should be sent to the appropriate Division Director in OECA, with a copy to the Multimedia Enforcement Branch Chief in ORE. I am delegating to the ORE Division Directors the authority to approve environmental compliance promotion SEPs and "Other" SEPs in their respective programs, after consulting with the Multimedia Enforcement Division.

¹ If the case involves a federal facility or Superfund matter, the initial consultation should be with the Federal Facilities Enforcement Office or OSRE, respectively.

.....

Questions regarding these procedures, or any aspect of the Final SEP Policy, may be directed to Ann Kline of the Multimedia Enforcement Division, 202-564-0119.

cc: ORE Division Directors
OECA Office Directors
SEP Workgroup Members
Joel Gross, DOJ



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 14 2000

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Appropriate Penalty Mitigation Credit under the SEP Policy
Eric V. Schaeffer
FROM: Eric V. Schaeffer, Director
Office of Regulatory Enforcement
TO: Regional Counsels, Regions I-X
Air Division Directors (Regions I-X)
Water Division Directors (Regions I-X)
RCRA Division Directors (Regions I-X)
Pesticides and Toxics Division Directors (Regions I-X)

The purpose of this memorandum is to reinforce a key element of the Supplemental Environmental Projects Policy (SEP Policy), SEP mitigation credit. I am sending this memorandum because I believe it is important from time to time to remind staff about certain aspects of the SEP Policy. Consistent application of the SEP Policy across all Regions is critical to its implementation.

The SEP Policy states that, while the percentage of penalty mitigation for a SEP is within EPA's discretion, with no presumption as to the correct percentage of mitigation, "[t]he mitigation percentage should not exceed 80 percent of the SEP COST, with two exceptions...." Section E, page 16. The two exceptions which allow for dollar-for-dollar SEP mitigation credit are:

- (1) for small businesses, government agencies or entities, and non-profit organizations who can demonstrate that the project is of outstanding quality, and
- (2) for any defendant/respondent if the SEP implements pollution prevention and the defendant/respondent can demonstrate that the project is of outstanding quality.

Dollar-for-dollar credit in other situations would not be consistent with the SEP Policy and would require a waiver from the Assistant Administrator. SEPs do not replace penalties. Rather, credit for SEPs is a recognition, based on many aspects of the project, of the

environmental or public health benefits anticipated by the project. Therefore, dollar-for-dollar credit would be inappropriate where the project was not of outstanding quality, and requests for waivers to allow dollar-for-dollar credit should also demonstrate the outstanding quality that makes the project worth the additional credit. Refer to the six factors listed in section E, step 4a of the SEP Policy, p. 15-16, for how to determine whether a project would be of outstanding quality.

We appreciate the Regions' efforts and commitment to obtain the most benefit for the environment and public health from our enforcement actions. The SEP Policy is an important tool in that effort and we appreciate the opportunity to assist you in applying it. Questions from your staff about the SEP Policy can be directed to Melissa Raack (202-564-7039) or Beth Cavalier (202-564-3271). In addition, please do not hesitate to call me (202-564-2220) or David Nielsen, Director of the Multimedia Enforcement Division (202-564-4022).

cc: Regional Enforcement Coordinators, Regions I-X
ORE Division Directors
SEP Network



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 22 2002

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Supplemental Environmental Projects (SEP) Policy

FROM: Sylvia K. Lowrance
Acting Assistant Administrator

TO: Regional Administrators, I-X
Regional Counsel, I-X

The continued use of Supplemental Environmental Projects (SEPs) in settlement agreements provides the Agency with a useful tool for achieving environmental benefits beyond those gained by compliance with Federal and state laws. The Regions' work in promoting and implementing SEPs over the past few years has been an important element in achieving these gains. With such environmental gains come the responsibility to ensure that these projects meet the applicable legal guidelines and are consistent with Agency policy. The purpose of this memo is to reiterate several important aspects of EPA's 1998 SEP Policy.

The SEP Policy describes the key characteristics that a project should have in order to be considered as a SEP. Projects must improve, protect, or reduce risks to public health or the environment; be undertaken in settlement of an enforcement action; and must be projects that the alleged violator is not otherwise legally required to perform.

The SEP Policy reflects the following legal guidelines to ensure that SEPs are within the Federal government's authority, and do not run afoul of any statutory requirements, especially the Miscellaneous Receipts Act (MRA), 31 U.S.C. §3302(b), and other applicable principles of appropriations law.

- 1) A project cannot be inconsistent with any provision of the underlying statute.
- 2) All penalty payments must be deposited into the Treasury unless otherwise authorized by law.
- 3) All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action and must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if:

- a) the project is designed to reduce the likelihood that similar violations will occur in the future; or
 - b) the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
 - c) the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.
- 4) EPA may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP.
 - 5) The type and scope of each project are defined in the signed settlement agreement
 - 6) A project cannot be used to satisfy EPA's statutory obligation or another federal agency's obligation to perform a particular activity.
 - 7) A project may not provide EPA or any federal agency with additional resources to perform a particular activity for which Congress has specifically appropriated funds.
 - 8) A project may not provide additional resources to support specific activities performed by EPA employees or EPA contractors.
 - 9) A project may not provide a federal grantee with additional funds to perform a specific task identified within an assistance agreement.
 - 10) Projects that involve only contributions to a charitable or civic organization are not acceptable.

It is important to note that these constraints are intended to ensure compliance with statutory requirements and cannot be waived by Agency officials. Working within these legal restrictions, the Agency has been extraordinarily successful in incorporating SEPs into settlements. SEPs are an important part of the settlement process and are an appropriate means to further Agency enforcement goals and objectives. We encourage the Regions to continue to promote SEPs and look for opportunities to incorporate such projects into their settlements.

The Multimedia Enforcement Division (MED) in the Office of Regulatory Enforcement (ORE) has overall responsibility for coordinating SEP issues for the regulatory enforcement program. Should you have any questions about a particular SEP or the SEP Policy, please contact me or MED's Director, David Nielsen at (202) 564-4022, or have your staff contact Beth Cavalier or Melissa Raack of David's staff. Beth can be reached at (202) 564-3271 and Melissa can be reached at (202) 564-7039.

Questions about SEPs at Federal facilities can be directed to Bernadette Rappold, Acting Director, Site Remediation and Enforcement Staff, Federal Facilities Enforcement Office (FFEO)

at (202) 564-0000, or to Melanie Garvey of her staff at (202) 564-2579. For any SEPs stemming from the cleanup enforcement program, please contact Ken Patterson, Director, Regional Support Division, Office of Site Remediation Enforcement (OSRE) at (202) 564-5134, or Michael Northridge of his staff at (202) 564-4263.

Attachment

cc: ORE Division Directors
Enforcement Division Directors, I-X
Ken Patterson, Director, RSD, OSRE
Charles Sheehan, Acting Deputy Director, RSD, OSRE
Craig Hooks, Director, FFEO
Bernadette Rappold, Acting Director, SRES, FFEO
SEP Coordinators
Enforcement Coordinators



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 31 2002

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

SUBJECT: Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy

FROM: Walker B. Smith, Director *WBS*
Office of Regulatory Enforcement

TO: Regional Counsel
Regional Enforcement Division Directors
Regional Media Division Directors

The purpose of this memo is to emphasize the importance of nexus in evaluating proposed Supplemental Environmental Projects (SEPs). The Office of Regulatory Enforcement (ORE) continues to receive many inquiries from enforcement staff regarding nexus in reviewing proposed SEPs. This memorandum explains what nexus is and why it is important, with emphasis on avoiding problems related to the Miscellaneous Receipts Act (MRA).

I. What is Nexus?

Nexus is the relationship between the violations being enforced and the proposed SEP. Nexus ensures that SEPs are within the Agency's or the Court's authority, and do not run afoul of any Constitutional and statutory requirements. Nexus exists only if a proposed project meets one of the following criteria:

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

In most cases, nexus is not difficult to establish. For example, a company that eliminates its use of the particular chemical that was the basis for the violation in the underlying settlement reduces the likelihood that similar violations will occur in the future. A company that has violated the Clean Air Act could hold an asthma screening day for the community that was

affected by the company's failure to comply. This type of project would reduce the adverse impact to public health by identifying and referring for treatment those people in the community suffering from asthma. A company that has violated the Emergency Planning and Community Right-to-Know Act could agree to operate a reverse 911 system for the community that would be affected by a release of hazardous pollutants from the violating facility. This type of project would reduce the overall risk to public health in the affected community by ensuring that potentially affected people receive a phone call notifying them of a release, so they can take prompt action to avoid exposure. In some cases, however, the nexus is not as clear. In such cases, we urge your staff to contact us so that we can fully discuss case-specific information and evaluate the proposed project under the SEP Policy and the MRA. Many times, after further review and discussion, we determine that the original project has a nexus to the violations. Sometimes, projects must be modified in order to establish nexus. In a few cases, even after discussions, no nexus is found. In those cases, we can suggest alternative projects that do have a nexus to the violations at issue. It is helpful, therefore, for any case team that has questions about nexus to contact my staff early in the process.

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

II. Importance of Nexus and Appropriations Law in Developing SEPs

An adequate nexus is important because it ensures that the Agency complies with the SEP Policy and the requirements of the MRA. The MRA requires that, unless otherwise provided by law, "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). It is intended to preserve Congressional prerogatives to appropriate funds as provided for in the U.S. Constitution. Penalties for violating the MRA include removal from office and, in some cases, personal liability for the amount of money misappropriated. 31 U.S.C. § 3302(d). If there is a relationship between the alleged violation and the SEP, then it is within the Agency's discretion to take the SEP into account as a mitigating factor when determining the amount of a penalty that the Agency will agree to as part of an overall settlement. If there is no nexus, then the Agency does not have that discretion.

A related concern involves augmentation of appropriations. EPA must be careful not to accept any project that augments or supplements, or appears to supplement, its appropriations or the appropriations of any other Federal agency. Augmentation of appropriations can occur if a proposed SEP is for an activity or project for which the EPA or another Federal agency has already received appropriated funds, or where the Federal Government is required by law to carry out the project or activity, or the activity is something for which the Agency has an established program to perform or fund, and the SEP would provide EPA with additional resources to perform or fund that particular program. For example, a proposed SEP that would print and

distribute EPA pamphlets describing the dangers of lead-based paint would augment EPA's appropriations. EPA is required by law to provide such pamphlets and receives funding in its budget for this activity. Augmenting an agency's appropriation is not permitted, as only Congress has the authority to appropriate funds for Federal agencies.

III. Resources for reviewing SEPs

Attached are some helpful SEP documents, including the model SEP Consent Agreement and Final Order language, the Questions and Answers for the Practitioner (January 1999) and the Revised Approval Procedures for SEPs (July 1998). Also, for SEP ideas, many regions have web-based SEP databases that may provide examples of acceptable SEPs.

IV. Conclusion

We appreciate your continued efforts to include SEPs in settlements, and hope that this memorandum has been helpful in explaining the importance of ensuring that a proposed SEP meets the nexus requirement in the SEP Policy. We recognize that in some instances, enforcement staff may need to seek a waiver from the Office of Enforcement and Compliance Assurance on other aspects of the SEP Policy. For the reasons noted above, however, nexus cannot be waived.

Should you have any questions on implementation of the SEP Policy, please contact Beth Cavalier (202) 564-3271 or Melissa Raack (202) 564-7039; questions concerning the MRA should be directed to James Drummond, Office of General Counsel, at 202-564-5456. Also, questions regarding SEPs and CERCLA should be directed to Michael Northridge (202)-564-4263; questions regarding SEPs and Federal Facilities should be directed to Melanie Garvey (202) 564-2579.

Attachments

cc: Regional SEP Coordinators
Headquarters SEP Coordinators
ORE Division Directors
Enforcement Coordinators
Karen Dworkin, DOJ




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 10 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

Subject: Clarification and Expansion of Environmental Compliance Audits under the Supplemental Environmental Projects Policy

From: Phyllis P. Harris, 
Principal Deputy Assistant Administrator

To: Regional Administrators (I-X)
Regional Counsel (I-X)

The purpose of this memorandum is to advise that the environmental compliance audit category of Supplemental Environmental Projects (SEPs) is being expanded and to notify you of our decision to allow all state and local governments, regardless of size, to undertake such audits as SEPs, without prior Headquarters approval. Environmental compliance audits are currently allowed only for small businesses (employing less than 100 persons) and small communities (containing less than 2,500 persons).

The SEP Policy allows for assessments and audits if they are not generally available as injunctive relief, and the defendant/respondent agrees to provide EPA with a copy of the assessment report. The SEP Policy limits environmental compliance audits to small companies because larger companies have the resources and expertise to routinely conduct them. Therefore, to mitigate penalties for such audits would reward violators for performing an activity that companies should already be doing. In contrast, these audits are not commonly done by small businesses, perhaps because they may be too expensive. We reviewed this limitation in the SEP Policy and determined that it is still appropriate. We recognize however, that some larger companies may conduct compliance audits that are exceptional; as such, a case team may always propose such a potential project under the "Other" category of the SEP Policy, and seek approval from the Director of the Multimedia Enforcement Division within the Office of Regulatory Enforcement. The case team should provide information on the exceptional environmental merit of such a project, and explain how the project is consistent with all other provisions of the SEP Policy.

Recently, several Regions requested that we consider expanding the “assessments and audits” category to allow state and local governments to receive SEP credit for conducting a compliance audit. Concerns were raised because state and local governments are similar to small business and small communities in that they do not commonly conduct compliance audits because they may be too costly and are not supported during state budget development. After reviewing this issue, we believe that it is appropriate to expand the assessments and audit category to allow state and local governments to conduct compliance audits as SEPs. Regions must ensure that all other aspects of the SEP Policy are met, e.g., nexus, for any proposed project.

As always, we appreciate your efforts to continue to include SEPs in settlements, as they are an important tool in our effort to obtain significant benefits for the environment and public health. If you have any questions, please contact Melissa Raack (202-564-7039) or Beth Cavalier (202-564-3271) of my staff. For questions concerning SEPs at Federal facilities, please contact Melanie Garvey of the Federal Facilities Enforcement Office (FFEO) at (202) 564-2579. For questions concerning SEPs and CERCLA, please contact Mike Northridge of the Office of Site Remediation Enforcement at (202) 564-4263.

cc: Media Enforcement Division Directors (I-X)
Regional Enforcement Coordinators, Regions I-X
ORE Division Directors
SEP Regional Contacts
HQ SEP Coordinators
S. Sisk (NEIC)
M. Guernica (OPPAC)
J. Silberman (OPPAC)



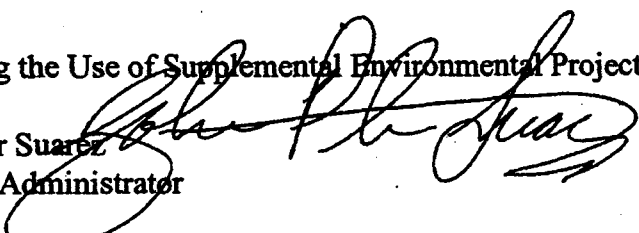
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 11 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Expanding the Use of Supplemental Environmental Projects

FROM: John Peter Suarez 
Assistant Administrator

TO: Assistant Administrators
Regional Administrators
Deputy Assistant Administrators
Deputy Regional Administrators
All OECA Staff
All Regional Enforcement Staff

As a follow up to my February 21, 2003 memorandum, Steve Shimberg, Associate Assistant Administrator and staff from the Office of Regulatory Enforcement (ORE) have discussed a variety of Supplemental Environmental Projects (SEP) Policy issues and ideas for new SEPs with Headquarters program offices and Regions. We have found the discussions to be extremely helpful in gaining insight into ways to simplify the SEP Policy, and useful in educating senior Agency staff about SEPs. These discussions reinforced our belief that certain SEP Policy revisions and clarifications are necessary. The purpose of this memorandum, therefore, is to summarize the foundation underlying our SEP Policy and to announce the actions we are taking to encourage and expand the use of SEPs in the settlement of enforcement actions.

During FY2002, 10% of our civil judicial and administrative penalty settlements included SEPs valued at a total of \$56.5 million dollars. While we should be proud of these figures, I believe that we have a tremendous opportunity to achieve greater benefits for the environment and communities affected by violations. Through settlements containing SEPs, we have the opportunity to not only bring regulated entities into compliance, but to secure public health and environmental benefits in addition to those achieved by compliance with applicable laws. As such, all enforcement staff should consider every opportunity to increase our use of SEPs and include more environmentally significant SEPs wherever possible.

In order to facilitate such efforts, we have begun to implement some activities to assist in maximizing the opportunity to include SEPs in settlements. For example, this week we are

issuing an Interim Final Guidance on Community Involvement in SEPs, and a guidance on when it is appropriate to give penalty mitigation for entities who undertake environmental management systems as SEPs. In addition, as discussed in further detail below, we are launching an effort to simplify the SEP Policy, and are piloting a SEP library which will serve as a clearinghouse for possible SEPs.

SEP Basics

SEPs are environmentally beneficial projects that a violator is not otherwise legally required to perform but agrees to undertake in settlement of an enforcement action. While the Agency has secured significant environmental benefits through SEPs, we must remain mindful of the legal guidelines that limit the Agency's ability to consider and approve some SEPs. These guidelines flow from the U.S. Constitution and Miscellaneous Receipts Act¹ (MRA) and preserve congressional prerogatives to appropriate funds as provided for in the U.S. Constitution. As such, these guidelines define the foundation on which the SEP Policy is premised. Within these legal boundaries, the Agency has broad discretion to settle environmental enforcement cases, including the discretion to include SEPs as an appropriate part of the settlement.

To ensure the Agency's enforcement discretion is used appropriately and in compliance with the U.S. Constitution and the MRA, all SEPs must satisfy several key elements. To be approved as a SEP, a project must:

- Be related to or have a "nexus" to the underlying violation;
- Provide significant environmental and public health benefits;
- Benefit the community affected by the violation; and
- Secure public health and/or environmental improvements beyond what can be achieved under applicable environmental laws.

Moreover, in light of the legal boundaries set by the U.S. Constitution and the MRA, there are several types of commonly proposed projects that are not acceptable as SEPs, and other limitations on SEPs, including:

- Donations to third parties;
- EPA management of funds obtained through a SEP;
- Augmentation of appropriations (absent express congressional authorization); and
- Projects for which a violator is already receiving federal financial assistance, i.e, a federal loan, contract or grant.

These concepts and legal guidelines are fundamental to the success and appropriateness of

¹ The Miscellaneous Receipts Act, 31 U.S.C. § 3302, requires that penalties due and owing the United States must be placed into the U.S. Treasury.

any project and are more fully defined in the SEP Policy. While they do limit the Agency's discretion in agreeing to some SEPs, we believe that the enforcement program's track record has established that they do not limit our ability to develop and approve creative and important SEPs. With these concepts in mind, we have begun taking steps to review and, where appropriate, revise certain aspects of the SEP Policy and how it is implemented. We believe that these changes, outlined in the list of action items attached, will help promote the use of SEPs in enforcement settlements by simplifying some provisions in the SEP Policy and by providing additional incentives to violators to agree to conduct SEPs.

Next Steps

Attached is a list of action items that represents a significant commitment to promoting the use of SEPs. Included in this list are projects designed to provide greater information on SEPs to Agency enforcement staff, violators and the public.

SEP Policy Simplification

During the discussions to date, several Regional and Headquarters offices raised questions about the complexity of the existing SEP Policy. Specifically, we heard a number of questions concerning how to define an appropriate nexus in certain situations, and whether or not nexus can be waived in a particular circumstance. As discussed above, nexus is important to ensure compliance with the MRA, and as such cannot be waived. Given this, however, we believe that there may be ways to simplify nexus, and still ensure that there remains a connection between the underlying violation and the SEP.

In addition to nexus, some offices raised questions about the appropriate minimum penalty that must be collected as part of a settlement that includes a SEP. Specifically, the issue raised is whether or not going below economic benefit would be appropriate in some cases. The current SEP Policy is based upon the premise that collection of at least economic benefit ensures that violators are not allowed to obtain an economic advantage over their competitors who complied with the law.

We recognize that there are a number of strongly held opinions about how to proceed with any proposed changes to such basic premises and, as such, no decisions have been made on whether to change these two critical parts of the existing SEP Policy. Therefore, we will initiate a dialogue on these important issues to more fully understand the implications of change and, if necessary, to clarify various aspects of the SEP Policy.

In addition to the dialogue, we understand that it may be helpful to shorten and simplify the current SEP Policy. We have begun work on several such changes, e.g., clarification on the role of EPA staff in community involvement, and will have a draft revised SEP Policy to the Regions for comment in November 2003.

Information on SEPs

We have also included in the action item list, two projects designed to provide greater access to information on both SEPs that are part of concluded settlements, and ideas for new SEPs. Specifically, an EPA intranet link, which includes information on SEPs that are part of concluded settlements, will be available in August 2003 through the Integrated Compliance Information System (ICIS). OECA plans to make this SEP link available on the internet in the near future. With respect to ideas for new SEPs, OECA will create a SEP Library Pilot, whereby staff from ORE will work with Headquarters Program Offices and Regions to solicit and develop project ideas generated from within the Agency and will include these ideas in a repository of potential SEPs. During the pilot, the list of project ideas will be available to Agency staff only via the Intranet.

Conclusion

We sincerely appreciate the time and effort that the Regions and Headquarters offices put into providing us with information on specific program ideas, and on ways to clarify/simplify the SEP Policy. Your efforts to include SEPs and ensuring their implementation shows your sincere commitment to finding creative ways to better the environment for the communities and environment affected by violations. We look forward to continuing to work with you on finding ways to encourage SEPs, and welcome your participation in our efforts to do so.

Attachment

cc: Christine Todd Whitman
Linda Fisher
Tom Gibson
Tom Sansonetti, US DOJ
John Cruden US DOJ
Bruce Gelber US DOJ

ATTACHMENT

SIGNIFICANT ACTION ITEMS TO BE IMPLEMENTED IN FURTHERANCE OF “SUPPLEMENTAL ENVIRONMENTAL PROJECTS”

Efforts to Provide Information on SEPs to the Public and EPA staff

- **Community Involvement in SEPs**

- Provide education and guidance to EPA, violators and communities on SEPs
 - Allows for better understanding of SEPs;
 - Provides additional incentives to violators who reach-out to affected communities
 - Emphasis on environmental justice
 - Office of Regulatory Enforcement (ORE)
 - Interim Guidance signed May 21, 2003

- **Guidance on the Use of Environmental Management Systems (EMSs) in Enforcement Settlements as Injunctive Relief and SEPs**

- Provides that EMSs by State and local governments and small businesses that meet the criteria in the SEP Policy will be eligible for SEP penalty mitigation credit as “other types of projects” without advance Headquarters approval
 - Office of Planning, Policy Analysis and Communication (OPPAC) and ORE
 - Guidance to be issued in June 2003

- **Promoting Appropriate SEPs**

- Development of SEP link to the ICIS Database via Intranet and Internet
 - Enhances ability to review SEPs that are part of a concluded settlement, from FY 1998 to present
 - ORE
 - Intranet ready, August 2003
 - Internet ready, First Quarter, FY 2004
- Implement a SEP Library Pilot, whereby Regions and Program offices can propose possible SEPs
 - Provides vehicle for proposing potential projects that are important to a particular office mission
 - Pilot library will include project ideas generated by Agency-staff only; available to Agency personnel only via Intranet, during pilot timeframe

- Pilot library for one year; review success, then revise if necessary and evaluate ability to make internet available
 - ORE
 - Memorandum soliciting project ideas sent to Regions, Sept. 2003
 - Intranet ready, FY 2004
 - Review/revise, August 2004
- Institute periodic memorandum from OECA AA advising enforcement staff (Regions and HQ and DOJ), of priority SEPs to support program priorities
 - Provides an opportunity for program offices to promote office priorities
 - ORE
 - First memorandum issued September 2003
- Encourage the use of SEPs in state settlements
 - Begin dialogue with states regarding the benefits of including SEPs in state settlements
 - Use existing discussions, i.e., MOA discussions, meetings with ECOS and NAAG to encourage SEPs
 - ORE, Regions

Efforts to Simplify and Provide Additional Guidance on SEP Policy

● **Simplify SEP Policy**

- Review various sections of the SEP Policy to simplify and shorten 1998 Policy;
 - Allows for better understanding and easier application of SEP Policy
 - ORE
 - Draft for Regional, Headquarters and Department of Justice (DOJ) review, November 2003
- Begin dialogue on nexus and minimum cash penalty provision with Regional and HQ SEP Coordinators
 - ORE
 - August 2003

● **Guidance on Use of Third Parties** (will be combined with Guidance on Aggregating SEPs and SEP Dollars, as issues are closely related)

- Provides information to EPA on proper use of third parties by defendants/respondents to implement SEPs, i.e, a contractor
 - Includes recommended approach for including language into settlements to allow for use of third parties
 - ORE

- Guidance to be issued June 2003

- **Guidance on Aggregating SEPs and SEP dollars**

- Provides information and guidance to EPA on legal impediments to aggregating or “pooling” SEP dollars
- Provides guidance on possibility of aggregating several SEPs, i.e., where several different defendants undertake discrete pieces of a SEP
 - Recommends contacting ORE for assistance when considering aggregating SEPs
 - ORE
 - Guidance to be issued June 2003

- **Guidance Permitting Profitable Projects as SEPs**

- Provides guidance for determining the value of profitable projects for mitigation purposes and parameters for determining whether to accept a profitable project as a SEP
 - ORE
 - Guidance to be issued August 2003



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

JUN 12 2003

SUBJECT: Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects

FROM: John Peter Suarez, Assistant Administrator

TO: Regional Administrators (I-X)
Regional Counsel (I-X)

A handwritten signature in black ink, appearing to read "John Peter Suarez", is written over the "FROM:" line and extends into the "TO:" line.

Through this Guidance, the Office of Enforcement and Compliance Assurance (OECA) is reiterating our support for the use of Environmental Management Systems (EMSs) by all sizes and types of organizations, whether they are in compliance or determined to be in violation. We will promote EMSs as a potentially valuable tool for maintaining compliance, achieving beyond-compliance results, and minimizing environmental impacts in non-regulated areas.

OECA will continue to encourage incorporating compliance-focused EMSs as injunctive relief in enforcement settlements when necessary to address the root causes of the violations. When EMS settlement terms are necessary as injunctive relief, enforcement staff should consult the OECA-National Enforcement Investigations Center's (NEIC) *Compliance-Focused Environmental Management System (CFEMS) - Enforcement Agreement Guidance* (revised August 2002).

Currently, the Supplemental Environmental Project (SEP) Policy provides that "Other Types of Projects" may be accepted with advance OECA approval. This Guidance provides that EMSs by State and local governments and small businesses that meet the criteria in the SEP Policy are now eligible for SEP penalty mitigation credit as "Other Types of Projects" without advance Headquarters approval. Each Region must consult with the Office of Planning, Policy Analysis and Communications (OPPAC) and the Office of Regulatory Enforcement (ORE)-Multimedia Enforcement Division (MED) prior to extending SEP credit to the first EMS for either a State or local government or small business under this Guidance. Regions are encouraged to consult with OPPAC and ORE-MED on subsequent State and local government and small business EMS SEPs.

EMSs by medium-size or large companies may be proposed for SEP credit as "Other Types of Projects." These SEPs will continue to require approval from the ORE-MED Director.

Finally, we are clarifying that EMSs that are not formally incorporated into settlement agreements as injunctive relief or SEPs may be considered for penalty adjustments in the context of settlement penalty calculations. This discretion may be exercised to the extent permitted under EPA's Audit Policy and media-specific penalty policies.

This Guidance is intended to apply to settlement negotiations, only. It is effective immediately. The attachment includes a list of OECA contacts for questions concerning EMSs and SEPs. OECA will continue to also support compliance audits as SEPs, as described in my January 10, 2003 memorandum, "Clarification and Expansion of Environmental Compliance Audits Under the SEP Policy."

Attachment

cc: Phyllis P. Harris, Principal Deputy Assistant Administrator
Steven J. Shimberg, Associate Assistant Administrator
John Cruden, Deputy Assistant Attorney General, DOJ-ENRD-EES
Media Enforcement Division Directors (I-X)
Regional Enforcement Coordinators, Regions I-X
OECA Office Directors
ORE Division Directors
OECA & Regional EMS and SEP Contacts
Steve Sisk, OCEFT-NEIC

- ATTACHMENT -

Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects

EPA has determined that properly designed and implemented Environmental Management Systems (EMSs) can help promote positive environmental outcomes. OECA supports the Agency's EMS policy as expressed in the *USEPA EMS Position Statement*. Together with Regional compliance and enforcement programs, we have and will continue to play a leading role within the Agency in actively promoting EMSs.¹ OECA supports and will promote EMSs for industry, state and local governments, and federal facilities of all types and sizes, whether in compliance or determined to be in violation.

EMSs as Injunctive Relief in Enforcement Settlements

EPA's approach in *all* enforcement actions is to seek appropriate injunctive relief to return violators to compliance and minimize or eliminate the potential for repeat violations by addressing the root causes of noncompliance. Where EPA determines, taking into account a violator's size, characteristics, and overall compliance obligations, that the root cause of a defendant's or respondent's violations is the absence of a systematic approach to identifying, understanding, and managing the regulated entity's compliance with applicable environmental requirements, the appropriate injunctive relief should include an EMS with a compliance focus. In addition, where specific elements or requirements common to EMSs are independently required by law or regulation, such elements/requirements should be sought as injunctive relief whether or not a compliance-focused EMS, per se, is sought. Since 1993, OECA and the Regions have concluded cases requiring the defendants to develop and implement compliance-focused EMSs at 258 facilities nationwide.²

¹ The *USEPA Position Statement on EMSs* at <<http://www.epa.gov/ems/policy/position.htm>> (EMS Position Statement; May 15, '02) articulates the Agency's policy that EMSs can help improve environmental performance when they are implemented diligently, supported with adequate resources, and continually improved. The *EMS Position Statement* encourages the widespread use of EMSs across a range of organizations and settings, with particular emphasis on adoption of EMSs to achieve improved environmental performance and compliance, pollution prevention through source reduction, and continual improvement.

² The enforcement cases with EMS injunctive components concluded to date address a range of facilities sharing the common characteristic of compliance issues requiring EMS-type solutions to address the violations' root causes. Examples of multi-facility settlements with EMSs as injunctive relief include the December 19, 2000 settlement in *U.S. v. Nucor Corporation, Inc. (Nucor)* and the January 16, 2003 settlement in *U.S. v. Koppers Industries, Inc. (Koppers)* addressing thousands of Clean Water Act (CWA) violations, in addition to some Clean Air Act (CAA), and Resource Conservation and Recovery Act (RCRA) violations. EMSs have also been obtained as injunctive relief in actions involving universities, e.g., *U.S. v. Massachusetts Institute of Technology* (April 18, 2001), single media cases with root cause management issues, e.g., *U.S. v. National Railroad Passenger Corp. [AMTRAK]* (September 19, 2001), and an action addressing a federal facility, *Department of Energy, Brookhaven National*

OECA practice is to seek, as injunctive relief in settlements, EMSs that are developed pursuant to the OECA-National Enforcement Investigations Center's (NEIC) *Compliance-Focused Environmental Management System (CFEMS) - Enforcement Agreement Guidance* (revised August 2002). *CFEMS* describes an EMS with policies and procedures addressing twelve key elements designed by NEIC, based on extensive, practical field experience, to assist in preventing and addressing noncompliance caused by management problems. The *CFEMS Guidance* includes model consent decree language to assist in settlement negotiation, and may be consulted on a case-by-case basis in litigated matters where the Agency is seeking a CFEMS or features of a CFEMS as injunctive relief.

The *CFEMS Guidance* is intended to supplement, not replace, EMS standards such as ISO 14001 developed by voluntary consensus standards bodies. The *CFEMS* 12 elements support the broad, multimedia, beyond-compliance approaches that are the hallmarks of an effective, functioning EMS. They supplement existing EMS voluntary consensus standards by filling potential compliance-related gaps and actively promoting compliance-focused approaches and results.³ An EMS that has been enhanced by the *CFEMS* elements is thus tailored to address the specific, additional compliance-focused needs of violators with systematic management issues.⁴

It is possible to use the *CFEMS* 12 elements as a starting point for development of a new EMS based on the "plan-do-check-act" management cycle. In practice, violators subject to enforcement actions may have EMSs – or a variety of discrete management elements such as policies, training programs, corrective action procedures, etc., that are common precursor elements to formal EMSs – already in place prior to the discovery of the violations by EPA. From a performance-based perspective, when violations whose root causes are management-based occur despite the prior existence of EMSs or precursor management elements, those EMSs or management elements have not achieved their goals. EPA can add significant value, when negotiating injunctive relief in appropriate settlement agreements, by requiring the violators to enhance their existing EMSs to achieve and maintain actual compliance (as opposed to merely

Laboratory Memorandum of Agreement (March 23, 1998). An EMS was required in a criminal action against a municipality, U.S. v. City of Roanoke, Virginia (January 10, 2000), as a condition of probation.

³ For example, while ISO 14001 requires organizations to express a "commitment to comply" and to identify and periodically evaluate compliance with legal obligations, the standard does not expressly require actual compliance, operational controls for assuring compliance, or that an organization establish compliance objectives and targets.

⁴ CFEMSs include: an environmental policy with an *express statement of management's intent to provide adequate EMS personnel and resources*; processes and monitoring to *ensure sustained compliance*; written targets, objectives, and action plans, for each organizational subunit, *to achieve and maintain compliance with all environmental requirements*; a *mandatory pollution prevention program*; a *program for ongoing community education and involvement* in the environmental aspects of the defendants' operations; procedures for *investigating and promptly correcting violations* and their root causes; and ongoing evaluation of facility compliance, including *periodic compliance audits by independent 3rd party auditors*.

committing to compliance as an internal policy goal).⁵

While OECA strongly encourages all organizations interested in focusing their EMSs on compliance to reference the CFEMS model as a potentially useful tool for supplementing existing EMS standards, it is not OECA's position that EMSs associated with voluntary EPA programs, e.g., National Environmental Performance Track (NEPT) and the Public Entity Environmental Management System Resource (PEER) Center/Local Government Program ⁶, need to incorporate the *CFEMS* 12 elements. NEIC developed the *CFEMS* model for application in enforcement actions as injunctive relief for defendants with violations caused by management failures. In our view, such organizations warrant the compliance focus embodied in the *CFEMS* approach. Different considerations may exist in addressing top performers who are pre-screened for compliance (e.g., "green track" programs) or other facilities not demonstrated to be currently in noncompliance (e.g., compliance assistance programs).

EMSs as Supplemental Environmental Projects (SEPs) for Small Businesses and State and Local Governments:

OECA is clarifying the eligibility of EMSs, under the SEP Policy (May 1, 1998)⁷ for penalty mitigation credit and encouraging their inclusion in settlements as SEPs when they meet the SEP Policy's terms and are not appropriate to require as injunctive relief. In the past, under the SEP Policy, OECA has allowed enforcement personnel to propose penalty mitigation credit for EMSs as "Other Types of Projects," but has required prior approval by the Director of the Multimedia Enforcement Division (MED) within the Office of Regulatory Enforcement (ORE).⁸

⁵ To ensure the most effective process possible for both parties, EPA staff should endeavor to the maximum extent possible to merge the CFEMS elements into the violators' preexisting EMSs or management elements. This includes utilizing a company's preexisting nomenclature, if it differs from the language employed in the CFEMS Guidance, as long as the requisite substantive enhancements are achieved.

⁶ The PEER Center is supported by a cooperative agreement between EPA's Office of Water and the Global Environment and Technology Foundation. OECA has supported and provided funding for this program. The PEER Center has developed a national clearinghouse of EMS information with a focus on municipalities. In July 2002, EPA also designated eight Local Resource Centers around the country to provide assistance to local governments interested in adopting EMSs. The PEER Center website may be accessed at <<http://www.peercenter.net/>>.

⁷ EPA Supplemental Environmental Projects Policy (May 1, 1998). The SEP Policy is posted at <<http://www.epa.gov/compliance/resources/policies/civil/seps/sepfinal2.pdf>>.

⁸ For example, Region 3 recently proposed, and OECA approved, SEP credit for an EMS in settlement of In the Matter of: State of Maryland, Department of Public Safety and Correctional Services.

OECA is now waiving the prior ORE-MED approval requirement for EMSs by state and local governments and small businesses⁹ that otherwise meet the criteria in the SEP Policy and this Guidance, i.e., EMSs by State and local governments and small businesses that meet the SEP Policy criteria are eligible for penalty mitigation credit as “Other Types of Projects” without advance ORE-MED approval. Each Region must consult with the Office of Planning, Policy Analysis and Communications (OPPAC) and ORE-MED prior to extending SEP credit to the first EMS for either a State or local government or small business under this Guidance. Regions are encouraged to consult OPPAC and ORE-MED on subsequent State and local government and small business EMS SEPs. EMSs by medium-size or large companies may be proposed for SEP credit where not appropriate as injunctive relief but will continue to require prior ORE-MED approval.

OECA recognizes that defendants and respondents often come to the settlement table with multiple SEP proposals. In such cases, the most environmentally beneficial candidate project(s) for SEP credit may be an EMS alone, an EMS in conjunction with one or more other projects, or the alternative projects. Consistent with smart enforcement principles, in choosing between multiple SEP candidates when violator funds and/or penalty mitigation opportunities are limited, EPA case teams should include in the settlements those projects which promise the greatest overall environmental benefits.

The decision as to whether to accept a proposed EMS for SEP credit under the SEP Policy remains within the discretion of EPA and the case team. The Settlement Justification Memoranda in all cases should explain how the EMS meets the SEP Policy’s conditions, including a nexus to the violations¹⁰ and documentation of key underlying facts and expenditures. The remainder of this section provides additional guidance on when and under what circumstances EMSs are appropriate for consideration as SEPs.

Guidance on When EMSs Are “Supplemental” Projects: The SEP Policy, and federal law,

Division of Correction, EPA Docket No. RCRA-3-2001-0404/CWA-3-2001-0403 (Consent Agreement and Final Order; May 6, 2003).

⁹ Under the SEP Policy, a small business is one that is owned by a person or another entity that employs 100 or fewer individuals. Small businesses can be individuals, privately held corporations, farmers, landowners, partnerships and others. Experience suggests that some small businesses are unlikely to implement EMSs as a normal course of business due to resource constraints. State and local governments face similar limitations that often lead to EMS design and implementation activities not receiving support during budget development. Providing penalty mitigation under the SEP Policy to these organizations is thus likely to produce positive environmental outcomes of benefit to the public which would not otherwise be realized.

¹⁰ The SEP Policy defines “nexus” as the relationship between the violation and the proposed project. This relationship exists where the project is designed to reduce the likelihood that similar violations will occur in the future, reduces the adverse impact to public health or the environment to which the violation at issue contributes, or reduces the overall risk to public health or the environment potentially affected by the violation at issue. *SEP Policy* at 4.

require SEPs to be “supplemental” projects that the violators are “not otherwise legally required to perform.” Under this requirement, the SEP Policy disallows projects that “the defendant/respondent is likely to be required to perform as injunctive relief.” Actions already required of violators by permit, order, or other similar enforceable mechanism are also not “supplemental.” Therefore, enforcement personnel should consider first whether the nature of the violations in any given case, given their root causes, warrants seeking an EMS as injunctive relief. The decision as to whether to accept a proposed EMS for SEP credit under the SEP Policy, versus requiring an EMS as injunctive relief and/or accepting other types of SEPs, is a matter of Agency discretion to be exercised based on case-specific facts.

Federal Facilities: Executive Order (E.O.) 13148 requires appropriate federal facilities to develop and implement EMSs by December 31, 2005. Federal facilities subject to E.O. 13148 remain ineligible to receive SEP credit for EMSs because they are already required to develop and implement EMSs pursuant to the E.O. Any exception to this policy for federal facilities will require the advance approval of the Assistant Administrator for OECA.

CERCLA Remediation Actions: OECA has not, at this time, identified a sufficient nexus between EMSs and CERCLA remediation actions to satisfy the SEP Policy’s nexus criterion. Therefore, EMSs should not be accepted as SEPs in these actions without prior ORE-MED approval, even for small businesses and State or local governments.

Guidance on When EMSs Are “Environmentally Beneficial Projects” Providing “Public Benefits”: An EMS is a systematic process of understanding and managing a facility’s environmental risks and hazards (aspects and impacts). Adopting an EMS does not ensure compliance with legal requirements. Nevertheless, as stated in the *EPA EMS Position Statement*, EMSs can help promote positive environmental outcomes and are encouraged by EPA. OECA has determined that the SEP Policy’s “environmentally beneficial projects” and “public benefits” SEP criteria can generally be satisfied when the terms of settlement require the violators to implement their EMSs for at least one full EMS cycle¹¹, identify and report performance results on two or more EMS targets and objectives promoting beyond-compliance results with public benefits¹², ensure that issues and priorities of concern to the communities in which the facilities

¹¹ A full cycle of EMS implementation means that the EMS is developed, put into practice, and a full “Plan-Do-Check-Act” cycle is completed, including auditing of conformance against the EMS standard, management review of the EMS (including the results of the audit), and any necessary adjustments to the EMS for continual improvement.

¹² The intent of this requirement is to encourage the adoption of targets and objectives that can produce real and quantifiable beyond-compliance environmental benefits. Examples of such benefits, with corresponding metrics, can be found in the Environmental Performance Table at pages 24-27 of the National Environmental Achievement Track (NEAT) Application Package (EPA240-B-00-003; December 2000). The Environmental Performance Table was developed by the Office of Policy, Economics, and Innovation (OPEI), based on the Global Reporting Initiative (GRI) and in the context of the NEPT program, to address essentially the same beyond-compliance/quantification/reporting issues of concern in the SEP context. The Table is posted at <<http://www.epa.gov/performance/track/apps/table.pdf>>.

are located are identified and considered, and submit to EPA SEP Completion Reports describing what the violators have done to develop, implement, and act on their EMSs. Settlement agreements should provide for copies of the parties' EMS Manuals, with trade secrets and other confidential business information redacted, to be made available to EPA upon request.

Guidance on EMS Costs Eligible for SEP Credit: SEP credit should be extended only to EMS expenditures that produce significant benefits accruing primarily to the public. EPA compliance and enforcement personnel may choose to limit the costs that are eligible for credit to developmental, as opposed to implementation/operational costs (though costs associated with implementing targets or objectives promoting beyond compliance results may be eligible for SEP credit) and/or require an appropriate expenditures/penalty adjustment ratio, to reflect an apportionment of the EMS benefits between the violator and the public or distinguish between efforts necessary to get EMSs up and running versus maintaining them once they are in place. Providing SEP credits for EMS developmental costs may be a particularly effective way to promote facilities to implement them, thereby realizing the public and private benefits that EMSs can provide. Where SEP credit consists primarily of (or is limited to) developmental costs, as discussed above, the settlement agreement should nevertheless specify EPA's expectations concerning EMS implementation and performance measurement.

Guidance on SEP Mitigation Credit: The exact percent of mitigation credit that can be given for any SEP is within the enforcement personnel's discretion. In general, for an EMS SEP, the Regions can offer up to 80% mitigation credit depending upon the level of performance in terms of anticipated public and environmental benefits. While the SEP Policy allows up to 100% mitigation credit for State and local entities and small businesses, the mitigation percentage for an EMS SEP should not exceed 80% unless the defendant/respondent can demonstrate that the EMS is of outstanding quality. An EMS satisfying all 12 CFEMS key elements that also provides environmentally beneficial, beyond compliance public benefits as described above under *Guidance on When EMSs Are "Environmentally Beneficial Projects" Providing "Public Benefits,"* may be considered to be of outstanding quality for this purpose.

Other SEP Policy Requirements: The EMS projects described in this guidance, like all SEPs, must be consistent with the SEP Policy to qualify for penalty mitigation. These include the "in settlement of" and "nexus" criteria. The SEP Policy provides a full discussion of these factors.

Other Penalty Adjustments for EMSs That Are Not Incorporated Into Settlement Agreements as Injunctive Relief or SEPs:

EPA's Audit Policy creates additional incentives for regulated entities to develop and implement EMSs as a means of achieving and maintaining compliance. A violator who discovers, corrects, promptly discloses, and prevents a recurrence of a violation through the implementation of an EMS will generally meet the Audit Policy's "due diligence" criterion. The Audit Policy provides for 100% of the gravity-based penalty to be waived in such circumstances

if all other conditions of the Audit Policy are met.¹³ A municipality with an EMS developed pursuant to the Agency-supported PEER program (*see* f.n. 6, above), for example, that uses its EMS to discover, correct, and disclose its violations under the Audit Policy would be expected to satisfy the “due diligence” criterion.

Pursuant to the Agency’s statute-specific penalty policies, EPA personnel have the discretion to calculate a settlement penalty that reflects relevant actions by violators. With respect to EMSs, the range of possible scenarios where a violator’s actions may be considered in adjusting a penalty downward from the preliminary penalty amount include where a company discovers a violation through an existing EMS and corrects the violation prior to EPA’s discovery or the company lacks a preexisting EMS but puts one into place before concluding settlement negotiations. For example, where EPA discovers that a company has identified and corrected violations through the implementation of an EMS, EPA may consider the implementation of that EMS, along with other case-specific facts, as an example of the defendant’s/respondent’s good faith efforts to comply, particularly where the violator institutes changes in its EMS to prevent recurrence of the violation. This proactive use of an EMS by a company is the type of responsible behavior we want to encourage through the penalty calculation formula.

It may also be appropriate to consider whether and to what extent a violator has implemented an EMS in assessing the degree of willfulness and/or negligence. For example, the RCRA Civil Penalty Policy provides that EPA should consider whether the violator took “reasonable precautions against the events constituting the violation,” in assessing the degree of the violator’s willfulness and/or negligence. Applying the RCRA Civil Penalty Policy to a particular set of facts which include a preexisting EMS, EPA may determine that it is appropriate to adjust the penalty downwards. An example might be where, as part of its EMS, a company has a good system for identifying, labeling, storing, and inspecting its on-site hazardous waste containers but committed isolated violations. On the other hand, where an EMS was in place but violations occurred nonetheless as a result of a lack of management commitment to the process, an upward penalty adjustment to reflect the willfulness or negligence of the violation may be appropriate.

Disclaimer

This Guidance is intended to apply to settlement negotiations, only. The procedures set out in this document are intended solely to guide government personnel. They are not intended to, and cannot be relied upon to create, rights, substantive or procedural, enforceable in any party in litigation with the United States. EPA reserves the right to act at variance to this Guidance or to change it at any time without public notice.

Contacts

¹³ “*Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*,” 65 FR 19,618 (April 11, 2000) (Audit Policy). The Policy is posted at <<http://www.epa.gov/compliance/resources/policies/incentives/auditing/finalpolstate.pdf>>.

If you have questions concerning EMSs, generally, please contact Jon Silberman of the Office of Planning and Policy Analysis (OPPAC) at (202) 564-2429. For questions on *CFEMS*, please contact Steve Sisk of the National Enforcement Investigation Center (NEIC) at (303) 236-6683. For questions concerning SEPs, generally, please contact Melissa Raack (202-564-7039) or Beth Cavalier (202-564-3271) of the Office of Regulatory Enforcement (ORE)-Multimedia Enforcement Division (MED). For questions concerning SEPs at Federal facilities, please contact Melanie Garvey of the Federal Facilities Enforcement Office (FFEO) at (202) 564-2579. For questions concerning SEPs and site remediation, please contact Mike Northridge of the Office of Site Remediation Enforcement (OSRE) at (202) 564-4263.

ENVIRONMENTAL PROTECTION AGENCY

[FRL –]

Interim Guidance for Community Involvement in Supplemental Environmental Projects

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice

SUMMARY: The Office of Enforcement and Compliance Assurance (OECA) is noticing an interim guidance document entitled, “Interim Guidance for Community Involvement in Supplemental Environmental Projects.” This document is intended to encourage EPA personnel to involve communities in supplemental environmental projects. EPA solicited public comments on a draft of this guidance on June 30, 2000 (65 FR 40639). The public comment period lasted sixty (60) days. EPA received five (5) comments on the draft guidance. The response to these comments follows below.

ADDRESSES: Copies of the interim guidance can be obtained by writing the Enforcement and Compliance Docket and Information Center (2201A), Docket Number EC-G-2000-055, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460, or by contacting the office via email at docket.oeca@epa.gov.

FOR FURTHER INFORMATION CONTACT: For further information contact Melissa

Raack, 202-564-7039 or Beth Cavalier, 202-564-3271, Office of Regulatory Enforcement, Mail Code 2248-A, United States Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460, e-mail: raack.melissa@epa.gov, cavalier.beth@epa.gov. The interim guidance can also be found at <http://www.epa.gov/compliance/resources/policies/civil/seps/sepcomm2003-intrm.pdf>.

John Peter Suarez,
Assistant Administrator
Office of Enforcement and Compliance Assurance

RESPONSE TO COMMENTS: Today, the United States Environmental Protection Agency (EPA) or (Agency) is issuing an interim guidance entitled “Interim Guidance for Community Involvement in Supplemental Environmental Projects.” This interim guidance is designed to provide information to EPA staff on involving communities in the selection and implementation of Supplemental Environmental Projects (“SEPs”), in appropriate cases. The Agency has decided to issue this guidance as “interim” in order to evaluate its effectiveness in involving communities in SEP selection and implementation, and to assess the establishment of SEP libraries. This interim guidance is effective immediately upon publication.

On June 30, 2000, EPA published a draft of the guidance in the Federal Register (65 FR 40639) and allowed 60 days for public comment. The comment period closed

on August 29, 2000. EPA received five comments. With one exception (discussed below), the comments on the draft guidance were generally favorable. Several commenters stated they believed the guidance could better define the meaning of the term “communities.” They also suggested that EPA clarify the guidance to provide that EPA should consult with the community adversely affected by the environmental violation, in addition to consulting community officials. These commenters suggested that the Agency should weigh input from the affected community more heavily than input from community officials or others in communities not directly affected by the violation. The Agency has clarified the guidance to indicate that EPA staff should give particular attention to input from communities affected by the violation that is the subject of the enforcement settlement.

A few commenters suggested that EPA should not accept SEPs from defendants who are unwilling to seek community input on potential SEPs. While the Agency agrees that the possibility of substantial penalties should provide an incentive for defendants to settle with EPA, the Agency will continue to enter into some settlements that include SEPs where the community has not been involved in the SEPs selection. This is because the Agency has placed a high priority on including SEPs in settlements. While the Agency has provided incentives for defendants to agree to involve the community in that process, such as informing defendants of the positive results of community input and considering a defendant's efforts in seeking community input on potential SEPs as a factor in determining the SEP mitigation percentage, nevertheless, some defendants may remain reluctant to involve the community. In addition,

timetables, such as court-ordered deadlines, may not permit community involvement. EPA may decide in some cases that a settlement with a SEP - even if not obtained with community involvement - is better than a settlement without a SEP. In some circumstances, EPA may elect to involve the community without the participation of the defendant. Every settlement and every defendant is unique, and EPA must take many factors into consideration when negotiating a settlement.

One commenter proposed that EPA not use the term “SEP Bank” because it is confusing. The commenter suggested the term “SEP Library” instead, which conveys more clearly what the term means, i.e., a collection of ideas for possible SEP projects. The Agency agrees with this comment, and has revised the guidance accordingly.

Another commenter stated that the draft guidance places too much emphasis on the limitations on community participation and not enough emphasis on empowering communities. As an example of the limitations, the commenter noted that the guidance suggests that, in some instances, “it may be desirable to delay the community involvement until after the consent decree is entered.” (65 FR 40641). The commenter was concerned that this may result in a final settlement document that does not take into account the needs of the affected community. In addition, the commenter believed that the Miscellaneous Receipts Act (31 U.S.C. § 3302) (“MRA”),¹ may impede efforts to

¹The MRA, 31 U.S.C. §3302(b), requires that money received for the use of the United States be deposited into the Treasury as soon as practicable unless the Federal agency receiving the money has statutory authority to use the funds differently.

“assign penalties to SEPs” once the decree is entered, and in effect, preclude communities from shaping the SEP. The Agency agrees that including communities as early in the process as possible, given the circumstances of a particular case, is desirable, and the guidance certainly does not suggest restricting community participation to circumstances where the consent decree has already been signed. Moreover, EPA does not intend to suggest that penalty money could be converted to a SEP based on comments received during the public comment period. Rather, the consent decree between EPA and the defendant must define the type, scope and costs of the project, as discussed in the SEP policy. The Agency believes that in some instances, given the timing of settlement negotiations within the context of litigation deadlines, a defendant and EPA may reach agreement on the SEP, but may not be able to finalize all details of the SEP before entry of the consent decree. In these circumstances, the Agency still believes community involvement after the consent decree is entered will help ensure the successful implementation of the SEP.

With respect to the commenter’s statement concerning the MRA, the Agency’s SEP policy has been designed to ensure compliance with the MRA. All monetary penalties assessed against violators are deposited into the Treasury. An acceptable SEP is a mitigating factor that EPA may consider in deciding whether to settle a matter and what the terms of such a settlement are. SEPs are not substitutes for monetary penalties. Another commenter stated that the Agency should not wait, as it currently does, to include a community in SEP proposal/selection until after it has identified a violation, conducted an investigation, and filed a lawsuit. This commenter also stated

that the Agency should work first with communities to identify opportunities for projects, then work such projects into settlements, instead of selecting the best approach for a specific case at hand. The Agency believes both approaches are meritorious and the guidance allows EPA a significant degree of flexibility. However, in no event will the desirability of a community SEP affect the Agency's decision to pursue an enforcement action. The guidance attempts to remain as flexible as possible with respect to all aspects of community involvement. The differences in cases and communities will dictate the particular approach that will work best for a specific case. In addition, the defendant must be willing to undertake a SEP; EPA cannot mandate that a SEP be part of a settlement. As such, EPA needs to ensure that the defendant is willing to conduct a SEP, to include the community in the SEP process, and to abide by Agency and court-ordered deadlines. However, the Agency does agree that working with communities to identify potential SEPs is a good way to expedite the SEP element of the settlement process and to include SEPs that are important to the affected community. The Agency believes that a SEP library is an excellent vehicle for collecting potential projects. Several Regional offices have already begun to collect ideas for SEPs from communities, and the interim guidance encourages Agency enforcement staff to consider development of SEP libraries.

The commenter also raised concerns that the draft guidance may discourage some SEPs because they are too "resource intensive" with respect to EPA oversight. Although the Agency seeks SEPs with the maximum favorable environmental impact, the Agency must also consider its resource limitations and balance those limitations

against the benefits of the proposed SEP when deciding whether or not to agree to a particular SEP.

One commenter proposed a SEP idea for its community but did not comment on the draft guidance. EPA has forwarded the comment to the appropriate regional office for evaluation and possible inclusion in a regional SEP library.

One commenter stated that the Agency should retain its existing approach to community input. The commenter suggested that the draft guidance created the presumption that communities would be involved in the earliest stages in most enforcement proceedings and act as a “third party” to the settlement. Although the commenter claimed that including communities in the SEP suggestion/selection process would create a substantial disincentive for companies to conduct SEPs, the commenter did not include any support for this claim, nor did it include any further details on the “substantial disincentive” the commenter envisioned.

EPA disagrees with these comments. First, the guidance makes clear that there is no formula for determining whether or not community involvement in SEP selection is appropriate and it does not dictate the level or timing of any such involvement. The guidance does not impose any requirements or obligations on EPA, defendants, or the community. Rather, the guidance identifies a number of factors for EPA staff to consider in evaluating what is appropriate in any given case. Second, the Agency believes that there are substantial benefits for defendants who involve affected

communities in SEP selection. One particularly important incentive is that, under the SEP policy, a defendant's inclusion of community input into a SEP may be considered as a factor supporting increased penalty mitigation. The interim guidance encourages enforcement staff to consider giving more credit to a defendant who agrees to implement a SEP where there has been a commitment to include affected communities into the SEP selection. As to the commenter's suggestion that including a community will unreasonably delay resolution of enforcement actions, the Agency does not believe that this will be a significant problem. The Agency can set milestones and objectives for community involvement that are consistent with litigation deadlines. There will be times when inclusion of a SEP, or community involvement in the SEP process, in a particular settlement is not appropriate, specifically where deadlines or other circumstances do not make inclusion of a project or community involvement possible, even if the community supports a particular project. Lastly, because EPA (and the Department of Justice (DOJ) in judicial actions) is the final decision maker on SEP selection, the Agency can ensure that all legal requirements are met.

The same commenter noted that DOJ and EPA already have opportunities to seek community/public input on cases, e.g., pursuant to DOJ's provision for public comment on consent decrees under 28 CFR § 50.7. While this is one opportunity for input, it occurs after the parties have signed a consent decree, which is late in the enforcement process. As stated in the interim guidance, the Agency would like to remain flexible, and where appropriate, include community involvement in selecting or implementing SEPs that address the needs and concerns of all involved: the Agency,

the defendant, and the affected community.

The commenter also noted that the revised Consolidated Rules of Practice ("CROP"),

64 FR 40138 (July 23, 1999)², did not include modifications to the "settlement process."

The Agency did not include such provisions because it is not requiring community involvement. The Agency encourages community involvement where appropriate and possible, and is issuing this guidance to provide helpful information to EPA staff to facilitate community involvement. The guidance specifically notes that there will be situations in which community involvement is not appropriate. This guidance is not intended to alter any current administrative or judicial settlement process requirements. Furthermore, the guidance is not intended to and does not alter statutory requirements for public participation in settlements, or change DOJ requirements for public comment on settlements. Finally, both the defendant and the Agency must agree to enter into a SEP as part of a settlement. If the defendant does not agree to a SEP, the settlement will not include a SEP.

The commenter also expressed concern about public participation as it relates to the finality of settlements. The Agency believes that if an affected community is involved in the selection of a SEP that is included in the final settlement, the community

²The CROP are procedural rules for the administrative assessment of civil penalties, issuance of compliance or corrective action orders, and the revocation, termination or suspension of permits, under most environmental statutes.

will be less likely to submit an adverse comment on the settlement as a whole.

In addition, this commenter also stated that by asking a defendant to “actively participate” in reaching out to communities, the Agency may, in effect, indirectly or directly supplement Agency outreach activities for which Congress has provided funding. The commenter specifically raised concerns about the MRA. The Agency has not sought nor has Congress specifically appropriated money for SEP outreach activities. Moreover, EPA carefully considered the MRA when designing the SEP Policy. The SEP Policy includes specific “Legal Guidelines” intended to preclude improper augmentation of EPA’s appropriations. See Section C., Item 5., of the May 1, 1998, SEP Policy. Nevertheless, EPA has clarified in the final guidance that should any costs be incurred when conducting community outreach, each party must bear its own costs throughout the settlement process in any enforcement action, including those which involve SEPs. Finally, a number of commenters suggested editorial, non-substantive comments on the guidance. The Agency has made these changes in the final guidance, where appropriate.

INTERIM GUIDANCE ON COMMUNITY INVOLVEMENT IN SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Introduction

In its Supplemental Environmental Projects Policy (SEP Policy) of May 1, 1998,

EPA included a section on community involvement³. Seeking community involvement in a SEP, especially from the community directly affected by the facility's violations, can have a number of benefits. It can promote environmental justice, enhance community awareness of EPA's enforcement activities, and improve relations between the community and the violating facility.

While community involvement is not possible or appropriate in all settlements involving SEPs, in many cases community involvement may be a valuable part of SEP consideration without adversely affecting the enforcement process. This document encourages EPA staff to include community involvement in settlements, where appropriate, and to strive to meet the community involvement goals of the SEP Policy. In addition, this interim guidance suggests resources that may be utilized to foster community involvement.

This interim guidance recognizes that not every settlement can include a SEP, or a SEP that is proposed or favored by community members. SEPs are projects

³ The SEP Policy allows EPA to consider a defendant's or respondent's willingness to perform an environmentally beneficial project when setting an appropriate penalty to settle an enforcement action. The purpose of a SEP is to secure significant environmental or public health protection improvements beyond those achieved by bringing the defendant into compliance. The SEP must be a new project, where EPA has the opportunity to shape the scope of the project before it is implemented, and the defendant must not be otherwise legally required to do the work. Community participation in SEP consideration is just one of the factors considered in valuing a SEP. This summary of the SEP Policy should not be considered a full summary of the SEP requirements and persons interested in such requirements should consult EPA's Final SEP Policy, available at 63 FR 24796 (May 5, 1998), or <http://www.epa.gov/compliance/resources/policies/civil/seps/index.html>.

undertaken voluntarily by defendants⁴, and not all defendants are interested in performing SEPs. Defendants may not be willing to solicit input from the community, or may not be receptive to community input. Further, final approval of all SEPs rests with EPA,⁵ which must review project proposals to ensure consistency with the SEP Policy and the law. A proposed project may not be able to be approved because it may not have the required nexus to the underlying violation, or may violate other legal requirements. Also, if different community groups support different SEP projects, some part of the community is likely to be disappointed no matter what the outcome of the SEP consideration process might be. Finally, court imposed deadlines on the parties may not allow for community input into the SEP selection.

Nevertheless, EPA believes that community involvement is an important factor that should be considered along with other factors surrounding the particular facts of a potential settlement, such as quick response to environmental threats, timely resolution of enforcement actions, and using limited resources effectively to achieve the maximum benefit for human health and the environment. This guidance encourages Regions to think creatively about how to engage communities, particularly communities affected by the facility's violations, even though direct community participation will not be possible

⁴ SEPs can only be obtained in settlement agreements, not imposed by a court or administrative tribunal. Under the MRA, 31 U.S.C. §3302(b), all court or administratively imposed penalties must be paid to the treasury. Only in settlement, before a penalty is imposed, can a penalty be mitigated by a SEP.

⁵ Throughout this interim guidance, the term "EPA," when used in the context of a judicial enforcement action, also includes the Department of Justice.

in every case that includes a SEP. For example, Regions can consider setting up a SEP library to solicit community project ideas outside of the context of a particular enforcement action so that community project ideas are available to draw from in appropriate cases. Also, settlements can be structured to provide for community input on implementation of the SEP, even if participation in SEP consideration itself is not feasible.

Building trust between EPA and communities is the foundation of effective community involvement in the SEP consideration process. Even where community outreach does not result in a community-supported or proposed SEP being included in a settlement, effective community outreach can help increase the community's confidence in the process and may encourage the community to work with EPA in the future.

Including communities, when possible, in the consideration of SEPs, may benefit the defendant⁶, the community, the environment, and EPA. First, because SEPs help to protect the environment and public health, and can redress environmental harm, involving communities in SEP consideration enables EPA and the defendant to focus on the particular environmental priorities and concerns of a community, which is especially important if several different SEPs are being considered. The community also can be a valuable source of SEP ideas, including ideas that result in creative or

⁶“Defendant,” when used herein, includes defendants in civil judicial actions and respondents in EPA administrative actions.

innovative SEPs that might not otherwise have been considered.

Furthermore, pursuant to the SEP Policy, a defendant's participation and inclusion of public input into a SEP is one of the factors EPA uses to determine the degree to which penalty mitigation is appropriate in a particular case. (SEP Policy, p. 16). Enforcement staff should consider giving a defendant who conducts outreach to communities in development of an acceptable SEP proposal, a greater mitigation percentage for a SEP than a defendant who does not conduct such outreach. Defendants may also benefit from community involvement because it can result in better relationships with the community.

Given the wide range of settlement scenarios, types of violations and communities, there is not standard formal to determine when community involvement in the consideration of a SEP is appropriate. There are a number of factors that may help EPA staff determine whether or not community involvement may be appropriate in a particular case. Generally these factors may include:

1. The parameters surrounding the specifics of each case, e.g., court-ordered deadlines, imminent and substantial endangerment situations;
2. The willingness of the defendant to conduct a SEP, and a willingness to solicit and respond in a meaningful way to community input;
3. The impact of the violations on the community, especially the community most directly affected by the facility's violations;

4. The level of interest of the community in the facility and the potential SEP;
and
5. The amount of the proposed penalty and the settlement amount that is
likely to be mitigated by the SEP.

An excellent way to include communities in SEPs is to establish a “SEP library.” A SEP library is an inventory of potential SEPs that can be consulted in individual cases where the defendant requests assistance in identifying appropriate SEPs. Several EPA Regional offices have established SEP libraries; others are considering development of a SEP library. A SEP library can include specific projects identified as priorities by communities, non-governmental organizations and others. SEP libraries can be developed from project ideas obtained from the affected community through town meetings, publications, the internet, or public hearings. Collecting ideas for possible SEPs for inclusion in a SEP library can happen at any time. Therefore, the enforcement action in which a SEP may ultimately be selected from the SEP library will be unknown at the time the potential SEP is placed into the library. Therefore, inclusion of SEP in the SEP library does not ensure that a project will be chosen and/or implemented in any particular settlement.

Finally, SEPs are developed in the context of settlement negotiations. As such, confidentiality between the government and the defendant is essential to the exchange of ideas and exploration of settlement options. Because of this, EPA must consider how to provide information to the public to facilitate its involvement in SEP

consideration and development without undermining the confidentiality of settlement negotiations. Much of the information developed by the government may be privileged and therefore not appropriate for release to the public. In addition, a defendant may provide information to the government that must be kept confidential. For example, a defendant may provide confidential business information (“CBI”) to EPA. CBI, by law, cannot be provided to the public.⁷ Thus, each case will have limits on what information EPA can make available to the public. In judicial cases, DOJ will also retain authority to determine what information can be released to the community.

EPA believes that community involvement in SEPs is an important goal, and is committed to involving communities in the consideration of SEPs. This interim guidance is intended to encourage enforcement staff to consider community involvement in SEPs, and to help effectuate the best possible SEPs in the settlement of enforcement cases in a manner that promotes mutual trust and confidence, and builds positive relationships between the community and the Agency.

Signed: _____

John Peter Suarez, Assistant Administrator

Office of Enforcement and Compliance

Assurance

This document is interim guidance intended for use of the EPA personnel and

⁷ See 40 CFR Part 2, subpart B.

does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. This interim guidance is not intended to supercede any statutory or regulatory requirements, or EPA policy. Any inconsistencies between this interim guidance and any statute, regulation, or policy should be resolved in favor of the statutory or regulatory requirement, or policy document, at issue.

APPENDIX A

RESOURCES FOR IDENTIFYING COMMUNITIES

Below are some suggested resources within and outside of EPA that may be useful in targeting community outreach efforts.

Suggested Internal Sources

1. Community involvement coordinators at EPA's Office of Emergency and Remedial Response Community Involvement and Outreach Center;
2. Headquarters offices, including: Office Environmental Justice, American Indian Environmental Office, Federal Facilities Enforcement;
3. Colleagues in other media programs or regions;
4. Regional offices or coordinators who handle community involvement, environmental justice, tribal issues, or community-based environmental

problems.

Suggested External Sources

1. State, local or tribal governments;
2. Education or spiritual organizations;
3. Other federal agencies
4. Neighborhood organizations or groups, and individuals in neighborhoods closest to the defendant's facility;
5. Community activists;
6. Environmental and environmental justice organizations and groups;
7. Local unions, business groups, and civic groups;
8. The defendant or other members of the regulated community (e.g., trade associations);
9. Local newspapers, radio, television, local internet sites.

APPENDIX B

COMMUNITY OUTREACH TECHNIQUES

* This list is intended to provide a library of options available for use in conducting community outreach, and is not intended to suggest that all of these techniques be used in any given case.

1. Interview: Face to face or telephone discussions with community members

provide information about local concerns and issues. A significant time commitment may be required to gather feedback representative of the community;

2. **Small Group Meeting:** Convening community members in a local meeting place stimulates dialogue, generates information, and may build rapport among participants;
3. **Focus Group Meeting:** Focus group participants are convened by a trained facilitator to provide answers to specific questions. The direct approach is an efficient information gathering tool if participants represent a cross-section of the community.
4. **Public Meeting:** Public meetings are useful for hearing what people have to say about current issues and engaging community members in the process. At public meetings, EPA should focus on active listening and learning from the public.
5. **Public Availability Session/Open House:** A public availability session is a less structured alternative to a public meeting that provides everyone an opportunity to ask questions, express concerns, react to what is being proposed, and make suggestions. Typically, a public official announces she or he will be available at a convenient time and place where community members can talk informally.
6. **Public Notice:** Public notices in the print media or on radio and television are a relatively inexpensive way to publicize community participation opportunities. In addition to the mainstream media, minority publications, church bulletins and other such vehicles offered by local organizations can reach a more diverse

audience.

7. **Workshop:** Workshops are participatory seminars to educate small groups of citizens on particular site issues.
8. **Site Tour:** Site tours can familiarize citizens, the media and local officials with the nature or environmental concerns affecting a community near a specific site. Tours may result in better communication among the community, facility and Agency.
9. **Information Repository:** An information repository is a project file containing timely information on site-specific activities and accurate detailed and current data about a site or enforcement action. Project files are typically kept at convenient public locations, e.g., libraries, and publicized through various media.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 5 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects

FROM: John Peter Suarez
Assistant Administrator

TO: Regional Counsel
Regional Enforcement Division Directors
Regional Media Division Directors

This memorandum advises enforcement personnel of a change in the Supplemental Environmental Projects (SEP) Policy. This change will allow for the acceptance, under certain circumstances, of SEPs that may ultimately be profitable to a defendant/respondent. Under the existing SEP Policy, profitable projects are not generally permitted as SEPs. However, after further consideration, the Office of Enforcement and Compliance Assurance (OECA) has determined that, in some instances, a project's environmental or public health benefits may outweigh its potential profitability to the alleged violator, such that the project may be allowed as a SEP. In addition, the positive returns for some projects may be so speculative or remote that a business may not decide to undertake the project independent of the enforcement settlement.

The attached guidance document describes the background and rationale for this decision and sets forth issues to consider for evaluating whether to accept a profitable project as a SEP as well as how to value such a SEP and establish the appropriate mitigation credit. Specifically, the guidance includes:

Acceptance of projects as SEPs that are expected to become profitable after five years is appropriate if the project is consistent with the criteria described in the guidance;

- An exception for small businesses and small communities. For these entities, projects that are expected to become profitable after three years may be accepted as SEPs if the projects are consistent with the criteria described in the guidance;
- A five to fifteen year period for evaluating the profitability of a proposed project;

- A recommended process for valuation of a profitable project using the PROJECT Model; and
- A recommended mitigation credit of no more than 80% for profitable pollution prevention SEPs, and not more than 60% for all other profitable SEPs.

The decision to permit profitable SEPs under certain circumstances was reached after considering numerous comments and suggestions from Regional and Headquarters enforcement and program personnel. These considerations are described further in the Background section of the attached guidance.

If you have questions about this guidance, the SEP policy, or specific SEPs, please do not hesitate to contact me or the Agency's SEP contacts, Melissa Raack and Beth Cavalier. Melissa can be reached at (202) 564-7039, and Beth can be reached at (202) 564-3271. For questions concerning the PROJECT model, please contact Jonathan Libber at (202) 564- 6102 or the Financial Issues Helpline at (888) ECONSPT ((888) 326-6778). For questions about SEPs at Superfund sites, please contact Michael Northridge at (202) 564-4263. For questions about SEPs at federal facilities, please contact Melanie Garvey at (202) 564-2579 or Bernadette Rappold at (202) 564-4387.

cc: ORE Division Directors
Regional SEP Coordinators
Enforcement Coordinators
Karen Dworkin, DOJ
Melanie Garvey, FFEO
Bernadette Rappold, FFEO
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Melissa Raack, ORE/MED
Beth Cavalier, ORE/MED
John Cross, OPPTS
David Sarokin, OPPTS

Attachment

**Guidance for Determining Whether a Project is Profitable,
When to Accept Profitable Projects as
Supplemental Environmental Projects,
and
How to Value Such Projects**

The purpose of this guidance is to modify that portion of the May 1998 Supplemental Environmental Projects (SEP) Policy, which states that profitable projects are generally unacceptable as SEPs.¹ The Office of Enforcement and Compliance Assurance (OECA) has determined that, in some instances, projects that are potentially or ultimately profitable to an alleged violator may be allowable as a Supplemental Environmental Project. OECA believes that in cases where a project's environmental or public health benefits outweigh its potential profitability to the alleged violator, the project may be acceptable as a SEP.

This guidance document describes the background and rationale for this decision and also provides criteria for evaluating if a project is likely to be profitable and whether to accept a profitable project as a SEP. In addition, the document provides guidelines for determining the value² of such a SEP and the appropriate mitigation credit.

Background

On August 22, 2001, the Office of Inspector General (OIG) issued an audit report, *Final Report on Region 6 Supplemental Environmental Projects*; Report No. 2001-P-00014, addressing the implementation of SEPs. This report criticized the Agency for approving projects that were ultimately profitable to the defendant/respondent in light of the current Policy's prohibition on such projects. In its response to the OIG, OECA committed to review this issue and provide guidance to the Regions. Following this review, and after extensive discussion with the Regions, other Headquarters offices, and the Department of Justice, OECA concluded that some projects that are ultimately profitable to the defendant/respondent may in fact have significant environmental or public health benefits (*e.g.*, pollution prevention projects). OECA also recognizes that some companies may not elect to pursue certain projects because of the speculative nature of the returns or the untested technology involved. Based on these considerations, OECA believes it is appropriate, under certain circumstances, to allow a proposed SEP, even though that SEP might eventually become profitable to the defendant/respondent.

¹ Conforming changes to the SEP Policy that reflect this guidance are underway.

² The SEP Policy uses the PROJECT model to calculate the value of a SEP. PROJECT generates the net cost of a project over time. For purposes of determining the monetary value of a SEP, OECA uses the PROJECT generated net cost, therefore, the net cost over time is considered the monetary "value" of the SEP.

Potentially profitable projects present a challenge to enforcement personnel who must determine the appropriate value of the project. A profitable project is one that results in no net cost to the alleged violator. This raises the question of how to determine the value of such a project and subsequently the associated mitigation credit. This guidance provides some background on this issue, describes the circumstances under which a profitable project may be acceptable as a SEP, and provides guidance for determining the value and mitigation credit that can be given.

1. Profitable Projects and the Project Period

Projects for which the net annual costs (*i.e.*, annual costs minus annual savings) reflect a savings are most likely to be profitable to the defendant/respondent at some point. To determine whether a project is profitable, the PROJECT financial model evaluates the project costs and savings for a specified period of time referred to as the “number of credited years” or the “project period.” If the PROJECT model returns a negative value, this indicates that the proposed project will provide a positive return over that period of time and should be considered “profitable” for the alleged violator.

Thus, the determination of whether a proposed SEP is profitable depends greatly on the project period, which is the length of time for which the project costs are considered. The OIG report noted the lack of guidance on this issue and recommended that OECA clarify the project period to be considered when determining the value of a SEP. The OIG recommended that the useful life of capital equipment (generally considered to be fifteen years) may be the appropriate period for determining SEP value (and for considering profitability). Under this scenario, projects that were profitable within the first fifteen years would be unacceptable as SEPs. The OIG made no recommendation regarding the appropriate project period for projects where no costs are incurred for capital equipment.

After soliciting Regional comments on the OIG recommendation, OECA rejected the OIG’s recommendation as impractical. The SEP Policy states that “at a minimum, the defendant/respondent must be required to implement the project for the same number of years used in the PROJECT model calculation.” (See page 14, paragraph 2.). Based on this language, under the OIG recommendation, defendants/respondents would be required to implement SEPs for fifteen years; consent decrees and administrative settlements would, therefore, have to remain open and be monitored for fifteen years, creating a significant administrative burden. In addition, imposing a complete ban on all SEPs that would likely be profitable within a fifteen year window would likely result in the elimination of many pollution prevention SEPs, which are more likely to be profitable to a defendant/respondent.

To balance competing concerns in this area, OECA proposed prohibiting as SEPs projects that are profitable to the defendant/respondent within the first five years of implementation. OECA further proposed the careful evaluation of projects that become profitable between five and fifteen years to ensure that the benefits to public health or the environment warrant giving the

defendant/respondent SEP credit. If the Region determines that it does, the project can be accepted as a SEP.

OECA proposed a five-year project period as the minimum time period for determining the acceptability of proposed, potentially profitable projects, because a five-year cycle is commonly used in the financial world for evaluating businesses' financial stability and for evaluating potential investments and other business activities. Because businesses commonly use a "five-year plan" for financial planning, OECA has also adopted this five-year period in its ability to pay analysis computer models.

Some of the Regional enforcement and pollution prevention personnel that reviewed the draft guidance commented that the proposed five-year limit for profitable projects might not be appropriate in all circumstances. Based on their experience, they felt that a five-year planning period was not always feasible, especially for small businesses. According to the Regions, because a five-year cost/benefit analysis may be burdensome for a small business, many small businesses will not opt to implement a project that was profitable in less than five years without the inducement of an enforcement settlement and the incentives that the SEP Policy provides. The Regions cited many factors, such as institutional barriers, opportunity costs of capital, emphasis on shareholder returns, and a lack of recognition of potential profits from resource conservation and efficiency, as reasons why smaller companies may not commit to a project that would be profitable in five, or less, years. The Regions commented that technical assistance agencies report that new technologies are resisted by companies receiving assistance, even when potential exists for great payback.

After considering the Regional comments and concerns and upon further discussion with OECA's financial experts, OECA has determined that approval as SEPs of projects that become profitable within five years is not appropriate. We believe that a shorter project period for limiting profitability would be inappropriate for larger, more sophisticated companies, which have the resources to implement a project that would not be profitable for five or more years. Thus, not only would these companies be reducing their civil penalties, but the SEP that provided the mitigation would be profitable in less than five years. This would seriously undermine the deterrent value of the settlements in those cases.

However, we understand the Regions' concern that a five-year project period may eliminate some otherwise acceptable projects especially for small businesses. Therefore, we have adopted a different approach for small businesses and small communities.³ For entities

³ To maintain consistency with the SEP Policy, which uses the Clean Air Act's definition of a small business stationary source (see CAA § 507(c)(1)(A)), "small business" is defined under this guidance to be a business that is owned by a person or another entity that employs 100 or fewer individuals. Small businesses could be sole proprietorships, individuals, privately held corporations, farmers, landowners, partnerships, and others. A small community is one comprised of fewer than 2,500 persons.

meeting the definition of a small business or a small community, a three-year project period may be used for determining the acceptability of a profitable project.

2. When to Accept a Proposed Profitable Project as a SEP

SEPs mitigate civil penalties in an enforcement action and reflect the Agency's use of its enforcement discretion. All proposed projects, including ultimately profitable projects found to be acceptable under this guidance, should meet the factors and conditions outlined in the SEP Policy. However, because a profitable project accepted as a SEP will provide benefits to the alleged violator as well as to public health or the environment, OECA believes that such projects should meet a higher standard, or "high hurdle," for acceptance. This "high hurdle" can be met if the project demonstrates attributes such as:

- (1) a high degree of innovation (*e.g.*, projects that use new technologies or processes not commonly in use by the industry or sector) with the potential for widespread application;
- (2) technology that is transferable to other facilities or industries, and the defendant/respondent will share information about the technology;
- (3) extraordinary environmental benefits that are quantifiable (*e.g.*, project will result in measurable reductions in air pollutant emissions or measurable improvement in water quality);
- (4) exceptional environmental or public health benefits to an Environmental Justice community; and/or
- (5) a high degree of economic risk for the alleged violator.

OECA believes it is inappropriate for SEPs that are profitable (as determined in Step 6, see below) to receive the maximum allowable mitigation credit. When considering the percent of mitigation credit to give, Regions should consider how well the project meets the "high hurdle" criteria as well as the length of time before the project becomes profitable and the degree of profit.⁴ Regions may wish to provide a lower percent of mitigation credit for projects that become profitable earlier on or show a significant profit. Projects that are only slightly profitable may receive a higher mitigation percent. OECA recommends a maximum upper mitigation percentage of 80% for profitable pollution prevention SEPs, and a maximum upper mitigation percentage of 60% for all other profitable SEPs.

⁴ This can be determined by running PROJECT using varying project periods between five and fifteen years.

3. Using the PROJECT Model to Calculate the Value of Such SEPs for Purposes of Penalty Mitigation

Section E of the SEP policy (see pages 12-17) describes the steps that Regions should take in calculating the value of a SEP. The policy recommends that use of the PROJECT model and describes the three types of cost information that may be associated with a SEP and that are entered into the PROJECT model. These three types of costs are: (1) capital costs, which are costs associated with equipment, buildings, etc.; (2) one-time, nondepreciable costs, such as the purchase of land or the removal of contaminated materials; and (3) annual costs and savings (also called “annual recurring costs”). Annual costs include operation and maintenance expenditures, lease payments, and insurance premiums. Annual savings may include items, such as reduced energy costs, reduced cost of raw materials, and reduced waste disposal costs resulting from the implementation of the project.

The PROJECT model requires input of data concerning the annual recurring costs of a SEP and the number of years that these costs will be credited. This data is entered into the annual recurring costs and number of credited years (also known as the “project period”) fields of the PROJECT model and, along with the cost information described above, is important in determining whether a SEP is profitable.⁵

In most cases, the value of a SEP as generated by the PROJECT model is the value on which any mitigation percentage will be based. A SEP that is profitable will generate a negative or zero value. A mitigation percent applied to such a value will result in zero credit. Therefore, we have developed a two-tier approach to assist the Regions in determining an appropriate value and mitigation credit for a profitable SEP.

The approach described in the steps below and in Attachment A should be used in evaluating any SEP for which there is a negative value entered into the annual recurring costs field of the PROJECT model. Annual recurring costs are determined by adding the annual costs to the alleged violator and subtracting any annual savings or profits that the alleged violator may realize as a result of performing the SEP. If the result of this calculation is a negative number,⁶ then a negative entry will be made in the annual recurring costs field of PROJECT. SEPs with a negative annual recurring cost are more likely to result in a zero or negative PROJECT value, indicating that the SEP may be profitable, and this guidance should therefore be applied.⁷

⁵ For the purposes of this discussion, SEPs that result in a zero or negative PROJECT result, indicating cost savings to the defendant/respondent, will be considered “profitable.”

⁶ A negative number indicates an annual return rather than cost to the violator.

⁷ Regions should be alert to other factors that could produce a profit for a violator. For instance, a violator may produce a new product line or business as a result of the SEP, which could ultimately result in increased revenues for the violator. Such factors should also be

4. Using PROJECT to Determine the Value of Profitable Projects

Step 1 - Collect information from defendant/respondent on costs of the project as well as any savings due to efficiencies, substitution of raw materials, re-use of waste products, etc.⁸

- If the cost entry for annual expenses is a negative number (indicating the project may return at least some savings to the defendant), proceed to Step 2.

- If the cost entry for annual expenses is positive, set the number of years in the annual expense category to the number of years that violator will be required to implement the project. Run PROJECT to determine the value of the SEP. This is the current process and will continue to apply for most SEPs.

Step 2 - Run PROJECT Model using five (5) years as the project period.⁹

Step 3 - If the PROJECT Model returns a negative value using the five-year project period, this indicates that there is a positive return for the defendant. A positive return at this step indicates that the SEP will be profitable within the first five years and the proposed SEP should be rejected.

Step 4 - If the PROJECT Model returns a positive value, indicating that there is a net cost to the defendant during the first five years, then the proposed SEP should be run through PROJECT again, this time using fifteen (15) years as the project period. This second PROJECT run is done to see if the proposed SEP will become profitable between five and fifteen years.

Step 5 - If the PROJECT Model still returns a positive value, indicating a net cost to the defendant, the SEP can be approved providing it meets all other requirements of the SEP Policy (e.g., nexus, etc.)

Step 6 - If the PROJECT Model returns a negative value, indicating that the defendant will be making a profit at some point during the fifteen-year project period, the Region should carefully consider the project's benefits to public health or the environment as described above. If the benefits are significant despite the profit to the defendant/respondent, the proposed SEP may be

considered as well when determining the acceptability of a proposed project and/or the appropriate mitigation percentage to apply.

⁸ The defendant/respondent should submit this information in writing, and the information should be kept in the case file as part of the record.

⁹ For a small business or small community, a project period of three (3) years may be used. The second-tier project period of fifteen (15) years will be used for all proposed SEPs, including those proposed by small businesses and small communities.

approved, however, the percent of mitigation credit given should reflect the fact that the defendant/respondent receives a financial benefit.

Step 7 - Determine the mitigation percentage: it is inappropriate for SEPs that are profitable (as determined in Step 6) to receive the maximum allowable mitigation credit. When considering the percent of mitigation credit to give, Regions should consider how well the project meets the “high hurdle” criteria as well as the length of time before the project becomes profitable.¹⁰

Regions may wish to give a lower percent mitigation credit for projects that become profitable earlier. OECA recommends a maximum mitigation credit of 80% for pollution prevention SEPs, and a maximum mitigation credit of 60% for all other SEPs.

Step 8 - The percent mitigation should be applied against the SEP’s value as determined by the PROJECT model. This requires the litigation team to enter information about the SEP, including the number of years credited into PROJECT. While the SEP Policy calls for entering the same number of years as the defendant/respondent is obligated to implement the SEP, this will generally not work for profitable SEPs, because the cost of performing the SEP decreases over time as the defendant/respondent recoups expenditures and approaches the profitability point. If, for example, a defendant/respondent is only obligated to implement the SEP for two years, but the SEP will become profitable at some point between five and fifteen years, using a two-year project period would likely place too high a value on the project and result in too high penalty mitigation. The overriding goal should be to use a timeframe that reflects the real cost of the SEP to the defendant/respondent but that takes into account that the SEP will become profitable in the near future. Therefore, we recommend using the value as determined by PROJECT using a five-year project period.¹¹ This is the value generated in Step 2 above.

Step 9 - Maintain written justification for selection or rejection of the proposed project(s) and the rationale behind the selected mitigation percentage for the case file. As part of the justification, the case file should include copies of the relevant PROJECT model runs conducted on each proposed SEP.

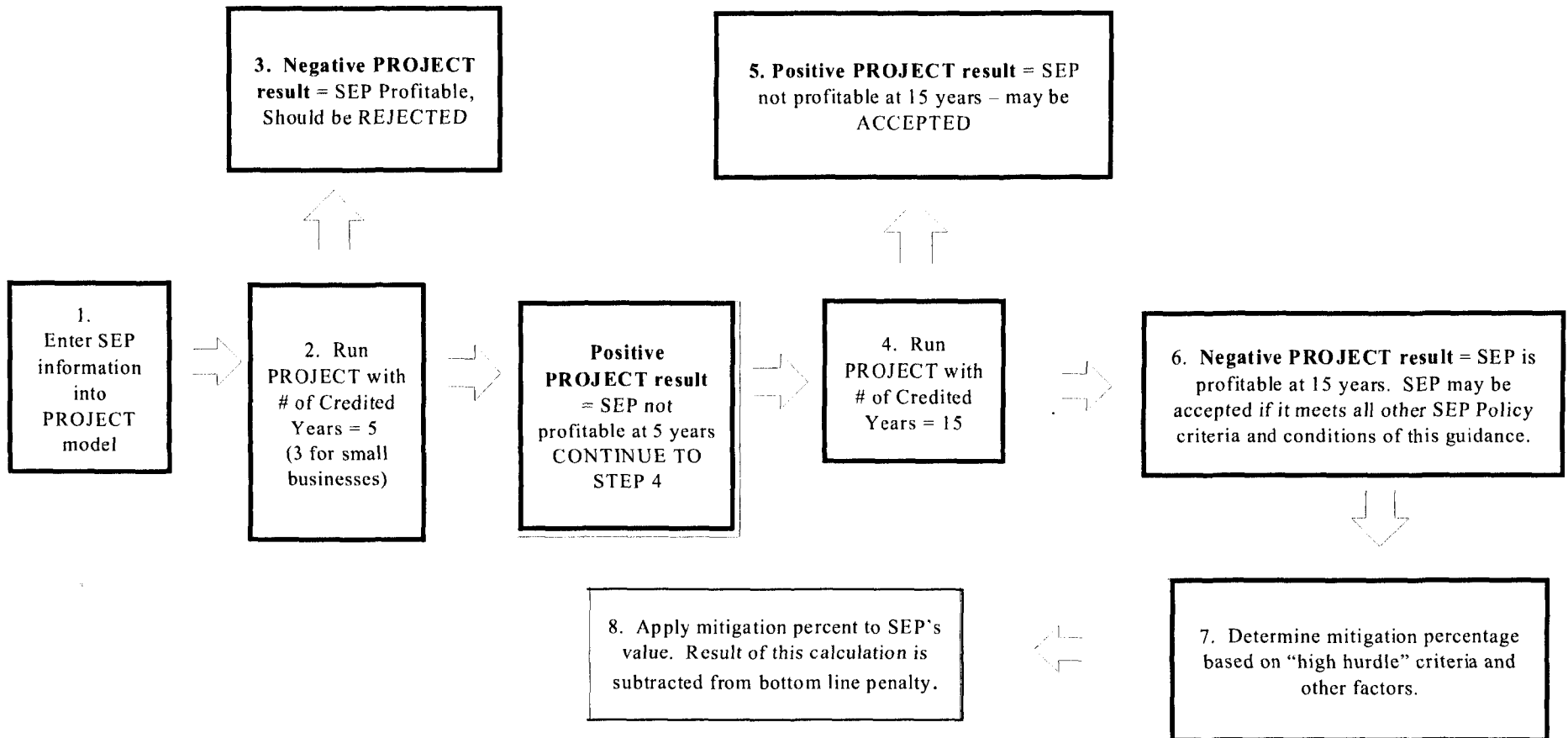
¹⁰ This can be determined by running PROJECT using varying project periods between five and fifteen years.

¹¹ It may also be the case that a defendant/respondent is committed to perform the SEP for more years than it will take for the project to become profitable. If a project is not profitable during the first five years, but becomes profitable later, the PROJECT-generated value will decrease over time and eventually become negative at the point at which the project becomes profitable. For the purposes of penalty mitigation, one cannot assign a percentage mitigation to a negative value. Therefore, we recommend using the PROJECT-generated value for a five-year project period as the value of the SEP for mitigation purposes for projects that will be profitable, unless another period more appropriately captures the costs, as well as the profitability, to the defendant/respondent.

This document is guidance intended for use of the EPA personnel and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. This guidance is not intended to supercede any statutory or regulatory requirements, or EPA policy. Any inconsistencies between this guidance and any statute, regulation, or policy should be resolved in favor of the statutory or regulatory requirement, or policy document, at issue.

Attachment A

**Process Flowchart for Determining Whether a Project is Profitable,
When to Accept Profitable Projects as Supplemental Environmental Projects
and
How to Value Such Projects**





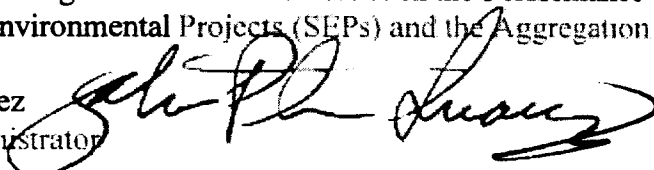
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 15 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds

FROM: John Peter Suarez 
Assistant Administrator

TO: Regional Counsels (Region I-X)
Regional Enforcement Managers (Region I-X)
Regional Media Division Directors (Region I-X)
Regional Enforcement Coordinators (Region I-X)

As part of my June 11, 2003 memorandum "Expanding the Use of Supplemental Environmental Projects," my office committed to issue guidance to assist Agency enforcement staff in encouraging and expanding the use of SEPs in enforcement settlements. Through settlements containing SEPs, we have the opportunity to not only bring regulated entities into compliance, but to secure public health and environmental benefits in addition to those achieved by compliance with applicable laws.

The June 11, 2003 memorandum also challenged enforcement staff to consider every opportunity to include more environmentally significant SEPs wherever possible. In response to that challenge, we have seen an increase in the number of innovative and creative SEP proposals put forward by the Regions. Two frequently asked questions concern the potential for aggregating funds to be used for SEPs into SEP "banks" or escrow accounts, and working with private entities to manage and/or implement SEPs. This memorandum provides guidance on how the Regions should approach these issues to comport with the Miscellaneous Receipts Act (MRA) and appropriations law. While the conditions of the MRA may limit our ability to aggregate SEP funds, this guidance provides suggestions for including SEPs in enforcement settlements in a manner that we believe does not trigger MRA or appropriations concerns. In addition, this guidance contains suggestions on the use of private organizations in implementing SEPs.

I. Aggregation of SEPs

A. Can SEPs Be Aggregated by Defendants/Respondents?

OECA has been asked whether there are circumstances in which EPA can allow defendants/respondents to aggregate SEP funds. Where several defendants/respondents are settling separate cases for similar violations in the same general geographic area and at approximately the same time, the aggregation of SEPs could provide increased leverage and allow for projects with a greater environmental or public health benefit, and could provide an opportunity for defendants/respondents in smaller cases to take advantage of the SEP Policy.

Where Defendants/Respondents Are Jointly and Severally Liable for Performance of Consolidated SEP: The aggregation of SEPs may be acceptable if the settlements are crafted carefully. For instance, defendants/ respondents may propose pooling resources to hire a contractor to manage and/or implement a consolidated SEP. Such an approach could be acceptable if the respondents/defendants remain liable under the settlement agreement to perform the consolidated project in the same manner as they would under a typical settlement. Defendants/respondents are generally held accountable through the inclusion of stipulated penalties should the SEP not be completed as agreed upon.

Performance of Complementary, Segregable SEPs: Another approach that may be acceptable could be a situation where defendants/respondents in separate cases are interested in performing discrete and segregable tasks within a larger project. Such an approach would have to meet the following conditions to address any MRA concerns: (1) each discrete project must have a nexus to the violations at issue in the particular settlements and meets all conditions of the SEP Policy; (2) each discrete project must be itself worthwhile with environmental or public health benefits; and (3) the settlement must hold each defendant/respondent responsible for implementation and completion of a specific portion of the larger project. If the settlements are structured carefully, such an approach can result in a significant environmental or public health benefit that might otherwise be unavailable.

Example 1: A number of defendants/respondents in separate enforcement actions are interested in restoring and conserving a particular piece of property. One defendant/respondent could assume responsibility for acquiring the property and transferring ownership to a third party such as a local municipality or a land trust. A second defendant/respondent could assume responsibility for conducting a stream bank clean up and revegetation project on the property. A third defendant/respondent could take responsibility for re-establishing a fish ladder or other aquatic habitat.

Example 2: Defendants/respondents in separate settlements could develop and deliver compliance and training programs providing training and assistance to a regulated sector in a manner that reaches a significantly greater subset of that sector. For example, defendants/ respondents in separate hazardous waste enforcement cases could develop and present specialized training materials, videos, brochures, etc. relating to hazardous waste management in particular educational areas such as science labs and art schools. Because each compliance

promotion SEP would focus on a different educational area, the aggregation of SEPs in this manner could result in a much greater impact within the regulated community.

Other Considerations: While the aggregation of SEPs under these scenarios could be designed to avoid MRA concerns, in addition to the conditions set forth above, there are other practical limitations which need to be considered. For example, aggregation of SEPs in this manner may require that all settlements be completed at approximately the same time and that defendants/respondents in separate settlements are willing to cooperate with one another, either because they are all responsible for completion of the entire project or because one party's project is dependent on the timely performance by another party of its project, as in the first example above.

Consultation with ORE/SPLD: Regions are encouraged to consult with the Office of Regulatory Enforcement's (ORE) Special Litigation and Projects Division (SLPD)¹ early in the process when considering proposals by defendants/respondents to aggregate or coordinate SEPs in a manner described above.

B. Can EPA Aggregate SEP Funds?

OECA has had several inquiries into the feasibility of establishing SEP "banks" or accounts for pooling the funds applied towards SEPs. Specifically, the question is whether EPA may hold and manage, in one account, SEP funds from several settlements that would otherwise have been used by defendants/respondents for SEP projects in each individual enforcement settlement. While the aggregation of SEP funds may result in a SEP with greater public health or environmental benefits than several smaller funds, we have been advised by OGC that the MRA prohibits EPA from managing SEP funds.

The SEP Policy was written carefully to ensure compliance with the MRA. SEPs are not penalties; they are environmentally beneficial projects not otherwise required by law. The SEP Policy makes clear that defendants/respondents must perform a project and be responsible for its satisfactory completion rather than simply making a cash payment. The SEP policy is based on the premise that where a defendant/respondent performs an environmentally beneficial project, the Agency has the discretion to take the performance of the project into account as a mitigating factor when determining the amount of a penalty that the Agency will agree to as part of an overall settlement. A cash payment, such as a payment or donation to a third party or to a SEP "bank," where there is no further responsibility for the defendant/respondent to ensure that a specific project is completed, is prohibited because it could easily be construed as a diversion from the Treasury of penalties due and owing the government.

There are also constraints within appropriations law that restrict the Agency's ability to establish SEP accounts. Only Congress can appropriate funds for a federal agency. Establishing a SEP account where the Agency manages the funds and determines how they are to be spent

¹ ORE's Multimedia Enforcement Division has been renamed the Special Litigation and Projects Division.

would amount to an augmentation of appropriations. The SEP Policy makes clear that EPA cannot manage or direct SEP funds. See SEP Policy, page 6 at paragraph 3.

II. Management of SEPs and SEP Funds by Private, Third Party Organizations

A. Can Defendants/Respondents Use Private, Third-Party Organizations to Manage SEPs and SEP Funds ?

We are aware that there are private organizations that are developing libraries of projects that might be suitable as SEPs. These groups hold themselves out as clearinghouses for environmental projects, and offer to obtain and manage funds, oversee the projects, and in some cases, charge a fee for their services. Private organizations that are developing libraries of projects and offering project and funds management, project implementation, and oversight services can play a valuable role in SEPs. It is permissible for defendants/respondents in enforcement actions to use a third party as a contractor or consultant to assist in the implementation of a SEP. See SEP Policy, Section F, page 17. An alleged violator could use a private organization to recommend SEPs to it during negotiations with the Agency, and then to manage a SEP, as long as (1) the defendant/respondent is obligated under the settlement document to complete the project satisfactorily, (2) the defendant/respondent fully expends the amount of funds agreed to be spent in performance of the SEP, and (3) the project meets all of the conditions and requirements of the SEP Policy. In other words, this approach is acceptable as long as the transactions with the defendants/respondents are structured such that the organizations are acting as contractual service providers to defendants/respondents as opposed to mere recipients of donated funds.

Cash Donations to Third Parties Are Not Permissible: Defendants/respondents may not simply make a cash payment to a third party conducting a project without retaining full responsibility for the implementation or completion of the project, as this appears to violate the MRA. In the context of an enforcement action, the Office of Legal Counsel (OLG) within the Department of Justice considered whether a defendant's donation of money to an organization designated by the Department of Interior (DOI) violated the MRA. In re: Steuart Transportation Company, 4 Op. Off. Legal Counsel 684 (1980), arose from a settlement of claims the United States and the Commonwealth of Virginia brought against an oil company for a spill in the Chesapeake Bay. Among other things, the federal government sought damages for the death of migratory waterfowl. The settlement terms required the oil company to resolve these claims by donating money to a waterfowl preservation organization designated by DOI and the Commonwealth of Virginia. One argument advanced to OLC by the proponents was that the proposed settlement did not violate the MRA because no money was received for the use of the United States within the meaning of the MRA since the funds did not go directly to DOI.

OLC concluded that the absence of a direct payment to DOI did not remove the transaction from the MRA. "[T]he fact that no cash actually touches the palm of a federal official is irrelevant for the purposes of [the MRA], *if a federal agency could have accepted possession and retains the discretion to direct the use of the money*. The doctrine of

constructive receipt will ignore the form of the transaction in order to get to the substance.” In re: Steuart at 688 (emphasis added).

B. Can EPA Use Private, Third-Party Organizations to Manage SEPs and SEP Funds?

Several private organizations have proposed working with EPA to maintain SEP libraries and provide project implementation and/or management services. This raises some difficult legal issues. First, a close working relationship with such organizations could create the appearance that EPA is using the organization as a means to indirectly manage or direct SEP funds. Second, there are ethical restrictions on endorsing or otherwise providing private organizations with unfair competitive advantages in selling their SEP management and implementation services to defendants/respondents. Based on consultation with OGC, we have concluded that it would be improper for EPA to enter into an agreement with such organizations at either the Headquarters or Regional level.

OGC has advised that Regions could make a list of such organizations available to defendants/respondents as long as the Region does not promote one group over another, has an open and fair process for adding other qualified groups to the list, and maintains a disclaimer making it clear that the list does not constitute an endorsement or recommendation of any of the listed entities.

If you have any questions about this memorandum, please contact Susan O’Keefe at (202) 564-4021, or either Beth Cavalier or Melissa Raack of her staff. Beth can be reached at (202) 564-3271; Melissa can be reached at (202) 564-7039.

cc: OECA Office Directors
ORE and OC Division Directors
SEP Coordinators
DOJ, Environmental Enforcement Section, Projects Group

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 23 2004

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Supplemental Environmental Projects In Administrative Enforcement Matters
Involving Section 1018 Lead-Based Paint Cases

FROM: Thomas V. Skinner *TVS*
Acting Assistant Administrator
Office of Enforcement and Compliance Assurance

TO: Regional Counsel
Regional Enforcement Managers
Regional Lead Program Managers
SEP Coordinators

The purpose of this memorandum is to provide an exception to the minimum penalty requirements of the Supplemental Environmental Projects (SEP) Policy for certain public health SEPs performed pursuant to administrative enforcement settlements under Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, and the regulations promulgated under Section 1018 (known as the Real Estate Notification and Disclosure Rule) apply to most housing built before 1978. The regulations require that:

Sellers and landlords must disclose known lead-based paint and lead-based paint hazards and provide available reports to buyers and renters;

Sellers and landlords must give buyers and renters the pamphlet titled "Protect Your Family from Lead in Your Home";

Home buyers receive a 10-day period to conduct a lead-based paint inspection;

Sales contracts and leasing agreements must include certain notification and disclosure language; and

Sellers, lessors, and real estate agents share responsibility for ensuring compliance.



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Through this memorandum, I am allowing an exception to the minimum penalty requirements of the SEP Policy¹ for Section 1018 administrative settlements only², where such settlements include certain public health SEPs. Specifically, for Section 1018 administrative settlements that include SEPs requiring lead-based paint abatement or blood lead level screening and/or treatment for children where Medicaid coverage is not available, the minimum penalty requirement is reduced from 25% of the gravity-based penalty to 10% of the gravity-based penalty.³ All other conditions of the SEP Policy, including those regarding mitigation credit, must be adhered to.⁴

This exception is being made to address concerns about the potentially significant health impacts, especially to children, that may result from violations of Section 1018. Regional enforcement staff have been working hard to negotiate administrative settlements for Section 1018 violations which include abatement SEPs, but have experienced some difficulties as respondents in these cases are often small businesses or individuals who may not have sufficient resources or the incentive to both perform significant abatement and pay a penalty equal to 25% of gravity. Reducing the minimum penalty will provide a financial incentive for a respondent to perform an abatement or blood-lead level testing SEP while at the same time maintaining the deterrent value of the penalty. OECA is optimistic that the changes outlined above will result in an increased number of SEPs in administrative settlements for Section 1018 violations, and

¹The SEP Policy requires a minimum penalty of 25% of the gravity-based penalty or 10% of the gravity-based penalty plus economic benefit, whichever is greater.

²Since the Residential Lead-Based Paint Hazard Reduction Act does not authorize EPA to seek injunctive relief in administrative enforcement actions, lead abatement work conducted pursuant to an administrative settlement may properly be considered a SEP provided the Region determines, based upon readily available information, that it is unlikely the government could obtain lead-based paint abatement projects as injunctive relief in federal court under the facts of the particular case. When the facts of a case, however, indicate that injunctive relief may be appropriate, the Region should consult with the Department of Justice (DOJ) and, if appropriate, refer the case to DOJ. This memorandum provides guidelines intended to assist the Regions, and does not prohibit the Regions from referring cases for penalties or injunctive relief to DOJ.

³There is generally no economic benefit to the violator from such violations.

⁴Lead-based paint abatement SEPs must be conducted in compliance with EPA regulations set forth at 40 C.F.R. § 745.227, including, but not limited to, the Department of Housing and Urban Development (HUD) Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (June, 1995, as revised in 1997), and executed by individuals certified to perform such work in accordance with the applicable EPA regulations, or where authorized, State law requirements. Following completion of the abatement work, the respondent must have lead clearance testing performed by a certified risk assessor. The abatement work and lead clearance sampling may not be performed by the same individual or entity. Where the Consent Agreement and Final Order (CAFO) calls for lead-based paint inspections or risk-assessments prior to abatement, clearance may be performed by the same individual or entity that conducted the lead-based paint inspections or risk-assessments so long as the individual or entity is certified.

therefore result in fewer incidences of childhood lead poisoning. The exception is permissive not mandatory, and the Regions should make a determination on a case-by-case basis as to whether the exception is appropriate.

OECA believes that it is appropriate to allow this exception for Section 1018 administrative settlements due to the unique combination of factors associated with the communities put at risk by Section 1018 violations and the nature of the violators.

- o Lead-based paint presents a significant hazard to children's health. Abatement is the most direct means to eliminating this hazard.
- o In promulgating Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, at 42 U.S.C. § 4851, Congress found, among other things, that (1) low-level lead poisoning is widespread among American children, afflicting as many as 3,000,000 children under the age of 6; (2) at low levels, lead poisoning in children causes intelligence deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems; and (3) the ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children. Congress further found that most of the poisoned children were from low economic backgrounds and were disproportionately minorities.
- o Many of the children exposed to the hazards of lead-based paint are living in older housing in economically disadvantaged communities, presenting environmental justice concerns. Executive Order 12898 directs each federal agency to make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations.
- o The President's Task Force on Environmental Health Risks and Safety Risks to Children has set a goal of ending childhood lead poisoning by 2010. A major theme voiced recently by the Center for Disease Control (CDC), U.S. Department of Housing and Urban Development (HUD), and EPA at the June, 2004 National Lead and Healthy Homes Grantee Conference in Orlando, Florida was that we can and must focus on the "bad properties" where children are being poisoned and use Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, and the regulations promulgated under Section 1018 (known as the Real Estate Notification and Disclosure Rule), to end the cycle of poisoning children.
- o OECA's FY 2005-2007 NPM guidance explicitly commits the national lead-based paint enforcement program to the 2010 goal. Lead-based paint abatement is the most direct means of achieving this goal.
- o Respondents in Section 1018 cases are typically small businesses and individual owners. In many cases, these respondents do not have the resources to undertake significant abatement work while at the same time paying the penalty called for under the SEP Policy. For these respondents, a smaller civil penalty will still provide necessary deterrence while at the same time encouraging this significant public health SEP.

o OECA's draft Action Plan To Integrate Environmental Justice for FY 2004-2005 specifically mentions EPA's focus on reducing the risks of lead-based paint in low-income communities, which often have a high incidence of childhood blood-lead poisoning associated with older, substandard housing.

o OECA's January 5, 2004 guidance on "Recommended Ideas for SEPs" includes lead-based paint abatement projects as one of the project ideas that have the greatest potential for significant and measurable environmental and/or public health benefits.

OECA believes that the proposal to provide an exception to the SEP Policy for Section 1018 cases, as set forth above, provides significant health benefits and is an important step towards meeting the goal of ending childhood lead poisoning by 2010.

If you have any questions about Section 1018 administrative enforcement settlements, please contact Stephanie Brown, Associate Director, Toxics and Pesticides Enforcement Division at (202) 564-2596. Questions about the SEP Policy in general, or this memorandum in particular, may be addressed to Susan O'Keefe, Associate Director, Special Litigation and Projects Division at (202) 564-4021, or to Beth Cavalier or Melissa Raack. Beth can be reached at (202) 564-3271. Melissa can be reached at (202) 564-7039.

cc: Walker B. Smith, Director
Office of Regulatory Enforcement

Randolph L. Hill, Deputy Director
Office of Regulatory Enforcement

Ann Pontius, Director
Toxics and Pesticides Enforcement Division

Stepanie Brown, Associate Director
Toxics and Pesticides Enforcement Division

Robert Kaplan, Director
Special Litigation and Projects Division

Susan O'Keefe, Associate Director
Special Litigation and Projects Division

Bruce Gelber, Chief
Environmental Enforcement Section
US Department of Justice

Karen Dworkin, Assistant Chief
Environmental Enforcement Section
US Department of Justice



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 21 2005

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Reminder That Waiver is Required for Supplemental Environmental Projects Not Meeting All Conditions of SEP Policy

FROM: Walker B. Smith, Director *WBS*
Office of Civil Enforcement

TO: Regional Counsel, I-X
Enforcement Division Director, I-X
Division Directors, OCE

The purpose of this memorandum is to remind Headquarters and Regional enforcement staff that if they want to receive SEP credit at the end of the fiscal year for a project, absent a waiver, the project must meet the conditions of the May 1998 SEP policy. Enforcement staff must include information in the Agency's enforcement case file that shows the project meets the SEP Policy, and document how the final penalty amount meets the minimum penalty requirements of the SEP Policy.

If a project does not meet the conditions of the SEP Policy and a Region or Headquarters wants to claim SEP credit for that project, the Region or Headquarters division managing the case must obtain a waiver of such SEP Policy conditions. The waiver must be approved by the Assistant Administrator of OECA prior to the settlement being finalized. The most common instances in which a waiver is required are 1) when the settlement does not comport with the SEP Policy's minimum civil penalty requirements¹ (the greater of 25% gravity or 10% gravity plus economic benefit); and 2) when the mitigation credit for the SEP exceeds the maximum allowable amount (generally 80%).² In no event can the nexus requirement of the SEP Policy be

¹ For example, in the event of a global settlement, such as those negotiated for refineries and utility cases, strict adherence to the SEP Policy's minimum penalty amounts may not be feasible.

² In addition, enforcement staff are reminded that, as a condition of the SEP Policy, projects falling into the "Compliance Promotion" or "Other" SEP categories must receive prior

waived. If a project does not satisfy the SEP Policy conditions and a waiver of the SEP Policy has not been granted by the AA/OECA, the project should be entered as injunctive relief for end-of-year reporting purposes.

Should you have any questions on this matter, or the SEP Policy in general, please contact the Headquarters SEP Policy contacts, Beth Cavalier (202-564-3271) or Melissa Raack (202-564-7039). For questions about SEPs arising in federal facility cases, please contact Melanie Garvey (202-564-2579). For questions about SEPs arising in site remediation cases (e.g., ones arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Section 3008(h) of the Resource Conservation and Recovery Act (RCRA)), please contact Michael Northridge (202-564-4263).

cc: K. Dworkin, USDOJ
Enforcement Coordinators, I-X
SEP Coordinators, I-X and HQ
M. Stahl, OC
D. Hindin, OC
B. Smidinger, OC
David Kling, FFEO
Bernadette Rappold, FFEO
Susan Bromm, OSRE
Paul Connor, OSRE

HQ approval. See July 21, 1998 memorandum, "*Revised Approval Procedures for Supplemental Environmental Projects.*"



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV - 4 2005

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Clean Water Act Municipal Settlements and Supplemental Environmental Projects (SEPs)

TO: Water Protection/Management Division Directors, Regions I-X
Director, Office of Environmental Stewardship, Region I
Director, Division of Environmental Protection and Planning, Region II
Enforcement and Compliance Assistance Directors, Regions II, VI, and VIII
Water, Wetlands, and Pesticides Division Director, Region VII
Regional Counsels, Regions I-X
Regional Enforcement Coordinators, Regions I-X
NPDES Branch Chiefs, Regions I-X

FROM: Mark Pollins, Director
Water Enforcement Division
Office of Civil Enforcement

Robert Kaplan, Director
Special Litigation and Projects Division
Office of Civil Enforcement

A handwritten signature in black ink, which appears to read "Robert A. Kaplan", is written over the typed name of Robert Kaplan.

The purpose of this memorandum is twofold. First, we are providing an explanation of Footnote 13 of the May 1998 Supplemental Environmental Projects (SEP) Policy, which addresses the interaction between the February 28, 1995 Revised Interim Clean Water Act (CWA) Settlement Penalty Policy (CWA Penalty Policy) and the SEP Policy and clarifies when to use the CWA Penalty Policy instead of the SEP Policy.¹ Second, this memorandum will discuss Federal settlements under the CWA where a State is a co-plaintiff and the State accepts an environmental project as its share of the settlement.

¹ This memorandum supercedes the previously issued "Clarification of Interaction Between 1995 Clean Water Act Interim Settlement Policy and the 1998 Supplemental Environmental Project Policy," dated March 22, 2002.

I. Clarification of Footnote 13 of SEP Policy

Footnote 13 in the 1998 SEP Policy states that “[p]ursuant to the February 1995 Revised Interim CWA Settlement Policy, section V, a smaller minimum penalty amount may be allowed for a municipality.” This footnote was intended to clarify that, for purposes of settling CWA cases with municipalities or other public entities (such as a sewer authority), Regional and Headquarters enforcement staff should follow the CWA Penalty Policy when determining the appropriate balance between the penalty and any SEPs.

The SEP Policy and the CWA Penalty Policy each provide for minimum penalty amounts in cases including a SEP. The SEP Policy requires a penalty of at least 25% of the gravity-based component or 10% of the gravity plus the economic benefit, whichever is greater. The CWA Penalty Policy has minimum penalty requirements for municipal cases as described below.

In enforcement cases where a municipality has failed to comply with the CWA but is making a good faith effort to return to compliance, EPA may calculate the penalty using the CWA Penalty Policy’s National Municipal Litigation Consideration (NMLC) tables.² The NMLC tables are discretionary in municipal cases. The NMLC tables consider both the gravity-based variables and economic benefit incurred for violations in municipal cases as well as other factors such as the size of the municipality. The practical impact of these tables is to substantially reduce the required penalty in a municipal CWA case.

In addition to the substantial penalty reduction afforded by the NMLC tables, the CWA Penalty Policy further provides that the “penalty amount established by the tables may be reduced by up to 40 percent for appropriate supplemental environmental projects.”³ This means that, at a minimum, 60% of the final value calculated using the NMLC tables must be assessed as the penalty,⁴ and no more than 40% of the penalty amount provided for by the NMLC tables may be mitigated by performance of an appropriate SEP.⁵ The selected project(s) must meet all other

² CWA Penalty Policy at p. 7-20.

³ CWA Penalty Policy at p. 17.

⁴ For example, if the NMLC generates a preliminary figure of \$1,000,000, the settlement must include a penalty of at least \$600,000. The remaining amount of \$400,000 may be mitigated with SEPs, provided those SEPs comply with EPA’s SEP Policy.

⁵ There may be unique circumstances that necessitate deviating from the 60% minimum penalty when a particular municipality agrees to conduct a SEP as part of a CWA settlement and where the NMLC is used to calculate the penalty. In such situations, a waiver of the CWA Penalty Policy’s minimum penalty requirements must be obtained from the Assistant Administrator for Enforcement and Compliance Assurance. (See SEP Policy at p. 20.)

requirements of the 1998 SEP Policy.⁶ Where the NMLC tables are not used to calculate the penalty in a CWA municipal case, the SEP Policy minimum penalty requirements should be followed.

II. Federal Municipal CWA Settlements Where the State is a Co-Plaintiff

For CWA settlements cases where the state is a co-plaintiff, the state may designate that its share of the penalty be used in any way permitted under state law. If state law allows penalties to be applied to certain projects or funds, the state penalty can be so applied and shall conform to all requirements of the state penalty provisions.

If the state penalty will be applied towards a project or fund, the federal consent decree should include a description of how the penalty will be used. The term "penalty" should be used in federal consent decrees for state penalties even when they are dedicated to projects or funds pursuant to state law. For example:

"Within 60 days after the Date of Entry of this Consent Decree, the City shall pay a total civil penalty in the amount of \$_____. The City shall pay the United States \$_____ and make payment of this amount by tendering a check payable to the "Treasurer, United States of America" and sending it to _____. The City shall pay the State a civil penalty of \$_____. Payment of such penalty shall be paid to X state fund (or other arrangement as authorized by state law.")

Should you have any questions regarding this matter, please contact Cassandra Rice, Water Enforcement Division at (202) 564-4057. For questions relating to the SEP Policy in general, please contact Beth Cavalier, Special Litigation and Projects Division (SLPD) at (202) 564-3271 or Melissa Raack, also of SLPD, at (202) 564-7039.

cc: SEP Regional and HQ Coordinators
Karen Dworkin, DOJ
Susan O'Keefe, SLPD
Beth Cavalier, SLPD
Melissa Raack, SLPD
Cassandra Rice, WED
Susan Lepow, OGC
Richard Witt, OGC
Jim Drummond, OGC

⁶ CWA Penalty Policy at p. 22.

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**SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY
FREQUENTLY ASKED QUESTIONS**

September 2006

Q1. *Is the 1998 SEP Policy still in effect?*

A. Yes, the 1998 SEP Policy is still in effect. There have been several supplemental guidance and implementation memoranda issued since then. These documents can be found on EPA's SEP web page, www.epa.gov/compliance/civil/seps/, and can be found in the SEP User's Guide. The SEP User's Guide is a helpful resource tool that includes each of the above documents, as well as a short summary of each document.

Q2. *What is nexus? Why is a nexus required and can the nexus requirement be waived?*

A. Nexus refers to the connection or link between the violation(s) being enforced and the proposed project. The requirement for nexus cannot be waived. Nexus provides the basis for the Agency's exercise of enforcement discretion in taking the SEP into account as a mitigating factor when determining the appropriate penalty that the Agency will agree to as part of an overall settlement. (See Tab 5, *Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy.*)

Q3. *To what extent are SEPs acceptable where they address a different medium from that in which the violation occurred, or address a pollutant different from the pollutant subject to the violation at issue?*

A. Where an appropriate nexus can be established, SEPs may be acceptable where they address a medium different from that in which the violation occurred, or address a different pollutant. Examples of how nexus may be established in such instances include, but are not limited to: (1) where the SEP addresses adverse impacts to environmental media that are related to the underlying violation occurring in another medium (e.g., where Clean Air Act violations contributed to water quality or aquatic ecosystem impacts through deposition in the water and

the SEP is designed to address those water quality or aquatic ecosystem impacts); and (2) where the pollutant(s) addressed by the SEP and the pollutants involved in the violation both contribute to the same adverse health impacts (e.g., two air pollutants that both contribute to childhood asthma).

Q4. *In settlements with state co-plaintiffs, where both sovereigns recover a civil penalty, must the U.S. penalty, after mitigation for a SEP, by itself reflect the minimum penalty requirements of the SEP Policy?*

A. No. It is sufficient that the entire civil penalty collected by both sovereigns together meets the minimum penalty requirements of the SEP Policy. This is true even if the Consent Decree directs the state penalty to a state fund other than the state Treasury or provides that it be used for a project (provided these are permissible alternatives under state law). The important factor is that the total amount identified in the settlement agreement as a civil penalty equal or exceed the minimum amounts required under the SEP Policy.

It follows that if the state mitigates its portion of the civil penalty with a state SEP, then only the amount that is a civil penalty can be considered in determining whether the total federal/state penalty meets the minimum requirements in the SEP Policy. SEPs are not penalties, and the amount to be expended on a federal or state SEP must not be counted in determining whether the minimum penalty amount has been met.

If the total does not meet the minimum penalty amount required by the SEP Policy, then a waiver of this requirement of the SEP Policy must be sought from the Assistant Administrator, Office of Enforcement and Compliance Assurance. (See Tab 13, *Reminder That Waiver is Required for Supplemental Environmental Projects Not Meeting All Conditions of SEP Policy*.)

Q5. *The SEP Policy provides that "[a] project may not provide a federal grantee with additional funds to perform a specific task identified within an assistance agreement." (See Tab 1, EPA Supplemental Environmental Projects Policy, page 7.) EPA and other federal agencies receive a significant amount of funding for, and have in place a number of grant programs. How can we ensure that a SEP does not run afoul of this prohibition?*

- A. EPA staff must ensure that a SEP is not the same project as that being done by a party under a federal grant. This may be done by reviewing the Request for Proposal of the grant to determine its purpose and scope, reviewing the grant application that was filed by the grantee to determine precisely what work is being done, and/or consulting with the program office responsible for administering the federal grant program. While the SEP Policy precludes a SEP that provides a grantee with additional resources to perform a specific task identified within an assistance agreement, the SEP Policy does not preclude all SEPs related to a program for which EPA has provided some grant funding. On the other hand, EPA staff must still ensure that the project does not run afoul of any other restriction designed to prevent augmentation of appropriations.

Q6. *Can a defendant/respondent use a third party to develop and/or implement a SEP?*

- A. Yes, a defendant/respondent can retain a third party to develop and/or implement a SEP. The defendant/respondent, however, must remain responsible for the satisfactory completion of the SEP. At a minimum, the defendant/respondent must submit a SEP completion report and, if the SEP is not completed as anticipated in the settlement, must pay stipulated penalties. (See Tab 11, *Guidance Concerning the Use of Third Parties in the Performance of SEPs and the Aggregation of SEP Funds*.)

Q7. *Can a defendant/respondent perform a SEP by giving funds to someone else (e.g., a state agency or charity) and let that entity perform the environmental project?*

- A. No. A defendant/respondent cannot make a charitable contribution to someone else to satisfy its obligation under a SEP. See Question 8—concerning use of a third party for further guidance. (See also Tab 11, *Guidance Concerning the Use of Third Parties in the Performance of SEPs and the Aggregation of SEP Funds*.)

Q8. *Can a defendant/respondent perform a SEP to offset stipulated penalties?*

- A. Generally no. However, the SEP Policy's Footnote 1 states that, in extraordinary circumstances, the Assistant Administrator of OECA may grant an exception, where the circumstances can meet the three conditions in Footnote 1. (See Tab 1, *EPA Supplemental Environmental Projects Policy*, page 1.)

Q9. *Do I need to get approval for SEPs?*

- A.** Two categories of projects require approval from OECA. These projects are "Compliance Promotion" SEPs and "Other" SEPs. These types of projects need approval from the appropriate office in OECA that corresponds to the violation at issue, i.e., a RCRA compliance promotion SEP needs to be approved by the OCE RCRA Enforcement Division Director. For cases involving federal facilities or site remediation, the Director, Federal Facilities Enforcement Office (FFEO) and the Director, Office of Site Remediation Enforcement (OSRE) have the authority to approve compliance promotion SEPs and SEPs falling into the "Other" category respectively. (See Tab 2, *Revised Approval Procedures for Supplemental Environmental Projects*.)

Q10. *Is there a SEP Library? Where can I go for project ideas?*

- A.** EPA does not have a central SEP library. However, ideas for projects can be obtained in several ways. First, there is a list of general project ideas on the SEP policy and guidance webpage at <http://cfpub.epa.gov/compliance/resources/policies/civil/seps/>. Second, we now have access through the Enforcement Compliance History Online system (ECHO) to SEPs that have been part of enforcement settlements. Enforcement staff can search through ECHO to find SEPs by simply entering information such as, project type, dates, or dollar amounts into a search screen. This system is accessible on the web at www.epa.gov/echo. In addition, some Regional offices have developed SEP libraries.

Q11. *Can a SEP be profitable to a defendant/respondent?*

- A.** Projects that are profitable within the first five years (or within the first three years if the defendant/respondent is a small business) are never acceptable. Projects that are profitable between five and fifteen years must be scrutinized based on a number of considerations set forth in EPA guidance. (See Tab 10, *Guidance for Determining Whether a Project is Profitable and When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects*.)

Q12. *Can a defendant/respondent perform and implement an Environmental Management System (EMS) as a SEP?*

- A. When the defendant/respondent is a small business, non-profit, or state entity, an EMS may be acceptable as a SEP. However, EMSs as SEPs are generally not allowable for large businesses and prior Headquarters approval is required. (See Tab 8, *Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects.*)
- Q13. *Can a Federal facility perform and implement an Environmental Management System (EMS) as a SEP?*
- A. "Appropriate federal facilities" are required by Executive Order to develop EMSs. Consequently, in considering an EMS as a SEP in resolution of a penalty action against a federal facility, EPA Regions should remain mindful of the fundamental SEP principle that SEPs must go beyond what is otherwise required and should consult closely with FFEO.
- Q14. *Can a private sector defendant/respondent perform a SEP that involves satisfying an environmental obligation of a federal agency at a facility currently owned or operated by the Federal Government?*
- A. No. Section C. 5.a. of the April 10, 1998 SEP policy precludes SEPs that will be used to satisfy a federal agency's statutory obligation to perform a particular activity.
- Q15. *May settlement agreements allow for dispute resolution of any SEP issues?*
- A. The 1998 SEP Policy discouraged dispute resolution for any issues relating to SEPs. However, OECA, in consultation with DOJ, has determined that dispute resolution is allowable in two instances only: (1) satisfactory performance of the SEP, and (2) determination of eligible costs.
- Q16. *Does a SEP have to be performed within a 50 mile radius of the site of the violation?*
- A. Not necessarily. The SEP Policy includes Footnote 5 in the discussion of Legal Guidelines, specifically the nexus requirement. This footnote states that "[t]he immediate geographic area will generally be the area within a 50 mile radius of the site on which the violations occurred. Ecosystem or geographic proximity is not by itself a sufficient basis for nexus; a project must always satisfy

subparagraph a, b, or c in the definition of nexus. In some cases, a project may be performed at a facility or site not owned by the defendant/respondent."

While SEPs which benefit the community impacted or potentially impacted by the violation are preferred, there may be cases in which a SEP may be performed at a distance greater than a 50 mile radius. If a project meets all conditions of the SEP Policy, including the nexus requirement, such a project can be performed as a SEP. For example: a violator has had an oil spill into a particular stream. Cleanup of the spill and other remedial actions are taken as part of the injunctive relief. At some distance from the site of the violation (e.g., more than 50 miles), the stream has suffered from severe degradation of the shoreline and the violator proposes restoration activities including stabilization of the streambank, removal of invasive species and revegetation with native species. This may be an acceptable SEP.

Q17. *Are the costs associated with implementation of a SEP tax deductible? Should defendants/respondents be required to certify that they will not deduct the costs associated with a SEP?*

A. Although the Internal Revenue Service has indicated that it believes certain SEP costs may be non-deductible, it has not issued official guidance on the deductibility of SEP costs.

In any event, it is inappropriate for EPA to give tax advice. Therefore, in determining the value of the SEP using EPA's PROJECT model, the defendant/respondent should be asked whether it intends to deduct SEP costs. The PROJECT model will generate a higher value for a project where the project has been flagged as non-deductible. It is recommended that, when a defendant/respondent states that it does not intend to deduct the cost of the SEP, language to that effect should be included in the consent decree or consent agreement.

Q18. *Can SEPs fulfill a third party's legal obligation?*

A. While the SEP Policy does not directly address this issue, it is generally inappropriate for a SEP to be used to meet the legal obligations of a third party. The purpose of the SEP Policy is to "encourage and obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by this Policy." (See Tab 1, *EPA Supplemental Environmental Projects Policy*, page 1.) Where EPA could obtain the same protections and improvements by pursuing the responsible party, this

purpose is not being served. Any exceptions to this limitation must be obtained in advance from the Director of the Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, and in cases involving federal facilities or site remediation, the Director, FFEO and the Director, OSRE, respectively

Q19. *Can a defendant/respondent begin implementing a SEP before the settlement becomes a final order? May EPA agree to a SEP that a defendant/respondent began before the government agreed to accept the project as a SEP?*

A. Sometimes, after the parties reach agreement on a SEP, there is a significant time between that agreement and issuance of a final order. This could occur for various reasons, including delays in negotiating other aspects of the agreement, or in obtaining final court or administrative approval. Defendants/respondents sometimes ask to start the SEP before the agreement becomes final. Allowing a defendant/respondent to begin implementing a SEP prior to the final order being issued is generally disfavored for a variety of reasons, including that it may take away an incentive to conclude the agreement, and in cases subject to public comment, it could create the misimpression that the government would not revisit the appropriateness of the SEP in light of public comment. However, there may be unique circumstances which make it necessary for a defendant/respondent to begin implementation early. In such cases, prior approval should be sought from Headquarters (and DOJ in judicial cases). In cases where it is allowed, it must be made clear to the defendant/respondent that defendant/respondent begins implementation at its own risk, as the SEP may be contested during public comment or disallowed by the court or judicial officer.

EPA is also sometimes asked to agree to accept as a SEP a project that a defendant/respondent began after being notified of the violation but before the government agreed to the project as a SEP. This is generally not appropriate. The SEP Policy requires that EPA have the opportunity to help shape the scope of the project. This will rarely be the case with projects begun before the parties agreed on the project as a SEP. In addition, the SEP Policy provides that the primary purpose of the policy is to obtain environmental or public health benefits that may not have occurred "but for" the settlement. Where a defendant/respondent begins a project before there is any agreement by the government to accept that project as a SEP, it is likely that the project will not meet this purpose.

July 2002

Quick Guide to Using the Project Model

There are two main data entry screens that will require input. The first screen asks general information such as case name, Region, analyst (see Attachment A).

The following additional information is required as well:

Entity Type - Usually a C-Corporation (filing IRS Form 1120 or Form 1120 A) - PROJECT defaults to this, however could also be Not-for-Profit or For Profit Other Than C- Corporation. Not for profit entities would include governmental entities, universities, not for profit hospitals, etc. For Profit Other Than C-Corporation covers S-Corporations (filing IRS Form 1120-S), Partnerships (filing IRS Form 1065) and Individuals (filing IRS Forms 1040, 1040 A and 1040 EZ). This last category is for entities that pay taxes at individual rates. Even though they are businesses and their income is reported on their corporate/partnership return, their incomes are taxed at individual rates.)

State - this is the state in which the violating facility is located, not necessarily the state in which they are incorporated. Selecting the state will bring up the appropriate tax rates.

Taxes - PROJECT has state-specific tax rates built in. Select the appropriate state and the tax rates are filled in for you. If a SEP involves multiple states, you may select AVG in place of a specific state. AVG gives an average of all state tax rates

If you believe that you have information supporting the use of tax rates different from that supplied by PROJECT, please contact the enforcement economics toll free hotline for assistance - 888-326-6778.

Penalty Payment Date - This is the date when the violator actually hands over the check, not necessarily the date of the settlement.

After you have filled in the general information, you will need to create a New Run. A "run" is the analysis that PROJECT will do for you. Give your "run" a name and type it in the field titled "New Run." Click on Add.

Highlight your run and click Enter/Edit. This will bring up the Run Input Screen. (See attachment B) You will be asked to input the following data:

Capital Investment - includes depreciable investments necessary to implement the SEP. This category includes items that wear out such as buildings, equipment, and other long-lived assests..

***Note: LAND IS NOT A DEPRECIABLE CAPITAL INVESTMENT.**

One time, Nondepreciable Expenditures - includes any one-time costs necessary to implement the SEP that do not involve capital expenditures. Such costs could be for materials or labor needed to start up the project, for purchasing land, or for engineering, financial or other services that are purchased as part of the project. Examples of one-time nondepreciable costs associated with SEP's include developing a training program, disposing of hazardous materials, dredging a stream, conducting a pollution prevention assessment and purchasing or restoring a wetland. If such expenditures must occur over time and regularly, rather than as a one-time instance, then input these costs instead as an annual recurring cost. (For example, if the project involves dredging a stream for four years at \$100,000 a year, your entry would be \$100,000 as an annual recurring cost.)

NOTE: IRS considers the labor and material costs associated with the construction or installation of a capital investment to be capital costs, not one time depreciable costs.

Tax Deductible - PROJECT assumes that the cost of the SEP will be deducted by the Respondent/Defendant. Unless the Respondent/Defendant is willing to certify that they will NOT deduct the SEP, this box should be checked.

** NOTE: Regarding land purchases - if the one time expense is for a land purchase, the tax deductible box should be unchecked. The reason for this is that the IRS does not allow any deductions for the cost of land.*

Annually Recurring Costs - includes costs associated with the on-going implementation of the SEP. This includes items such as labor, power, raw materials, supplies, waste disposal, lease payments, and property taxes. It DOES NOT include annualized capital recovery, interest payments, or depreciation.

**NOTE That Annual Cost may be a negative number to reflect net cost savings associated with the implementation of the project.*

Cost Estimate Dates - all costs require the entry of an estimate date. This is the **date on which the SEP estimate is based**. If you know the exact date (provided by the respondent/defendant in a memo or email, or in a phone call) you should enter that date. If you only know that the estimate was made in a particular month, use the first day of that month.

Inflation Rate - PROJECT will put this in for you. For a detailed discussion, see the PROJECT User's Manual. If you feel you want to use a rate different from the PROJECT default value, please contact the hotline at 888-326-6778.

Number of Credited Years - This should correspond to the number of years that the respondent/defendant is legally required to operate the project.

** NOTE THAT FOR PROJECTS WITH A NEGATIVE ANNUAL OPERATING EXPENSE FIGURE, A SLIGHTLY DIFFERENT PROCEDURE MAY APPLY IN THE FUTURE.*

Project Operation Date - This is the date on which the project will begin operation - generally when all capital investments and one-time expenses have been incurred. If the SEP involves only annual expenses (or the vast majority of the expenses are annual) then you should use the date the defendant begins incurring the annual expenses as the Project Operation Date.

Discount Rate - again, this is calculated by PROJECT. If you have questions or want to use a different rate, please contact the hotline at 888-326-6778.

Getting the Result: Once you have finished entering the data, click on OK. Highlight your run and click on Calculate. PROJECT will provide a summary sheet of the calculations and the final result. (see attachment C)

PROJECT RESULTS - The value that results from a PROJECT run is a reasonable estimate of the net present after-tax cost of the proposed SEP. It is this figure that should be used as the value of the proposed SEP, and it is from this figure that penalty mitigation consideration should be applied. A negative PROJECT result indicates that the proposed SEP will be profitable to the defendant. Should this result occur, please contact HQ for further guidance.

QUESTIONS: For questions about PROJECT, using PROJECT, or PROJECT results please use the help system in model by typing the F1 key or accessing the Help menu at the top of the screen. If that is insufficient, please contact the enforcement economics hotline at 888-326-6778, Jonathan Libber at 202-564-6102. Melissa Raack at 202-564-7039 or Beth Cavalier at 202-564-3271.

c

MODEL SEP CAFO

Explanatory text is indicated in bracketed *italics* type, preceded by the word *Note*. Placeholder text in which fact specific information should be inserted is indicated in bracketed **bold** text.

January 1999

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION ____
BEFORE THE ADMINISTRATOR**

In the Matter of)
)
[Respondent's Name]) Docket No.
[Respondent's Address])
)
Respondent.)

CONSENT AGREEMENT AND ORDER

Complainant, the United States Environmental Protection Agency ("EPA"), having filed the Complaint herein on [date] against Respondent [Respondent's Name]; and

Complainant and Respondent having agreed that settlement of this matter is in the public interest, and that entry of this Consent Agreement and Order without further litigation is the most appropriate means of resolving this matter;

NOW, THEREFORE, before the taking of any testimony, upon the pleadings, without adjudication of any issue of fact or law, and upon consent and agreement of the Parties, it is hereby Ordered and Adjudged as follows:

I. PRELIMINARY STATEMENT

1. EPA initiated this proceeding for the assessment of a civil penalty, pursuant to [statute and regulations].

2. The Complaint alleges that Respondent [describe conduct] in violation of [relevant legal requirements].

3. Respondent filed an Answer and requested a hearing pursuant to [statute and regulations].

4. This Consent Agreement and Order shall apply to and be binding upon Respondent, its officers, directors, employees, successors and assigns, including, but not limited to, subsequent purchasers.

5. Respondent stipulates that EPA has jurisdiction over the subject matter alleged in the Complaint and that the Complaint states a claim upon which relief can be granted against Respondent. Respondent waives any defenses it might have as to jurisdiction and venue, and,

1 without admitting or denying the factual allegations contained in the Complaint, consents to the
2 terms of this Consent Agreement and Order.

3 6. Respondent hereby waives its right to a judicial or administrative hearing or appeal on
4 any issue of law or fact set forth in the Complaint.

5 **II. TERMS OF SETTLEMENT**

6 7. Pursuant to § ___ of [statute], the nature of the violations, Respondent's agreement to
7 perform a Supplemental Environmental Project (SEP) and other relevant factors, EPA has
8 determined that an appropriate civil penalty to settle this action is in the amount of
9 [_____ dollars (\$_____)].

10 *[Note: In order to avoid conflicts with the Miscellaneous Receipts Act, the civil*
11 *penalty provisions must be drafted separately from the provisions for*
12 *implementation of the SEP.]*

13 8. Respondent consents to the issuance of this Consent Agreement and consents for the
14 purposes of settlement to the payment of the civil penalty cited in the foregoing paragraph and to
15 the performance of the Supplemental Environmental Project.

16 *[Note: Remember that the Respondent must consent to the issuance of the Final*
17 *Order and the performance of the SEP]*

18 9. Not more than thirty (30) days after the date of issuance of the executed Consent Order
19 signed by the EPA Regional Administrator, Region __, Respondent shall submit a cashier's or
20 certified check, payable to the order of the "Treasurer, United States of America," in the amount
21 of [_____ dollars (\$_____)], to:

22 EPA -- Region __
23 P.O. Lock Box _____
24 [address]

25 Respondent shall provide a copy of the check to:

26 Regional Hearing Clerk
27 [Regional Address] and
28 [Attorney Name and Address]

29 The check shall bear the case docket number. Interest and late charges shall be paid as specified
30 in Paragraph 21 herein.

31 10. The penalty specified in Paragraph 7, above, shall represent civil penalties assessed
32 by EPA and shall not be deductible for purposes of Federal taxes.

33 **11. [Description of the SEP]**

34 a. Respondent shall complete the following supplemental environmental project
35 ("SEP"), which the parties agree is intended to secure significant environmental or public health
36 protection and improvements. Not more than (30) days after receiving a copy of this Consent
37 Agreement signed by the Regional Administrator, Respondent shall [brief description of SEP].

38 b. Respondent shall complete the SEP as follows: [Identify key components of the
39 SEP]. The SEP is more specifically described in the scope of work (hereinafter, the "Scope of
40 Work"), attached hereto as Exhibit A and incorporated herein by reference.

1 *[Note: a milestone schedule may be appropriate if implementation will take*
2 *longer than 6 months].*

3 *[Note: Ensure that the description of the project to be performed is clear,*
4 *complete and specific. Almost all the details of the project should be set forth in*
5 *the CAFO or scope of work; negotiations over the type and scope of the SEP*
6 *must be completed prior to finalization of the CAFO.]*

7 **[If applicable] 12. [New chemical not more toxic than eliminated chemical]**
8 Respondent anticipates that the facility will use **[new chemical]** as a substitute for **[eliminated**
9 **chemical]** in the new systems constituting the SEP. In no event, however, shall any substitute
10 chemical be used in connection with the SEP which is more toxic or hazardous than **[eliminated**
11 **chemical]**, as such characteristics are described on the material safety data sheet (MSDS) for
12 **[new chemical]** attached hereto as Exhibit B.]

13 **13. [Cost of SEP]** The total expenditure for the SEP shall be not less than **[e.g., \$x to**
14 **purchase the equipment and \$y to operate the equipment each year for z years]**, in
15 accordance with the specifications set forth in the Scope of Work. Respondent shall include
16 documentation of the expenditures made in connection with the SEP as part of the SEP
17 Completion Report.

18 **14. [Certifications that SEP is not otherwise required]** Respondent hereby certifies
19 that, as of the date of this Consent Agreement, Respondent is not required to perform or develop
20 the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or
21 develop the SEP by any other agreement, grant or as injunctive relief in this or any other case.
22 Respondent further certifies that it has not received, and is not presently negotiating to receive,
23 credit in any other enforcement action for the SEP.

24 *[Note: This language emphasizes that the SEP is not required by any other law*
25 *(federal, state or local); nor is it required by any other agreement, grant or as*
26 *injunctive relief in the instant or any other case. In addition, the language*
27 *precludes Respondent from attempting to obtain double credit for the same*
28 *project. Also, Respondent cannot be allowed to "bank" projects (i.e., Respondent*
29 *is not to be given credit for projects it has already commenced or completed in*
30 *advance of the enforcement action by EPA.)]*

31 **15. [SEP Reports]**

32 a. **SEP Completion Report** Respondent shall submit a SEP Completion Report to
33 EPA by **[date]**. The SEP (*Completion*) Report shall contain the following information:

- 34 (i) A detailed description of the SEP as implemented;
35 (ii) A description of any operating problems encountered and the solutions thereto;
36 (iii) Itemized costs;
37 (iv) Certification that the SEP has been fully implemented pursuant to the provisions
38 of this Consent Agreement and Order; and
39 (v) A description of the environmental and public health benefits resulting from
40 implementation of the SEP (with a quantification of the benefits and pollutant
41 reductions, if feasible).

1 b. **Periodic Reports** Respondent shall submit any additional reports required by the
2 Scope of Work to EPA in accordance with the schedule and requirements recited therein. *(Note:*
3 *For any SEP where implementation is expected to exceed one year, EPA should require*
4 *submission of periodic reports by Respondent).*

5 c. Respondent agrees that failure to submit the SEP Completion Report or any
6 Periodic Report required by subsections a) and b) above shall be deemed a violation of this
7 Consent Agreement and Order and Respondent shall become liable for stipulated penalties
8 pursuant to paragraph 20 below.

9 d. Respondent shall submit all notices and reports required by this Consent Agreement
10 and Order to **[specify name and address]** by first class mail.

11 e. In itemizing its costs in the SEP completion report, Respondent shall clearly
12 identify and provide acceptable documentation for all eligible SEP costs. Where the SEP
13 completion report includes costs not eligible for SEP credit, those costs must be clearly identified
14 as such. For purposes of this Paragraph, "acceptable documentation" includes invoices,
15 purchase orders, or other documentation that specifically identifies and itemizes the individual
16 costs of the goods and/or services for which payment is being made. Canceled drafts do not
17 constitute acceptable documentation unless such drafts specifically identify and itemize the
18 individual costs of the goods and/or services for which payment is being made.

19 **[If applicable] 16. [EPA right to inspect]** Respondent agrees that EPA may inspect the
20 facility at any time in order to confirm that the SEP is being undertaken in conformity with the
21 representations made herein.

22 *[Note: Consistent with the provisions below for Failure to Complete SEP and*
23 *EPA To Judge Achievement of SEP, this language provides vehicle for EPA to*
24 *exercise its discretion in determining if SEP has been completed satisfactorily and*
25 *whether stipulated penalties should be assessed.]*

26 **[If applicable:] 17. [Respondent must use SEP]** Respondent shall continuously use or
27 operate the systems installed as the SEP for not less than **[number]** year(s) subsequent to
28 installation, and Respondent shall not reinstate the use of **[eliminated chemical]** at any time.

29 **18. [Document retention and certification]** Respondent shall maintain legible copies
30 of documentation of the underlying research and data for any and all documents or reports
31 submitted to EPA pursuant to this Consent Agreement and shall provide the documentation of
32 any such underlying research and data to EPA not more than seven days after a request for such
33 information. In all documents or reports, including, without limitation, any SEP reports,
34 submitted to EPA pursuant to this Consent Agreement, Respondent shall, by its officers, sign and
35 certify under penalty of law that the information contained in such document or report is true,
36 accurate, and not misleading by signing the following statement:

37 I certify under penalty of law that I have examined and am familiar with
38 the information submitted in this document and all attachments and that, based on
39 my inquiry of those individuals immediately responsible for obtaining the
40 information, I believe that the information is true, accurate, and complete. I am

1 aware that there are significant penalties for submitting false information,
2 including the possibility of fines and imprisonment.

3 **19. [EPA acceptance of SEP Report]**

4 a. After receipt of the SEP Completion Report described in paragraph 15.a above,
5 EPA will notify the Respondent, in writing, regarding: i) any deficiencies in the SEP Report itself
6 along with a grant of an additional thirty (30) days for Respondent to correct any deficiencies; or
7 (ii) indicate that EPA concludes that the project has been completed satisfactorily or (iii)
8 determine that the project has not been completed satisfactorily and seek stipulated penalties in
9 accordance with paragraph 20 herein.

10 b. If EPA elects to exercise option (i) above, i.e., if the SEP Report is determined to
11 be deficient but EPA has not yet made a final determination about the adequacy of SEP
12 completion itself, EPA shall permit Respondent the opportunity to object in writing to the
13 notification of deficiency given pursuant to this paragraph within ten (10) days of receipt of such
14 notification. EPA and Respondent shall have an additional thirty (30) days from the receipt by
15 EPA of the notification of objection to reach agreement on changes necessary to the SEP Report.
16 If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall
17 provide a written statement of its decision on adequacy of the completion of the SEP to
18 Respondent, which decision shall be final and binding upon Respondent. Respondent agrees to
19 comply with any requirements imposed by EPA as a result of any failure to comply with the
20 terms of this Consent Agreement and Order. In the event the SEP is not completed as
21 contemplated herein, as determined by EPA, stipulated penalties shall be due and payable by
22 Respondent to EPA in accordance with paragraph 20 herein.

23 **20. [Stipulated Penalties for Failure to Complete SEP/Failure to spend agreed-on**
24 **amount]**

25 a. In the event that Respondent fails to comply with any of the terms or provisions of
26 this Agreement relating to the performance of the SEP described in paragraph 11 above and/or to
27 the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP
28 described in paragraph 13 above, Respondent shall be liable for stipulated penalties according to
29 the provisions set forth below:

30 (i) Except as provided in subparagraph (ii) immediately below, for a SEP which has
31 not been completed satisfactorily pursuant to this Consent Agreement and Order,
32 Respondent shall pay a stipulated penalty to the United States in the amount of \$ [**EPA**
33 **to set a number 75 - 150 percent of the amount by which the settlement penalty was**
34 **mitigated on account of the SEP]**.

35 (ii) If the SEP is not completed in accordance with paragraphs [X-Y], but the
36 Complainant determines that the Respondent: a) made good faith and timely efforts to
37 complete the project; and b) certifies, with supporting documentation, that at least 90
38 percent of the amount of money which was required to be spent was expended on the
39 SEP, Respondent shall not be liable for any stipulated penalty.

40 (iii) If the SEP is completed in accordance with paragraphs [X-Y], but the Respondent
41 spent less than 90 percent of the amount of money required to be spent for the project,
42 Respondent shall pay a stipulated penalty to the United States in the amount of \$ [**10 - 25**

percent of the amount by which the settlement penalty was mitigated on account of the SEP].

(iv) If the SEP is completed in accordance with paragraphs [X-Y], and the Respondent spent at least 90 percent of the amount of money required to be spent for the project, Respondent shall not be liable for any stipulated penalty.

(v) For failure to submit the SEP Completion Report required by paragraph 15(a) above, Respondent shall pay a stipulated penalty in the amount of \$[amount] for each day after [date in paragraph 15] until the report is submitted.

(vi) For failure to submit any other report required by paragraph 15(b) above, Respondent shall pay a stipulated penalty in the amount of \$[amount] for each day after the report was originally due until the report is submitted.

b. The determinations of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion of EPA.

c. Stipulated penalties for subparagraphs (v) and (vi) above shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the activity.

d. Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of paragraph 9 above. Interest and late charges shall be paid as stated in paragraph 21 herein.

e. Nothing in this agreement shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this agreement or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any applicable provision of law.

[Note: Language included for payment of an additional penalty for non-completion of SEP or failure to expend amount of funds committed to in Consent Agreement must not appear to give EPA a choice between: 1) collection of an additional penalty; or 2) additional SEP expenditures by Respondent. Such a provision might appear to give EPA control or discretion over the use of penalty dollars. Unlike a SEP, all assessed penalty dollars must be deposited in the Treasury.]

21. Payment Provisions Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on a civil or stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). A charge will be assessed to cover the costs of debt collection, including processing and handling costs and attorneys fees. In addition, a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. Any such non-payment penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid. 4 C.F.R. §§ 102.13(d) and (e).

[Note: Penalty and interest provisions and recovery of attorneys fees may vary by statute. If appropriate, substitute a statute-specific collection authority in this

1 *paragraph. The maximum non-payment penalty charge is six (6) percent unless a*
2 *statute specifically provides otherwise.]*

3 **22. [Public statements must acknowledge enforcement action]** Any public statement,
4 oral or written, in print, film, or other media, made by Respondent making reference to the SEP
5 shall include the following language, "This project was undertaken in connection with the
6 settlement of an enforcement action taken by the U.S. Environmental Protection Agency for
7 violations of **[citation to legal requirements violated]**."

8 **23. [No relief from compliance; no endorsement by EPA]** This Consent Agreement
9 and Order shall not relieve Respondent of its obligation to comply with all applicable provisions
10 of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any
11 issue related to any federal, state or local permit, nor shall it be construed to constitute EPA
12 approval of the equipment or technology installed by Respondent in connection with the SEP
13 undertaken pursuant to this Agreement.

14 **24. [Force Majeure—if appropriate and requested by Respondent]**

15 a. If any event occurs which causes or may cause delays in the completion of the
16 SEP as required under this Agreement, Respondent shall notify Complainant in writing not more
17 than 10 days after the delay or Respondent's knowledge of the anticipated delay, whichever is
18 earlier. The notice shall describe in detail the anticipated length of the delay, the precise cause or
19 causes of the delay, the measures taken and to be taken by Respondent to prevent or minimize the
20 delay, and the timetable by which those measures will be implemented. The Respondent shall
21 adopt all reasonable measures to avoid or minimize any such delay. Failure by Respondent to
22 comply with the notice requirements of this paragraph shall render this paragraph void and of no
23 effect as to the particular incident involved and constitute a waiver of the Respondent's right to
24 request an extension of its obligation under this Agreement based on such incident.

25 b. If the parties agree that the delay or anticipated delay in compliance with this
26 Agreement has been or will be caused by circumstances entirely beyond the control of
27 Respondent, the time for performance hereunder may be extended for a period no longer than the
28 delay resulting from such circumstances. In such event, the parties shall stipulate to such
29 extension of time.

30 c. In the event that the EPA does not agree that a delay in achieving compliance with
31 the requirements of this Consent Agreement and Order has been or will be caused by
32 circumstances beyond the control of the Respondent, EPA will notify Respondent in writing of
33 its decision and any delays in the completion of the SEP shall not be excused.

34 d. The burden of proving that any delay is caused by circumstances entirely beyond the
35 control of the Respondent shall rest with the Respondent. Increased costs or expenses associated
36 with the implementation of actions called for by this Agreement shall not, in any event, be a basis
37 for changes in this Agreement or extensions of time under section (b) of this paragraph. Delay in
38 achievement of one interim step shall not necessarily justify or excuse delay in achievement of
39 subsequent steps.

1 25. *[If Respondent has agreed that it will not treat the cost of performing the SEP as a*
2 *business expense to be deducted for purposes of federal taxes, and the tax rate in the PROJECT*
3 *computer model was thus set at zero, include this paragraph. If not, exclude this paragraph.]*

4 Respondent hereby agrees not to claim any funds expended in the performance of the SEP as a
5 deductible business expense for purposes of Federal taxes. In addition, Respondent hereby
6 agrees that, within thirty (30) days of the date it submits its Federal tax reports for the calendar
7 year in which the above-identified SEP is completed, it will submit to EPA **[identify EPA**
8 **official]** certification that any funds expended in the performance of the SEP have not been
9 deducted from Federal taxes.

10
11 26. This Consent Agreement and Order constitutes a settlement by EPA of all claims for
12 civil penalties pursuant to **[cite statute]** for the violations alleged in the Complaint. Nothing in
13 this Consent Agreement and Order is intended to nor shall be construed to operate in any way to
14 resolve any criminal liability of the Respondent. Compliance with this Consent Agreement and
15 Order shall not be a defense to any actions subsequently commenced pursuant to Federal laws
16 and regulations administered by EPA, and it is the responsibility of Respondent to comply with
17 such laws and regulations.

18 27. Each undersigned representative of the parties to this Consent Agreement certifies
19 that he or she is fully authorized by the party represented to enter into the terms and conditions of
20 this Consent Agreement and to execute and legally bind that party to it.

21 28. Each party shall bear its own costs and attorneys fees in connection with the action
22 resolved by this Consent Agreement and Order.

23
24 For Complainant:

For Respondent:

25 _____
26 Director
27 U.S. Environmental Protection
28 Agency, Region ____
29 Date: _____

President, ----- Company

Date: _____

30 _____
31 _____
32 Assistant Regional Counsel
33 Date: _____

_____, Esq.
[Firm Name]
Date: _____

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Date: _____

[Regional Administrator or delegatee]
[Title]
 U.S. Environmental Protection Agency Region __