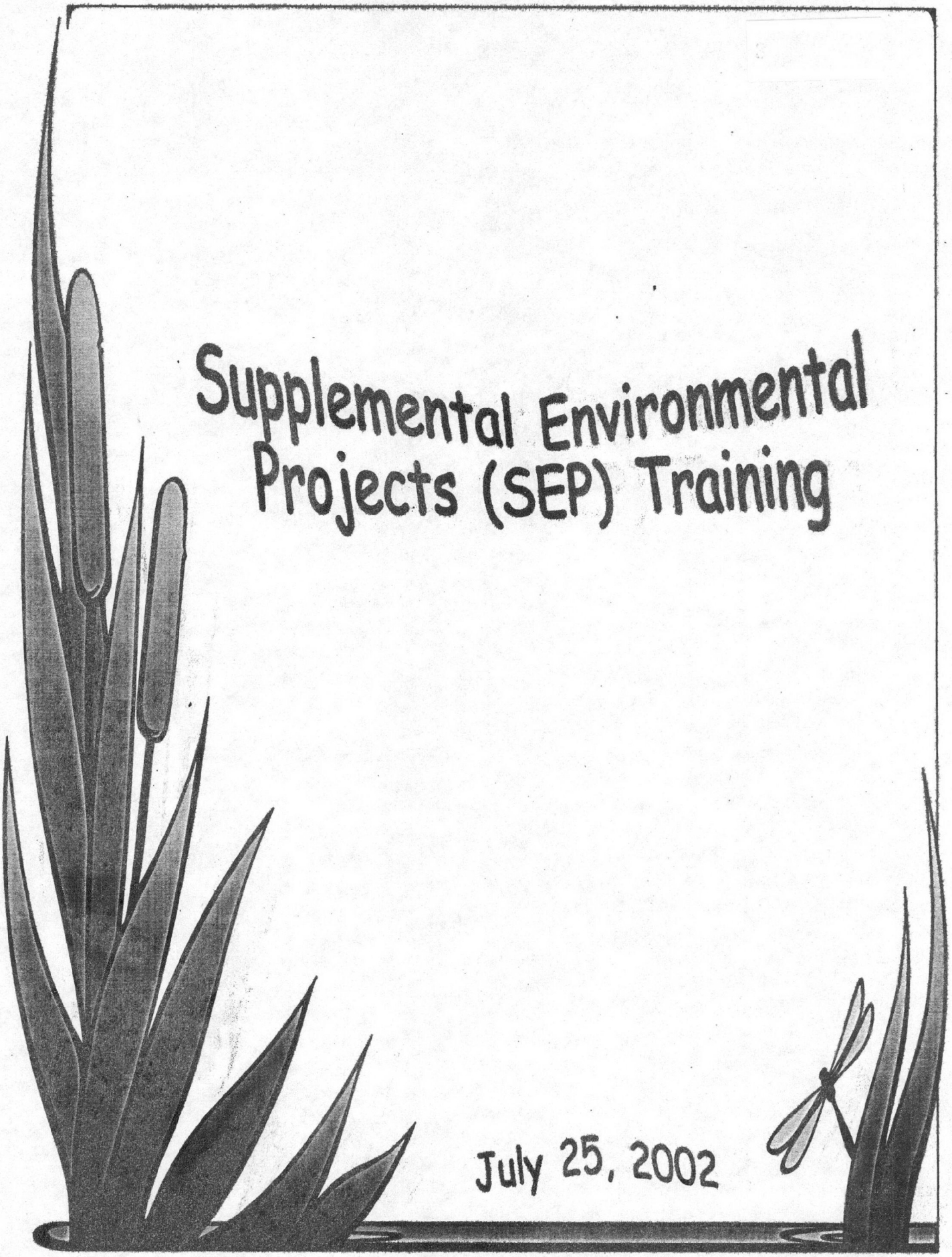
Supplemental Environmental Projects (SEP) Training



July 25, 2002

AGENDA FOR SEP TRAINING
JULY 25, 2002
REGION 4, ATLANTA

8:30am	Welcome/Logistics
8:45am- 9:15am	History of Environmentally Beneficial Projects -Mobile Source cases -GAO/Congressional Inquiries -Development of Early SEP policies
9:15am- 9:45am	What is a SEP? -in settlement of an enforcement action -voluntary -not otherwise required by law
9:45am- 10:30am	Legal Requirements/Nexus
10:30am- 11:00am	Types of Acceptable SEPs (Melissa/Gwen) (include some Region 4 examples)
11:00am- 11:30am	Appropriate Penalty Mitigation/PROJECT
11:30am- Noon	Region 4 Internal Procedures (Gwen) /HQ Approvals Clarification New memos/updates

SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Resource Packet - June, 2002

Table of Contents

Some ideas:

Energy efficiency; Solar and other alternative power installations; LEED certification, Energy STAR

Daylighting and on-site recycling

Biological controls for storm water -- planting bamboo, creation of wetlands

Redevelopment of Brownfields

Better Transportation Systems

Urban Forestry,

Permeable and porous cement for low-traffic areas

Reexamining waste streams to separate out products or recycle

Company funded carpooling or mass transit for employees

Rehabilitation of impacted property for open space and habitat

Preservation of sensitive environments with educational components

Underdevelopment of sites to provide recreation in EJ areas

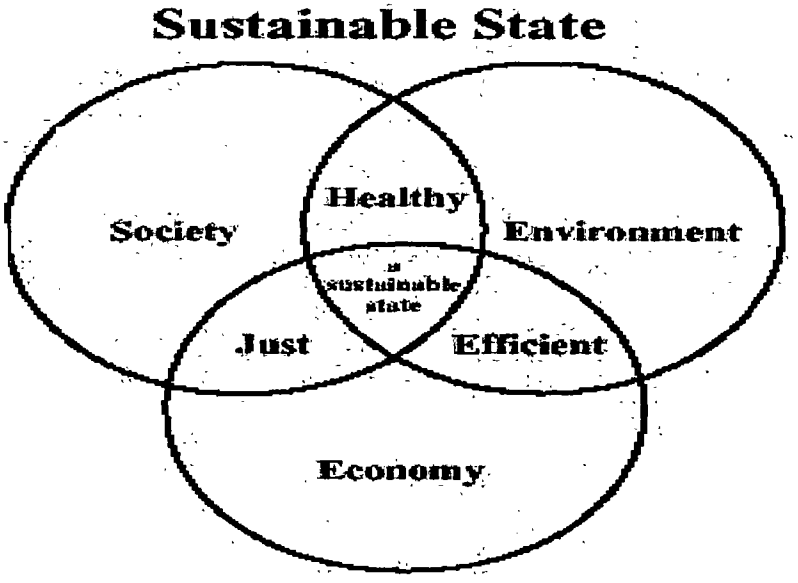
Land conservation

Sustainability Training including Sustainability, What and Why; Smart Growth, Agriculture, Transportation Alternatives, Water Quality and Quantity, Sustainable Tools coming in 2003.

Region 4 SEP Training,
July 25, 2002

Sustainability and SEPs

Sustainability = Community-based activities with results that are self-continuing and holistic in nature, benefitting the Environment, Economy and Social fabric of the community



Sustainability is thinking outside the box, in innovative ways to solve problems without creating new ones -- creating results that are better overall, not just in one area

Sustainability SEPs can change the bottom line to make capital investments suddenly attractive; improve public relations; and boost worker morale

Think:	**Efficient industrial processes that recycle, reduce waste and save resources**
Think:	**Innovative building practices that reduce energy and water use, prevent runoff, and improve conditions for the building's users**
Think:	**Preservation and restoration of habitats that support local recreation and wildlife while cleaning the air and water**
Think:	**Looking into the future and capitalizing for future gain**
Think:	**Going beyond compliance and beyond the ordinary**

For help or data needs, contact:

Sustainability	**Annette Hill 2-8287**
Sustainable SEPs	**Melissa Heath 2-9520**
Smart Growth	**MaryJo Bragan 2-8323**

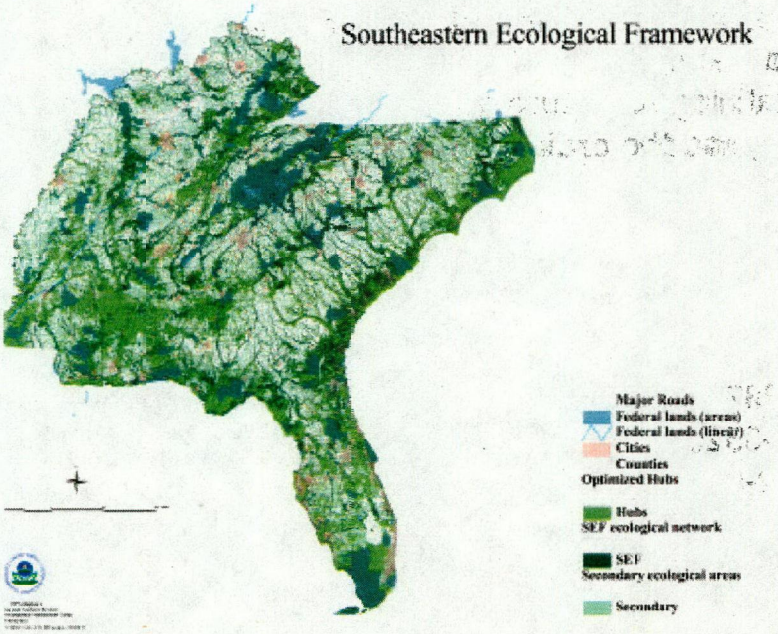
Southeastern Ecological Framework

EPA's Mission
The mission of the Environmental Protection Agency is to protect human health and to safeguard the natural environment – air, water and land – upon which life depends

What is an Ecological Framework?

The natural environment and the processes that support it are our life support system. Every thing that the environment provides to us for free, usually comes at a very high price if we have to replace it or maintain it. In that regard, preservation of existing natural systems and their inherent processes is essential for our survival. Landscape ecologists have known for a long time that piece-meal protection of the environment often leads to degradation of the parts being protected. The resulting fragmentation prevents the operation of many large-scale processes from adequately functioning. Preservation of natural areas that are contiguous with other natural areas is an important principle.

The Southeastern Ecological Framework is a prototype for the protection of water quality, species habitat, important ecological areas, quality of life and other important natural features by protecting large, intact landscapes and connectivity between such areas. The Southeastern Ecological Framework follows natural land and water features such as rivers, ridges, estuaries, wetland basins and upland forests at a regional (8 state) scale. The framework is comprised of important regional ecological hubs and corridors that connect them. The hubs of the framework are typically land areas with important riparian areas, no or few roads, high habitat diversity, little habitat fragmentation, rare habitats or species, and greater than 5,000 acres in size. Often they are associated with existing managed lands such as wildlife refuges, parks, national forests or private protected lands. The corridors of the framework connect the hubs and typically follow natural land forms and water features, allowing ecosystem processes to operate at a larger scale.



What is this project about?

With funding from the Intermodal Surface Transportation Efficiency Act (ISTEA), the University of Florida developed a model to identify potential greenways and trails in Florida. That project developed the modeling protocol and expertise for designing landscape linkages and prioritizing ecological hubs. The Florida Greenways and Trails model underwent significant public participation, comment and peer review. The University of Florida Departments of Landscape Architecture, Urban and Regional Planning and Wildlife Ecology and Conservation were awarded a cooperative agreement grant to develop an ecological connectivity model for the eight states in the Environmental Protection Agency's Southeast Region (4). The purpose of the project is to identify regionally significant lands that would aid in protection of water resources, wetlands, and other natural areas. The conservation of native landscapes and ecosystems also connect people to the land with other archeological, historical and cultural resources. The finished product is a

place-based coverage of ecological hubs and corridors in the Southeast. The resulting framework represents some of the best remaining large intact ecological areas in the southeastern states of Georgia, Florida, Mississippi, Alabama, Tennessee, Kentucky, South and North Carolina.

Why is this important?

A green infrastructure in the southeast can have significant ecological, economic and social benefits for the region. From an environmental point of view, the Southeastern Ecological Framework can be an important component of regional, state and local conservation efforts. From EPA's perspective, the models and data can play an innovative and multi-purpose role in protecting water and air quality. The approach can serve other agency missions by contributing to wildlife habitat conservation, prioritizing wetland mitigation locations, sequestering carbon and removing particulate matter, identifying growth management strategies, and more.

This product can offer a wealth of opportunity as a template for other federal and state agencies and non-profits to coordinate programmatic activities that support environmental protection while maintaining ecosystem connectivity. One example of coordination is in direct support of Georgia's Community Greenspace Program. The Southeastern Ecological Framework is helping local governments prioritize land that connects communities with their natural surroundings. Through voluntary efforts, the fastest growing counties in Georgia are identifying 20% of available greenspace and designing plans to protect this vital resource. EPA Region 4 and the Trust for Public Land are working with county governments to identify local connectivity within the context of a statewide greenway network.

What can it be used for?

The Southeastern Ecological Framework is a template of important ecological areas that can be used for many purposes: 1). The development of mitigation banks and sites that provide connectivity to larger intact wetland systems, 2). buffering of protected wildlife or natural areas such as wildlife refuges, national parks, state and local parks and private wilderness areas, 3). planning of future road right of ways to minimize impacts on existing natural areas, 4). watershed protection and guidance for siting of future industrial activities, 5). prioritization for areas in conservation through wetland reserve or conservation reserve programs, 6). siting for reforestation of riparian areas, 7). integration of local greenspace protection efforts into the larger regional picture, 8). conservation reserve design and planning for conserving biological diversity. This list is only a start of the types of activities that can be planned around the SE ecological framework to preserve and protect our dwindling natural resource base.

Who to contact:

Rick Durbrow, Program Analyst, US EPA, 404-562-8286, durbrow.rick@epa.gov

John Richardson, Project Officer, US EPA, 404-562-8290, richardson.john@epa.gov

Tom Hoctor, UFL Dept. of Wildlife Ecology & Conservation, 352-392-5037, tomh@geoplan.ufl.edu

Margaret Carr, Principal Investigator, University of Florida Department of Landscape Architecture, 352-392-6098 ex 327, mcarr@geoplan.ufl.edu

University of Florida Geoplan website: www.geoplan.ufl.edu/projects/epa/epaindex.html

Supplemental Environmental Projects

SEP History

- Early use of environmental projects
- Congressional and GAO inquiries
- Development of Sep Policies

What is a SEP?

Environmentally beneficial projects

Undertaken in settlement of an enforcement action

Defendant not otherwise legally required to perform

Legal Guidelines

- **Must be related to the underlying violation; in other words, must have a nexus/connection. HOW?**
  - **The project is designed to reduce the likelihood that similar violations will occur in the future; or**
  - **The project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or**
  - **The project reduces the overall risk to public health or the environment potentially affected by the violation at issue**

Legal Guidelines continued

"A different pollutant in a different medium"

Footnote No. 5

- Nexus cannot be waived
- Miscellaneous Receipts Act
- Augmentation of Appropriations

OGC 1995/1998 Memos

Types of Acceptable SEPS

Eight categories of acceptable SEPs

Public Health

- **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**

Pollution Prevention

- Reduces the generation of pollution through source reduction; BEFORE pollutants are generated
- Eliminates pollution
- Must lower the overall amount and/or toxicity of pollution released to the environment

Pollution Reduction

- AFTER pollutants or waste streams are generated
- Recycles, treats or contains pollution
- Must go beyond basic legal requirements

Natural presence

Mining Facility NPDES

- unpermitted discharge, TN
- multi-regional settlement
- creation of 4-acre wetland

Environmental Restoration and Protection

- Enhances the condition of the ecosystem or immediate geographic area adversely affected
- Natural or artificial environments
- Includes land transfers and protection of endangered species, put at risk by the violation

Assessments and Audits

- **Assessments**
  - **Pollution Prevention**
  - **Environmental Quality**

- **Audits**
  - **Environmental Compliance (available for small businesses** < 100 people employed **and small communities)**
    < 2500 people

Environmental Compliance Promotion

- Training or technical support to OTHER members of the regulated community
- Only for similar regulatory requirements
- Need prior approval from HQ Media-specific enforcement division

Emergency Planning and Preparedness

- Non-cash assistance
- Supports local government's emergency response capability
- For violations related to emergency planning, reporting or spills

Other Types of Projects

- Projects determined by the case team to have environmental merit which do not fit within at least one of the above categories
- Must be fully consistent with all other provisions of the SEP Policy
- Need PRIOR approval of media-specific Div. Director within OECA, with consultation from the Multimedia Enforcement Division SEP contacts

Not Acceptable

- General public education
- Projects already required to be performed, by a federal, state or local requirement or a settlement, including third-party agreements
- Outright donations, including contributions to environmental research at a college or university
- Studies without commitment (except for pollution prevention assessments)
- Projects funded by federal loans or grants

Non - environmental projects

Penalty Mitigation/PROJECT

- Penalties may be mitigated UP TO 80% for an acceptable SEP*** CWA memo regarding municipal settlements
- EXCEPTION: Up to 100% for small businesses, govt. entities and non-profits for projects of outstanding quality, or
- EXCEPTION: Up to 100% for <u>any</u> defendant who implements a pollution prevention SEP, if the project is of outstanding quality [criteria pp 15-17]
- Must collect at least 25% gravity or 10% gravity plus economic benefit, whichever is greater
- Must run proposed SEP through PROJECT to determine SEP

Regional Internal Procedures/ Approvals Clarification

- Regional procedures
- Clarification of HQ Approvals
- SEP CONTACTs:
- Multimedia Enforcement Division: Beth Cavalier (202-564-3271) and Melissa Raack (202-564-7039)
- DOJ: remind DOJ staff attorney to consult with DOJ SEP contact!!

Upcoming Changes to SEP Policy/New Memos

- Currently being considered by OECA:
- Expansion of Environmental Compliance Audit category to allow state and local entities to conduct compliance audits as SEPs
- Clarification of Nexus
- Valuation of SEPs

Upcoming Changes to SEP Policy/New Memos, continued

- Use of Dispute Resolution in Judicial Settlements
- Revisions to Stipulated Penalties Section
- Issuance of Community Guidance and revision to Community Guidance section of the policy
- Footnote 13; CWA municipal penalty policy limits SEP credit to 40%

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

APR 10 1998

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
Regional Enforcement Coordinators, Regions I-X
Chief, DOJ, EES

SEP Workgroup Members
David Hindin, Chair, EPTDD
Leon Acierto, V
Christropher Day, III
Joe Boyle, V
Lourdes Bufill, WED
Becky Dolph, VII
Karen Dworkin, DOJ, EES
Gwen Fitz-Henley, IV
Melanie Garvey, FFEO
Mark Haag, DOJ, PSLS
Tanya Hill, OGC
Leslie Jones, OSRE
Maureen Katz, DOJ, EES
Amelia Katzen, I
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Gerard Kraus, MED
Sylvia Liu, DOJ, PSLS
Amy Miller, IX
Peter Moore, MED
Mike Northridge, OSRE
Reginald Pallesen, V
Rudy Perez, II
Erv Pickell, AED
JoAnn Semones, IX
Efren Ordonez, VI
Lawrence Wapensky, VIII

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 relief[3] 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,

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[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 geographic[5] 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

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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, not

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/oeca/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,

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[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 projects.

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.	$

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,

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

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

II. TERMS OF SETTLEMENT

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

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

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

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

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

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

Respondent shall provide a copy of the check to:

Regional Hearing Clerk
[Regional Address] and
[Attorney Name and Address]

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

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

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

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

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

[Note: a milestone schedule may be appropriate if implementation will take longer than 6 months].
[Note: Ensure that the description of the project to be performed is clear, complete and specific. Almost all the details of the project should be set forth in the CAFO or scope of work: negotiations over the type and scope of the SEP must be completed prior to finalization of the CAFO.]

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

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

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

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

15. **[SEP Reports]**

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

(i) A detailed description of the SEP as implemented;

(ii) A description of any operating problems encountered and the solutions thereto;

(iii) Itemized costs;

(iv) Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Agreement and Order; and

(v) A description of the environmental and public health benefits resulting from implementation of the SEP (with a quantification of the benefits and pollutant reductions, if feasible).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) If the SEP is not completed in accordance with paragraphs **[X-Y]**, but the Complainant determines that the 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, Respondent shall not be liable for any stipulated penalty.

(iii) If the SEP is completed in accordance with paragraphs **[X-Y]**, but the Respondent spent less than 90 percent of the amount of money required to be spent for the project, 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

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

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

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

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

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

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

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

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

25. [*If Respondent has agreed that it will not treat the cost of performing the SEP as a business expense to be deducted for purposes of federal taxes, and the tax rate in the PROJECT computer model was thus set at zero, include this paragraph. If not, exclude this paragraph.*] Respondent hereby agrees not to claim any funds expended in the performance of the SEP as a deductible business expense for purposes of Federal taxes. In addition, Respondent hereby agrees that, within thirty (30) days of the date it submits its Federal tax reports for the calendar year in which the above-identified SEP is completed, it will submit to EPA **[identify EPA official]** certification that any funds expended in the performance of the SEP have not been deducted from Federal taxes.

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

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

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

For Complainant:	For Respondent:
_____	_____
Director	President, --------- Company
U.S. Environmental Protection Agency, Region __	
Date: _____	Date: _____
_____	_____
_____	_____, Esq.
Assistant Regional Counsel	**[Firm Name]**
Date: _____	Date: _____

III. ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Order. The Respondent is hereby ordered to comply with the terms of the above Consent Agreement, effective immediately.

Date: _____

_____

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

July 15, 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 Corporation - PROJECT defaults to this, however could also be Not-for-Profit or For Profit Other Than Corporation
  - **State** - this is the state in which the respondent/defendant conducts the majority of its business, 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.

- 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 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. This category includes things such as materials or labor needed to begin project, engineering or financial services, or **purchasing land.**

  - **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.*

- **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.

- **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 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.

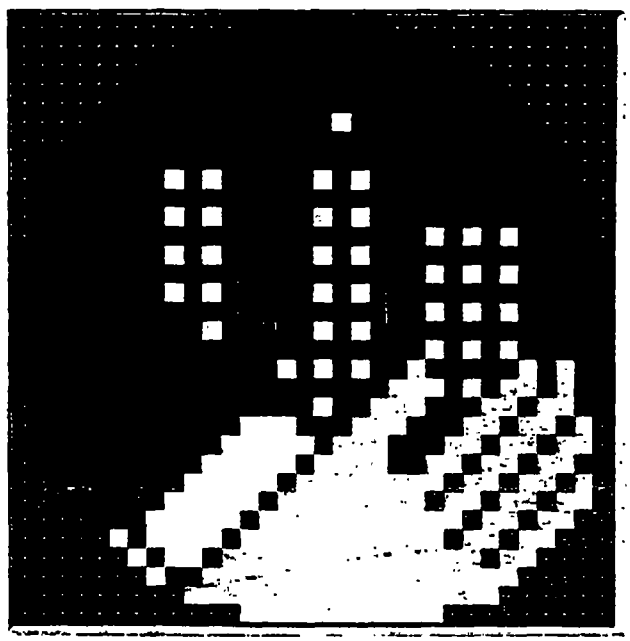
PROJECT USER'S MANUAL

Multimedia Enforcement Division (2248-A)
Office of Regulatory Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
401 M Street, SW
Washington, D.C. 20460

September 1999

United States
Environmental Protection Agency

PROJECT
User's Manual



ACKNOWLEDGMENTS

This document was prepared under the technical direction of Mr. Jonathan Libber, BEN/ABEL Coordinator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency (EPA). Technical assistance was provided under contract to EPA by Industrial Economics, Incorporated (IEc) of Cambridge, Massachusetts.

MAILING LIST ADDITION

If you would like to receive updated materials, and you work for a federal, state or local government environmental agency, please e-mail your name, government mailing address, and government phone number to benabel@indecon.com. If you have any questions about updates, contact the EPA enforcement economics toll-free helpline at 888-ECON-SPT (326-6778).

If you are a member of the public and would like to obtain these materials, download them from the U.S. EPA's web site at http://es.epa.gov/oeca. (This address may have changed by the time you read this manual. To obtain the current address, you can call the helpline at 888-ECONSPT.)

September 1999

TABLE OF CONTENTS

A. OVERVIEW

In some environmental enforcement cases, the violator may be allowed to perform a Supplemental Environmental Project (SEP) as part of a settlement of the case. EPA defines SEP's as environmentally beneficial projects that a violator undertakes — but is not otherwise legally required to perform — in exchange for favorable penalty consideration in settlement of an enforcement action.[1] The PROJECT computer model assists EPA staff in determining the actual cost of such projects.[2] PROJECT can also calculate the value of injunctive relief. Generally PROJECT is appropriate for settlement purposes but not trials or administrative hearings. See EPA's SEP policy (Appendix B) for more context.

The actual "true" cost of a SEP to a violator is the after-tax net present value of the project. Net present value is the cost of the project in today's dollars. The concept of present value accounts for the "time value of money": a dollar today is worth more than a dollar one year from now because of investment possibilities. The time value of money is quantified by "discounting" future costs to determine their present value using a discount rate that reflects the violator's cost of money for investments. For this reason, project costs occurring in future years will have a lower net present value in today's dollars. Furthermore, the after-tax net present value will be even lower if the costs

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[1] See Appendix B, memorandum from Steven A. Herman, "Issuance of Final Supplemental Environmental Projects Policy," dated April 10, 1998, for details on acceptable projects and other SEP policy issues.

[2] For "early compliance" SEP's, use the BEN model instead of PROJECT. As a form of SEP, a defendant may offer to comply with an environmental regulation significantly earlier than is required. Just like other SEP's, this action has associated with it an after-tax net present value that is the maximum amount by which you can reduce the proposed civil penalty. For the "compliance date" in the BEN model, enter the date when the regulation requires compliance of the defendant (i.e., the date by which you would normally expect the defendant to achieve compliance). For BEN's "noncompliance date," enter the date that the defendant is proposing for its early compliance (i.e., a date earlier than the noncompliance date you previously entered). BEN's "economic benefit" result is the maximum amount by which you should mitigate the proposed civil penalty..

of the project are deductible from the violator's taxes, since the project is creating tax savings for the violator.

PROJECT first calculates the present value as of the project operation date, and then determines the final value as of the penalty payment date. Project cost components include capital investments and one-time nondepreciable expenditures required to install capital equipment or conduct other activities (e.g., remove contaminated sediments from a stream), as well as annually recurring costs (for operation and maintenance of capital equipment or for other purposes).[3]

PROJECT is easy to use, and designed for people without any background in financial economics.[4] To calculate the present value of a SEP, you must supply the case name, EPA Region, analyst name, tax status, state, penalty payment date, run name, estimated project costs, and project operation date. For the remaining variables (tax, inflation, and discount rates, tax deductibility of one-time nondepreciable expenditures, and number of credited years for annual cost), you can either accept the model's standard values or specify your own.

This *PROJECT User's Manual* contains all the information a user needs to run the model, as well as descriptions of the underlying formulae. This manual is designed to help you determine the appropriate input data for PROJECT, enter such data correctly, and understand the results. Appendix A provides a detailed explanation of PROJECT's computational methods, but you do not have to be familiar with Appendix A to use PROJECT or this manual.

B. HOW TO USE THE MANUAL

This manual provides instructions for using PROJECT, taking you step-by-step through a PROJECT run. If you are already familiar with the BEN model, you will notice that the models operate similarly, with many of the same data requirements.

Chapter 2 describes how to use PROJECT. Chapter 3 defines each of the inputs you will need to run the model. Appendix A provides detailed explanations of PROJECT's calculations. Appendix B is a copy of EPA's SEP policy.

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[3] PROJECT considers and calculates only the direct financial costs (or savings) associated with implementation of a SEP. PROJECT does not consider any changes in sales, market share, employee morale, or public image that may be associated with some SEP's. Such changes (if present) may have significant financial impacts for the violator, but they are often difficult to estimate and are outside the scope of this analysis.

[4] The PROJECT model should provide reasonable estimates of the after-tax net present value for almost all SEP's. In some unusual cases, the model may not be appropriate or may need to be used in a modified manner. If you ever suspect that you might have such a case, consult with EPA's toll-free enforcement economics helpline (888-ECONSPT) for guidance.

Most of this information (except the appendices) is also in PROJECT's on-line help system, accessible through the F1 key from any screen within the model. If you need further assistance in operating the program or understanding the results, please contact the U.S. EPA enforcement economics toll-free helpline at 888-ECONSPT (326-6778) or benabel@indecon.com. If you need legal or policy guidance, please contact Jonathan Libber, the BEN/ABEL Coordinator at 202-564-6102, or e-mail him at libber.jonathan@epamail.epa.gov.

PROJECT is an interactive computer program that runs in the Windows™ operating environment. This chapter contains five sections. Section A describes the structure of the computer program. Section B explains the procedures for installing the program on your computer. Section C provides data format requirements and additional helpful hints for entering data at your computer, as well an overview of error messages. Section D tells you how to calculate and print results. Section E explains how to exit the program and save files. For an in-depth description of each variable and recommended sources of information, see Chapter 3.

A. STRUCTURE OF THE COMPUTER PROGRAM

PROJECT consists of three different screens: main screen/case creation, run input, and results/output. In general, you start with the main screen, enter data on a separate screen, return to the main screen, then view (and print) your output from a final screen. PROJECT operates like EPA's BEN model and any standard Windows™ applications (although it differs significantly from EPA's ability to pay models of INDIPAY, MUNIPAY, and ABEL). Use the mouse or the Tab and Return keys to move between cells and within a screen. Hold down the Shift key while pressing Tab to return to previous entries.

When you first open PROJECT the case screen appears. PROJECT starts up with a blank case screen. You can obtain a new screen at any time by selecting "New" from the File menu, or using the Ctrl+N shortcut. To toggle between cases, select the appropriate file name under the "Window" menu.

The first inputs on the case screen are case name, analyst name, and office/agency. These values are for reference only and do not affect the results. Next PROJECT asks for the violator's tax status and state. With this information PROJECT references an internal database and automatically calculates the relevant marginal tax rate. After the tax rate PROJECT requests the penalty payment date.

The right side of the case screen is for run management. Here you can create a new run, enter or edit run data, copy a run, remove a run, and calculate a run. You can create multiple runs for each case.

The run screen is where you enter the cost components of the SEP. It is also where you have the opportunity to customize the discount and inflation rates, as well as other default values. You must enter all the cost data for a run before you can calculate the after-tax net present value of a SEP.

The output screen displays the results of PROJECT's calculation. Here you have three options. You can print out a summary of the PROJECT calculation, you can print out a detailed version of the calculation, and/or you can return to the run screen.

Once you are finished with a calculation, you can create, edit or calculate other runs. You can even create other case files, and toggle between them. Before you exit PROJECT it gives you the option of saving the current case, but you can also save your case file at anytime during your session. All runs are automatically saved with the case. The case is saved with a ".prj" extension in the folder you specify.

At any time during your use of the model you can access the help system by pressing the F1 key, just as in any Windows application.

B. PROGRAM INSTALLATION

PROJECT requires a personal computer running the Windows operating system (version 3.1 or higher). In addition, for optimal formatting of various data entry screens, set your display in the control panel to the "small fonts" option. ("Small fonts" is the Windows default, so unless your display settings have been altered, your computer should be set appropriately.)

The remainder of this section describes how to install PROJECT from EPA's website or from floppy disks, onto a local network or stand-alone PC. Installing PROJECT will automatically install the BEN model, since the models share some installation files. If you have trouble downloading or installing the model, consult your local computer technician.

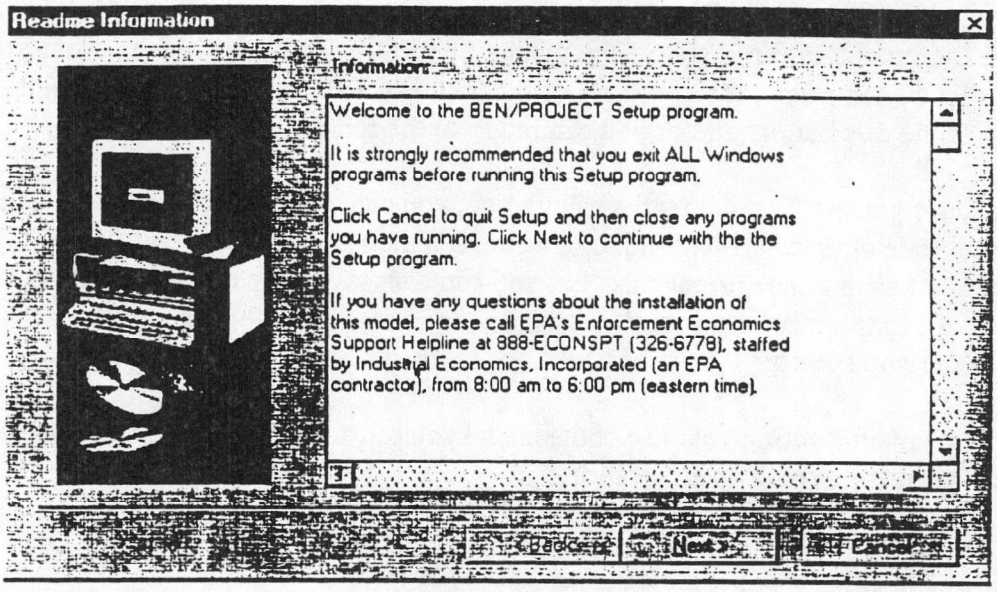
PROJECT is located on the EPA website at http://es.epa.gov/oeca.[5] To install PROJECT, first download the installation file to your computer or network, then run the file and follow the steps listed below for installing it from a set of disks. The installation screens will appear as they do for installation from a disk, although you will not be prompted for a second disk.

If you have access to the installation disks, insert Disk 1 and run "a:\setup.exe" (or

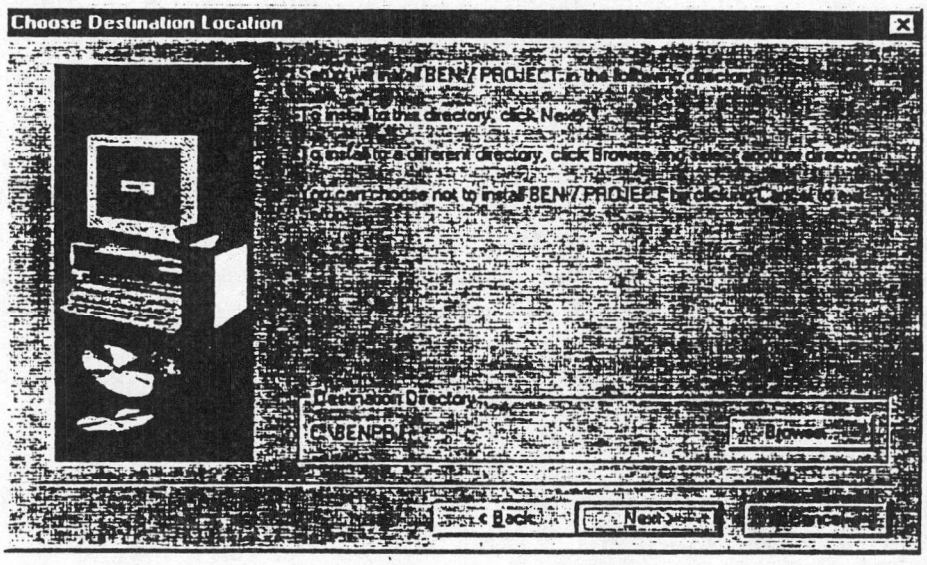
[5] This address may have changed by the time you read this manual. To obtain the current address, you can call the helpline at 888-ECON-SPT.

"b:\setup.exe" if the floppy is in the b:\ drive). Then click **[OK]**. If you receive a warning message that you cannot copy a file because it is in use, simply click **[OK]**. It is merely notifying you that the file the installation system is trying to copy already exists on your computer and is currently open.

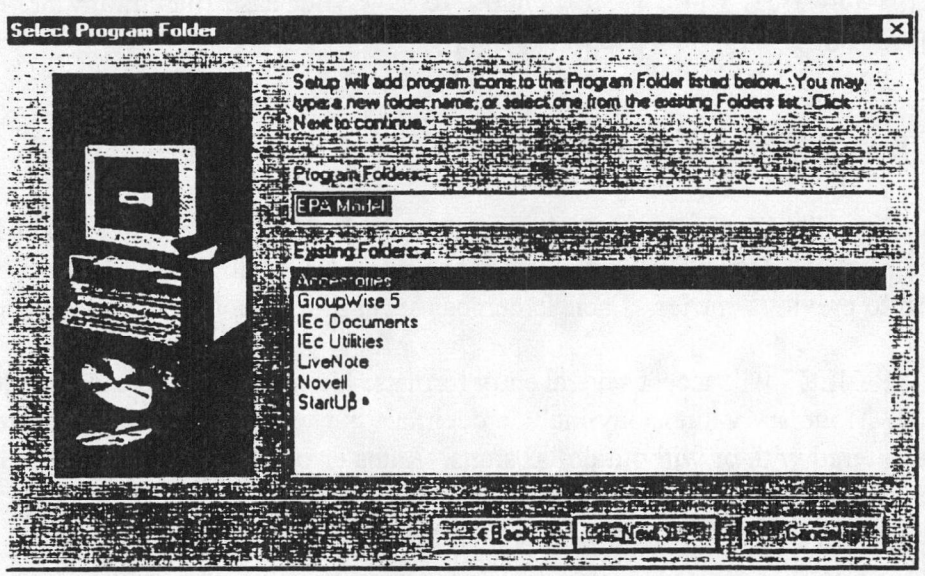
The first PROJECT setup screen will appear:



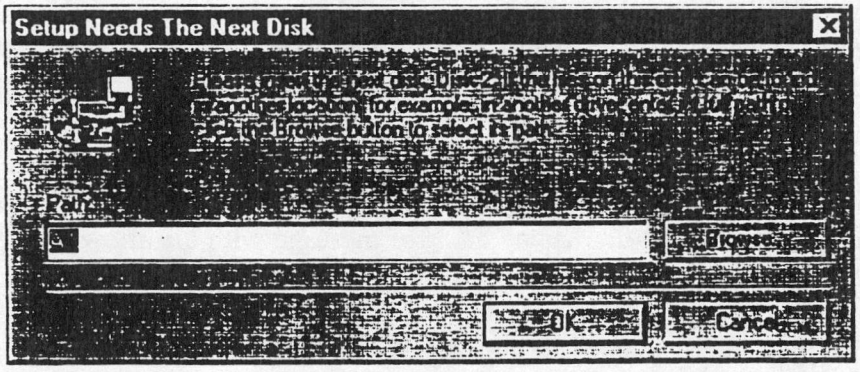
You should close all other programs before installing the model. To do so, click on **[Cancel]**, close the programs and repeat the appropriate steps above. Otherwise click **[Next]** and proceed to the second screen as shown below:



The second screen offers you the opportunity to designate a directory in which to store the model. The default directory is "c:\BENPRJ" (assuming that your local hard drive is c:\). If you wish to save the model to a different directory, press **[Browse]** and choose your desired directory. To proceed with the BEN/PROJECT installation, press **[Next]**. The next setup screen allows you to choose a program folder name as shown below:



The default folder name is EPA Models, which you may alter. To continue installation press **[Next]**. BEN/PROJECT will partially install and then prompt you for Disk 2, as shown below:



If the files are not on Disk 2 you may type their location or use browse to find them. Press **[OK]** when the path is correct. If the program is on two disks, simply insert Disk 2 and press **[OK]**. The setup program will create icons for BEN and PROJECT and finish installing them. When you have completed the installation process, you should reboot your computer prior to using the PROJECT model or any other software package.

Once PROJECT has been loaded onto your hard drive, simply double-click the model icon to start the program. If you are running Windows™ 95 or higher, and did not change the default directory and folder, BEN and PROJECT will automatically be listed on the start menu under programs in the "EPA Models" folder.

After installing the model, you may wish to create a subdirectory for storage of all your case files. Alternatively, you may also choose to save your case files in any pre-existing directories corresponding to different cases or projects

C. DATA ENTRY

Like other Windows™-based programs PROJECT uses the mouse or the Enter and Tab keys to move from entry to entry or from screen to screen. Hold down the Shift key while pressing Tab to return to previous entries. Each screen has several options and spaces for input.

PROJECT will accept several entry formats. Numerical values can include but do not require commas. Monetary values may include decimals but will be rounded to the nearest dollar. They may be entered with or without dollar signs. Rates or percentages should be entered as a decimal number without a percent symbol (e.g., enter 0.20 to represent 20 percent). If you type 2.5 for an inflation rate, PROJECT will read it as an inflation rate of 250 percent.

PROJECT converts all dates to a "1-Jan-1998" format, but can understand almost any sensible format. If you enter an atypical date format, be sure to check that PROJECT has interpreted it as you intended.

Be careful to use only number keys to enter numerical values. A frequent mistake is typing the lowercase letter **L** instead of a number **1**. Another error occurs when the letter **O** is typed instead of the number **0** (zero).

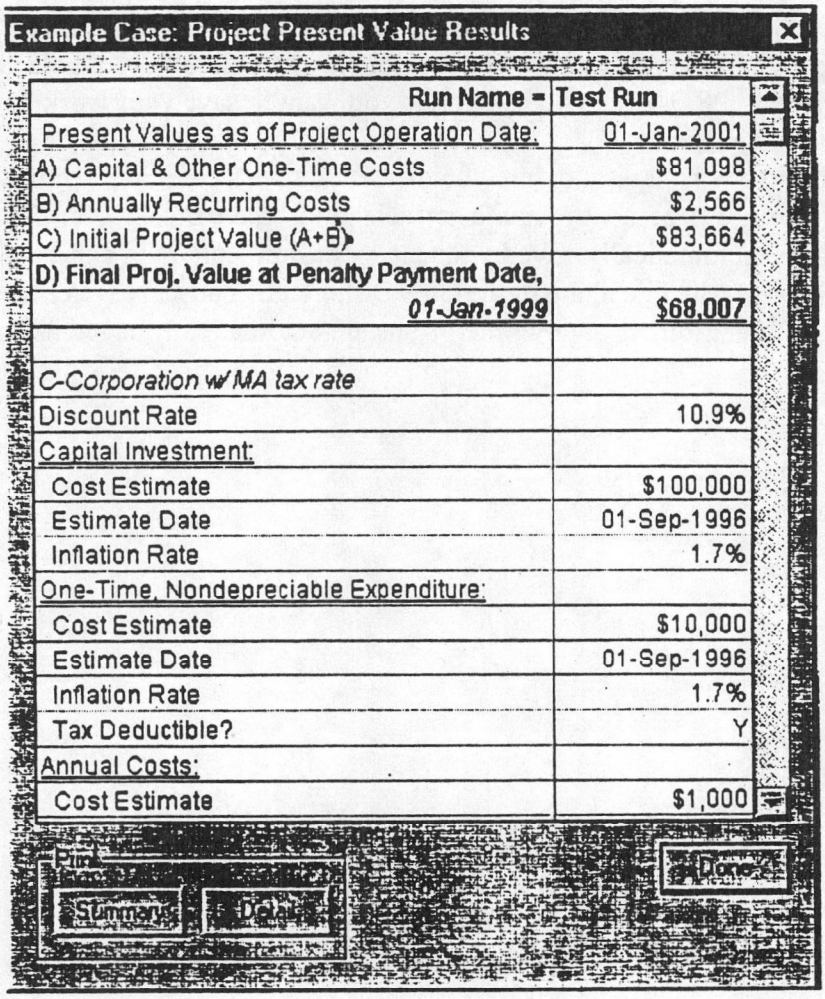
PROJECT will tell you if the format for the entry is incorrect. If this happens correct the number and enter it again. Some inputs are limited to a range of values. If an entered value falls out of this range, PROJECT will display an error message with the allowable range of values. Other error messages will appear if you did not enter data in a required field.

You may enter variables on the same screen in any order. The only exception to this is that you must have entered all of the inputs for a case before you create a run. Therefore you will receive non-entry error messages only when moving from screen to screen or creating a run.

After typing your entry you might discover that you have typed an incorrect letter or number. Typing errors are easy to correct: simply return to the relevant value and type over the mistake. Like all computer programs, PROJECT follows the GIGO protocol: "Garbage In, Garbage Out." Verifying your data inputs is therefore extremely important.

D. CALCULATING AND PRINTING RESULTS

To perform a net present value calculation, select the desired run title from the list on the main screen and press **[Calculate]**. If you have entered data for only one run, you will therefore have only one run to choose. If more than one run is on the list, you may calculate multiple runs and display the results simultaneously. To do this, first select multiple run titles (i.e., select a run and then click on subsequent desired runs, while simultaneously holding down the Control key), then press **[Calculate]**. Additional runs are useful when you are analyzing more than one proposed SEP, or if you want to compare the effects of changing variables. The following screen will display a summary of the results:



You may print either a summary or the detailed calculations for the results. The **[Summary]** button will print only the information from the results screen. The **[Detail]** option will print, separately for each run, a summary page, a page showing the present value calculations for capital and other one-time costs, and one or two pages showing the present value calculations for annually recurring costs.

For more information on interpreting these pages, consult Appendix A, or call EPA's toll-free enforcement economics support helpline at 888-ECONSPT (326-6778).

Although printing is done from the output screen, the printer setup is controlled by the pull-down menu on the main screen. The printer setup allows you to shift between landscape and portrait printing, as well as choose more advanced options.

E. EXITING AND SAVING

You exit PROJECT just like any other standard Windows application. From the main screen, select Exit under the File pull-down menu at the top left corner of your screen, or click on the [x] button at the top right corner of your screen, or double-click on the PROJECT icon at the top left corner of your screen. PROJECT will ask you if you want to save your work before you exit.

Be sure to save your case(s) before you exit. You save a case by selecting "Save" under the File menu (or give the case a new name by selecting "Save As..."), or the Ctrl+S shortcut. PROJECT cases are automatically saved with the extension ".prj" and can be accessed using the "Open" command under the File menu or the Ctrl+O shortcut. You can save cases in any folder, and switch between different folders at any time. Runs are automatically saved as part of a case.

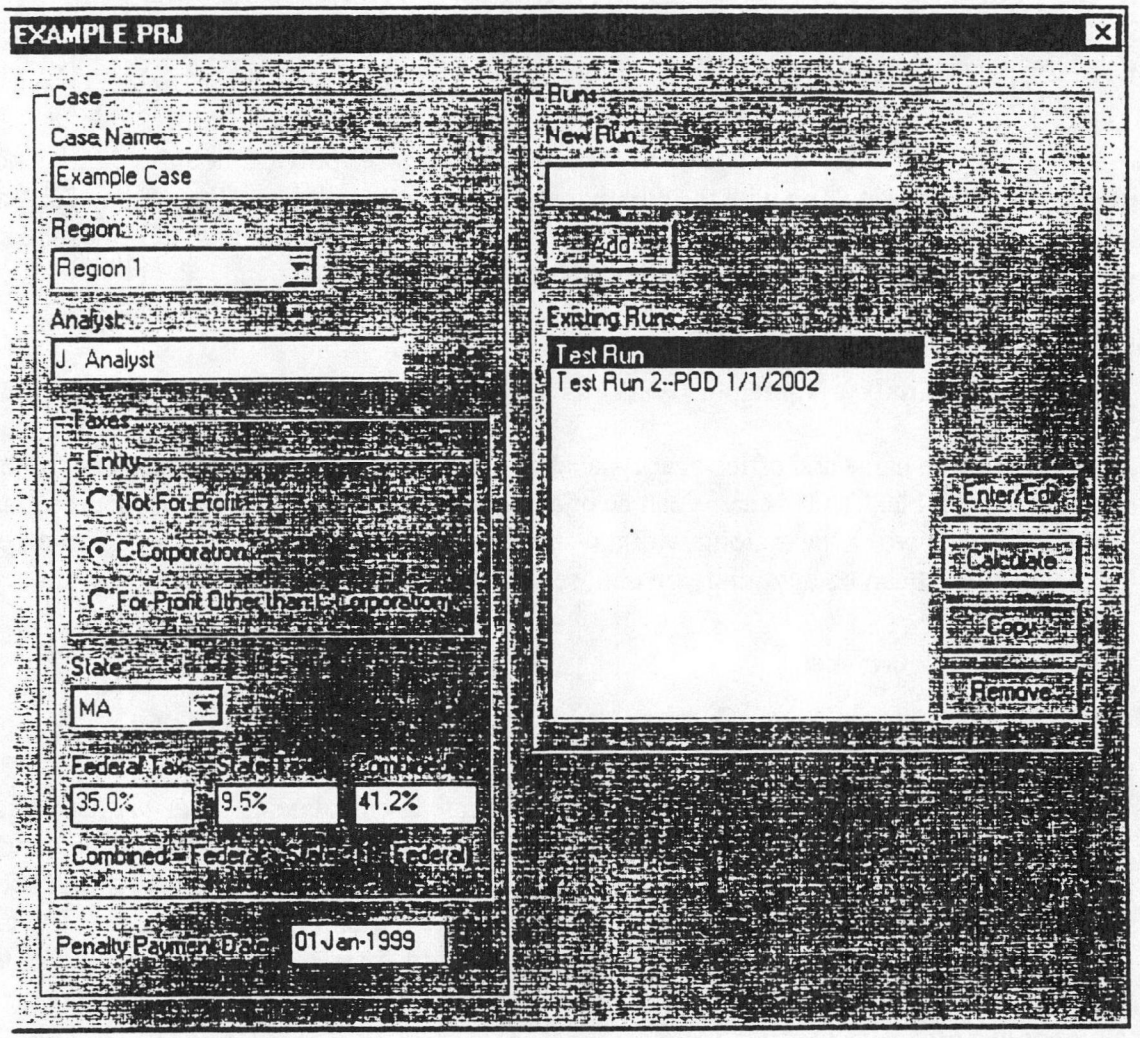
To calculate the after-tax net present value of supplemental environmental projects (SEP's), PROJECT requires the entity's tax status, state, penalty payment date, project cost estimates and dates, and project operation date. For the tax, inflation, and discount rates, you can either accept PROJECT's tailored default values or specify your own.

This chapter explains the variables in the order in which you enter them in PROJECT. The explanations include a brief description of the criteria you should use in developing the input values, and the basis for each of the standard values. Each explanation also contains a statement regarding how a change in the value of each variable will affect the PROJECT after-tax net present value result, as summarized below (holding all other variables constant).

Input Item	Direction of Change	Impact on Result
Entity Type	not-for-profit to c-corp. or other for-profit	decrease
Marginal Tax Rate	increase	decrease
Penalty Payment Date (PPD)	later	increase
Cost Estimates	increase	increase
Inflation Rates	increase	increase
Tax Deductibility of One-Time Nondepreciable Expenditure	tax-deductible to not tax-deductible	increase
Credited Years for Annual Costs	increase	increase
Project Operation Date (POD)	later	decrease
Discount Rate	increase	varies

A. CASE SCREEN

The case screen shown below is what you see when you first open PROJECT. This is where you enter the following variables: case name, office/agency, analyst name, entity type, state, tax rate, penalty payment date, and run name. It is also where you add, edit, calculate and remove runs.



1. Case Name, Office/Agency, Analyst Name

Case name, analyst name, and office/agency (formerly EPA region) are the first three inputs in PROJECT. They are for reference purposes only and do not affect the calculation. Each of them will appear along with the current date on the bottom of every page of the results.

a. Case Name

Case name is the first input in PROJECT. This name can be any length and can contain letters, spaces, punctuation and numbers (although you may not leave it blank). It will appear along with the current date, analyst name, and EPA region on each page of the results. Since its sole purpose is documentation, this label can contain anything you choose. It can reflect the violator's name, the name of a specific SEP, or a characteristic of the specific case (e.g., "Payment on July 15, 1999"). Each case can contain several runs, so you will not need to alter the case name to save individual calculations.

b. Office/Agency

Like case name, office/agency is for reference purposes only (although you may not leave it blank). It will appear along with the current date, case name, and analyst name on each page of the results. A pull down menu to the right of the cell lists all ten EPA regions, EPA headquarters, and the option of "other." You may also type in a different value.

c. Analyst Name

Like case name and office/agency, analyst name is for reference purposes only (although you may not leave it blank). This name can be of any length and can contain letters, spaces, punctuation and numbers. It will appear along with the current date, case name, and EPA region on each page of the results. It can be anything you choose, but it is most appropriate to simply enter your own name.

2. Entity Type, State, Customized Tax Rate

PROJECT needs to know the violator's tax rate to calculate the after-tax net present value of a SEP, since project costs are generally tax-deductible. Because tax-deductible expenses and depreciation associated with capital investments reduce taxable income, they result in tax savings. PROJECT uses the marginal tax rate to account for the tax effects of project costs. The higher the tax rate, the higher the tax savings, and therefore the lower the after-tax value of the SEP. Changing the violator's state or tax status changes the violator's marginal tax rate and thus alters the value of a proposed SEP.

a. Entity Type

PROJECT asks you to designate the tax filing status of the entity, either Not-For-Profit, C-Corporation, or For-Profit Other than C-Corporation. Choosing the correct tax status is critical, because it determines PROJECTS's application of the tax rate and the discount rate. PROJECT will default to C-Corporation status.

A C-Corporation files a federal tax Form 1120 or Form 1120-A. These companies are taxed at corporate income tax rates. Virtually all publicly traded companies are C-Corporations, but small private firms can also be C-Corporations.

For-profit entities other than C-corporations may be S-corporations, partnerships, or sole proprietorships (e.g., a corner grocery store). These entities file federal tax returns other than 1120 or 1120-A (e.g., an S- corporation files a Form 1120-S and a Schedule K for each shareholder). The income and expenses of these organizations are divided among the shareholders and reported on their individual income tax returns. Income is therefore taxed at the individual income tax rate.

Not-for-profit entities, such as municipalities, public authorities, and charitable organizations, generally have a tax-exempt status. When you indicate that the violator is a not-for-profit entity, PROJECT sets the marginal income tax rate to zero. (Although rare, certain not-for-profit companies are subject to taxation. You should verify the status of the not-for-profit in question and adjust the tax rates accordingly.)

b. State

This is the state in which the entity conducts the majority of its business, which is not necessarily the state in which it is incorporated. Selecting the correct state is important because PROJECT uses a state-specific tax rate in its calculations. The pull-down menu lists all fifty states plus "AVG", which is an average of all state tax rates (appropriate if the proposed SEP involves several states).

c. Customized Tax Rate

After you have entered the tax status and state of the violator, PROJECT will automatically calculate the marginal combined tax rate. The marginal income tax rate is the fraction of the last dollar of taxable income that a defendant would pay to federal and state governments. PROJECT uses the marginal tax rate, not the average tax rate (i.e., total tax divided by total taxable income), because the marginal tax rate is the rate that applies to incremental changes in the violator's tax-deductible expenses.

State tax rates must be adjusted to reflect their deductibility from federal taxable income. The adjustment is made by multiplying the marginal state tax rate by a factor equal to one minus the marginal federal tax rate, as shown in the following formula:

$$\text{Combined tax rate} = \text{Federal rate} + [\text{State rate} \times (1 - \text{Federal rate})]$$

State income taxes do not include sales tax, inventory tax, charter tax, or taxes on property.

One-time tax payments, such as taxes on the purchase of equipment, should be included in capital investments or in one-time nondepreciable expenditures. If the tax recurs regularly, then it should be included in annually recurring costs. For example, sales tax would be included in the capital cost while property tax would be included in annual cost.

If you have information that supports the use of tax rates other than those supplied by the PROJECT model (e.g., the entity was not subject to the highest marginal rate), you may modify the combined tax rate. To do so, simply select the tax rate and type over the standard value. Remember to enter the tax rate as a decimal. PROJECT will automatically convert it to a percentage.

When the tax rate has been modified, a note indicating the modification will appear in the PROJECT run results. Note that once tax rates are modified, re-designation of the state or entity type will result in a loss of the customized information.

PROJECT assumes that the expenses (including depreciation) of SEP's are deductible from a violator's income for tax purposes. If the violator asserts that the SEP costs are not tax deductible and commits in the settlement document not to deduct such costs, then the marginal tax rate may be set to zero. Further, for each tax year costs are incurred by defendant for the SEP, the violator's chief financial officer (or other official responsible for tax preparation) must submit a signed statement to the Agency certifying that the expenses were not deducted. The certification should state:

> "Under penalties of perjury, I declare that I have examined the tax return pertaining to the year XXXX. To the best of my knowledge and belief, these tax returns do not contain deductions or depreciation for any supplemental environmental project expenses my company has incurred."

The agreement to make this submission should be spelled out in the settlement document. The settlement should contain language that the defendant acknowledges that the settlement and certifications will be forwarded to the IRS. The litigation team should make the defendant aware that should the SEP costs be deducted, not only will the defendant be facing prosecution for perjury, but the Agency will seek the full penalty regardless of how much work was performed on the SEP. If you need further guidance on this issue, please contact Jonathan Libber of the Multimedia Enforcement Division at 202-564-6102 or e-mail him at libber.jonathan@epamail.epa.gov.

3. Penalty Payment Date

The penalty payment date is the date when the violator will make its actual payment to the government. If you vary the date of penalty payment, PROJECT automatically adjusts the SEP's present value by discounting the costs to the revised date. The present value of project costs will increase as the penalty payment date is pushed further into the future.

Dates may be entered as month/day/year (i.e. 7/31/98) or written out (i.e. July 31, 1998).

PROJECT will accept two-digit years, but four-digit years are preferable. You must enter dates to the day. If you do not enter a day, PROJECT will assume the first of the month.

4. Creating/Adding, Copying, and Removing Runs

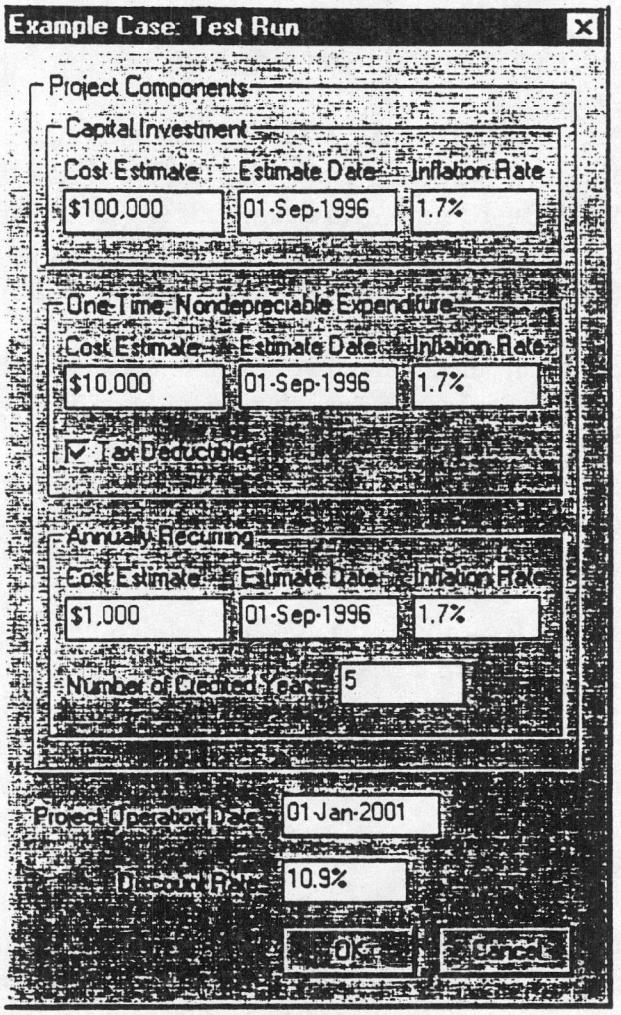
You must create a run before you can enter SEP cost information. To add a new run, enter the run name under "New Run:" and press **[Add]**. PROJECT will save the new run and list it under "Existing Runs." Run names can be any length and include any letter, punctuation or number. Each case may contain multiple runs. Addtional runs are useful when analyzing the net present value of more than one SEP for a particular case, or if you want to compare the effects of changing variables.

To copy an existing run select the run you wish to copy from the list of existing runs and press **[Copy]**. A window will appear asking you to enter a name for the new run. No two runs can have the same name. Enter the new name and press **[OK]** to save the new run or **[Cancel]** to delete it. The copy will contain all of the information from the original. Copies are particularly useful when making only minor changes in cost information from run to run, because they can be used to carry over consistent data.

To remove a run select it from the existing run window and press **[Remove]**. A window will appear asking you if you are sure. Press **[Yes]** and the run is deleted. Remember that PROJECT does not have a "trash bin" to hold deleted runs, so you will have no way to retrieve a run once you have removed it.

B. RUN INPUT SCREEN

To access the run input screen, select a run and press **[Enter/Edit]**, or simply double click on the run name. Here you enter cost estimates for the SEP's three possible components: capital investments, one-time nondepreciable expenditures and annually recurring costs. Each cost component requires a cost estimate and an estimate date, with the additional option of overriding the default inflation rate. In addition, you can override the assumption that the one-time nondepreciable expenditure is tax deductible, as well as change the default assumption of five years of credited annually recurring costs. At the bottom of the run screen you must enter the project operation date and may alter the default discount rate. The run screen is shown on the next page.


Example Case: Test Run
Project Components
Capital Investment
Cost Estimate
Estimate Date
Inflation Rate
$100,000
01-Sep-1996
1.7%
One-Time, Nondepreciable Expenditure
Cost Estimate
Estimate Date
Inflation Rate
$10,000
01-Sep-1996
1.7%
Tax Deductible
Annually Recurring
Cost Estimate
Estimate Date
Inflation Rate
$1,000
01-Sep-1996
1.7%
Number of Depreciation Years
5
Project Operation Date
01-Jan-2001
Discount Rate
10.9%
OK
Cancel

1. Cost Estimate Dates

Each cost estimate needs a date. This is the date on which the estimate of the SEP cost is based. Dates may be entered as month/day/year (i.e., 7/31/98) or written out (i.e., July 31, 1998). PROJECT will accept two-digit years, but four-digit years are preferable. You must enter dates to the day. If you do not have date information to the day, use the day that falls in the middle of the time frame you have. For example, if all you know is that the estimate was made in May of 1998, use May 15, 1998 as the estimate date. If all you know is that the estimate was made in 1998, use July 1, 1998 as the estimate date. If you do not enter a day, PROJECT will assume the first day of the month. If you have costs with different dollar-years, enter them as separate runs, and sum the separate runs' results.

2. Inflation Rate

The inflation rate in PROJECT is the annual rate at which the costs of environmental control projects are expected to increase over time. These cost increases are the result of various factors affecting supply and demand for particular products and services, as well as general inflationary pressures in the economy. PROJECT uses this rate to adjust the cost of SEP's from the cost estimate date to the project operation date. The higher the inflation rate, the higher the value of the SEP will be at the project operation date.

PROJECT's inflation rate is based on the "Plant Cost Index" (PCI) published in *Chemical Engineering* magazine. The PCI is used rather than another index (e.g., the Consumer Price Index, or the GDP Implicit Price Deflator), because it more accurately reflects the costs of activities associated with pollution-control expenditures. The PCI is based on cost changes in typical components of pollution control, including equipment, construction labor, buildings, and engineering and supervision.

To calculate future inflation, PROJECT extrapolates the PCI forward in time at a forecasted rate based upon a consensus forecast for the Consumer Price Index (CPI) and the PCI's historical relationship to the CPI. (The rationale for the calibration of the PCI to the CPI is that the CPI — yet not the PCI — has widely available forecasts for projected inflation.)

The inflation rate for each SEP cost category may be modified individually because the different cost categories may be affected by different inflationary trends. If you have some reason to believe that a better inflation forecast for your purposes is available, or if you would like to obtain the detailed calculations for this projected rate (which is updated each year), please call EPA's helpline at 888-ECONSPT. If you customize the inflation rate be certain that you enter an annual rate and not a monthly or semiannual rate.

3. Component Cost Estimates

a. Capital Investment

The capital investment should include all depreciable investment outlays necessary to implement the SEP. Depreciable capital investments are usually buildings, equipment, or other long-lived assets.[6] Typical environmental capital investments include groundwater monitoring wells, stack scrubbers, and wastewater treatment systems. In addition to these conventional capital investments, capital costs may also be associated with projects that do not appear at first to be capital investments. For example, a project to restore a wetland may include capital costs like pipes and pumps.

You may enter capital costs with or without commas or dollar signs. PROJECT will accept decimals but will round the amount to the nearest whole dollar. Enter a zero if capital investment costs will not be incurred. All else being equal, a larger capital investment will result in a higher net present value for the SEP.

b. One-Time, Nondepreciable Expenditure

Include any one-time nondepreciable expenditures necessary to implement the SEP. Such costs could be for materials or labor needed to start up the project (excluding design and installation costs for capital equipment), engineering, financial, or other services (e.g., a training program, waste disposal), or purchasing land. If such expenditures must occur over time and regularly, rather than as a one-time event, enter them as an annually 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 annually recurring cost.)

You may enter the cost estimate with or without commas or dollar signs. PROJECT will accept decimals but will round the amount to the nearest whole dollar. Enter a zero if these costs will not be incurred. All else being equal, a larger one-time nondepreciable expenditure will result in a higher net present values for the SEP.

PROJECT next allows you to override the assumption that the one-time nondepreciable expenditure is tax-deductible. The only one-time nondepreciable expenditure that is not tax-deductible is land. Note that, all else being equal, overriding the tax-deductibility assumption will increase the PROJECT result.

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[6] Note that land is not a depreciable capital investment. Land costs should be input as a one-time nondepreciable expenditure, and the tax-deductibility box should be unchecked.

c. Annually Recurring Costs

For the annually recurring costs associated with implementation of the SEP, enter the net change in expenditures for labor, power, water, raw materials, supplies, training, waste disposal, recycling, lease payments, and property taxes. Annual costs, however, should not include annualized capital recovery, interest payments, or depreciation. Do not enter any annual costs that appear speculative or unsubstantiated.

For some SEP's, the annual cost may be a negative number to reflect net cost savings associated with implementation of the project. (This is particularly likely for a pollution prevention capital improvement, which may make the production process more efficient; e.g., by reducing electricity consumption and waste generation.) PROJECT will calculate the net cost to the company of such a project by evaluating both the capital investment for the new equipment and the operational cost savings.

You may enter annual costs with or without commas or dollar signs. PROJECT will accept decimals but will round the amount to the nearest whole dollar. Enter a zero if no annual costs will be incurred. All else being equal, larger annually recurring costs will result in higher net present values for the SEP.

Enter the number of years for which the annual costs will be credited. The number of years of annual costs should correspond to the number of years that the defendant is legally required to operate the project. EPA takes this position because it has no way to be sure the money will ever be spent on the project without such a legal requirement. The default value is five years because in most cases it would be impractical for the government to monitor a consent decree for more than five years.

PROJECT will not allow you to enter a value that exceeds 15 years. This restriction is based on the expectation that the government cannot continue to monitor whether the defendant is still implementing the SEP 15 or more years after start-up. Further, in most cases changes in technology, market conditions, and environmental conditions create too much uncertainty to reasonably assume that a project will be implemented in the same manner for more than 15 years. Finally, the useful life of capital equipment will typically be 15 years. In many cases these reasons justify limiting the entry for this variable to no more than five years.

You may enter annual costs with or without commas or dollar signs. PROJECT will accept decimals but will round the amount to the nearest whole dollar. Enter a zero if no annual costs will be incurred. All else being equal, larger annually recurring costs will result in a higher net present values for the SEP.

4. Project Operation Date

This is the date when the SEP will commence operation, which is generally when all capital investments and one-time nondepreciable expenditures will have been incurred, and/or the annual costs will first start to be incurred. For example, a pollution control project that requires the installation of a stack scrubber would not be considered operational until all capital costs for the scrubber are expended. In cases where the SEP involves only annual expenses, the project operation date is when the violator begins incurring those costs. The project operation date may occur before or after the penalty payment date. In virtually all cases, however, the project operation date will occur after the commencement of the enforcement action. (Otherwise, the violator is credited for a project that presumably would have been undertaken anyway.)

Holding all other variables constant, the present value of project costs will decrease as the project operation date is pushed further into the future.

Dates can be written out or entered in month/day/ year format. For example, January 4, 1998 can be written as January 4, 1998, Jan 4 1998, 1-4-98, or 1/4/1998. Four-digit years are preferable, although PROJECT will accept some two-digit formats. If using numerical abbreviations, be sure to enter the month first, e.g., PROJECT will interpret 10/2/98 as October 2, 1998, not February 10, 1998.

5. Discount Rate

To compare cost estimates from different dates, PROJECT calculates the initial present value of the costs as of the project operation date, and then the final value as of the penalty payment date. To perform these present value calculations, PROJECT must employ a discount rate that reflects the violator's "time value of money."

PROJECT uses the weighted-average cost of capital ("WACC") to discount cash flows for all for-profit entities. The WACC represents the average cost of capital to the violator, after taxes, assuming constant risk and constant capital structure. PROJECT uses the cost of municipal debt as the basis for the discount rate for not for-profit organizations. When you indicate that the violator is a not for-profit entity, PROJECT automatically defines the discount rate based on average municipal bond yields.

Violators may occasionally request an adjustment in the discount rate to reflect their financial condition more precisely. Make the violator aware that a case-specific analysis could change the discount rate in a way that would lead to a lower present value for the SEP. Furthermore, a case-specific analysis for the PROJECT discount rate might also affect the BEN discount rate. If you alter the discount rate, be sure to enter it as a decimal. PROJECT will automatically convert it to a percentage.

Each year the standard-value discount rates are updated. If you have any questions about the discount rate, including the detailed derivation of the standard values, or guidance on tuning the discount rate to a specific violator or industry, please contact the EPA helpline at 888-ECONSPT.

METHODOLOGY FOR COMPUTING THE VALUE OF A SUPPLEMENTAL ENVIRONMENTAL PROJECT — APPENDIX A

This technical appendix explains the methodology the PROJECT computer program uses to calculate the present value of a supplemental environmental project (SEP). The first section is an introduction to the theory and underlying assumptions of PROJECT. The second section is a step-by-step explanation of a sample PROJECT calculation.

A. THEORY AND ASSUMPTIONS

In some environmental enforcement cases, the violator may be allowed to perform a supplemental environmental project as part of a settlement of the case. EPA defines SEP's as environmentally beneficial projects that a violator undertakes — but is not otherwise legally required to perform — in exchange for favorable penalty consideration in settlement of an enforcement action. The PROJECT computer model assists EPA staff in determining the actual cost of such projects. PROJECT can also calculate the value of injunctive relief.

The actual "true" cost of a SEP to a violator is the after-tax net present value of the project. Net present value is the cost of the project in today's dollars. The concept of present value accounts for the "time value of money": a dollar today is worth more than a dollar one year from now because of investment possibilities. The time value of money is quantified by "discounting" future costs to determine their present value using a discount rate that reflects the violator's cost of money for investments. For this reason, project costs occurring in future years will have a lower net present value in today's dollars. Furthermore, the after-tax net present value will be even lower if the costs of the project are deductible from the violator's taxes, because the project is creating tax savings for the violator.

PROJECT first calculates the present value as of the project operation date (POD), and then determines the final value as of the penalty payment date (PPD). Project cost components include capital investments and one-time nondepreciable expenditures required to install capital equipment

or conduct other activities (e.g., remove contaminated sediments from a stream), as well as annually recurring costs (for operation and maintenance of capital equipment or for other purposes).[1]

PROJECT is easy to use, and designed for people without any background in financial economics. To calculate the present value of a SEP, you must supply the case name, EPA Region, analyst name, tax status, state, penalty payment date, run name, estimated project costs, and project operation date. For the remaining variables (tax, inflation, and discount rates, tax deductibility of one-time nondepreciable expenditures, and number of credited years for annual cost), you can either accept the model's standard values or specify your own.

B. CALCULATIONS AND SPREADSHEET

PROJECT references a Microsoft Excel™ spreadsheet to perform all of its present value calculations, although you do not need Excel to run PROJECT. The data you enter into the program is automatically transferred to the spreadsheet. The spreadsheet calculates the present value of the SEP and returns the result to the program for output. This section illustrates a PROJECT calculation by taking you step-by-step through relevant portions of the underlying spreadsheet. Italicized comments within brackets are added to explain the calculations, and are not part of the spreadsheet itself.

The spreadsheet is in your PROJECT folder (on your C drive or wherever else you installed PROJECT), filename "proj****.xls". The asterisks represent the most recent year for which EPA has performed updates for the spreadsheet. You may open the file, but it has been write-protected to preserve the integrity of the calculations. This spreadsheet contains necessary formulas and background information like tax rates and discount rates. The background information will be updated once a year, but the calculations themselves will remain the same.

1. Inputs and Variables

The first section of the spreadsheet contains the variables entered by the user. These are a prerequisite for the calculations. The following is a list of PROJECTS's basic inputs, along with inputs from an example case.

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[1] PROJECT considers and calculates only the direct financial costs (or savings) associated with implementation of a SEP. PROJECT does not consider any changes in sales, market share, employee morale, or public image that may be associated with some SEP's. Such changes (if present) may have significant financial impacts for the violator, but they are often difficult to estimate and are outside the scope of this analysis.

Inputs	Example	Comments
Case Name	Example Case	
Analyst Name	T.R. Analyst	
EPA Region	EPA Region 1	
Tax Status	C-corp	*[Also known as "Entity Type"]*
State	MA	
Customized Tax Rates?	n	*[You may customize the tax rate, in which case PROJECT will use the customized rate instead of its internal table]*
Federal Tax Rate	35.0%	
State Tax Rate	9.50%	
Combined Tax Rate	41.2%	*[Combined = Federal +(State x (1-Federal))]*
Penalty Payment Date (PPD)	01-Jan-1999	
Run Name	Test Run	
Discount Rate	10.0%	*[This is one of PROJECT's two discount values, one for companies and one for not-for-profits]*
Capital Investment:		
Cost Estimate	$100,000	
Estimate Date	01-Sep-1996	
Inflation Rate	2.2%	*[This is the default value]*
One-Time, Nondepreciable Expenditure:		
Cost Estimate	$10,000	
Estimate Date	01-Sep-1996	
Inflation Rate	2.2%	*[This is the default value]*
Tax Deductible?	Y	*[This is the default setting]*
Annual Costs:		
Cost Estimate	$1,000	
Estimate Date	01-Sep-1996	
Inflation Rate	2.2%	*[This is the default value]*
Number of Credited Years	5	*[This is the default value]*
Project Operation Date (POD)	01-Jan-2001	

Tax rates are contained in the spreadsheet as a table that contains current corporate and individual federal tax rates and state tax rates. Annual updates will keep tax rates current. When you designate a state and tax status for the violator, PROJECT finds the appropriate federal and state tax rates and calculates a combined tax rate. Because state taxes are deductible from federal taxable income, the combined tax rate calculation is:

Combined tax rate = Federal rate + [State rate x (1 - Federal rate)].

2. SEP Cost Components

PROJECT first calculates costs as of the date they will be expended, then adjusts them to the project operation date (POD). The present value (as of the POD) of each date's cash flow is equal to the cash flow multiplied by that date's present value factor. The PV factor uses the discount rate to determine a dollar's equivalent value in POD dollars. Therefore, the PV factor for any date is equal to the sum of one plus the discount rate, raised to the difference in the number of years (including any fractions) between that date and the project operation date.

Capital investments and one-time nondepreciable expenditures are calculated together for the year in which they are originally incurred. PROJECT also calculates the future depreciation tax shields for the initial capital investment.

Annually recurring costs are calculated for the number of credited years. The number of credited years may be customized, but the default value is five, and it may never be more than fifteen. Note that PROJECT automatically adjusts annual costs for inflation, and also adjusts the annual cost for any partial years.

The following page is PROJECT's spreadsheet calculation of the present value of capital, one-time, and annually recurring SEP costs as of the project operation date.

A) Capital & Other One-Time Costs

	01-Jan-2001	01-Jul-2001	01-Jul-2002	01-Jul-2003	01-Jul-2004	01-Jul-2005	01-Jul-2006	01-Jul-2007	01-Jul-2008
One-Time, Nondepreciable Expenditure	(10,990)								
Capital Investment	(109,898)								
Depreciation	0	(15,700)	(26,914)	(19,225)	(13,732)	(9,808)	(9,808)	(9,808)	(4,904)
Marginal Tax Rate	41.2%	41.2%	41.2%	41.2%	41.2%	41.2%	41.2%	41.2%	41.2%
Net After-Tax Cash Flow	(116,360)	6,468	11,088	7,921	5,658	4,041	4,041	4,041	2,021
PV Factor: Adjusts Cash Flow to POD	1.0000	0.9538	0.8671	0.7883	0.7164	0.6513	0.5921	0.5383	0.4892
PV Cash Flow as of POD	(116,360)	6,170	9,615	6,244	4,053	2,632	2,393	2,175	988

Total PV as of POD: **(82,090)** *[Present value of all one-time and capital investment costs as of the project operation date.]*

[Companies may deduct the depreciation of capital equipment from their taxable income. Below is the standard 7-year depreciation schedule, using the half-year convention]

Depreciation (MACRS):	*14.2860%*	*24.4897%*	*17.4935%*	*12.4953%*	*8.9243%*	*8.9243%*	*8.9243%*	*4.4626%*

B) Annually Recurring Costs

Year:	1	2	3	4	5	6	7	8	9
Period of Annual Costs; From:	01-Jan-2001	01-Jan-2002	01-Jan-2003	01-Jan-2004	01-Jan-2005				
To:	01-Jan-2002	01-Jan-2003	01-Jan-2004	01-Jan-2005	01-Jan-2006				
Annual Costs	(1,111)	(1,135)	(1,160)	(1,186)	(1,212)				
Marginal Tax Rate	41.2%	41.2%	41.2%	41.2%	41.2%				
Net After-Tax Cash Flow	(653)	(668)	(682)	(697)	(713)				
PV Factor: Adjusts Cash Flow to POD	0.9535	0.8668	0.7880	0.7163	0.6511				
PV Cash Flow as of POD	(623)	(579)	(538)	(499)	(464)				

Total PV as of POD: **(2,703)** *[Present value of all annual costs as of the project operation date.]*

4. Net Present Value

Once PROJECT has computed the value of capital costs and annually recurring costs, it adds them together to calculate the value of the project as of the project operation date. This initial value is then adjusted to the penalty payment date at the discount rate. To do this, the initial value is multiplied by the sum of one plus the discount rate, raised to the difference in the number of years (including any fractions) between the project operation date and the penalty payment date. The final net present value of the proposed project as of the penalty payment date is the maximum amount by which you may mitigate the penalty.

Run Name = Test Run		Comments
Present Values as of Project Operation Date:	01-Jan-2001	
A) Capital & Other One-Time Costs	$82,090	*[From previous calculation]*
B) Annually Recurring Costs	$2,703	*[From previous calculation]*
C) Initial Project Value (A+B)	$84,793	*[Value as of project operation date]*
D) Final Proj. Value at Penalty Payment Date,		
01-Jan-1999	***$70,058***	*[Final result, value as of penalty payment date]*

EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY APPENDIX B

Effective May 1, 1998

Note that this policy's references to the PROJECT model are for the older DOS model, but the new Windows™ versions of the model and User's Manual supplant any prior versions.

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

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[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.

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.

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:

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[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

(a) as injunctive relief[3] 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, 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:

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[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.

[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.

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 geographic[5] area. Such SEPs may have sufficient nexus even if the SEP 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.

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[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 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.

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 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.

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[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.

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, not 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 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.

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[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.

[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.

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 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 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

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[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.

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

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[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/oeca/models/".

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 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

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[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 projects.

marginal tax rate. If a business is not willing to make this commitment, 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

[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.

compliance. This includes "technology forcing" techniques which may establish new regulatory "benchmarks."

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,

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

and other complex SEPs may not be appropriate in administrative enforcement 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.

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[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.

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 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.

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

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

... Klein

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 defendable 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.

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[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

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

MAR 24 1998

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Final Revised Supplemental Environmental Projects Policy

FROM: Jonathan Z. Cannon
General Counsel (2310)

TO: Steven A. Herman
Assistant Administrator for
Enforcement and Compliance Assurance (2201A)

I understand that the Office of Enforcement and Compliance Assurance (OECA) plans to issue the *EPA Supplemental Environmental Projects Policy* (the new Policy) to provide a framework for EPA in exercising its enforcement discretion in determining appropriate settlements that include supplemental environmental projects (SEPs). My staff has worked closely with your office in the development of the new Policy which will supersede the May 1995 *Interim Revised Supplemental Environmental Projects Policy* (the 1995 Policy). The 1995 Policy superseded the February 12, 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements (the 1991 Policy). OGC staff also worked with your office in developing the 1995 Policy and, on May 3, 1995, issued a detailed legal opinion supporting the 1995 Policy.

As you are aware, the General Accounting Office (GAO) reviewed the 1991 Policy. In a March 1, 1993, letter to Congressman Dingell (B-247155.2), GAO indicated that the 1991 Policy was not consistent with GAO's interpretation of appropriations law principles. The appropriations law issues raised by GAO were fully considered and taken into account in developing the new Policy. While we cannot ensure GAO's ultimate concurrence[1], we believe, based on our review, that there is reasonable legal basis for issuing the new Policy.

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[1] Although GAO opinions and legal interpretations are useful sources on appropriations law matters, they are not binding on executive agencies. See Implementation of the Bid Protest Provisions of the Competition in Contracting Act, 8 Op. O.L.C. 236, 246 (1984); Memorandum for Janis A. Sposato, General Counsel, Justice Management Division, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel. (August 5, 1991); Memorandum for Emily C. Hewitt, General Counsel, General Services Administration from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel. (August 11, 1997).

OC
98-0261

We look forward to continuing to support OECA's efforts to effectively enforce and encourage compliance with our environmental laws. Please contact Jim Nelson at 260-5340 or Tanya Hill at 260-1486 if you have any further questions.

cc. David Hindin (2248A)

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

MAY 3 1995

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Review of 1995 Revised Policy on Supplemental Environmental Projects

FROM: James C. Nelson
Associate General Counsel
Pesticides and Toxic Substances Division (2333R)

TO: Steven A. Herman
Assistant Administrator
Office of Enforcement and Compliance Assurance (2201)

The Office of Enforcement and Compliance Assurance (OECA) is revising EPA's Supplemental Environmental Projects (SEPs) Policy which sets forth the conditions for including SEPs in settlements of environmental enforcement actions. You asked that we review the final draft of the revised Policy (dated April 24, 1995, hereafter the "Draft Policy") before it is issued for legal sufficiency, and that we address the concerns raised by Representative Dingell and the General Accounting Office (GAO) concerning certain Clean Air Act mobile source SEPs.

Examination of relevant statutes and case law shows that EPA has authority to include SEPs in settlement of civil penalty actions. The environmental statutes administered by EPA provide broad authority to enforce, including authority to prosecute violators, to assess penalties, to mitigate penalties, and to enjoin future violations, as well as seek appropriate relief. Implicit in this enforcement authority is broad discretion to settle enforcement actions on terms that are consistent with the underlying objectives of the statutes which the Agency is charged to enforce. EPA can settle a civil penalty action by accepting a lower penalty than it had originally sought in return for a defendant's agreement to undertake a SEP. However, such a settlement must be a reasonable exercise of discretion and not otherwise contrary to law.

We have carefully reviewed the Draft Policy and, as set forth fully below, conclude that the Draft Policy establishes criteria to assure that settlements of civil penalty enforcement

actions which include SEPs comply with applicable law.[1] Additionally, we think that the Draft Policy addresses the criticisms raised by GAO. Thus, it is appropriate to issue the Policy in the form we have reviewed.

DISCUSSION

I. Introduction

In a July 22, 1992 letter, Representative Dingell, as Chair of the Subcommittee on Oversight and Investigation, House Committee on Energy and Commerce, forwarded to former Administrator Reilly a GAO opinion that called into question EPA's authority to enter into certain settlement agreements for Clean Air Act (CAA) mobile source enforcement cases. GAO specifically challenged EPA's practice of allowing defendants in mobile source actions to fund public awareness projects in exchange for EPA accepting a lower penalty than originally sought by EPA when it brought the penalty action. GAO also concluded that such practice was inconsistent with the Miscellaneous Receipts Act, 31 U.S.C. §3302(b), and was an improper augmentation of appropriations.

OECA has been revising EPA's SEP Policy with GAO's concerns in mind, and we have worked closely with your staff during this process. The Draft Policy will supersede the 1991 SEP Policy in effect at the time of the GAO opinion. The Draft Policy sets forth the types of projects that are permissible as SEPs, the calculation of an appropriate settlement penalty when considering a proposed SEP, and the terms and conditions under which SEPs may become a part of a settlement. As described in the Draft Policy, SEPs are environmentally beneficial projects which a violator agrees to undertake in settlement of an enforcement action, but which the violator is not otherwise legally required to perform. The acceptable categories of projects include: public health, pollution prevention, pollution reduction, environmental restoration and protection, assessments and audits, environmental compliance promotion, and emergency planning and preparedness. The Draft Policy includes legal guidelines for evaluation of whether a proposed SEP is within EPA's authority and consistent with all statutory and Constitutional requirements.

This memorandum discusses EPA's authority to include SEPs in settlements of civil penalty actions, the limitations on EPA's authority, and how the Draft Policy helps assure that settlements which include SEPs comply with law and the Constitution.

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[1] This memorandum does not address mitigation of stipulated penalties for violations of a consent decree or other settlement document.

II. EPA's broad enforcement authority includes authority to settle cases and, as part of the settlement, to consider environmentally beneficial actions agreed to be taken by a defendant in determining an appropriate settlement penalty.

A. EPA has statutory authority to enforce the federal environmental statutes; this authority includes broad discretion to settle enforcement cases and accept lower penalties in such settlements.

Congress creates statutory obligations and associated enforcement authorities. Congress has specifically authorized EPA to enforce the federal environmental statutes and the regulations promulgated thereunder. Generally, EPA can initiate judicial civil enforcement actions under a statute it administers seeking penalties and/or injunctions to be awarded by a court, or EPA can levy civil penalties administratively and/or compel compliance through administrative orders. Most of EPA's statutes also contain provisions for criminal penalties. The discussion that follows focuses solely on the civil penalty authority.

Typically, administrative civil penalty enforcement provisions in EPA statutes direct that the Administrator may impose a civil penalty for violation of the statute, up to a specified dollar amount either per violation or per day of violation. For example, the Emergency Planning and Community Right to Know Act (EPCRA) §325(b)(1), 42 U.S.C. §11045(b)(1), an administrative civil penalty provision, states: "A civil penalty of not more than $25,000 per violation may be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title."[2] In this context, Congress delegated to EPA authority to prosecute, to determine the amount of penalties to seek, up to the specified maximum, and to impose the penalties.

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[2] Examples of other administrative civil penalty provisions include: EPCRA §§325(b)(1)(A), (2), and (c), 42 U.S.C. §§11045(b)(1)(A), (2), and (c); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) §14(a)(1), 7 U.S.C. §136l(a)(1); Toxic Substances Control Act (TSCA) §§16(a)(1) and 207, 15 U.S.C. §§2615(a)(1), and 2647; Clean Water Act (CWA) §309(g)(1) and (2), 33 U.S.C. §§1319(g)(1)(and (2); CAA §§113(d), 120(a), 205(c), and 211(d), 42 U.S.C. 7413(d), 7420(a), 7524(c), and 7545(d); Resource Conservation and Recovery Act (RCRA) §§3008(a) and 9006(a), 42 U.S.C. §§6928(a) and 6991e(a); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) §109(a)(1) and b), 42 U.S.C. §9609(a)(1) and (b), Safe Drinking Water Act §§1423(c) and 1414(g)(3)(A), 42 U.S.C. §§300h-2(c) and 300g-3(g)(3)(A), Marine Protection, Research, and Sanctuaries Act §105(a), 33 U.S.C. §1415(a).

Judicial civil penalty provisions are similar, for example: "Any person who violates [certain provisions of the CWA, permit conditions or limitations, requirements in a pretreatment program. . .] . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation." CWA §309(d), 33 U.S.C. §1319(d).[3] In the judicial context, EPA has the authority to prosecute[4] and to determine the amount of penalty to seek; the court imposes the penalty.

EPA's authority to enforce federal environmental statutes carries with it broad discretion to decide whether to prosecute, in some cases this discretion is almost unreviewable. Heckler v. Chaney, 470 U.S. 821, 831 (1985) (an agency's decision not to prosecute or enforce is a decision generally committed to an agency's absolute discretion). Implicit in the authority to enforce is the authority to settle. Courts have presumed that agencies have broad authority to settle cases that the agencies are empowered to adjudicate. See e.g. Oil, Chemical & Atomic Workers v. Occupational Safety & Health Review Comm., 671 F.2d 643, 650 (D.C. Cir. 1982) cert. denied 459 U.S. 905 (1982) (necessarily included within an agency's prosecutorial power is the discretion to withdraw or settle a claim). There is no

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[3] Examples of other judicial civil penalty provisions include the CAA §113(b) and §205(b), 42 U.S.C. §7413(b) and §7524(b); EPCRA §325(a), 42 U.S.C. §11045(a); RCRA §3008(g) and §7003(b), 42 U.S.C. §6928(g) and §6976(b); CERCLA §104(e)(5)(B), §106, and §109(c), 42 U.S.C. §9604(e)(5)(B), §9606, and §9609(c).

[4] Actually, it is the Attorney General that prosecutes judicial actions on behalf of EPA. The Attorney General has plenary power and supervision over any litigation to which the United States is a party, absent an applicable congressional directive to the contrary. United States v. California, 332 U.S. 19, 27 (1947); FTC v. Guignon, 390 F.2d 323,324 (8th Cir. 1968), relying on 28 U.S.C. §§516 and 519. Included within the broad authority of the Attorney General to carry on litigation is the power to compromise. Halbach v. Markham, 106 F. Supp. 475 (D.N.J. 1952), aff'd 207 F.2d 503 (3d Cir. 1953), cert. denied, 347 U.S. 933 (1954). This power is both inherent in the creation of the Office, e.g. Confiscation Cases, 74 U.S. at 457-459, and derived from the client agencies' authority to settle cases. United States v. Newport News Shipbuilding; 571 F.2d 1283, 1287 (4th Cir.), cert. denied 439 U.S. 875 (1978). The Attorneys General have long recognized that they have authority to settle cases even when the agency charged with administering the underlying law would not have that authority. 38 Op. Att'y Gen. 98, 99 (1934). For simplicity, this memorandum refers throughout to EPA's authority in judicial actions, but it is implicit that the reference is collectively to EPA and the Department of Justice.

indication in case law that courts would treat prosecutorial discretion exercised in administrative enforcement actions differently from discretion exercised in judicial enforcement actions.

As illustrated by the penalty provisions quoted above, the civil penalty provisions in statutes administered by EPA include the authority to assess penalties up to a specified maximum. Necessarily included in this authority is the discretion to assess a penalty for a lesser amount. Courts defer to agency determinations on penalties. See, e.g., NL Industries, Inc. v. Dept. of Transp., 901 F.2d 141 (D.C. Cir 1990) (Administrative agency is entitled to substantial deference in assessing civil penalty appropriate for violation of its regulations.); Cox v. U.S. Dept. of Agriculture, 925 F.2d 1102 (11th Cir. 1991) cert. denied 112 S. Ct. 178 (1991) (Assessing penalties for violation of the Animal Welfare Act was an exercise of a discretionary grant of power by USDA, and review by the court is limited.). Indeed, courts on occasion suggest that penalty assessments within the range authorized by statute are virtually unreviewable. See Mendelson v. Macy, 356 F.2d 796, 799 n.4 (D.C. Cir. 1966).

B. Penalty assessment provisions support EPA's authority to mitigate penalties based on a defendant's commitment to undertake a SEP.

In addition to the civil penalty enforcement provisions, many of EPA's statutes include penalty assessment provisions that set out criteria that EPA or the court must consider in determining the appropriate penalty. Section 325(b)(1)(C) of EPCRA is typical of those penalty provisions:

> In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

42 U.S.C. §11045(b)(1)(C)(Class I administrative penalties).[5]

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[5] While the precise language differs, many EPA statutes contain similar penalty assessment provisions, see, e.g., EPCRA §325(b)(2) (Class II penalties for EPCRA 304 violations), TSCA §16(a)(2)(2)(B), CAA 113(e) (stationary sources), CAA §205(c) (emission standards for motor vehicles), CAA §211(d) (regulation of fuels), CWA §309(g), CERCLA §109 (a)(3) and (b), §SDWA 1423(c) (underground injection), RCRA §9006(c)(underground storage

These criteria are also appropriate for EPA enforcers to consider in determining whether and how much to mitigate a penalty in negotiating a settlement, as the Draft Policy recognizes. The Draft Policy provides that evidence of an alleged violator's commitment and ability to perform a SEP is a relevant factor to consider in establishing an appropriate penalty during settlement. The statutes clearly support considering such factors with language such as "other matters as justice may require" or "good faith" of the defendant.

C. EPA has discretion to fashion settlements that serve the objectives of the statute being enforced, and such settlements may include remedies other than those specified in the statute.

EPA is charged with enforcing the federal environmental statutes and has broad discretion in fashioning a settlement which it believes is consistent with the purpose and objectives of the statute under which it is acting. Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967) ("the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objective"); Moog Industries, Inc. v. FTC, 355 U.S. 411, 413 (1958) (Agency, in exercising its enforcement discretion, can decide the course "best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.").

In negotiating the terms of settlement of civil penalty actions, EPA is not limited to civil penalties. Nor is there a statutory bar that would preclude EPA from including a SEP as a term of a settlement. Indeed, EPA settlements often contain terms in addition to penalties, depending on the circumstances of the case, such as agreements by defendants to cease violating the law, to remediate contamination resulting from the violation, to conduct audits and self-report violations, to conduct in-house educational seminars on compliance, and to analyze manufacturing processes to determine ways to reduce discharges and pollution. Case law shows that settlements of enforcement and civil penalty actions can include remedies different from those specified in the statute.

While EPA cannot order a defendant to perform a SEP as a remedy for the violation when the statute only authorizes civil penalties for such a violation, EPA can exercise its enforcement discretion to settle a civil penalty case on terms that include a

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tanks), and FIFRA §14(a).

SEP as well as a penalty. There is no case law directly on point.[6] However, the case law on judicial review of consent decrees and of agency settlements, discussed below, supports this conclusion.

Settlement of judicial civil penalty actions

When EPA settles judicial civil penalty actions, EPA enters the settlement agreement as a consent decree for approval by the court. The Supreme Court has explicitly held that courts are not barred from approving consent decrees which contain relief that the court lacked authority, under the statute, to award after a trial. Local No. 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986). In Firefighters, the statute prohibited a court from ordering relief for individuals who were not actual victims of discrimination, but the consent decree provided race-conscious relief that benefited individuals who were not actual victims of discrimination. The Court concluded that, where the parties have consented to the terms of the decree, the court may enter the decree as long as the decree 1) falls within a court's subject matter jurisdiction, 2) is within the general scope of the complaint, and 3) furthers the objectives of the law upon which the complaint was based. Id. at 525.

Similarly, in Sierra Club, Inc. v. Electronic Controls Design, Inc. (ECD), 909 F. 2d 1350 (9th Cir. 1990), the court noted that it was clear that it could not order a defendant in a civil penalty citizens suit under the CWA to make payments to an organization other than the U.S. Treasury, but held that this prohibition did not extend to a settlement agreement between the parties where the court is not ordering non-consensual monetary relief. The court stated:

> There is no indication that where a defendant agrees to a settlement it must also agree to pay penalties to the treasury. Likewise, the Act's legislative history reveals no Congressional intent that private parties be precluded from entering into settlements which do not require the defendant to tender civil penalties to the United States. . . . The payments to the environmental organizations are not in recognition of liability under the Clean Water Act and are not civil penalties.

909 F. 2d at 1356.

Settlement of administrative civil penalty actions

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[6] EPA has routinely settled judicial civil actions with SEPs in various District Courts, and the courts have not objected to these provisions.

Unlike settlements of judicial civil penalty enforcement actions, settlements of administrative civil penalty enforcement actions do not require judicial ratification. Accordingly, courts are not typically asked to rule on the substance of such settlements. However, courts have ruled on other types of settlements of administrative actions.

In Center for Auto Safety, Inc. v. Lewis, 685 F. 2d 656 (D.C. Cir. 1982) the court held that the Secretary of Transportation did not abuse his discretion by settling a transmission defect investigation on the basis of a remedy other than the remedy specified in the National Traffic and Motor Vehicle Safety Act. The Act requires recall and replacement of the defective part by the manufacturer. However, the Secretary, rather than continue with an enforcement action, settled the case in return for the manufacturer agreeing to send owners of automobiles notice of the alleged transmission defect and a warning not to leave the automobile with the engine running. The court rejected the argument that the Secretary lacked authority to settle a safety defect investigation for any form of relief other than the remedies prescribed in the statute. The court's holding in this regard was primarily based on the fact that there had been no final determination under the statute that the vehicles under investigation contained a defect. The Secretary had the burden of proof and would have to prevail against the challenge by the manufacturers before the Secretary could require the remedies specified in the Act. See also, Center for Auto Safety v. Ruckelshaus, 747 F. 2d 1 (D.C. Cir. 1984) (while EPA could not order an automobile pollution offset commitment as a substitute for the recall remedy specified in the statute, EPA could "take account of an offset commitment in the exercise of its enforcement discretion."); State Water Control Bd. v. Train, 559 F. 2d 921, 927 (4th Cir. 1977).

Similarly, in National Coalition Against Misuse of Pesticides (NCAMP) v. EPA, 867 F. 2d 636 (D.C. Cir. 1989), the court rejected a challenge that EPA lacked authority to enter into a settlement whose remedy was different from that provided by statute. EPA has administrative authority in FIFRA §6(b) to cancel registrations of pesticides that cause unreasonable adverse effects on the environment, and to allow continued sale and use of existing stocks of a cancelled pesticide if EPA finds that such sale or use will not have an unreasonable adverse effect. Here, EPA settled and allowed continued sale and use of the cancelled pesticide without finding that continued sale and use of the cancelled pesticide would not have an unreasonable adverse effect on the environment. The court rejected the challenge because here EPA did not cancel under FIFRA §6(b); instead, in response to a threat of cancelling under §6(b), the registrant agreed to cancel voluntarily in return for being allowed to continue to sell and distribute the cancelled pesticide until existing stocks were exhausted. The court found

it reasonable for EPA to settle on these terms because the settlement enhanced the purposes of FIFRA by resulting in less use of the pesticide than if EPA had gone through the lengthy cancellation proceedings. Thus, the court approved a settlement with a remedy for existing stocks that EPA could not have ordered after going through the cancellation proceedings (unless EPA made the required statutory finding).

These cases support a conclusion that courts may uphold agency settlements and approve consent decrees that settle civil penalty enforcement actions with a SEP as a term of the settlement even though the statute upon which the action is based does not specifically authorize such a remedy.

D. Settlements can go beyond remedying the specific violation at issue.

Courts have rejected contentions that provisions in a consent decree must be limited to remedying specific violations of a statute. In Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983), cert. denied 467 U.S. 1219 (1984), the court found that such limitations on a court's authority are unduly narrow. In Gorsuch, the issue was whether the court had authority to approve provisions of a consent agreement which directed EPA to take actions not required to remedy the specific violations of the CWA. EPA had agreed to implement a requirement of the CWA concerning toxic pollutant regulations using more extensive criteria than those imposed by the CWA, and agreed to undertake a study to identify additional toxic pollutants not covered by the CWA. The court rejected the contention that the consent decree be limited to remedying the specific violation at issue. The court reasoned that to limit a court's authority to approve consent decrees only to the extent the decrees remedy wrongs which the court could specifically identify would require a court

> "...to undertake a close examination of each part of the Decree in order to establish that it was responsive to a specific violation of the Act. This would require, in turn, detailed findings that the Act had been violated in various ways. However, the long-standing rule is that a district court has power to enter a consent decree without first determining that a statutory violation has occurred." Swift & Co. v. United States, 276 U.S. 327 (1928).

Gorsuch at 1125. The court considered the agreement appropriate given that it was consistent with the purposes of the CWA and fairly resolved the controversy.

If a court will approve a consent decree that contains a remedy which is not limited to correcting the specific violation

at issue, then implicitly the court would not consider such settlement beyond an agency's authority. Although Gorsuch involved judicial review of a consent decree between EPA and NRDC, there is no reason that the EPA Environmental Appeals Board's or EPA Regional Administrator's approval of a consent order settling an administrative civil penalty case should be subject to a different standard. Indeed, EPA's rules governing consent orders in settlement of administrative civil penalty cases only require that the settlement be consistent with the provisions and objectives of the statute and applicable regulations. 40 CFR §20.18(a).

E. Injunctive Counts are not needed for SEPs.

In U.S. v. Roll Coater, 21 Envtl. L. Rep. 21073 (S.D. Ind. 1991), the court rejected a defendant's request for monies to be paid to an environmental entity rather than being paid as a civil penalty because, among other things, there was no injunctive count. The court agreed with Roll Coater that it could fashion injunctive relief requiring the defendant to pay monies to other entities, but here there was no claim for injunctive relief, so the court lacked "jurisdiction to grant Roll Coater's request for an alternative remedy." This case, however, is not controlling for EPA's settlement authority. Roll Coater concerned a court acting after rendering a decision on liability, and whether the court had authority to order the defendant to pay money to environmental entities as a remedy for the defendant's violation of pretreatment standards under the CWA. The court itself noted that the law would be different if the case involved review of a settlement agreement. Id. at 21077.

Indeed, the case law discussed above supports a conclusion that injunctive counts are not needed. Courts will approve consent decrees that go beyond the remedies in the statute. Therefore, it should not make a difference to a court reviewing a consent decree whether the government is only seeking civil penalties, or includes an injunctive claim.

F. There is evidence of Congressional acceptance of SEPs

Congress has indicated approval of EPA settlements involving SEPs. When Congress amended the CWA in 1987 to add a provision on administrative penalties in §309 that included a penalty assessment provision similar to that in EPCRA § 325 quoted above, the Conference Committee stated:

> In certain instances settlements of fines and penalties levied due to NPDES permit and other violations have been used to fund research, development and other related projects which further the goals of the Act. In these cases, the funds collected in connection with these violations were used to investigate pollution

> problems other than those leading to the violation. Settlements of this type preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of environmental protection. Although this practice has been used on a selective basis, the conferees encourage this procedure where appropriate.

H. Report 99-1004, 99th Cong. 2d Sess. at 139 (Oct. 15, 1986). The cited passage is evidence of Congressional acceptance of SEPS which address pollution problems other than those leading to the violation.

III. EPA may include SEPs in judicial and administrative settlements as long as the settlements represent a reasonable exercise of discretion and are not otherwise contrary to law.

Section II above discusses EPA's broad enforcement authority and prosecutorial discretion. This section focuses on the limitations on the exercise of that discretion in settling cases and including SEPs as a term of a settlement.

A. EPA settlements with SEPs must be a reasonable exercise of enforcement discretion.

Generally, the standard for determining whether an agency has abused its discretion is one of reasonableness. Hudson Stations v. EPA, 642 F. 2d. 261 (8th Cir. 1981). If an agency chooses a course of action that is reasonable in light of the facts and its statutory mandate, there is no abuse of discretion. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Niagara, supra. The law concerning the reasonableness of settlement of enforcement actions is limited, possibly because of the limited scope of review and the deference granted by courts to agency settlement of enforcement actions. Settlements approved by a federal agency charged with enforcement of environmental protection statutes carry a "strong presumption of validity." Hooker Chemicals and Plastics Corp., 540 F.Supp. at 1072. See FTC v. Standard Financial Management Corp., 830 F. 2d 404, 408 (1st Cir. 1987) (discussing need for judicial deference "to the agency's determination that the settlement is appropriate"); NCAMP v. EPA, 867 F. 2d 636 (D.C. Cir. 1989).

The case law concerning judicial approval of consent decrees in U.S. Government enforcement actions provides guidance on factors that can be considered in determining whether a settlement represents a reasonable exercise of enforcement discretion. Courts reviewing consent decrees lodged by the U.S. Government to settle enforcement actions have stated the criteria for approving a consent decree in a variety of ways, e.g., a consent decree must be fair, reasonable, and adequate, and not

contrary to law. U.S. v. Metropolitan St. Louis Sewer District, 952 F. 2d. 1040 (8th Cir. 1992); the decree must be fair, adequately protect the public interest, and accord with the dictates of Congress. U.S. v. Hooker Chemicals and Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.NY. 1982); U.S. v. Ketchikan Pulp Co., 430 F. Supp. 83, 86 (D. Alaska 1977). The criteria are not mutually exclusive and are generally considered collectively by the courts.

Generally, in considering fairness, courts look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance. Courts also consider whether the defendant is bearing the cost of the harm for which it is responsible. Reasonableness involves considering whether the decree adequately compensates the public for the harm caused, and whether the decree reflects the relative strength or weakness of the government's case. Overriding both fairness and reasonableness is the question of whether the decree furthers the goals of the statute upon which the complaint is based. U.S. v. Cannons Engineering Corp., 899 F.2d 79 (1st Cir. 1990). In determining whether the decree serves public interests, courts will judge whether the penalties agreed to are adequate to deter future violations. Ketchikan Pulp. Because the consent decree is not a judgment on the merits of the case, the court does not apply the penalty assessment criteria in the statute to determine an appropriate penalty. Metropolitan St. Louis Sewer.

In determining that consent decrees are not contrary to law, courts have considered whether the decree conflicts with the underlying statute (Firefighters), is beyond the agency's authority (NCAMP), or violates appropriations law, i.e. the Miscellaneous Receipts Act (Sierra Club v. ECD). [This latter issue is discussed at length in Section IV.]

B. Settlements with SEPs that further enforcement goals and the goals of the underlying statute should be considered a reasonable exercise of enforcement discretion.

A central theme of the consent decree cases discussed above is that the settlement must be consistent with (some cases say ... further the goals of) the underlying statute. EPA's authority to settle derives from the enforcement provisions in its statutes. Therefore, a settlement that furthers enforcement goals should be a reasonable exercise of enforcement discretion. The primary goal of civil penalty provisions is to induce compliance. See, e.g. National Independent Coal Operators' Assn'. v. Kleppe, 423 U.S. 388, 401 (1976) (purpose of mine safety penalties is to provide a "strong incentive for compliance with the mandatory health and safety standards"); Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Col. L. Rev. 1435, 1455-57. So, certainly penalties

are an important part of settlement of civil penalty actions. Also, as courts have acknowledged, penalty provisions serve remedial functions, such as compensation and removal of the economic benefit of noncompliance (restitution). E.g., PIRG of New Jersey v. Powell Duffryn, 913 F.2d 64, 80; Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128, 1141 (11th Cir. 1990); Tull v. United States, 481 U.S. 412, 422 (1987) (purpose of civil penalties is threefold: retribution, deterrence, and restitution); Diver at 1461-1472. SEPs that address the violation or harm caused could serve the goals of deterrence, compensation, or restitution. In determining the reasonableness of a consent decree, courts do examine whether the consent decree serves enforcement purposes.[7]

C. EPA's Draft Policy will help assure that settlements with SEPs are a reasonable exercise of enforcement discretion.

The Draft Policy sets out criteria for settlements with SEPs to help assure that EPA settlements as a whole serve enforcement goals and meet the standard of review for consent decrees. First and foremost, the Draft Policy points out that EPA seeks substantial monetary penalties in civil penalty actions, and requires settlements to include a monetary penalty, generally at the level which captures the economic benefit of noncompliance plus some appreciable portion of the gravity component of the penalty. This requirement clearly serves enforcement goals of

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[7] Courts have approved consent decrees negotiated by EPA and defendants to settle judicial civil penalty enforcement actions, when the settlements included environmentally beneficial projects in addition to civil penalties. See e.g. U.S. v. City of Sarasota No. 87-210-CIV-T-15B (D. Fla. 1988); U.S. v. Amoco Oil Co. No. 80-0801-CV-W-5 (D. Mo. 1984); U.S. v. City of Englewood, Civ. No. 78-1033 (D. Colo. 1978); U.S. v. Molycorp Inc., Civ. No. 81-0785 M (D. N.M. 1981); U.S. v. City of Los Angeles and State of Cal., Civ. No. CV-773047-HP (C.D. Cal. 1980); and U.S. v. Longoria, Civ. Action No. C-90-205 (S.D. Tx. 1992). In Longoria, the court approved a consent decree with penalties and a SEP, settling a case alleging violations of §203 of the CAA for tampering with automobile emission control devices. Specifically, the defendant agreed to sponsor a public information compliance program designed to educate persons who service exhaust systems of motor vehicles in the Corpus Christi, Texas area. Although the court did not specifically address the legality of the SEP, the court approved the consent decree and, therefore, did not consider the settlement beyond the government's authority or an abuse of enforcement discretion.

deterrence and helps meet the judicial review standard of reasonableness.

The Draft Policy also requires that there be a close relationship or "nexus" between the violation (or harm caused) and the benefits to be derived from the SEP. The Draft Policy provides that a SEP can have a nexus to the violation if it remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future. We believe the nexus requirement is an important part of the Draft Policy. The nexus requirement serves as a surrogate for several legal requirements and ensures that SEPs meet these legal requirements. Most importantly, the nexus requirement helps assure that SEPs further enforcement goals of deterrence and/or restitution and the goals of the statute being enforced. Additionally, a project related to remedying the harm caused or risk posed by the violation is within EPA's enforcement authority, and should not appear to be an EPA or federal program that could give rise to the appropriations issues raised by GAO and discussed in section IV.

In addition to the nexus requirement, the Draft Policy also requires that a SEP advance at least one of the declared objectives of the environmental statutes that are the basis of the enforcement action.[8] This requirement is consistent with criteria set out by courts discussed above. Most SEPs under the Draft Policy should further enforcement goals because of the nexus requirement. However, even if a SEP did not specifically address enforcement goals, the requirement that the SEP advance at least one of the declared objectives of the underlying statute that is the basis for the enforcement action, should make a settlement with penalties and a SEP a reasonable exercise of enforcement discretion because the penalties, which are required to be included in the settlement, will further specific enforcement goals such as deterrence, while the SEP serves the underlying statutory goals.

The Draft Policy also lists and describes seven categories of projects that may qualify as acceptable SEPs, and prohibits projects of the type that have been cited by GAO and Congress as

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[8] For example, the declaration of purpose of Congress in enacting the CAA is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." CAA §101(b)(1), 42 USC §7401(b)(1). The CWA provides that a primary goal of the Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA §101(a), 33 U.SC §1251(a).

problems in the past. By limiting SEPs to these categories, in addition to the requirement that SEPs have a nexus to the violation, the Draft Policy guides the exercise of enforcement discretion to ensure that settlements with SEPs are reasonable and within EPA's authority.

Finally, the Draft Policy provides that SEPs cannot be something which the defendant is otherwise legally required to perform, nor can SEPs be something which the defendant could be required to do. This latter requirement prevents penalties from being improperly mitigated.

All the requirements in the Draft Policy discussed above help assure that a SEP is a reasonable exercise of enforcement discretion.

D. EPA's Draft Policy addresses GAO's concern about EPA's authority for public awareness SEPs that are not related to correction of the violation.

In its 1992 letter, GAO concluded that EPA did not have authority to settle mobile source air pollution enforcement actions under §205 of the CAA by allowing violators to fund certain public awareness projects (CAA opinion). The public awareness projects at issue included an American Automobile Association training program to instruct high-school automotive instructors on the most recent emissions control technology and sponsorship by the alleged violator of public events to promote clean air such as marathons, bicycle races, airplane towing messages, and "Clean Air Days." GAO concluded that EPA's enforcement authority did not extend to these remedies which were unrelated to correction of the violation. GAO pointed out that EPA's 1991 SEP Policy allowed public awareness projects without requiring any relationship between the project and the violation at issue.[9]

The Draft Policy, which will supersede the 1991 SEP Policy, addresses this concern. As discussed above, the Draft Policy requires nexus for all SEPs. Additionally, the Draft Policy specifically prohibits general public awareness SEPs.

GAO also raised appropriations issues concerning the mobile sources SEPs, which are discussed below.

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[9] We do not believe GAO's opinion suggests that all SEPs are inappropriate or beyond EPA's authority. However, to the extent the opinion could be read in such a manner, we disagree for the reasons set out in this memorandum.

IV. The Draft Policy addresses GAO's concerns about the Miscellaneous Receipts Act (MRA) and improper augmentation of appropriations.

GAO concluded that EPA's practice of settling Notices of Violations (NOVs) under the CAA by reducing penalties in return for the defendant funding a public awareness project relating to mobile source violations, violated the MRA and improperly augmented Agency appropriations. GAO based this conclusion on two previous opinions it had issued, In the Matter of: Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties (NRC opinion) (B-238419), 70 Comp. Gen. 17 (1990), and In the Matter of: Commodity Futures Trading Commission B-210210 (Sept. 1983) (CFTC opinion). Both matters involved the agencies proposing to allow violators to donate money to educational institutions for research in lieu of civil penalties, and in both instances, GAO thought that the agencies would be improperly augmenting appropriations by such actions. In the NRC opinion, GAO concluded that the NRC's proposal to allow violators to contribute the amount of the penalty to a university or nonprofit institution to fund nuclear safety-related research would result in an unlawful augmentation of appropriations because the Atomic Energy Act of 1954 authorized the NRC to award contracts to nonprofit educational institutions to conduct nuclear safety-related research. GAO reasoned that the NRC would be circumventing the appropriations process by controlling the amount of funds available for nuclear safety research projects. GAO viewed EPA's mobile source SEPs as similar to the proposals by NRC and CFTC.[10]

As discussed below, we believe that EPA's exercise of its enforcement discretion to settle cases with a mix of penalties

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[10] GAO also stated, in a footnote, that had Congress intended to authorize EPA to fund projects with civil penalties it could have said so in the statute. To support this, GAO points to the 1990 amendment of the CAA adding to the citizens suit provision in §304(g) that penalties assessed in citizens suits shall be deposited in a special fund in the Treasury for use by EPA to "finance air compliance and enforcement activities." We do not believe that the penalty fund provision added to the citizens suit section of the CAA restricts in any way EPA's authority to settle civil penalty cases under the separate enforcement provisions of the CAA by accepting a mix of penalties and a SEP. The penalty fund established in the CAA citizens suit provision does not preclude EPA from including SEPs in settlements of EPA enforcement cases, nor does it prevent citizens from settling their suits with the defendant agreeing to perform an environmental project. There is no legislative history of the 1990 CAA amendment showing any Congressional intent at odds with this conclusion.

and a SEP does not violate appropriations law. The Draft Policy sets forth the circumstances under which settlements may include SEPs to help assure that SEPs do not violate appropriations law, and will not allow the types of projects that GAO found offensive in the NRC, CFTC, and CAA opinions.

A. EPA's exercise of its discretion to settle cases and consider a defendant's agreement to undertake a SEP in determining an appropriate penalty should not violate the MRA.

1. The only money received for the use of the Federal government is the monetary penalty designated in the settlement as a penalty and that penalty must be deposited in the Treasury when it is collected.

The Constitution places the power of the purse in Congress: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . ." U.S. Const. art. I, §9, cl.7. Congress' appropriation authority goes not just to the amount, but also to specifying how appropriated money will be spent. In specifying how the money will be spent, Congress defines the limits of the Federal government. The MRA serves to implement Congress' appropriation authority by providing that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. §3302(b). Pursuant to the MRA, all funds received for use of the government are public funds subject to congressional control. All such funds must be deposited in the Treasury. Once money is deposited into the general fund of the Treasury, it takes an appropriation to get it back out. 3 Comp. Gen. 296 (1923); 13 Comp. Dec. 700, 703 (1907). The effect of the Appropriations Clause and the MRA is to assure that the Executive branch remains dependent on the congressional appropriations process (except where Congress has enacted exceptions to the requirement that all money received by the government must be deposited in the Treasury).

Clearly, under the MRA, any money received by EPA must be deposited in the Treasury (unless otherwise provided by statute). However, in settlement of civil penalty cases for a combination of civil penalties and a SEP funded by a defendant, the only "money received for the government" is the monetary penalty designated as a civil penalty in the settlement. EPA has no authority to require that a defendant pay money to the government unless and until EPA has prevailed in the enforcement action. In administrative enforcement actions, EPA generally demands a specific penalty amount in the Complaint. But this penalty demand is only a prayer for relief, and no specific penalty amount is due until the Complaint is resolved, either through a settlement or through a final order which is not timely appealed.

In judicial cases, EPA generally pleads in the Complaint for an appropriate penalty amount up to the statutory maximum. Thus, no specific penalty amount in a judicial case is due until a settlement is entered, or until a court issues an order which is not timely appealed.

In mitigating penalties as part of a settlement from those originally sought by EPA in an enforcement case, EPA is not giving up collection of funds which are clearly due to the government, but rather EPA has decided to settle on terms which, in consideration of relevant factors (e.g., acts of the defendant, litigation risks, agency resources) it has determined achieve the goals of the statute.[11] In exchange for the savings of additional cost and risk to the litigants, the parties each give up something they might have won had they proceeded with the litigation. This is a classic exercise of prosecutorial discretion and settlement authority. Settlement is encouraged, particularly where the settlement "will contribute significantly toward ultimate achievement of statutory terms." Hooker Chemicals and Plastics Corp. (citing cases); Patterson v. Newspaper & Mail Deliverers Union of New York, 514 F.2d 767 (2d Cir. 1975), cert. denied, 439 U.S. 911 (1976).

The MRA was not intended to limit an agency's lawful exercise of its authority to settle cases and mitigate penalties as part of a settlement from those originally sought by the agency. See e.g. 17 Op. Att'y Gen. 592 (1883) (Enactment of the MRA did not "touch the powers of the Secretary as regards the superintendence [sic] of suits, or the mitigation of penalties."). The MRA was enacted to curb unlimited discretion of tax collectors to withhold payments from the Treasury for a period of time for their own use before turning it over the Treasury. U.S. v. Forsythe, Fed. Cas. No. 15,133 (1855). Thus, the MRA is intended to prohibit agencies that receive money from using that money for their own purposes rather than depositing it in the Treasury. EPA's exercise of its enforcement authority to settle cases by mitigating penalties from those EPA originally sought in its Complaint in exchange for a defendant's agreement to perform a SEP does not result in EPA receiving money equivalent to the value of the SEP within the meaning of the MRA.[12]

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[11] See Sierra Club v. ECD, supra, (payments made in the context of settlements were not penalties, but merely payments, and as such were not required to be deposited in the U.S. Treasury).

[12] See Donald W. Stever, "Environmental Penalties and Environmental Trusts--Constraints on New Sources of Funding for Environmental Preservation," in 17 Environmental Law Reporter 10356 (Sept. 1987), for a discussion of the MRA and civil

SEPs, as structured by the Draft Policy, are not an alternative to penalty payment. Once a civil penalty is reduced to a sum certain and is due to be paid under a settlement agreement in accordance with the Draft Policy, the penalty must be deposited in the Treasury when the Agency has collected it. Similarly, after a civil penalty action has been adjudicated, either by a court or an Administrative Law Judge and a penalty has been assessed in an order, the penalty must be deposited in the Treasury when the Agency has collected it. Of course, if the defendant were to appeal the finding of liability or the amount of the penalty assessed, or if a defendant disputed that a penalty is actually due, the same discretion and considerations in deciding whether to settle the original action for mitigated penalties in return for a SEP would be operable on appeal. The parties could decide to settle after an appeal is filed, the same as they would do at the time of the original adjudication, to save themselves the time, expense, and risk of further litigation. In a settlement at either stage, the defendant is only agreeing to perform a SEP in the context of the settlement whose terms represent a weighing of the time, expense, and risks of litigation to both parties.

2. The Draft Policy sets out criteria for SEPs to help assure that EPA does not constructively receive the money a defendant spends in carrying out a SEP.

There are no judicial opinions of which we are aware that address how the MRA applies to the government's settlement of administrative or judicial enforcement actions seeking civil penalties from a violator where those settlements result in the defendant paying less as a penalty than the government originally sought in its Complaint and undertaking other actions as part of the settlement such as a SEP.

However, a 1980 legal opinion by the Department of Justice rendered in the context of a proposed settlement of a case involving a claim for civil damages filed by the government, found that the MRA applies to money "constructively" as well as actually received. In Re Steuart Transportation Company, U.S. Department of Justice, 4 Office of Legal Counsel Opinion (OLC) 684 (1980). That is, if a federal agency could have accepted possession and retains discretion to direct use of the money, it has constructive receipt of the money, and the money must go to the Treasury ("cash touching the palms of a federal official" is irrelevant). Id.

In Steuart, the United States and the State of Virginia sued Steuart seeking, among other remedies, damages for the death of migratory waterfowl. A term of the settlement specified that the

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penalties.

U.S. and the State would share an entitlement to the damages and that the defendant would donate this money to an environmental organization to be designated by the U.S. and the State. Thus, the proposed settlement would have designated the money to be donated as "damages" and would have allowed the U.S. to retain discretion to direct the use of those funds after entry of the settlement. For these reasons, OLC concluded that the U.S. constructively received the funds because the U.S. "could have accepted possession and retains discretion to direct the use of the money". Id. The concept of constructive receipt relied upon by OLC is derived from tax law. According to tax law, constructive receipt occurs when the taxpayer has unfettered control or command of the money. "Though not reduced to possession, it must be available to the taxpayer without restriction or limitation." Bennett v. United States, 293 F. 2d 323, 326 (9th Cir. 1961); Pittsburgh-Des Moines Steel Co. v. United States, 360 F. Supp. 597, 600-601 (W.D. Pa. 1971).

The circumstances of the proposed settlement described in Steuart are different from those presented by EPA's settlements of civil penalty actions using SEPs, and thus it does not appear that the reasoning used by OLC in Steuart applies to the situation involved in EPA civil penalty settlements and the use of SEPs in such settlements under the Draft Policy.

First, Steuart involved a claim by the U.S. of entitlement to damages based on an injury to the public. As set forth in the Draft Policy, SEPs do not mitigate claims for damages or for injunctive relief. They are used only in settlement of civil penalty actions.

Second, the proposed Steuart settlement apparently would have acknowledged that the U.S. was entitled to be paid damages (to be shared with the State of Virginia) and would have explicitly provided that those damages would be paid to a third-party waterfowl preservation organization rather than sent to the Treasury. Under the Draft Policy, EPA's entitlement to the amount designated as a "civil penalty" in the settlement will be clearly established. The SEP will be designated separately as a condition of the settlement and is not a "civil penalty" to which EPA would have any claim.[13] Thus, EPA settlements involving civil penalties and SEPs do not establish that EPA is in any way "entitled" to the money that will be spent by the defendant to carry out the SEP.

Third, under the proposed Steuart settlement, the U.S. would have retained the authority, after the settlement was entered, to designate the waterfowl preservation organization to whom the defendant would be required to pay the money. Under the Draft

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[13] See discussion in Section IV.A.1., supra.

Policy, EPA does not retain any authority, after the settlement is entered, to manage or administer how money is spent on a SEP.[14]

However, even if we were to assume that the reasoning in the Steuart opinion were to apply somehow to settlement of civil penalty cases which include a SEP, EPA settlements of civil penalty actions under the Draft Policy will be different from the situation in Steuart and, thus, will avoid the problem of constructive receipt that would have occurred in the proposed settlement in Steuart. Under the Draft Policy, any money involved in carrying out a SEP will clearly not be a civil penalty for these purposes; EPA will clearly not be entitled to obtain that money; and EPA will not retain discretion to decide how the SEP funds will be spent. Rather, the Draft Policy requires that the terms and conditions of the SEP to be carried out will be specifically set out in the settlement document. Additionally, the Draft Policy guards against EPA control or command of a SEP by prohibiting EPA or any other federal agency from playing any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP.

The Draft Policy allows settlements to contain conditions requiring the defendant to submit progress reports on the project and specifying that the defendant pay stipulated penalties for violation of the settlement agreement if it fails to carry out the SEP. These conditions are appropriate and would not cross the line described in Steuart. They do not amount to EPA control over the project or the funds spent on the SEP, but are merely to assure the defendant's compliance with the underlying settlement agreement.

B. The Draft Policy addresses GAO appropriations concerns.

GAO's "rule" against augmentation of appropriations is based mostly on the MRA,[15] but also rests on Congress' appropriations

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[14] EPA oversight to ensure that the terms of the settlement agreement, including the SEP are properly carried out would not be the sort of management or administration that was at issue in Steuart.

[15] According to the Comptroller General, the rule against augmentation of appropriations is derived from three different statutes: 31 U.S.C. §3302(b) (the MRA); 31 U.S.C. §1301(a) (restricting use of appropriated funds to their intended purposes); and 18 U.S.C. §209 (prohibiting payment of, contribution to, or supplementation of the salary of a government officer or employee as compensation for his or her official duties from any source other than the government of the United States).

authority. Generally stated, GAO's position is that an agency cannot resort to other sources of funds to supplement its appropriations. This is a corollary to the separation of powers doctrine in that it assures that federal agencies do not engage in activities beyond those authorized by appropriations.

In its opinions, GAO concluded that NRC's proposal to allow alleged violators to contribute to universities for nuclear safety research in lieu of paying part or all of a penalty, CFTC's proposal to allow alleged violators to donate to educational institutions for research and information programs on futures trading in lieu of paying a penalty, and EPA's mitigation of CAA civil penalties in return for alleged violators, among other things, sponsoring public events to promote clean air, all improperly augmented appropriations. Each situation involved an alleged violator funding a third party for research, to conduct a training program, or to carry out a public event. The Draft Policy does not allow projects that involve a defendant paying money to a third party. These types of SEPs are more likely to draw scrutiny from GAO and Congress, who may question whether the money donated was really public funds that should have gone to the Treasury. Even though the settlement agreement may specify a use for the funds that has a nexus to the violation, the appropriations issue still arises. For this reason and the fact that the limitation addresses GAO augmentation concerns, we think this limitation on SEPs is appropriate.

In the NRC and CFTC opinions, GAO also perceived that the projects were being used by these agencies to supplement the agencies' effort in carrying out their own statutory responsibilities, thus GAO viewed this action as the agencies devising a way to add to their appropriations. GAO did not assert that the CAA mobile source public awareness SEPs were activities that EPA was responsible for doing and for which EPA had received appropriations. Certainly, a SEP that undertakes something EPA is mandated to do by its statutes could be viewed as improperly augmenting EPA's appropriations. Generally, actions undertaken by the U.S. Government or on behalf of the U.S. Government by its agents (such as its contractors) must be authorized by Congress and paid through appropriations. EPA does have responsibilities to educate the regulated community on what is required to comply with the laws implemented by EPA. To assure that SEPs do not cross over into areas where EPA has responsibilities, the Draft Policy prohibits general public awareness SEPs. It also directs that the SEP 1) cannot be something which EPA itself is required by its statutes to do, 2) must not provide EPA with additional resources to perform an activity for which Congress has specifically appropriated funds, and 3) should not appear to be an expansion of an existing EPA program. Additionally, the Draft Policy requires that the project have a nexus to the violation. As long as the SEP is addressing the violation or harm caused, EPA is acting within its

enforcement authority and the settlement is an exercise of enforcement discretion, not an activity beyond EPA's authority which raises the specter of augmentation. For the foregoing reasons, we believe that the Draft Policy addresses GAO's augmentation concerns.

CONCLUSION

We have carefully considered the Draft Policy and conclude that it complies with applicable law. EPA has broad enforcement authority under the federal environmental statutes it implements. This authority includes broad discretion to settle cases and mitigate penalties in the context of a settlement from those originally sought by EPA. In fashioning settlements of civil penalty cases, EPA can include remedies in addition to civil penalties, and such remedies can go beyond addressing the specific violation at issue, provided such settlements are within the general scope of the Complaint and consistent with the objectives of the statute upon which the action is based.

The limitations on EPA's exercise of its enforcement discretion are that settlements with SEPs must be a reasonable exercise of enforcement discretion and cannot be otherwise contrary to law. As discussed in this memorandum, we believe that the Draft Policy sets out criteria which serve to keep SEPs within EPA's enforcement authority and to prevent SEPs from violating appropriations law. Additionally, the Draft Policy addresses the criticisms raised by GAO in its CAA opinion.

Gaylene Vasaturo of my staff worked closely with your staff in developing and analyzing the Draft Policy and is largely responsible for substance of this memorandum. Gaylene is currently on a detail to the Office of Regional Counsel in Region V. If you have any questions about this memorandum, please contact me at 703-235-5300.

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

MAR 22 2002

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Clarification of Interaction Between 1995 Clean Water Act Interim Settlement Policy and the 1998 Supplemental Environmental Project Policy

TO: Regional Counsel, Regions I-X
Water Division Directors, Regions I-X
Enforcement Division Directors, Region I-X

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

David A. Nielsen, Director
Multimedia Enforcement Division
Office of Regulatory Enforcement

This memorandum clarifies the interaction between the May 1995 Interim Clean Water Act (CWA) Settlement Penalty Policy (CWA Policy) in regards to settlements with municipalities that include supplemental environmental projects (SEPs), and the May 1998 Supplemental Environmental Project Policy (SEP Policy). This memorandum will clarify that for purposes of settling CWA cases with municipalities, or other public entities (such as a sewer authority), Regional and Headquarters CWA enforcement staff should follow the CWA Policy when considering the appropriate balance between the cash penalty and SEPs.

The CWA Policy states on page 17, that for municipal cases, "the cash penalty amount established by the tables may be reduced based on compelling ability to pay considerations and by up to 40 percent for appropriate supplemental environmental projects." Therefore, a minimum of 60% of the gravity component should be collected in cash. This differs from the SEP Policy, which provides for collection of a cash component of 10% of gravity plus economic benefit, or 25% of gravity, whichever is larger. (See SEP Policy, page 12).

The rationale behind this limitation is that the municipality penalty chart on page 17 of the CWA Settlement Policy already provides substantial penalty mitigation for municipalities.

As a result, additional mitigation for SEPs should be limited. However we recognize that there may be specific circumstances that would necessitate deviating from the 60% cash minimum when a particular municipality or public entity agrees to conduct a SEP as part of a CWA settlement. In such situations, Regional CWA enforcement staff should contact the Water Enforcement Division for consultation and approval.

Should you have any questions regarding this matter, please contact Mark Pollins, Director, Water Enforcement Division at (202) 564-4001.

cc:

Enforcement Coordinators Regions I-X
SEP Regional and HQ Coordinators
W. Smith, DOJ
K. Dworkin, DOJ

Melissa Raack

06/06/02 04:00 PM

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Subject: SEP resources/ideas

Hello everyone... hope you are all doing well....recently, a number of regions expressed interest in doing renewable energy and energy efficiency Supplemental Environmental Projects (SEPs) in settlements. Below are some examples of recent projects, as well as a list of resources, based on discussions we've had with some Regions and the Department of Energy.

Example #1 - The Federal Bureau of Prisons, Federal Correctional Institution and the Federal Medical Center are implementing SEPs as part of a settlement for Clean Air Act New Source Performance Standards and State Implementation Plan violations. The SEPs involved the installation of a compressed natural gas (CNG) pumping station and replacement of thirty-five gasoline-powered vehicles with thirty-five CNG-powered vehicles. This will serve as a pilot for other Bureau of Prisons Institutions to encourage the use of CNG fueled vehicles.

Example #2 - As part of its settlement with EPA for violations of the New Source Performance Standards and New Source Review provisions of the Clean Air Act which caused excess emissions of NOx and SOx, Nucor agreed to provide funding for additional wind turbines for the Utah Blue Sky program. This will allow the program to provide electricity generated by wind power, thereby reducing emissions of NOx and SOx from traditional power plants.

As always, it is important to ensure that any proposed project meets all of the criteria discussed in the SEP Policy (May 1, 1998), including nexus requirements. It is not enough that the SEP would be beneficial to an area near the source of the violations.

The Department of Energy has provided contacts from their Office of Energy Efficiency and Renewable Energy and the National Renewable Energy Laboratory who are available to assist regional staff in evaluating the cost and technology requirements of proposed energy efficiency and renewable energy SEPs.

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Thanks everyone.. if you have any questions, please feel free to contact me or Beth if you need assistance evaluating any proposed SEPs, including energy efficiency and renewable energy SEP projects.

Melissa

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