

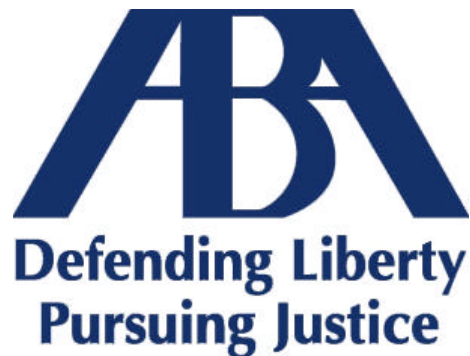
**The Public Law Research Institute**  
University of California, Hastings College of the Law

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**Supplemental Environmental Projects**  
**A Fifty State Survey with Model Practices**

Written in association with the American Bar Association's Section of Individual Rights and Responsibilities

Co-Sponsored by the Section of Environment, Energy, and Natural Resources and Section of State and Local Government Law



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*Supplemental Environmental Projects: A Fifty State Survey with Model Practices*

Steven Bonorris, Editor

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< [www.abanet.org/irr/committees/environmental/](http://www.abanet.org/irr/committees/environmental/) > or from the Public Law Research Institute < [www.uchastings.edu/cslgl/SEPs.html](http://www.uchastings.edu/cslgl/SEPs.html) > .

## Preface

This Report is the first comprehensive study of the laws, policies and practices under which Supplemental Environmental Projects (SEPs) are established. SEPs are environmentally beneficial projects, which are undertaken voluntarily by environmental defendants, in potential mitigation of penalties. They are an increasingly important and common feature of environmental enforcement settlements and have the ability to make a tangible improvement in communities impacted by environmental violation. SEPs, therefore, are perhaps the most prevalent form of “restorative justice” recognized by environmental law, and can serve to address environmental justice issues and to improve or repair relationships among all stakeholders (*i.e.*, impacted communities, facilities, and government, at all levels) following an environmental violation.

*Supplemental Environmental Projects: A Fifty State Survey with Model Practices* aims to assist the public, industry, environmental advocates, and state environmental regulators in understanding the diversity of SEP practices in the 50 states and the District of Columbia. It is hoped, as well, that this report can assist states as they consider the adoption and modification of SEP policies. Finally, the report is intended to be a resource for practitioners as they negotiate SEPs in the future. For further updates to this report, as well as links to online SEP resources, go to [www.uchastings.edu/cslgl/SEPs.html](http://www.uchastings.edu/cslgl/SEPs.html).

This report is the second major study produced under a partnership between the American Bar Association and the University of California, Hastings College of the Law. The goal of the partnership is to: (1) foster scholarship and leadership in the next generation of environmental attorneys; (2) increase the diversity of the environmental bar; and (3) be a resource for those in communities, industry, academia, the private bar and government at all levels who are seeking to address issues of environmental justice. Recognizing the special needs of environmentally impacted communities, which are often in the greatest need of assistance and least able to afford expert advisors, we are making this report available at no cost. If you have suggestions for future projects please contact us at [ej4all@email.uchastings.edu](mailto:ej4all@email.uchastings.edu).

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January 30, 2007

## **Methodology and Appreciations**

The authors of this report have endeavored to create a comprehensive list of Supplemental Environmental Projects authorities (*e.g.* laws, regulations, cases, administrative orders) and initiatives (*e.g.* programs, policies and guidelines). At a minimum, we (1) researched the website of each state's environmental protection bureau; (2) canvassed the Lexis/Nexis databases, including both primary and secondary sources; and (3) engaged in phone interviews with personnel in state Attorney Generals' offices as well as officials within the state environmental agencies, usually in the enforcement/compliance sections, and (4) spoke with a number of academics, public interest attorneys and industry group representatives.

A draft of this report was circulated to the pertinent agencies in the fifty states and the District of Columbia in order to ensure comprehensiveness and accuracy. The authors are very grateful to all the state reviewers and interview subjects; without their cooperation and efforts this report would have failed in its aim of providing the reader with a snapshot of the SEP laws, policies and practices in the fifty states. In addition, a panel of environmental law experts, drawn from federal and state government, the board of the ABA's Environmental Justice committee, as well as other experts from the private bar, academic circles, the U.S. Department of Justice and the Office of Civil Enforcement at the U.S. Environmental Protection Agency have graciously given us their time in the form of conference calls and reviews of drafts. Among the many advisors to the project are: Professor Eileen Gauna (University of New Mexico School of Law), Professor Brian Gray (UC Hastings), John Cruden (U.S. Department of Justice), Quentin Pair (U.S. Department of Justice), Sue Briggum (Waste Management, Inc.), Robert Harris (Pacific Gas & Electric Company), Stephanie Kodish (Environmental Integrity Project), Professor Patricia Salkin (Government Law Center, Albany Law School), Susan O'Keefe (U.S. Environmental Protection Agency), Melissa Raack (U.S. Environmental Protection Agency), Beth Cavalier (U.S. Environmental Protection Agency), Cory Fleming (International City/County Management Association), Chris Davis (Goodwin Proctor, LLP), Luke Cole (Center on Race, Poverty and the Environment), and Veronica Eady (New York Lawyers in the Public Interest). The views expressed in this report are those of the authors alone and do not purport to represent the views of any other institution. Further, no endorsement is implied on the part of the reviewers, who graciously lent their expertise to this project.

We would like to extend our deepest thanks to Nicholas Targ and Benjamin Wilson, co-chairs of the Special Committee on Environmental Justice, Section of Environment, Energy, and Resources, the American Bar Association, without whose thoughtful leadership, efforts and patience, this project would have been impossible. And, the roster of benefactors would not be complete without acknowledging our generous grantor, Jeff Levinsky of Interactive Sciences, Inc. of Palo Alto, California, whose generous support financed a team of more than 10 Hastings law students, who gained practical experience in the day-to-day lives of lawyers, as they researched and drafted the substance of the state survey and its analytic frame.

Chelsea Holloway ('05), Annie Lo ('05) and Grace Yang ('05) were responsible for the primary and secondary research, as well as the early drafts of this report. Their dedication and inspired efforts have made this comprehensive document possible, and it is hoped, relevant to the broad audience for whom this report is intended. In addition, Tom McCarthy (UC Hastings, Scholarly Publications), Annie Lo, Avinash Kar ('05), and Francis Shehadeh ('07) provided substantial and trenchant editorial comments, while Sarah Hooper ('08), Emily Veltri ('05), Meghan Quinlivan ('06), Douglas Obegi ('06), Chelsea Pailes ('06), and Chris Kemos ('05) supplied diligent cite checking and proofreading.

The bulk of the primary research was completed and verified in January 2005, although in the Summer of 2006 the states were provided the opportunity to supply updated information. While this document is meant to provide background information on SEP practices, practitioners and others should not rely on the material in this report to the exclusion of their own research, judgment and legal counsel.

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January 25, 2007

## **Table of Contents**

<b>Methodology and Appreciations</b>	<b>4</b>
<b>TABLE OF CONTENTS</b>	<b>6</b>
<b>Summary of Findings</b>	<b>14</b>
<b>Structure of the Report</b>	<b>18</b>
<b>BACKGROUND</b>	<b>20</b>
<b>I. U.S. EPA SEP GUIDELINES AND MEMORANDA</b>	<b>25</b>
<b>A Look Inside Chapter 1: a Synopsis of U.S. EPA's SEP Policies</b>	<b>25</b>
<b>Legal Principles</b>	<b>26</b>
<b>Categories of SEPs</b>	<b>28</b>
<b>Calculation of the Final Penalty</b>	<b>29</b>
<b>Liability for Nonperformance of a SEP and Stipulated Penalties</b>	<b>30</b>
<b>Oversight and Drafting Enforceable SEPs</b>	<b>30</b>
<b>Community Input</b>	<b>31</b>
<b>EPA Procedures</b>	<b>32</b>
<b>Profitable SEPs</b>	<b>33</b>
<b>Aggregation of Funds</b>	<b>34</b>
<b>Third Parties</b>	<b>34</b>
<b>II. FEDERAL LAW AFFECTING SEPS</b>	<b>36</b>
<b>A Look Inside Chapter 2: Legal Strictures on SEP policies</b>	<b>36</b>
<b>Applicability to the States</b>	<b>37</b>
<b>The Federal Picture</b>	<b>37</b>
<b>EPA's General Enforcement Discretion</b>	<b>39</b>
<b>Going Beyond the Relief Outlined in the Statute through Consent Decrees</b>	<b>40</b>
<b>The GAO Opinions and the Miscellaneous Receipts Act</b>	<b>41</b>
<b>III. POLICY IMPLICATIONS OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS</b>	<b>44</b>
<b>A Look Inside Chapter 3: Stakeholder Perspectives</b>	<b>44</b>
<b>The Benefits of SEPs</b>	<b>45</b>
<b>The Risks of SEPs</b>	<b>48</b>
<b>SEPs and the Separation of Powers</b>	<b>53</b>
<b>Summation</b>	<b>54</b>
<b>IV. MODEL PRACTICES OF THE FIFTY STATES</b>	<b>56</b>

<b>A Look Inside Chapter 4: Values and Model Practices</b>	<b>56</b>
<b>1. Towards a New Enforcement Model</b>	<b>57</b>
<b>Practices</b>	<b>60</b>
Facilitating Environmental Justice	60
SEP Idea Libraries	62
Towards a New Cooperative Compliance Model	63
State SEP Funds	64
<b>2. SEPs for States</b>	<b>66</b>
<b>Practices</b>	<b>66</b>
Contributions to Third Parties to Implement SEPs	66
Facilitating SEPs for Small Violators	68
Accommodating Transboundary SEPs	68
Outsourcing Project Negotiation and Management	69
<b>3. Efficient and Effective Administration of Environmental Laws (“First, do no harm”)</b>	<b>70</b>
<b>Practices</b>	<b>71</b>
Oversight and Enforceability	71
Transparency and Neutrality in the SEP Approval Process	72
Community Input	72
<b>V. STATE BY STATE SURVEY</b>	<b>75</b>
<b>Alabama</b>	<b>75</b>
Definition of SEPs	76
Legal Principles	76
Categories of SEPs	76
Calculation of the Final Penalty	76
Oversight and Drafting Enforceable SEPs	77
Failure to Perform a SEP and Stipulated Penalties	77
Comparison with U.S. EPA Principles	77
Other Research	77
<b>Alaska</b>	<b>78</b>
Definition of SEPs	78
Comparison with U.S. EPA Principles	78
Other Research	78
<b>Arizona</b>	<b>78</b>
Definition of SEPs	79
Legal Principles	79
Categories of SEPs	79
Calculation of the Final Penalties	80
Community Input	80
Other Research	80
<b>Arkansas</b>	<b>80</b>
Definition of SEPs	81
Legal Principles	81
Categories of SEPs	82
Calculation of the Final Penalty	82
Comparison with U.S. EPA Principles	83
Community SEP Proposals	84
Other Research	84
<b>California</b>	<b>84</b>

Legal Principles	85
Categories of SEPs	86
Calculation of the Final Penalty	86
Oversight and Drafting Enforceable SEPs	87
Failure to perform a SEP and Stipulated Penalty	87
Other Research	87
<b>Colorado</b>	<b>88</b>
Legal Principles	88
Categories of SEPs	88
Calculation of the Final Penalties	89
Failure to perform a SEP and Stipulated Penalty	89
Oversight and Drafting Enforceable SEPs	89
The Strategic Environmental Project Pipeline Foundation (“StEPP”)	90
Comparison with U.S. EPA Principles	91
Other Research	91
<b>Connecticut</b>	<b>92</b>
Legal Principles	92
Categories of SEPs	93
Calculation of the Final Penalty	93
Failure to perform a SEP and Stipulated Penalty	93
Other Research	94
<b>Delaware</b>	<b>94</b>
Definition of EIP	95
Legal Principles	95
Categories of EIPs	95
Calculation of the Final Penalty	96
Approval Process	96
Comparison with U.S. EPA Principles	96
Project Bank	97
Community Environmental Project Fund	98
Other Research	98
<b>District of Columbia</b>	<b>98</b>
Air Quality Division (“AQD”)	99
Definition of SEPs	99
Legal Principles	99
Categories of SEPs	99
Stipulated Penalty	100
Comparison with U.S. EPA Principles	100
Hazardous Waste Division (“HWD”)	100
Legal Principles: Draft Proposed Rules	100
Water Quality Division (“WQD”)	101
Other Research	101
<b>Florida</b>	<b>101</b>
Definition of IPP	102
Legal Principles	102
Categories of IPPs	102
Calculation of the Final Penalty	103
Definition of PPP	103
Categories of PPPs	103
Calculation of the Final Penalty	103
Approval Process for IPPs and PPPs	103

Comparison with U.S. EPA Principles	104
Other Research	104
<b>Georgia</b>	<b>104</b>
Other Research	105
<b>Hawaii</b>	<b>105</b>
Other Research	105
<b>Idaho</b>	<b>105</b>
Definition of SEPs	105
Legal Principles	105
Categories of SEPs	106
Calculation of the Final Penalty	106
Failure to perform a SEP and Stipulated Penalties	107
Approval Process	107
Comparison with U.S. EPA Principles	107
Other Research	107
<b>Illinois</b>	<b>107</b>
Definition of SEPs	108
Categories of SEPs	108
Calculation of the Final Penalty	108
Comparison with U.S. EPA Principles	109
SEP Idea Bank	109
Other Research	109
<b>Indiana</b>	<b>110</b>
Definition of SEPs	110
Categories of SEPs	110
Calculation of the Final Penalty	111
Approval Process	111
Comparison with U.S. EPA Principles	111
Other Research	112
<b>Iowa</b>	<b>112</b>
Definition of SEPs	112
Legal Principles	112
Categories of SEPs	113
Oversight and Drafting Enforceable SEPs	113
Comparison with U.S. EPA Principles	114
Other Research	114
<b>Kansas</b>	<b>114</b>
Bureau of Waste Management (“BWM”)	114
Definition of SEPs	115
Legal Principles	115
Categories of SEPs	115
Calculation of the Final Penalty	115
Failure to perform a SEP and Stipulated Penalties	116
Comparison with U.S. EPA Principles	116
Bureau of Water (“BW”)	116
Bureau of Air (“BA”)	117
Bureau of Environmental Remediation (“BER”)	117
Other Research	117
<b>Kentucky</b>	<b>117</b>
Other Research	118

<b>Louisiana</b>	<b>118</b>
Definition of BEP	119
Categories of BEPs	119
Approval Process	120
Comparison with U.S. EPA Principles	120
Other Research	120
<b>Maine</b>	<b>121</b>
Legal Principles	121
Categories of SEPs	121
Calculation of the Final Penalty	122
Failure to perform a SEP and Stipulated Penalty	122
Other Research	122
<b>Maryland</b>	<b>122</b>
Legal Principles	123
Calculation of the Final Penalty	123
Failure to perform a SEP and Stipulated Penalty	123
Other Research	123
<b>Massachusetts</b>	<b>124</b>
Legal Principles	124
Categories of SEPs	124
Calculation of the Final Penalty	125
Failure to perform a SEP and Stipulated Penalty	125
Other Research	125
<b>Michigan</b>	<b>125</b>
Legal Principles	126
Categories of SEPs	126
Calculation of the Final Penalty	126
Oversight and Enforceability	127
Other Research	127
<b>Minnesota</b>	<b>127</b>
Legal Principles	127
Categories of SEPs	127
Calculation of the Final Penalty	128
Failure to perform a SEP and Stipulated Penalty	128
Other Research	128
<b>Mississippi</b>	<b>128</b>
Other Research	128
<b>Missouri</b>	<b>128</b>
Definition of MOSEPPs	129
Categories of MOSEPPs	129
Legal Principles	130
Calculation of Final Penalty	130
Comparison with U.S. EPA Principles	131
Other Research	132
<b>Montana</b>	<b>132</b>
Other Research	132
<b>Nebraska</b>	<b>132</b>
Other Research	133
<b>Nevada</b>	<b>133</b>
Definition of SEPs	133

Legal Principles	133
Categories of SEPs	134
Calculation of the Final Penalty	134
Other Research	134
<b>New Hampshire</b>	<b>134</b>
Legal Principles	135
Categories of SEPs	135
Calculation of the Final Penalty	135
Comparison with U.S. EPA Principles	136
Other Research	136
<b>New Jersey</b>	<b>136</b>
Categories of SEPs	136
Calculation of the Final Penalty	136
Other Research	136
<b>New Mexico</b>	<b>137</b>
Air Quality Bureau (“AQB”)	137
Definition of SEPs	137
Legal Principles	137
Categories of SEPs	137
Calculation of the Final Penalty	138
Comparison with U.S. EPA Principles	138
Hazardous Waste Bureau (“HWB”)	138
Solid Waste Bureau (“SWB”)	138
Other Research	139
<b>New York</b>	<b>139</b>
Legal Principles	140
Nexus	140
Categories of SEPs	140
Oversight and Drafting Enforceable SEPs	141
Calculation of the Final Penalty	141
Escrow Accounts	141
Other Research	142
<b>North Carolina</b>	<b>143</b>
<b>North Dakota</b>	<b>143</b>
Other Research	144
<b>Ohio</b>	<b>144</b>
Statute	144
Calculation of the Final Penalty	145
Other Research	145
<b>Oklahoma</b>	<b>145</b>
Definition of SEPs	145
Categories of SEPs	145
Other Research	146
<b>Oregon</b>	<b>146</b>
Legal Principles	146
Categories of SEPs	147
Calculation of the Final Penalty	147
Process and Oversight	148
Other Research	148
<b>Pennsylvania</b>	<b>148</b>

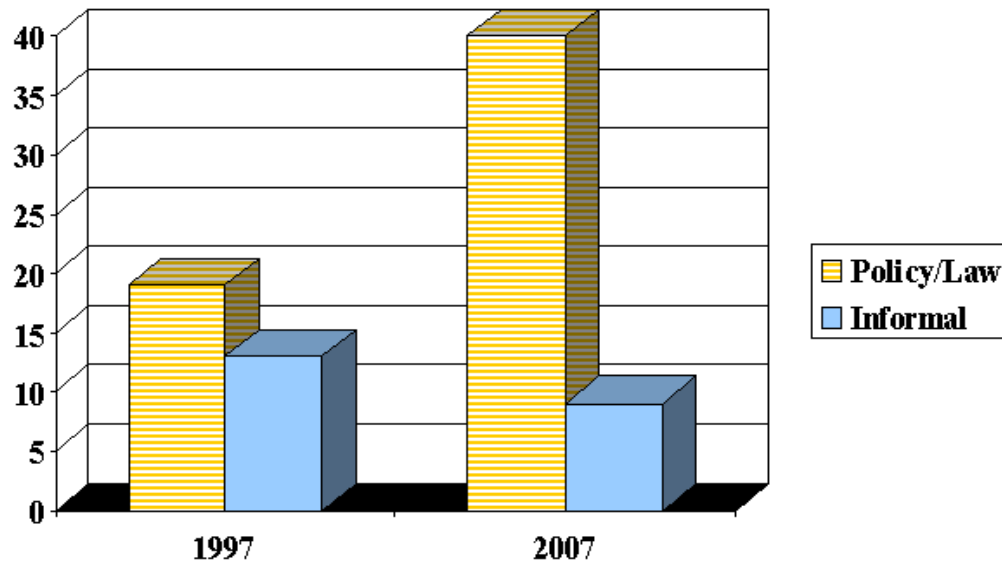
Legal Principles	149
Categories of CEPs	149
Calculation of the Final Penalty	150
Other Research	150
<b>Rhode Island</b>	<b>150</b>
Legal Principles	150
Categories of SEPs	151
Calculation of the Final Penalty	151
Other Research	152
<b>South Carolina</b>	<b>152</b>
Other Research	152
<b>South Dakota</b>	<b>152</b>
Other Research	152
<b>Tennessee</b>	<b>153</b>
Legal Principles	153
Categories of SEPs	153
Calculation of the Final Penalty	153
Other Research	154
<b>Texas</b>	<b>154</b>
Legal Principles	154
Categories of SEPs	154
Calculation of the Final Penalty	155
Third-Party Projects	155
Transboundary SEPs	155
Other Research	155
<b>Utah</b>	<b>156</b>
Legal Principles	156
Categories of SEPs	157
Calculation of the Final Penalty	157
Comparison with U.S. EPA Principles	158
Other Research	158
<b>Vermont</b>	<b>158</b>
Legal Principles	158
Categories of SEPs	159
Calculation of the Final Penalty	159
Other Research	159
<b>Virginia</b>	<b>159</b>
Legal Principles	159
Categories of SEPs	160
Calculation of the Final Penalty	160
Other Research	161
<b>Washington</b>	<b>161</b>
Legal Principles	161
Categories of SEPs	162
Calculation of the Final Penalty	162
Accountability of SEPs	162
Other Research	163
<b>West Virginia</b>	<b>163</b>
Other Research	164
<b>Wisconsin</b>	<b>164</b>

Other Research	164
<b>Wyoming</b>	<b>164</b>
Other Research	164
<b>VI. SIDEBARS</b>	<b>165</b>
<b>Nexus in <i>Nollan/Dolan</i></b>	<b>165</b>
<b>The Legal Significance of Guidelines</b>	<b>168</b>

## Summary of Findings

The results of this fifty state survey show that twenty-eight states and the District of Columbia have instituted formal, published SEP policies in the form of legislation, executive agency regulation or guidelines. Nine states with formal policies also enjoy some form of statutory authorization for their use of SEPs. Only twenty-one states rely on internal, unpublished policies or informal practices, although within the past year two states have taken steps towards formalizing their SEP policies. The figure of twenty-eight states and the District of Columbia with formal policies and/or laws represents a significant increase over the past ten years, up from nineteen states with formal policies or statutes and thirteen others informally negotiating SEPs, as shown in the only prior survey of state SEP practices.<sup>1</sup> Two states, North Carolina and South Carolina, have rejected the use of SEPs outright as a matter of policy or law.

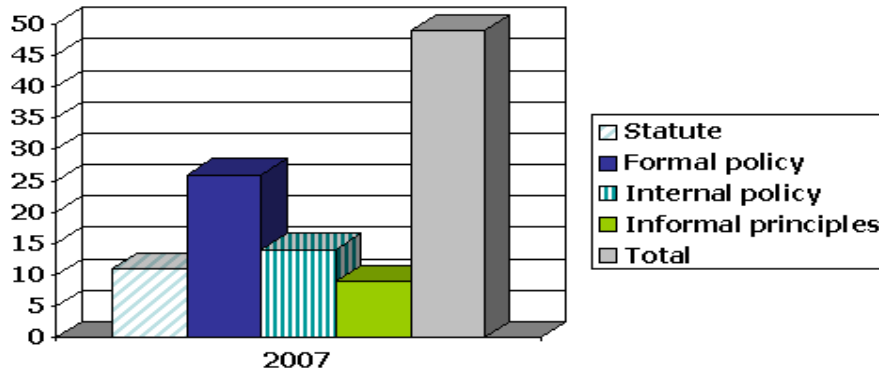
### States with SEP laws/policies and informal practices, 1997-2007



source: PLRI research

<sup>1</sup> Hazardous Waste Enforcement Task Force, Association of State and Territorial Solid Waste Mgmt. Officials, *Supplemental Environmental Projects: Survey of States and Territories* (Oct. 1997), available at <http://www.astswmo.org/Working%20Folder%20with%20Publications%20-%20Sept.%2026%202005/sepsur.pdf> (last visited Aug. 19, 2006).

## States with SEP laws, policies and informal practices, 2007



source: PLRI research

SEPs represent a real and practicable opportunity to provide significant benefits to all the stakeholders in the environment: the environment itself, affected communities, the regulated industry, and the regulators. By funding environmentally beneficial projects, violators can help improve and protect the environment, whereas the traditional fine paid for environmental violations is simply absorbed into the federal or state treasury. Accordingly, SEPs benefit the environment directly, protecting the common interest in a clean and healthy environment beyond what may be achieved through penalties. In addition, violators and regulators can benefit from SEPs that carry patent environmental benefits by improving environmental quality and repairing public image and relationships that may have been damaged as a result of the environmental violation.

However, SEPs also present potential pitfalls. Foremost, this report argues against leaving the negotiation of SEPs to the unfettered discretion of enforcement personnel and suggests that states without formal guidelines look to other states as examples. SEPs uninformed by guidelines may be insufficiently transparent and open, leading to inequities for both violators and affected communities. Community groups may perceive unstructured negotiations as softening enforcement penalties, undermining the effectiveness of environmental regulation, and resulting in SEPs that fail to address environmental justice (that is, the fair distribution of environmental benefits and risks).

The use of SEPs, even with formal guidelines, implicates other, less obvious concerns. These include the possibility that private or regulatory interests may reap the benefits of SEPs to the exclusion of the public interest. And because SEPs may dramatically reduce the amount of cash penalty paid, regulators must ensure that the use of SEPs in settlements does not weaken the deterrent effect of environmental laws – at a minimum, state SEP policies should recapture a significant portion of the economic benefit of noncompliance. Moreover, SEPs can complicate relations between the executive and legislative branches of state government, or the separation of powers. Assertive use of SEPs in settlements may amount to the funding of environmental programs not expressly authorized by state legislatures.

Provisions already implemented in the federal and state SEP policies go a long way towards meeting many of these concerns. A theme throughout the report and survey is the concept of nexus (in the federal SEP policy, a mandatory connection between a violation and the SEP), recurring in a variety of legal doctrines. Although nexus is largely optional for state SEP policies, its manifestation in various legal doctrines – injunctive relief, land use exactions<sup>2</sup> and the rational basis standard – argues for its inclusion in state SEP policies. Strong policy reasons support its inclusion as well: a nexus requirement is a structural constraint that cabins executive branch decisions, delineates executive and legislative spheres of power, and ensures that SEPs do not stray too far from the will of legislatures as expressed in the goals of the environmental statutes giving rise to the enforcement action. Including a form of the nexus requirement ensures that regulators may approve only those SEPs that further the aims of environmental statutes (reflecting the input of legislative bodies, community groups and others).

In the case of projects with weak connections to a statutory purpose, community input (and legislative oversight) helps to balance the executive and legislative branches of government through a simulacrum of the open processes that attend the enactment of the environmental laws and regulatory standards.<sup>3</sup> The federal SEP policies strongly encourage community input in the SEP process, primarily to respond to the needs of the impacted community and to promote environmental justice. This increase in the level of “procedural justice” may assuage the concern of environmental justice communities that closed-room negotiations between regulators and violators can undercut the protections of environmental statutes. At the same time, community input also puts government decisions “in the sunshine,” creating a balance between the openness of the creation of environmental standards and their enforcement, thus meeting the separation of powers concern. This helps ensure that SEPs benefit the public and not exclusively private or regulatory interests. The authors

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<sup>2</sup> The Supreme Court defines “exactions” as “government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005)(citations omitted). For a discussion of the *Nollan/Dolan* exactions cases as they bear on SEPs, refer to the sidebar “Nexus in *Nollan/Dolan*” starting at page 165, *infra*.

<sup>3</sup> See, e.g., Illinois’s SEP program, affording the Illinois legislature an opportunity to comment on proposed SEPs. Interview with William Ingersoll, Manager, Enforcement Programs, Illinois Environmental Protection Agency (March 25, 2004) (on file with authors).

observe that some states have chosen to follow EPA's lead in promoting community input in the SEP process, and recommend inclusion of this protective and curative element.

In addition, the federal SEP guidelines expressly seek to further goals that go beyond the objectives of the violated statute, in keeping with the overarching dictates of Executive Order 12898 and the Pollution Prevention Act of 1990.<sup>4</sup> States are not bound by these goals, but may consider them in formulating their SEP policies.<sup>5</sup> Ten states expressly include environmental justice as a factor in their SEP policies: Michigan, Colorado, New Mexico, New York, Utah, Virginia, Florida, Oregon, Massachusetts and Connecticut.<sup>6</sup>

This report sets out a variety of model SEP practices, which respond to many of the foregoing legal and policy considerations. In addition, the model SEP practices serve three broad sets of values: a collaborative model of environmental enforcement; interests unique to the states; and the protection of the public interest that lies at the core of environmental laws and regulations. The SEP practices identified under the first set of values all promote a new, collaborative model of enforcement that reflects a partnership among regulators, regulated entities and affected communities. State SEP practices may also be tailored to meet the special requirements of the states: several states have made substantial progress in adapting the EPA SEP principles for their own ends through practices permitting small violators to make in kind contributions, for instance. And finally, some states have tailored SEP practices to protect the ends of the environmental laws that give rise to SEPs, safeguarding the deterrent effect of environmental laws. These states have gone beyond the important, but commonly observed mechanisms for ensuring deterrence (the EPA requirement of a civil penalty in addition to the SEP) and enforceability (ensuring that the agencies can adequately ensure performance of the SEPs).

A concern for minimizing the transaction costs, delays and uncertain project outcomes influenced the selection of the model practices. Undue additional costs greatly deter violators (and regulators) from including SEPs in settlement agreements. Here, the ability of states to streamline EPA's SEP guidelines proves useful, although prudent policies preserve the ability to monitor and enforce SEP project outcomes. In closing, the authors note that the survey discovered no instances of states monitoring deterrence with and without SEPs; nor did they find any instances of states confirming SEPs' beneficial effects on the environment, although some states are making first steps in that direction.<sup>7</sup>

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<sup>4</sup> *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Executive Order No. 12898 (Feb. 11, 1994), 59 Fed. Reg. 7,629 (requiring all federal agencies to consider the impacts of their actions on minority and low-income populations); Pollution Prevention Act of 1990, 42 U.S.C. § 13101 *et seq.* (2005) (prioritizing pollution prevention over the "last resort" of safe pollution disposal).

<sup>5</sup> U.S. EPA, *Issuance of Final Supplemental Environmental Project Policy*, at 4 (April 10, 1998) available at <http://www.epa.gov/compliance/resources/policies/civil/seps/fnl-sup-hermn-mem.pdf> (last visited Aug. 19, 2006) [hereinafter, "*Final SEP Policy*"].

<sup>6</sup> For a full discussion of environmental justice and SEPs, see note 223 *infra*, and accompanying text.

<sup>7</sup> A General Accounting Office report found a similar absence of results-oriented measures of alternative compliance strategies. U.S. GAO, RCED-98-113, *Environmental Protection: EPA's and States' Efforts to Focus State*

## Structure of the Report

First off, this report sketches out a brief background section, laying out the history of SEPs in the federal system, and explaining the complex interplay of federal and state environmental regulators. Next, the report summarizes the EPA SEP guidelines in order to use it as a backdrop for comparing each state's SEP policies; readers not well-versed in the EPA's SEP guidelines and policies would benefit from a perusal of this chapter. The report next examines the salient legal issues surrounding the use of SEPs, including a summary of current federal law affecting SEPs and an inquiry into the meaning and authority of the state and federal guidelines (this chapter is written for a legal audience, but lays out concepts and concerns that are of note for all). The authors turn to a recital of the policy implications of SEPs through the lens of industry, environmental groups and academics. Next, the authors set out a discussion of "model practices" and the critical values that they advance. The report culminates in the results of the 50-state survey, which provides a snapshot, as of Summer 2006, into the states' articulation of SEP policies, reflecting their adaptation and adoption of U.S. EPA's seminal 1995 and 1998 policies. In summarizing the state authorities and initiatives, the authors utilize the EPA's terms in order to facilitate cross-state comparisons with a standardized language.

Our discussion of each state's SEP authorities and initiatives begins with a brief explanation of which department or division has promulgated the state's SEP policies, and a categorization of a policy as "formal," published and public; "internal," written, but not published; or "informal," an unwritten, yet adhered to, policy or practice. When the state laws or policies provide for it, we further divide the state summaries into several categories. The categories include: the state's definition of SEPs; the legal principles regulating the use of SEPs; the categories of allowable SEPs; an explanation of how the final civil penalty is calculated; any principles<sup>8</sup> that provide direction on the oversight and drafting of enforceable SEPs; an explanation of what happens when a violator fails to perform a SEP, and whether the state law or policy provides for stipulated penalties in such a situation; a comparison with the U.S. EPA Policy; and, a section devoted to any cases, administrative decisions or law review articles regarding SEPs in the state. Much of the material within the state survey itself will be highly repetitive, given the broad influence of the U.S. EPA principles. Because it is anticipated that this report will be published on the web in database format, we have chosen

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*Enforcement Programs on Results*, available at <http://www.gao.gov/archive/1998/rc98113.pdf> (May 1998) (last visited Aug. 19, 2006).

Michigan's 2005 revision to its SEP policy encourages the violator to include metrics quantifying the benefits of the SEP in the settlement agreement, where feasible. Michigan Dept. of Environmental Quality, *DEQ Policy and Procedures – Supplemental Environmental Projects for Penalty Mitigation* (April 15, 2005), at 7, available at <http://www.deq.state.mi.us/documents/deq-oec-sup-env-projects-penalty-mitigation.pdf> (last visited Aug. 12, 2006).

<sup>8</sup> The term, "principles" is used to describe any sort of rule, instruction, guideline, or preference within a state law or policy. In addition, the various U.S. EPA guidelines and policy statements will be collectively referred to as the "EPA principles" or "EPA guidelines."

to risk overinclusiveness in order to make its results more useful for researchers and practitioners.

## Background

SEPs are environmentally beneficial projects that are undertaken voluntarily by violators, in consideration of which the EPA or other regulator may mitigate the penalty imposed.<sup>9</sup> Before turning to the central focus of this report – the SEP laws and policies of the fifty states<sup>10</sup> – some readers may benefit from a brief synopsis of the origin of federal SEP policy, and the role the states play in enforcing federal environmental laws. Readers already versed in the history of SEPs may readily bypass this section of the report.

The United States Environmental Protection Agency (“U.S. EPA” or “EPA”) has encouraged the use of SEPs in settlements since the early 1990s, to further the agency’s mission to protect and enhance public health and the environment.<sup>11</sup> EPA reported that in fiscal year 2005, the EPA regions negotiated 207 settlements with SEPs, valued at \$57 million.<sup>12</sup> This figure is relatively unchanged from the fiscal year 2000 result of \$56 million.<sup>13</sup> In 2005, the total administrative penalties assessed were \$27 million in 2,273 settlements, suggesting that SEPs are a vital component of U.S. EPA’s enforcement strategy: roughly 10% of all administrative settlements contain a SEP.<sup>14</sup>

In its 1998 *Final SEP Policy*, EPA set out principles determining which projects may qualify as SEPs and the mechanism for calculating how much penalty mitigation is

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<sup>9</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 3.

<sup>10</sup> This report does not specifically address the use of SEPs in citizen suits, confining itself to the laws and guidelines that regulate settlement agreements reached between state environmental protection agencies and the violators of environmental laws.

<sup>11</sup> *Id.*; U.S. EPA, *Policy on the Use of Supplemental Environmental Projects in EPA Settlements* (Feb. 12, 1991); U.S. EPA, *Interim Revised EPA Supplemental Environmental Projects Policy*, 60 Fed. Reg. 24,856 (May 8, 1995); Jeff Ganguly, “Environmental Remediation Through Supplemental Environmental Projects and Creative Negotiation: Renewed Community Involvement in Federal Enforcement,” 26 B.C. Env’tl. Aff. L. Rev. 189, 207 (1998).

<sup>12</sup> U.S. EPA, “Compliance and Enforcement Annual Results: FY2005 Numbers at a Glance,” <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2005/2005numbers.html> (last visited Aug. 23, 2006).

<sup>13</sup> U.S. EPA, “FY2001 Numbers at a Glance,” <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2001/2001numbers.html> (last visited Aug. 23, 2006).

<sup>14</sup> U.S. EPA, “FY2005 Numbers at a Glance,” *supra* note 12.

It should be noted that recently the U.S. General Accountability Office looked at EPA’s settlement practices and came to a figure of \$4.1 billion in fiscal years 2001 and 2002; this figure is somewhat misleading as it includes the value of cash penalties, SEPs, and most significantly, the value of injunctive relief (which in FY 2005 amounted to \$10 B vs. \$158 M in fines and \$57 M in SEPs). U.S. General Accountability Office, GAO-05-747 *Tax Administration: Systematic Information Sharing Would Help IRS Determine the Deductibility of Civil Settlement Payments* (Sept. 2005), available at <http://www.gao.gov/new.items/d05747.pdf> (last visited August 2, 2006) [hereinafter, “2005 GAO Report”]. As EPA observed in the comments to the report, there is a distinction between “monetary payments made directly to a governmental entity (e.g. civil penalties) and costs to be incurred by a defendant/respondent as a consequence of performing the actions required under the civil settlement agreement [i.e. SEPs as well as injunctive relief cleaning up contamination or bringing a violator into compliance].” 2005 GAO Report, at 40.

appropriate.<sup>15</sup> SEPs must improve, protect or reduce risks to public health or the environment, and must not have been implemented prior to the identification of the violation, nor may they be already mandated by law, be injunctive relief, or be part of an existing settlement.<sup>16</sup> In consideration of a violator's agreeing to perform a SEP, EPA may mitigate a portion of the violator's penalty.

Beyond the requirements that a SEP benefit the environment and represent a new commitment on the part of the violator, the EPA principles are designed to preserve the separation of powers among the branches of the federal governments; specifically, the Congressional prerogative to appropriate funds as provided in the U.S. Constitution.<sup>17</sup> A SEP must have a "nexus" or connection between the violation and the project; also, EPA cannot manage or control the SEP funds.<sup>18</sup> In addition, a project cannot be used to satisfy EPA's statutory obligation or another federal agency's obligations to perform a particular activity.<sup>19</sup> Finally, projects that involve only contributions to a charitable or civic organization are not acceptable.<sup>20</sup>

The use of SEPs may be characterized as a part of a larger trend away from the traditional deterrence based model, where the regulator identifies violators, and imposes a civil penalty including a gravity (*i.e.* severity) based component and the recapture of the economic benefit of noncompliance, towards new models of achieving environmental standards.<sup>21</sup> These new strategies, including EPA's Project XL,<sup>22</sup> reflect the intent to build

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<sup>15</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 7-17.

<sup>16</sup> *Id.*

<sup>17</sup> U.S. EPA, *Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy*, Memorandum from Walker B. Smith, Director, EPA Office of Regulatory Enforcement, to EPA Regional Counsel and Division Directors, at 2 (Oct. 31, 2002), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/sepnexus-mem.pdf> (last visited Aug. 19, 2006) [hereinafter, "*Importance of the Nexus Requirement*"].

<sup>18</sup> U.S. EPA, *Supplemental Environmental Projects (SEP) Policy*, Memorandum from Sylvia K. Lawrence, Acting Assistant EPA Administrator, to EPA Regional Administrators and Regional Counsel, at 1-2 (March 22, 2002), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/sepguide-mem.pdf> (last visited Aug. 19, 2006) [hereinafter, "*SEP Policy Memorandum*"].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Classical theories of deterrence would insist on recovering, at a minimum, the economic benefit of noncompliance weighted by the chances of escaping detection and punishment, lest the risk-neutral violator simply adopt noncompliance as an environmental game of chance.

Joel Mintz, "Scrutinizing Environmental Enforcement: A Comment on a Recent Discussion at the AALs," 17 J. Land Use & Envtl. L. 127, 130 (2001); David L. Markell, "The Role of Deterrence-Based Enforcement in a 'Reinvented' State/Federal Relationship: The Divide Between Theory and Reality," 24 Harv. Envtl. L. Rev. 1, at 10-15 (2000). See also Clifford Rechtschaffen, "Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement," 71 S. Cal. L. Rev. 1181 (1998), for a complete discussion of the shift in emphasis from a deterrence based model to a compliance based one.

It should be noted that U.S. EPA is not alone in this effort: the Occupational Health and Safety Administration may similarly settle workplace violation cases if violators agree to undertake additional safety measures at work

greater flexibility into EPA's mission of protecting the environment and preventing environmental violations through individualized, negotiated regulation.<sup>23</sup> EPA's inclusion of SEPs in enforcement settlements can be viewed as part of this new strategy of promoting a climate of compliance through negotiation and collaboration, as opposed to the more procrustean enforcement method of imposing rigid penalties for violations.<sup>24</sup>

While EPA is ultimately accountable for implementing federal environmental laws and has the authority to establish national policy direction, Congress envisioned that EPA would rely on qualified and interested states to do most of the implementation and enforcement.<sup>25</sup> States typically can respond more quickly to local pollution problems, better understand environmental conditions, have more everyday interaction with the regulated community, and can be more innovative and flexible in their solutions.<sup>26</sup> Indeed, the state role in implementing and enforcing environmental laws has increased dramatically in recent years.<sup>27</sup> The states now conduct between 80% and 90% of all environmental enforcement actions.<sup>28</sup> Further, more than 75% of the major delegable environmental programs have been delegated to or assumed by the states.<sup>29</sup>

Since EPA is ultimately accountable for enforcement of the federal environmental laws, EPA normally oversees and supports state performance.<sup>30</sup> Ordinarily, EPA will only delegate enforcement authority once a state adopts and administers its own version of federal environmental laws.<sup>31</sup> Many Memoranda of Agreement delegating enforcement authority to the states require, at a minimum, that any final penalty recapture the economic benefit

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locations not cited for violations. *Cf.* Sidney A. Shapiro, "Outsourcing Government Regulation," 53 *Duke L.J.* 389, 403 (2003).

<sup>22</sup> Project XL, a multi-media program developed by EPA in the 1990s, sought to bring together regulators and regulated entities to negotiate site-specific environmentally-protective agreements in exchange for lifting relevant statutory requirements. Jamie A. Grodsky, "Environmental Protection as a Jurisdynamic Experience: The Paradox of (Eco)pragmatism," 87 *Minn. L. Rev.* 1037, 1061 (2003)(citations omitted).

<sup>23</sup> Markell (2000), *supra* note 21, at 14.

<sup>24</sup> *Id.* The academic literature posits that the use of SEPs, as part of a more collaborative model of environmental enforcement, fosters a reworked, improved relationship of regulator and the regulated community, ultimately leading to less litigation and an increase in voluntary compliance. Hard evidence for this improvement was not discovered in the course of research. It should be noted that this collaborative model does not signify that the violator is not responsible for bringing itself back into compliance with environmental standards; that is a given under the federal and most state SEP policies: SEPs are intended to give benefits above compliance.

<sup>25</sup> *Id.* at 109.

<sup>26</sup> David R. Hodas, "Environmental Federalism: Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?" 54 *Md. L. Rev.* 1552, 1571 (1995).

<sup>27</sup> Mintz, *supra* note 21, at 130.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Markell (2000), *supra* note 21, at 35.

<sup>31</sup> *Id.*; many Memoranda of Agreements delegating enforcement authority to the states require, at a minimum, that any final penalty recapture the economic benefit conferred by the noncompliance. Conference call with John Cruden, Deputy Assistant Attorney General, U.S. Dept. of Justice (May 13, 2004).

conferred by the noncompliance.<sup>32</sup> An example of delegation is seen in Florida, where pursuant to the delegation of Clean Air Act enforcement authority to Florida's Department of Environmental Protection, the Department of Community Affairs agrees to coordinate "the use of emergency planning, training, and response-related Supplemental Environmental Projects, consistent with the guidelines established by the United States Environmental Protection Agency."<sup>33</sup>

Aside from delegations where states have agreed to abide by federal SEP principles, states are free to develop enforcement policies outside the U.S. EPA's strictures.<sup>34</sup> State enforcement actions are subject to the rare possibility of U.S. EPA "overfiling."<sup>35</sup> "Overfiling" is the term for U.S. EPA's bringing suit against an alleged violator when the EPA considers the state's initial enforcement of a federal environmental law to be inadequate.<sup>36</sup> Concern over overfilling must not be overstated, however: statistics show that overfiling is a very rare event, in general, and neither EPA nor the authors could find a single instance of an overfiling due to a state's overly permissive settlement with a SEP.<sup>37</sup> EPA itself

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<sup>32</sup> Conference call with John Cruden, *supra* note 31.

<sup>33</sup> FLA. REV. STAT. §§ 252.934, 252.936, 252.920(d)(3) (West 2004).

<sup>34</sup> The *Final SEP Policy* itself notes that states are free to deviate from the federal SEP policies. *Supra* note 5, at fn. 4.

<sup>35</sup> Some states argue that U.S. EPA lacks the authority to overfile, relying on the Eight Circuit's decision in *Harmon Indus. v. Browner*, 191 F.3d 894, 895 (8th Cir. 1999) (holding once state is authorized EPA is precluded from bringing enforcement action under federal environmental law to administer hazardous waste program). Other courts have upheld EPA overfiling under RCRA, however. Wendy Zeft, "Harmon v. Browner: A flawed interpretation of EPA overfiling authority?" 14 Vill. Envtl. L.J. 179, 180 (2003) (citing *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1060-61 (D.Colo. 2000) (holding EPA action was not precluded by state's enforcement action and res judicata did not bar claim), *aff'd*, 2002 WL 2017134 (10th Cir. 2002); see also *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1060-61 (W.D. Wis. 2001) (concluding EPA was not precluded from its RCRA claims by pending state action); *United States v. LTV Steel Co., Inc.*, 118 F. Supp. 2d 827, 828 (N.D. Ohio 2000) (settling city air pollution charges under Clean Air Act did not preclude plaintiff from suing for additional penalties under fed law)).

<sup>36</sup> Markell (2000), *supra* note 21, at 85.

<sup>37</sup> *Id.* at 86. The EPA Office of Civil Enforcement notes that "[t]o our knowledge, [EPA] ha[s] not overfiled simply based on a state having a different SEP Policy from EPA's SEP Policy." Electronic mail from U.S. EPA, Office of Civil Enforcement (Aug. 3, 2006)(on file with authors).

While rare, the possibility of overfilling does influence state enforcement policy and violators. For example, an interview with an official at the Maryland Dept. of the Environment ("MDE") revealed that although the department understands it is not bound to follow the U.S. EPA *Final SEP Policy*, MDE conforms to the EPA policy in order to avoid EPA overfiling. Telephone interview with Bernard Penner, Director of Special Programs, Maryland Dept. of the Environment (May 3, 2004). A private bar attorney has observed that the specter of overfiling creates uncertainty over the finality of settlements, and could lead to further, unwelcome delay in the closure of an enforcement action, all of which deterring some violators from pursuing settlements with SEPs. Chris Davis, Esq., conference call (May 13, 2004). Of course, this is not a concern for enforcement actions undertaken exclusively under the authority of state environmental laws.

Additionally, overfiling raises a fairness issue for the regulated community, as a violator must face enforcement proceedings from both the state environmental agency and EPA. *Id.* This concern partly explains the infrequent occurrence of overfiling.

notes that states “may have more or less flexibility in the use of SEPs depending on their laws”; significantly, the limitation is a state’s own laws and not the EPA’s retained oversight authority.<sup>38</sup> In addition, EPA has never required state civil penalties to be equivalent to, or even similar to, their federal analog; the rare cases of overfiling arise in instances of a general breakdown of the state enforcement regime.<sup>39</sup> As the survey shows, many states mimic the U.S. EPA *Final SEP Policy*, and it is hoped that they have not sacrificed their freedom to innovate out of a concern for the highly unlikely prospect of overfiling.

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<sup>38</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5.

<sup>39</sup> Markell (2000), *supra* note 21, at 37 (observing that federal civil penalties under the Clean Water Act 33 U.S.C. § 1319(d) are not to exceed \$25,000 per day per violation, while EPA regulations consider “as adequate state authority to recover penalties of at least \$5,000 per day for each violation” under 40 C.F.R. § 123.27(a)(3)(i) (1998)).

# I. U.S. EPA SEP Guidelines and Memoranda

## A Look Inside Chapter 1: a Synopsis of U.S. EPA's SEP Policies

### Core requirements of Federal Supplemental Environmental Projects

- ❖ Be environmentally beneficial and not otherwise legally required.
- ❖ Cannot be inconsistent with underlying statutes.
- ❖ Must advance objective of statute and have “nexus,” or connection, with the violation.
- ❖ Cannot implicate EPA in managing or controlling the SEP funds.
- ❖ Be identified in the consent agreement and consent decree, with specificity.
- ❖ Cannot satisfy EPA's obligation to perform an activity required by law.
- ❖ Cannot provide funds to EPA to perform an activity for which Congress has appropriated funds.
- ❖ Cannot fund activities performed by EPA employees or contractors.

### Categories of Acceptable SEPs

- ❖ *Public Health*, providing diagnostic, preventative and/or remedial health care.
- ❖ *Pollution Prevention*, reducing prospective pollution.
- ❖ *Pollution Reduction*, reducing the amount or toxicity of pollution already created.
- ❖ *Environmental Restoration and Protection*, in area adversely affected by the violation.
- ❖ *Assessments and Audits*, self-assessments of potential pollution problems.
- ❖ *Environmental Compliance Promotion*, assisting others in the regulated community to prevent pollution.
- ❖ *Emergency Planning and Preparedness*, providing non-cash assistance to responsible state or local emergency response or planning entities.
- ❖ *Other* projects, with environmental merit, approved by the case team and otherwise fully consistent with the requirements of the policy.
- ❖ Projects that are *not* acceptable as SEPs include general public environmental awareness projects, contributions to environmental research at a college or university, projects that are unrelated to environmental protection (*e.g.* donating playground equipment), studies or assessments without a requirement to address the problems identified in the study, and projects which the violator will undertake with some form of federal financial assistance or non-financial assistance (*e.g.* loan guarantees).

### Penalty Calculations with SEPs

- ❖ Most SEPs will reduce the initially calculated penalty after being multiplied by an 80% mitigation ratio: the actual SEP costs will usually exceed the amount of the penalty offset.
- ❖ The minimum final penalty must be the greater of 10% of the gravity component plus the economic benefit of noncompliance *or* 25% of the gravity component.
- ❖ The final penalty is the greater of the minimum final penalty, *or* the initially calculated penalty minus the SEP mitigation amount.

Supplemental Environmental Projects (SEPs) are environmentally beneficial projects that are undertaken by a violator of environmental laws as part of a settlement agreement, usually resulting in a reduction in the amount of the civil penalty imposed by the regulator.<sup>40</sup> U.S. EPA has encouraged these projects for more than a decade in order to further the agency's goals of protecting and enhancing public health and the environment.<sup>41</sup> In its *Final SEP Policy* of 1998, EPA set forth principles for determining which projects may qualify as SEPs and calculating how much penalty mitigation is appropriate.<sup>42</sup> In order for a SEP to be approved and receive the calculated amount of penalty mitigation, a project must meet the basic definition of a SEP, satisfy all legal principles, fit within one of the designated categories of SEPs and meet all other criteria. A discussion of the principles follows.

U.S. EPA defines SEPs as “environmentally beneficial projects which a violator agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform.”<sup>43</sup> These definitional thresholds require that a project must primarily “improve, protect or reduce risks to public health or the environment,” and be implemented entirely after U.S. EPA has identified a violation, giving EPA an opportunity “to shape the scope of the project before it is implemented”<sup>44</sup> In addition, the project may not be already mandated by law, as part of injunctive relief, as part of an existing settlement, or by state or local requirement: the project must be a voluntary endeavor by the violator, though once agreed upon, it becomes an enforceable commitment.<sup>45</sup> Along with other mitigating factors, such as good faith efforts to comply, EPA weighs the SEP as a “relevant factor in establishing an appropriate [*i.e.*, reduced] settlement penalty.”<sup>46</sup>

### **Legal Principles<sup>47</sup>**

Over the decades, EPA's SEP policies have evolved from informal practices into a body of guidelines and policies. The 1998 *Final SEP Policy* and the 2002 *Supplemental Environmental Projects (SEP) Policy* memoranda are designed to ensure that the approval of SEPs are within the EPA's authority, and do not run afoul of any statutory requirements, especially the Miscellaneous Receipts Act (“MRA”) and other applicable principles of

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<sup>40</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 1, 4.

<sup>41</sup> *Id.* at 3.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* The EPA refers to the violators of environmental statutes as both “violators” and “defendants/respondents.” For purposes of concision, this report will use “violators,” although guilt is rarely acknowledged in the settlement agreements.

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.*

<sup>46</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 1.

<sup>47</sup> The U.S. EPA *Final SEP Policy* uses the term “guidelines,” but “principles” will be used within this report to encompass the broader set of guidance given by the totality of the EPA SEP memoranda, as well as the individual states' SEP policies. U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5-7.

appropriations law.<sup>48</sup> Specifically, the EPA principles are designed to preserve the Congressional prerogative to appropriate funds as provided in the U.S. Constitution and cannot be waived by EPA personnel.<sup>49</sup> The EPA principles require the following:

1. A project cannot be inconsistent with any provision of the underlying statutes.<sup>50</sup>
2. “All penalties must be deposited into the U.S. Treasury unless otherwise authorized by law.”<sup>51</sup>
3. All projects must further an objective in the violated statute and contain an adequate nexus between the violation and the proposed project.<sup>52</sup> The nexus requirement is only met if one of the following conditions is satisfied:
  - 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 the 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.”<sup>53</sup>
4. EPA cannot control or manage the SEP or its funds.<sup>54</sup>
5. The type and scope of each project must be defined in a settlement agreement.<sup>55</sup>
6. “A project cannot be used to satisfy EPA’s statutory obligation or another federal agency’s obligations to perform a particular activity.”<sup>56</sup>
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.”<sup>57</sup>
8. “A project may not provide additional resources to support specific activities performed by EPA employees or EPA contractors.”<sup>58</sup>

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<sup>48</sup> Miscellaneous Receipts Act, 31 U.S.C. §3301(b)(2000)(“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”); U.S. EPA, *Expanding the Use of Supplemental Environmental Projects*, Memorandum from John Peter Suarez, Assistant EPA Administrator, to EPA Assistant Administrators and Enforcement Staff, at 2 (June 11, 2002), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-expandinguse.pdf> (last visited Aug. 19, 2006). For more detail on the legal questions surrounding the legal framework surrounding EPA’s SEP guidelines, please consult Chapter II, “Federal Law Affecting SEPs.”

<sup>49</sup> U.S. EPA, *Importance of the Nexus Requirement*, *supra* note 17.

<sup>50</sup> *SEP Policy Memorandum*, *supra* note 18, at 1.

<sup>51</sup> *Id.* In the interests of precision, much of the federal guideline language cited is verbatim, or nearly so.

<sup>52</sup> *Importance of the Nexus Requirement*, *supra* note 17, at 1-2.

<sup>53</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5.

<sup>54</sup> *Id.* at 6.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

9. “A project may not provide a federal grantee with additional funds to perform a specific task identified within an assistance agreement.”<sup>59</sup>
10. Projects that involve only contributions to a charitable or civic organization are not acceptable.<sup>60</sup>

### **Categories of SEPs**

In order for a project to be accepted as a SEP, it must fit within at least one of the following categories and satisfy all other requirements set out in the *Final SEP Policy*.<sup>61</sup>

1. *Public Health* projects provide “diagnostic, preventative and/or remedial health care.”
2. *Pollution Prevention* projects reduce the amount or toxicity of pollution produced.
3. *Pollution Reduction* projects reduce the amount or toxicity of pollution already created.
4. *Environmental Restoration and Protection* projects “enhance the condition of the ecosystem or immediate geographic area adversely affected” by the violation.
5. *Assessments and Audits* examine internal operations to determine if other pollution problems exist or if operations could be improved to avoid future violations. Possible projects include pollution prevention assessments, environmental quality assessments, and environmental compliance audits.
6. *Environmental Compliance Promotion* projects help others in the regulated community to maintain compliance and reduce pollution.
7. *Emergency Planning and Preparedness* projects provide non-cash assistance to responsible state or local emergency response or planning entities.
8. *Other* projects have environmental merit, but must be approved by the case team and must be otherwise fully consistent with all other requirements of the *Final SEP Policy*.
9. Projects that are not acceptable as SEPs include general public environmental awareness projects, contributions to environmental research at a college or university, projects that are unrelated to environmental protection (*e.g.* donating playground equipment), studies or assessments without a requirement to address the problems identified in the study, and projects which the violator will undertake with some form of federal financial assistance or non-financial assistance (*e.g.*, loan guarantees).<sup>62</sup>

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<sup>58</sup> *Id.* at 6-7.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 12.

<sup>61</sup> *Id.* at 7-12.

<sup>62</sup> *Id.*

## Calculation of the Final Penalty

Although the *Final SEP Policy* encourages the use of SEPs in enforcement settlements, civil penalties are still an important part of any EPA settlement agreement for reasons of deterrence and fairness.<sup>63</sup> The EPA calculates the final civil penalty with a five-step process.<sup>64</sup>

The first step involves calculating the settlement amount without the SEP, considering the circumstances and extent of the violation.<sup>65</sup> The applicable media-specific EPA penalty policy is used to determine the “gravity component” – which weighs the severity of the violation, and provides the deterrent effect for any civil penalty. Adjusting the gravity component by such factors as good faith efforts to comply, cooperation, and litigation risk, and adding this to the economic benefit of noncompliance yields the “settlement amount” or minimum settlement penalty, in the absence of a SEP.

The second step is to determine the minimum penalty amount when a SEP is contemplated.<sup>66</sup> The minimum civil penalty must equal or exceed the greater of: 1) the economic benefit of noncompliance plus 10% of the gravity component; or 2) 25% of the gravity component.<sup>67</sup>

Third, the SEP’s cost is computed using a computer program called “PROJECT.”<sup>68</sup> The program considers three types of SEP costs, including capital costs (*e.g.*, equipment, buildings), one-time nondepreciable costs (*e.g.*, removing contaminated materials, purchasing land), and annual operation costs *and* savings. The program also considers whether a violator will deduct the SEP expenditures from its income taxes. The resulting, after-tax, SEP cost is the maximum amount that EPA may take into account when mitigating the penalty amount.

Fourth, EPA determines the mitigation percentage (*i.e.*, the percentage of penalty offset afforded each dollar of SEP costs) and the mitigation amount (*i.e.*, the net amount of penalty offset).<sup>69</sup> The EPA considers factors such as the benefits to the public and environment at large, the innovativeness of the project, the extent to which the SEP reduces risk to minority or low-income populations, the extent to which the violator seeks community input, the multimedia impact of the project, and the extent to which the project achieves pollution prevention. The better the project performs in each of these categories, the greater the mitigation percentage. The mitigation percentage cannot exceed 80% of the SEP cost, save for projects undertaken by small businesses, government agencies and non-profits, and projects of outstanding pollution prevention quality. These projects may receive 100%

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<sup>63</sup> *Id.* at 12-17. It is important to note that EPA does not consider SEPs to be “penalties,” per se. In EPA’s parlance, a settlement with a SEP is said to contain a civil (cash) penalty and a promise on the part of the violator to perform a SEP.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 13.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 13-15.

<sup>69</sup> *Id.* at 15.

mitigation credit.<sup>70</sup> Once the mitigation percentage is determined, the mitigation amount is calculated. This mitigation amount is the amount of the SEP cost that may potentially be used in mitigating the settlement penalty.

Finally, the EPA calculates the final settlement penalty with a SEP.<sup>71</sup> This final penalty is the greatest of either: 1) 10% of the gravity component plus the economic benefit of noncompliance; *or* 2) 25% of the gravity component (the 2<sup>nd</sup> step determination); *or* 3) the difference of the settlement without the SEP and the SEP mitigation amount.<sup>72</sup>

### **Liability for Nonperformance of a SEP and Stipulated Penalties**

Violators are responsible and liable for ensuring that a SEP is completed satisfactorily.<sup>73</sup> According to the *Final SEP Policy*, if a SEP is not completed satisfactorily, the violator should be required, pursuant to the settlement agreement, to pay stipulated penalties.<sup>74</sup> Stipulated penalties for failing to satisfactorily perform a SEP range between 75 and 150% of the mitigation value originally awarded to the project.<sup>75</sup> A violator may avoid the penalty if good faith and timely efforts were made to complete the work and at least 90 % of the funds budgeted for the SEP were spent.<sup>76</sup> Pursuant to the *Final SEP Policy*, overestimating the cost of a SEP should also be penalized, even if the SEP is successfully completed. If the final cost of a completed SEP is less than 90% of the projected cost, the violator should pay a stipulated penalty, between 10 and 25% of the mitigation amount originally conferred.<sup>77</sup>

### **Oversight and Drafting Enforceable SEPs**

EPA may decide not to approve SEPs when the likelihood of a successful SEP is sufficiently uncertain, or where the costs to EPA of reviewing and overseeing the SEP proposal are too great.<sup>78</sup> In cases where EPA does approve the SEP, the *Final SEP Policy* dictates that the settlement agreement should accurately and completely describe the SEP.<sup>79</sup> It should describe the actions to be performed by the violator and provide objective means to verify completion of the project.<sup>80</sup> The violator may be required to submit periodic reports to

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<sup>70</sup> *Id.* at 16. In cases of 100% mitigation, each dollar spent on a SEP offsets a dollar from the initial penalty calculation; the violator remains subject to the minimum cash penalty requirements, however.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 13, 17. The calculation actually has two steps in the U.S. EPA *Final SEP Policy*: at 13, EPA calculates a minimum cash penalty with a SEP, and then, at 17, it specifies that the final penalty is the greater of the minimum cash penalty, or the difference between the SEP mitigation amount and the settlement amount without a SEP.

<sup>73</sup> *Id.* at 17. Further, a violator may not transfer liability to another third party, although a violator may use contractors or consultants to assist in implementing a SEP.

<sup>74</sup> *Id.* at 18.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 3.

<sup>79</sup> *Id.* at 17-18.

<sup>80</sup> *Id.*

the EPA.<sup>81</sup> A violator 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.<sup>82</sup> The violator “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.”<sup>83</sup> The EPA provides a model consent agreement and order to assist settlement negotiators with these requirements.<sup>84</sup>

### **Community Input**

In appropriate cases, the *Final SEP Policy* states that EPA staff “should make special efforts to seek input on project proposals from the local community that may have been adversely impacted by the violations.”<sup>85</sup> In order to provide the community with information regarding possible SEPs, the EPA negotiating team is directed to seek community input after the EPA knows 1) the violator is interested in conducting a SEP, 2) how much money is available for a SEP, and 3) settlement is likely.<sup>86</sup> The *Final SEP Policy* notes that representatives of community organizations usually will not participate directly in the settlement negotiation itself due to the confidential nature of the negotiation and the difficulty in determining which community group should participate in the negotiations; moreover, only EPA holds the power to approve or disapprove a SEP.<sup>87</sup> The negotiating team should use informal methods of seeking input such as making telephone calls to local organizations, local churches, local elected leaders, or other groups.<sup>88</sup> Public notice in a newspaper may also be appropriate.<sup>89</sup> The EPA negotiating team, perhaps in conjunction with the violator, should also provide information about what SEPs are and the reasonable possibilities and limitations of such projects.<sup>90</sup>

In 2003, the EPA issued *Interim Guidance for Community Involvement in Supplemental Environmental Projects*, further encouraging EPA regional offices to solicit community input.<sup>91</sup> The Interim Guidance did not significantly change the existing policy, however, it did recommend the use of “SEP libraries,” or archives of community suggestions for possible SEPs.<sup>92</sup> In addition, those violators that include public input into the design of SEPs and that

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> U.S. EPA, *Supplemental Environmental Projects Model Consent Agreement and Order* (Jan. 1, 1999), available at <http://www.epa.gov/compliance/resources/policies/civil/rcra/sepmo-dcao-rpt.pdf> (last visited Aug. 19, 2006).

<sup>85</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 19-20.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> U.S. EPA, *Interim Guidance for Community Involvement in Supplemental Environmental Projects*, (June 17, 2003), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/sepcomm2003-intrm.pdf> (last visited Aug. 19, 2006) [hereinafter, “*Interim Guidance for Community Involvement*”].

<sup>92</sup> *Id.*

conduct community outreach in developing SEPs continue to be eligible for a higher mitigation percentage.<sup>93</sup>

The enumerated benefits of community involvement include the promotion of environmental justice, the enhancement of community awareness of EPA enforcement, and the improvement of relations between the community and the facility.<sup>94</sup> And while the memorandum encourages community involvement, it is not a requirement for SEP approval. There are a number of factors to consider in determining whether community involvement may be appropriate in a particular case.<sup>95</sup> These factors include: the parameters surrounding the particular case (*e.g.*, court-ordered deadlines); the willingness of the violator to conduct the SEP and consider community input; the impact of the violation on the community; the level of interest of the community in the particular facility or SEP; and “the amount of the proposed penalty and the settlement that is likely to be mitigated by the SEP.”<sup>96</sup> Finally, the memorandum includes appendices containing resources for identifying communities and community outreach techniques.<sup>97</sup>

### **EPA Procedures**

Generally, the authority of a government official to approve a SEP is included in the official’s authority to settle an enforcement case and thus no special approvals are required.<sup>98</sup> Situations in which special approval is required include where a project may not fully comply with the *Final SEP Policy*, when a SEP would involve activities outside the United States, and when an environmental compliance promotion project or project in the *Other* category is contemplated.<sup>99</sup>

The *Final SEP Policy* requires documentation of cases in which SEPs are used as part of a settlement.<sup>100</sup> The documentation requires an explanation of the SEP, a description of the expected benefits of a SEP, and a description by the enforcement attorney of how nexus and other legal requirements are satisfied are required.<sup>101</sup> Such documentation and explanations of a particular SEP may be confidential, exempt from the Freedom of Information Act, and protected by various privileges.<sup>102</sup>

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<sup>93</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 16; U.S. EPA, *Interim Guidance for Community Involvement*, *supra* note 91, at 14.

<sup>94</sup> *Id.* at 11.

<sup>95</sup> *Id.* at 14-15.

<sup>96</sup> *Id.* In EPA’s view, SEPs in federal settlements are not “penalties,” however.

<sup>97</sup> *Id.* at 17-20.

<sup>98</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 20.

<sup>99</sup> U.S. EPA, *Revised Approval Procedures for Supplemental Environmental Projects*, Memorandum from Eric V. Schaeffer, Director, EPA Office of Regulatory Enforcement, to EPA Regional Counsel, Directors, and Enforcement Coordinators (July 21, 1998), *available at* <http://www.epa.gov/compliance/resources/policies/civil/seps/sepapprovrev-mem.pdf> (last visited Aug. 19, 2006).

<sup>100</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 20-21.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

## Profitable SEPs

A 2003 EPA memorandum effected a change in the EPA's SEP policy to allow for the acceptance, where appropriate, of SEPs that may be ultimately profitable to violators.<sup>103</sup> The memorandum gives guidance on how to determine whether a project is profitable: the SEP information is entered into the PROJECT model that calculates the annual costs and savings of a project.<sup>104</sup> Projects that are profitable (a project with a net annual savings) within the first five years of their implementation (or three years for a small business) will be rejected.<sup>105</sup> If the project is not profitable within that first project period, personnel should next determine whether the project will be profitable at fifteen years.<sup>106</sup> Projects not profitable at fifteen years may be accepted.<sup>107</sup> However, if a project will be profitable in five to fifteen years (or between three and fifteen years for small businesses) the project may still be accepted if it meets all other SEP Policy criteria and conditions.<sup>108</sup>

However, those projects considered profitable must meet a "high hurdle" in determining the mitigation credit for the project: the memorandum explains that it would be inappropriate for SEPs that are profitable to receive the maximum allowable mitigation credit.<sup>109</sup> This "high hurdle" can be met if the project demonstrates attributes such as: a high degree of innovation with a potential for widespread application; technology that is transferable to other facilities or industries; extraordinary environmental benefits that are quantifiable; exceptional environmental or public health benefits to an Environmental Justice community; and/or a high degree of economic risk for the alleged violator.<sup>110</sup> The better the project performs in each of these areas, the higher the mitigation credit the project will receive. As a ceiling, the EPA Office of Enforcement and Compliance Assistance recommends a maximum upper mitigation percentage of 80% for profitable pollution prevention SEPs and a maximum upper mitigation percentage of 60% for all other profitable SEPs.<sup>111</sup>

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<sup>103</sup> U.S. EPA, *Guidance for Determining Whether a Project is Profitable and, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects*, Memorandum from John P. Suarez, Assistant EPA Administrator, to EPA Regional Counsel and Division Directors, at 5 (Dec. 5, 2003), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-profitableprojects.pdf> (last visited Aug. 19, 2006).

<sup>104</sup> *Id.* at 8, 11.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 6.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* See *supra* note 70, and accompanying text for the exceptions to the 80% ceiling: 100% mitigation ratio for nonprofits and especially noteworthy pollution prevention projects.

## Aggregation of Funds

A later memorandum clarifies the EPA's position on allowing two or more violators to aggregate separate SEP funds or projects within the context of a larger SEP project.<sup>112</sup> The memorandum explains that aggregation would be allowed, but not where the EPA would be required to hold or manage aggregated funds.<sup>113</sup>

Two examples of permissible aggregation were described.<sup>114</sup> One is where separate violators pool resources to hire a contractor to manage and/or implement a consolidated SEP.<sup>115</sup> This type of project is permissible as long as the project is "carefully crafted" so that the violators remain liable in the same manner as they would be under a typical settlement.<sup>116</sup> Another possibility is where the separate violators perform discrete and segregable projects within a larger one.<sup>117</sup> Such a project is permissible as long as the violators remain liable for the implementation and completion of a specific portion of the larger project.<sup>118</sup> The EPA, on the other hand, may not aggregate funds in a SEP account to be used at a later time, as the Miscellaneous Receipts Act and Anti-Deficiency Act prohibit the EPA from collecting and managing SEP funds.<sup>119</sup>

## Third Parties

This same memorandum also clarifies that a violator may use a private, third party organization to manage SEPs and SEP funds, as long as a few conditions are met.<sup>120</sup> A violator must be obligated to complete the SEP satisfactorily, must fully expend the amount of funds agreed to be spent in performance of the SEP, and the project must fulfill the requirements of the SEP Policy.<sup>121</sup> Further, the memorandum underscores that the violator cannot merely make a cash payment to a third party and thereby escape legal responsibility for the successful

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<sup>112</sup> U.S. EPA, *Guidance Concerning the Use of Third Parties and the Performance of SEPs and the Aggregation of SEP Funds*, Memorandum from John P. Suarez, Assistant EPA Administrator, to EPA Regional Counsel, Enforcement Managers, Enforcement Coordinators and Division Directors, at 1 (Dec. 15, 2003), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-thirdparties.pdf> (last visited Aug. 19, 2006) [hereinafter, "*Guidance Concerning the Use of Third Parties*"].

<sup>113</sup> *Id.* at 3.

<sup>114</sup> *Id.* at 2.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 3.

<sup>120</sup> *Id.* at 4-5.

This memorandum extends only to the ability of violators to utilize third parties. Just as EPA may not directly manage or implement SEPs, nor may EPA use private, third parties to implement a SEP: this relationship could create the appearance that EPA is using the organization to indirectly manage or direct SEP funds, in violation of the Miscellaneous Receipts Act (a more complete discussion of this issue ensues in Chapter II of this report, "Federal Law Affecting SEPs," *infra*). There is no such concern when violators themselves contract with third party organizations to manage and/or complete a SEP.

<sup>121</sup> *Id.*

completion of the SEP.<sup>122</sup>

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<sup>122</sup> *Id.*

## **II. Federal Law Affecting SEPs**

### **A Look Inside Chapter 2: Legal Strictures on SEP policies**

#### **The Legal Authority to settle with SEPs**

- ❖ No specific law authorizes EPA to approve SEPs at the federal level, but EPA and state agencies have general enforcement discretion to bring environmental suits and settle them; further, the power to enforce laws includes the power to not prosecute violations.
- ❖ Voluntary settlements may include provisions that could not have been imposed by the agency or a court under the environmental statutes that were violated; however, any injunctive relief must relate back to the purposes of the statute itself (*Local No. 93*).
- ❖ Federal SEPs are on strongest legal ground when there is a clear nexus, or connection, between the violation and the SEP.

#### **Implications for the States**

- ❖ States with procurement and appropriations law similar to the law of the federal government should closely mark the EPA principles.
- ❖ States concerned about the possibility of U.S. EPA's "overfiling" should consider SEP policies that require, at a minimum, the recapture as a civil penalty of the economic benefit of noncompliance.
- ❖ State agencies solicitous of the separation of powers between the legislative and executive branches should ensure that SEPs do not augment their appropriations for legislatively authorized activities; as a corollary, the state agencies should not control or manage the SEP funds themselves.
- ❖ Requiring a nexus between the violation and the SEP addresses diverse legal doctrines, and may be advisable even for those states not bound by a restrictive appropriations law regime.

## Applicability to the States

What follows is a discussion of the current federal law as it bears on the policy and practices of SEPs, with a focus on the body of case law and administrative materials. The lessons gleaned are applicable to the states, as well. For instance, most state environmental protection agencies find themselves in the same position as U.S. EPA, fashioning settlements not expressly authorized by their legislatures. Our research has found only one state court case finding that a state environmental agency overstepped its statutory authority in approving settlements with SEPs; due to the unique constitutional provision relied on by the North Carolina court in holding the SEP impermissible, it is impossible to infer that a state must adopt an EPA-styled nexus requirement or any other EPA SEP requirements.<sup>123</sup> Nevertheless, many states have adopted the EPA's nexus requirement as a means of deflecting any criticism of their environmental penalty policies. As seen in the following chapters, there are strong policy grounds for invoking a form of the nexus requirement as well.

## The Federal Picture

No Congressional act expressly authorizes EPA to accept SEPs in mitigation of civil penalties in the settlement of federal enforcement actions. That said, EPA enjoys broad authority to bring enforcement actions as well as ample discretion in settling them, in accordance with the underlying objectives of the environmental statutes.<sup>124</sup> Moreover, the research indicates that no federal court has ever invalidated a U.S. EPA-approved settlement with a SEP.<sup>125</sup> This chapter will take a closer look at the statutory authorities and prosecutorial discretion of the EPA, and the objections raised by federal General Accounting

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<sup>123</sup> Idaho's Constitution echoes the federal Anti-Deficiency Act, 31 USC 1341(a), but even so, the Idaho SEP policy does not require a nexus between the violation and the SEP itself. Idaho Const. Art. VII, § 13 ("No money shall be drawn from the treasury, but in pursuance of appropriations made by law"); on the other hand, the North Carolina Dept. of Environment and Natural Resources has categorically rejected the approval of SEPs, based on court cases interpreting a provision of the state constitution that requires all civil penalties be directed to a civil penalty forfeiture fund, for the benefit of local schools. *Craven County Bd. of Educ. v. Boyles*, 343 N.C. 87, 92, 468 S.E.2d 50, 53(1996)(citing N.C. Const. art. IX, § 7); *North Carolina Schools Boards Assn. v. Moore*, 160 N.C. App. 253, 585 S.E.2d 418 (N.C. Ct. App., 2003)(a \$50,125 SEP paid to Lenoir Community College by the City of Kinston in 1998 was subject to the state constitution provision requiring penalties to be used for the maintenance of free public schools). Mere adoption of a nexus requirement would be unlikely to mollify the concern that SEP funds were being diverted from their constitutionally mandated destination: the *Craven* court stressed the "*nature of the offense committed*," and not the "[collection] *method employed*" in finding that the settlement proceeds were a penalty. *Craven*, 468 S.E. 2d at 53 (citations omitted)(emphasis supplied). For a complete discussion of the North Carolina cases, refer to footnotes 793-96, *infra*, and accompanying text.

<sup>124</sup> Marshall J. Breger, "The Fiftieth Anniversary of the Administrative Procedure Act: Past and Prologue: Regulatory Flexibility and the Administrative State, 32 *Tulsa L. J.* 325, 338 (1996)("Traditional doctrines of prosecutorial discretion have given a wide range of discretionary authority to regulators to 'plea bargain' or settle cases.").

<sup>125</sup> In one of the few judicial pronouncements close to being on point, a federal court observed that briefing materials did not provide evidence of the "clear Congressional authorization for the EPA's agreeing to the SEP" in a particular consent decree, but the court did not comment on the scope of EPA authority further. *United States v. Atofina Chemicals, Inc.*, 2002 U.S. Dist. LEXIS 15137, at \*15 (E.D. Pa. Aug. 15, 2002).

Office (“GAO”) to the early versions of EPA’s SEP policy, with the caveat that this chapter aims less at resolving the precise nature of EPA’s SEP authority and more at underscoring the legal issues that should be considered by the states as they move forward with their SEP policies and statutes. Of particular interest is the continual reappearance in various legal doctrines of “nexus,” or the connection between the statutory violation and the supplemental environmental project. Though most states are not legally constrained to require nexus, they might benefit from including at least a mild variant of nexus within their policies.<sup>126</sup>

Congress has never expressly authorized EPA (or the United States) to accept a lower settlement penalty in response to a violator’s agreement to perform an environmentally beneficial projects.<sup>127</sup> Some federal statutes contain express provisions that implicitly support EPA’s use of SEPs in settlement agreements, however. The Toxic Substances Control Act specifically allows the EPA to pursue “settlements with conditions.”<sup>128</sup> The Clean Air Act (“CAA”) also expressly grants EPA the authority to “compromise, modify, or remit, with or without conditions,” any administrative penalties under the Act.<sup>129</sup> However, there is no specific authority for EPA to settle suits with conditions in other environmental statutes.<sup>130</sup>

EPA’s interpretation of its authority under the CAA, as allowing consent decrees with SEPs, gains support from long Congressional inaction in the face of a decade and a half of settlements with SEPs. While there is a “general reluctance of courts to rely on congressional inaction as a basis for statutory interpretation ... [u]nder certain circumstances, inaction by Congress may be interpreted as legislative ratification of or acquiescence to an agency’s position.”<sup>131</sup> Relevant factors include whether Congress has held hearings on the issue as well as Congress’ awareness of the agency action in considering related legislation.<sup>132</sup> Congress has long been aware of EPA’s practice of including SEPs in settlements.<sup>133</sup> The Conference

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<sup>126</sup> Some commentators suggest that that nexus should serve as a policy tool, to ensure that projects benefit the communities affected by the violations, whereas an overly rigid application of nexus can undercut the restorative goal that should be the *sina qua non* of SEP policies.

<sup>127</sup> Laurie Droughton, “Supplemental Environmental Projects: A Bargain for the Environment,” 12 Pace Envtl. L. Rev. 789 (1995). One provision of the Clean Air Act does permit up to \$100,000 of civil penalties assessed to be directed to a special fund used for air pollution compliance and enforcement projects. 42 U.S.C. § 7406(g). SEPs do not fall within the meaning of this provision.

<sup>128</sup> Toxic Substances Control Act §16(a)(2)(C), 15 U.S.C. §2615(a)(2)(C) (2005)(specifically allowing EPA to “compromise, modify or remit, with or without conditions, any civil penalty which may be imposed under this subsection.”).

<sup>129</sup> Clean Air Act §§113(d)(2)(B), 304(g)(2), 42 U.S.C. §7413(d)(2)(B) (2005).

<sup>130</sup> David Dana, “The Uncertain Merits of Environmental Enforcement Reform: The Case of SEPs,” 1998 Wis. L. Rev. 1181, 1183 (1998).

<sup>131</sup> *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 170 (4th Cir. 1998) (citations omitted) (finding support in Congressional inaction for FDA’s historic interpretation that it would exceed its statutory authority in regulating the sale and distribution of tobacco).

<sup>132</sup> *Id.*

<sup>133</sup> Dana, *supra* note 130, at fn. 9: “EPA does not keep use of SEPs a secret. Indeed, in testimony before Congressional committees, EPA officials have touted the use of SEPs in settlements as evidence of the Agency’s commitment to improve upon older models of environmental regulation. See, e.g. Environmental Issues: Hearing on H.R. 1924, H.R. 1925, & H.R. 2015 Before the Subcomm. on Transp. & Hazardous Materials of the

Committee Report discussing what would become the 1987 amendments to the Clean Water Act noted:

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*.<sup>134</sup>

Hence, it may be argued that this language amounts to approbation of U.S. EPA's SEP practices, even though Congress has not passed legislation clarifying EPA's SEP authority.

### **EPA's General Enforcement Discretion**

While Congress has never given explicit authorization for the use of SEPs, Congress has, of course, authorized EPA to enforce federal environmental statutes. EPA's authority to enforce environmental statutes carries with it the broad discretion to decide how to prosecute or whether to prosecute at all.<sup>135</sup> This discretion is almost totally unreviewable by the judiciary.<sup>136</sup> The authority to enforce also includes the authority to settle an enforcement action.<sup>137</sup> Consequently, EPA's authority to include SEPs in a consent decree would appear to fall within this broad discretion to administer and enforce environmental laws. Courts are hesitant to interfere with the inner workings of an agency's allocation of its scarce resources in prioritizing among possible enforcement actions:

an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency

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House Comm. on Energy & Commerce, 103rd Cong. 155, 157 (1993) (statement of Kathleen Aterno, Deputy Assistant Administrator, Office of Administration and Resources Management, EPA)."

<sup>134</sup> H.R. Rep. No. 99-1004, 99<sup>th</sup> Cong., 2d Sess. at 139 (Oct. 15, 1986)(emphasis added).

<sup>135</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (an agency's discretion not to prosecute or enforce is generally committed to the agency's absolute discretion); *see also Sierra Club v. Whitman*, 268 F.3d 898, 902-03 (9<sup>th</sup> Cir. 2001)(finding that Congress imposed no mandatory enforcement duty within the provisions or legislative history of the CWA, even when EPA finds a violation).

This section of the report uses cases identified in the U.S. Department of Justice's brief in the Rocky Mountain Steel Mills case. United States' Supplemental Memorandum of Points and Authorities in Support of Entry of Consent Decree, *United States of America v. CF&I Steel, L.P. d/b/a/ Rocky Mountain Steel Mills* (Civ. Action No. 03-M-0608 (MJW))(Nov. 7, 2003).

<sup>136</sup> *Heckler v. Chaney*, 470 U.S. at 823.

<sup>137</sup> *See, e.g., Oil, Chemical and Atomic Workers v. Occupational Safety & Health Review Comm'n.*, 671 F.2d 643, 650 (D.C. Cir. 1982) (necessarily included within an agency's prosecutorial power is the discretion to withdraw or settle a claim).

resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.<sup>138</sup>

This deference to agency internal resource allocations may also cover the decision making process of EPA in granting SEPs, permitting EPA to determine how to achieve the broad goals of environmental enforcement by advancing SEP-related pollution reduction and prevention and achieving extrinsic goals, e.g., promoting a collaborative relationship among violators, affected communities and the EPA itself. The broad power that EPA enjoys to mitigate or abandon environmental enforcement actions entirely would appear to include the lesser power to settle an action by incorporating a SEP.<sup>139</sup>

### **Going Beyond the Relief Outlined in the Statute through Consent Decrees**

That the form of relief proposed in a settlement with a SEP is greater than that outlined in the statute does not in itself invalidate the settlement. In different contexts, courts have upheld the legality of consent decrees that go beyond the express relief outlined in a statute, with the proviso that the decrees are consistent with the underlying purpose of the statute. For example, in *Citizens for a Better Environment v. Gorsuch*, a citizen suit was brought against the Administrator of the EPA for not implementing certain provisions of the Clean Water Act.<sup>140</sup> The court approved a consent decree requiring the EPA to promulgate guidelines and limitations governing the discharge of pollutants even though the decree was more extensive and specific than required by the Clean Water Act.<sup>141</sup> The court upheld provisions of the consent decree that were “consistent with” the underlying statute, and expressly did not require that the provisions “track” the language of the statute closely.<sup>142</sup>

In a different context, in *Local No. 93, International Association of Firefighters v. City of Cleveland*, the Supreme Court held that a court may approve a consent decree containing relief that the court itself could not grant after a trial.<sup>143</sup> The Court held that it was unnecessary to examine the precise limits of the underlying statute because its limits “are not

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<sup>138</sup> *Heckler v. Chaney*, 470 U.S. at 831.

<sup>139</sup> Section 309(d) of the Clean Water Act requires a court to consider a defendant's good faith effort at compliance in assessing an appropriate penalty for Clean Water Act violations. 33 U.S.C. § 1319(d). This suggests that the Congressional scheme envisions that some violators will be treated more leniently, based on the individualized nature of their violations; the SEP policy is another expression of this broad intent.

<sup>140</sup> *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983), cert. denied *sub nom. Union Carbide Corp. v. Natural Resources Defense Council, Inc.*, 467 U.S. 1219 (1984).

<sup>141</sup> *Id.* at 1121.

<sup>142</sup> *Id.* at 1125.

<sup>143</sup> *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986)(holding that a voluntary consent decree's relief is not limited to the types of relief set out in the statute giving rise to the lawsuit, as “the parties' consent animates the legal force of a consent decree”). *Local No. 93* and other cases establish that a court has the power to enter *and enforce* consent decrees with provisions beyond the underlying statute's remedies: courts will retain jurisdiction over this type of consent decree. *See, e.g., Jeff D. v. Kempthorne*, 365 F.3d 844, 853 (9th Cir. 2004)(“even assuming that defendants are no longer in violation of federal law, the district court continues to vindicate federal interests by ensuring that its judgment is enforced”).

implicated by voluntary agreements.”<sup>144</sup> Some provisos remain, however: the consent decree must itself be legal, within the court’s subject matter jurisdiction, within the general scope of the complaint, and must further the objectives of the law upon which the complaint was based.<sup>145</sup> Thus, *Local No. 93* shifts the inquiry away from the issue of the general legality of SEPs to whether a specific SEP is consistent with and enjoys a nexus to the underlying environmental statute. That these conditions so closely track the core elements of EPA’s current SEP Policy is a significant convergence of legal doctrines.

### **The GAO Opinions and the Miscellaneous Receipts Act**

In the early 1990s, the GAO twice opined that EPA lacked the authority under the Clean Air Act to enter into settlement agreements “allowing alleged violators to fund certain public awareness and other projects ... in exchange for reductions of the civil penalties assessed” for mobile source pollution violations.<sup>146</sup> In particular, the GAO found that the implementation of SEPs that furthered the aims of statutes not related to the violation itself ran against a line of GAO opinions, which interpreted statutes similar to the Clean Air Act.<sup>147</sup> The GAO had previously found that the Nuclear Regulatory Commission’s authority to “compromise, mitigate or remit” penalties did not extend to reducing penalties in exchange for the funding of nuclear safety research at a university for, “in all likelihood, [the university] would have no relationship to the violation and would not have suffered injury from the violation.”<sup>148</sup> Although EPA pointed to independent provisions within the Clean Air Act that required EPA to improve public knowledge of the effects of air pollution on citizen’s health, the GAO was similarly not persuaded that there was a sufficient relationship to the underlying violation.<sup>149</sup>

Moreover, the GAO was concerned that allowing “public awareness” SEPs would circumvent the Miscellaneous Receipts Act (“MRA”) and the rule against the augmentation of appropriations, because the appropriations power is a right exclusively reserved for Congress

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<sup>144</sup> *Local No. 93*, 478 U.S. at 526.

<sup>145</sup> *Id.* at 525.

<sup>146</sup> GAO Opinion B-247155, 1992 WL 726317 (Comp. Gen.) (July 7, 1992) (holding that EPA’s discretionary authority to “compromise, or remit, with or without conditions,” civil penalties assessed under CAA § 205 empowers EPA to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but does not extend to remedies unrelated to the correction of the violation in question); GAO Opinion B- 247155.2, 1993 WL 798227 (Comp. Gen.) (March 1, 1993).

The 2005 GAO Report notes that to address the GAO’s concerns, “subsequent to the [early 1990s GAO] decisions, EPA made substantial changes to its SEP policy”; however to date, the GAO has “not assess[ed] the changes to EPA’s SEP policy.” 2005 GAO Report, *supra* note 12, at fn. 13. It is convenient to frame the SEP negotiation process as a typical enforcement action, wherein the regulator weighs the severity of an offense against mitigating factors, such as good faith efforts to comply and willingness to perform an environmentally beneficial project: accordingly, in exchange for the violator’s agreement to perform a SEP, the EPA may mitigate the violator’s penalty.

<sup>147</sup> GAO Opinion B- 238,419, 1990 WL 293769, 70 Comp. Gen. 17 (Comp. Gen.) (Oct. 9, 1990); GAO Opinion B- 210,210, 1983 WL 197623 (Comp. Gen.) (Sept. 14, 1983).

<sup>148</sup> GAO Opinion B- 238,419, 70 Comp. Gen. at 19.

<sup>149</sup> GAO Opinion B- 247,155 at 3.

by the Constitution.<sup>150</sup> The MRA requires that a “person having custody or possession of public money” must deposit the money with the Treasury within a certain time limit.<sup>151</sup> The MRA’s purpose is to ensure that Congress retains control of the public purse and to effectuate Congress’ constitutional authority to appropriate monies.<sup>152</sup> The GAO opined that EPA oversteps its authority in approving some SEPs, as this diverts funds from the Treasury and augments the amount of funds available for environmentally beneficial projects.<sup>153</sup> The GAO further noted, in its second opinion on EPA’s approval of SEPs for public awareness, that the payment of funds to third parties for the performance of SEPs violates the MRA, even though EPA never actually “received” the funds in question.<sup>154</sup> At its most extreme, the GAO posture would imply that any payment made pursuant to a SEP, independent of its recipient, would result in an MRA violation.<sup>155</sup>

EPA has read the GAO opinions narrowly and only applied them to mobile source violations under the Clean Air Act, the focus of the GAO opinions.<sup>156</sup> More fundamentally, the conflict has been largely resolved by EPA’s redrafting of its SEP policy in 1996 and 1998, which led to the removal of the public awareness category of SEPs and the re-emphasis of the nexus requirement and the prohibition on the funding of projects that have already been authorized by Congress.<sup>157</sup> Supplemental memoranda lay out EPA’s arguments explicitly, namely that nexus establishes continuity between EPA’s authority over the violation itself, with the SEP conceptually serving as a mitigating factor in setting the final civil penalty.<sup>158</sup> In addition, the GAO analysis has not influenced the courts, at least in the context of citizen suits yielding SEPs: the nexus requirement has not been required to safeguard against MRA violations.<sup>159</sup>

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<sup>150</sup> Miscellaneous Receipts Act, 31 U.S.C. § 3302(b)(2000)(directing that all assessed penalties be deposited in the U.S. Treasury); Anti-Deficiency Act, 31 USC § 1341(a)(prohibiting agency expenditures in excess of Congressional appropriations).

<sup>151</sup> *United States v. Smithfield Foods*, 982 F. Supp. 373, 374 (E.D.Va. 1997)(citing 31 U.S.C. § 3302(c)(1)).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> GAO Opinion B- 247155.2 1993 WL 798227 (Comp.Gen.).

<sup>155</sup> There is not a great deal of external support for GAO’s contention equating expenditures on SEPs with civil penalties received by an agency, with the possible exception of the SEC’s aggregating the cash portion of the penalty with the funds allocated to a SEP for purposes of reporting requirements under securities laws. Regulation S-K, 17 C.F.R. § 229.103.

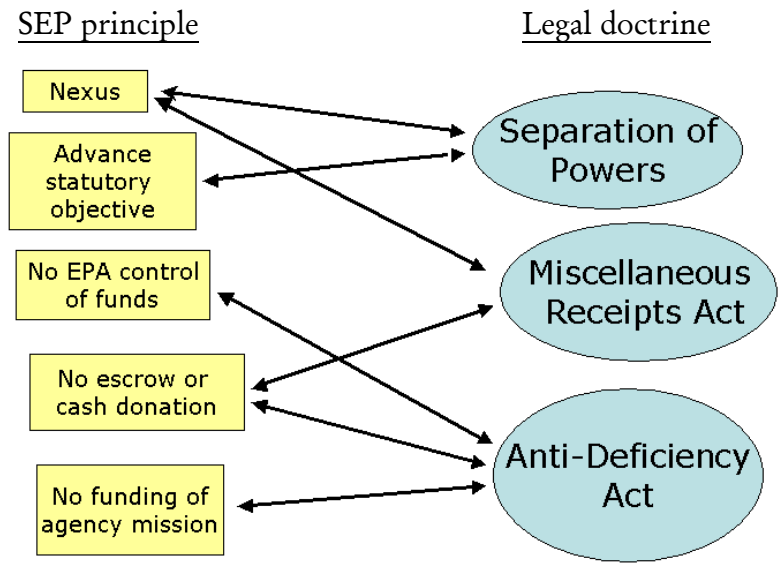
<sup>156</sup> Droughton, *supra* note 127, at 811.

<sup>157</sup> 2003 U.S. EPA guidance set out additional requirements to ensure that SEPs, “do not run afoul of any Constitutional or statutory requirements,” especially the Miscellaneous Receipts Act (MRA), 31 U.S.C. §3302(b), indicating that all penalties must be deposited into the U.S. Treasury unless otherwise authorized by law and that projects that involve only contributions to a charitable or civic organization are not acceptable, addressing another GAO concern. U.S. EPA, *Expanding the Use of Supplemental Environmental Projects*, *supra* note 48, at 2.

<sup>158</sup> *Importance of the Nexus Requirement*, *supra* note 17, at 1-3.

<sup>159</sup> See *Natural Resources Defense Council v. Interstate Paper Corp.*, 1988 WL 156749 (S.D.Ga. 1988), 29 ERC (BNA) 1135 (court entered a consent decree for a citizen suit against a CWA violator, notwithstanding the fact that the decree contained a \$27,500 grant to the Georgia Conservancy for education of schoolchildren, bearing no nexus to the underlying violation). In general, courts will permit third party payments, as long as there has been no adjudication of the violator’s liability. See Quan Nghiem, “Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act,” 24 B.C. Env’tl. Aff. L. Rev. 561 (1997); *Sierra*

The following chart helps explicate the legal and Constitutional rationales for some of the EPA's less transparent SEP requirements:



source: PLRI research

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*Club v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1356 (9<sup>th</sup> Cir. 1990)(finding that consent decree-based payments to environmental organizations are not made in recognition of liability under the Clean Water Act and hence are not civil penalties); *see also CFTC v. Samaru*, 2001 U.S. App. LEXIS 26812, 26813 (9<sup>th</sup> Cir. 2001)(finding that restitution of the amount of the victims' loss was not a civil money penalty).

## III. Policy Implications of Supplemental Environmental Projects

### A Look Inside Chapter 3: Stakeholder Perspectives

#### Regulator

- ❖ SEPs fostering cooperative conduct between agency and regulated industry, reducing litigation costs and enforcement costs in time of scarce public resources in the states.
- ❖ SEPs boosting popular support for regulation, as benefits of regulatory action seen by community.
- ❖ Experimentation with new technologies and “anticipatory compliance” furthering pollution prevention.
- ❖ **Overarching goals:** pollution prevention in excess of statutory minimums and enhanced support for agency activities.

#### Industry

- ❖ Public relations benefit perceived in implementing beneficial projects, restoring the damaged public face of the company or institution.
- ❖ Favorable opportunity presented for innovation that need not make business sense.
- ❖ Risk of swelling transaction costs from attorney fees, prolonged negotiations with regulators and third parties remaining top of mind.
- ❖ Abiding interest in regulatory certainty, similar violations treated identically with finality.
- ❖ **Overarching goals:** flexible, individuated enforcement and improvements in corporate image.

#### Community Groups

- ❖ Fairness: the opportunity to provide input in decisions affecting communities, ensuring that no further harm imposed on affected communities and that actual benefit accrues; born of dissatisfaction with timeliness of notice given to communities in the EJ context.
- ❖ Nexus may be too restrictive to ensure that communities affected by cumulative exposure receive benefits of SEPs; nexus may also be too loose, permitting SEPs distant from affected community.
- ❖ Concerns about insufficient technical and legal expertise to comment upon and meet requirements of SEP proposals; impediments to communicating meaningful input.
- ❖ Best SEP practices modeled on successful EJ processes (early involvement, technical assistance to community groups, meaningful pre-decision input).
- ❖ **Overarching goals:** communicating meaningful input on projects affecting the community, projects that redress environmental degradation of communities.

#### Academics

- ❖ Concern for separation of powers within state government; executive agencies’ settlements may veer too close to legislative appropriations power.
- ❖ Some SEP policies may be insufficiently supportive of checks and balances to agency settlements
- ❖ Laws and regulations conceived in the open; asymmetry of inconsistent, closed room negotiations increasing chance of “industry capture” of regulators.
- ❖ Potential for abuse: estimates and actual costs/benefits in control of the violator.
- ❖ **Overarching goal:** SEPs should serve public, not private, ends.

In general, environmental enforcement actions seek to achieve several policy goals. According to EPA:

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.<sup>160</sup>

In light of these overarching goals, this section asks whether the use of SEPs in settlements can undercut the carefully calibrated balance already in place regarding the enforcement of environmental laws. This section also sets out the various ways that stakeholders perceive that SEPs may further goals that might be exogenous to the narrow model of environmental enforcement.

### **The Benefits of SEPs**

Proponents of SEPs believe that SEPs should be allowed as part of an enforcement action for several reasons. When applied to certain situations, SEPs benefit all those involved -- the regulators, industry, the community, and the environment. The presence of a SEP policy demonstrates the regulator's willingness to cooperate with the regulated industry, and creates a flexible enforcement climate, with the corollary effect of rendering the regulations more acceptable to industry. Industry advocates point out that SEPs can benefit communities through promoting environmental and health improvements beyond regulatory minimums, and underscore the "good neighbor" obligations of permitted facilities.<sup>161</sup>

SEPs promote a cooperative relationship between the regulator and the violator, to the benefit of both. In the view of industry groups and regulators, SEPs can obviate litigation costs, allow for greater fairness to the regulated industry, and increase "popular support for the environmental regulatory endeavor."<sup>162</sup> Because of the nature of environmental enforcement, the regulator and the regulated industries will continually interact; an ongoing relationship that is cooperative may make for a more effective mode of regulation by reducing adversarial tensions. In the words of one state environmental attorney, "cooperative enforcement may dissuade regulated firms from making political attacks on the statutory

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<sup>160</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 1.

<sup>161</sup> Electronic mail from Susan Briggum, Director of Environmental Affairs, Waste Management, Inc. (June 29, 2004) (on file with authors).

<sup>162</sup> Matthew D. Zinn, "Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits," 21 *Stan. Env'tl. L.J.* 81, 86 (2002).

regime or the agency's authority and budgets and may shore up general public support for the agency's regulatory mandate."<sup>163</sup> One commentator notes that "rigidly punitive enforcement may be undesirable, even if it results in net social benefits such as reduced pollution, if it imposes unfair burdens on individuals."<sup>164</sup>

Without the kind of back-end cooperative enforcement promoted by SEPs, "[u]nfairness may inspire recalcitrance in regulated firms that would otherwise comply voluntarily."<sup>165</sup> In the eyes of the industries, their resistance to regulations -- noncompliance, concealment of procedure and pollution by-product, delay in dealings with regulators, and litigation challenging regulations -- are all justified by what they view as coercive, irrational, and sub-optimal regulations.<sup>166</sup> It is important to underscore that violators must continue to comply with environmental regulations, although the SEP negotiation process itself may positively influence the dynamic of regulatory compliance and enforcement.<sup>167</sup> As a result, regulators may benefit from a collaborative, rather than adversarial, relationship.

Resource scarcity . . . forces agencies to seek cooperation to legitimate their authority and streamline interactions with the regulated community. If the regulated community challenges every action taken by the agency, the agency's mission may be substantially hindered. And if a regulated entity views the regulator's authority as illegitimate, it is more likely to shirk compliance with imposed regulations (and cover up that noncompliance), which increases demand for already scarce agency resources.<sup>168</sup>

Because violators may perform SEPs using new technologies or processes, regulators may gain insight into new compliance and pollution prevention techniques.

SEPs allow regulators to set the ground for future regulatory initiatives and programs by affording them opportunities to experiment with new technologies and management practices. If, for example, a technology is proved cost-effective in a SEP experiment, the regulatory agency may be able to justify requiring the technology on a general industry basis. If the technology instead proves unworkable, the regulators know not to advocate its general adoption.<sup>169</sup>

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<sup>163</sup> *Id.* at 101.

<sup>164</sup> *Id.* at 100.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> As EPA observes, "the performance of a SEP reduces neither the stringency nor timeliness requirements of Federal environmental statutes and regulations.... [and] the performance of a SEP does not alter the defendant/respondent's obligation to remedy a violation expeditiously and return to compliance." U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5.

<sup>168</sup> Zinn, *supra* note 162, at 110.

<sup>169</sup> Dana, *supra* note 130, at 1201; see also Massachusetts Institute of Technology, Center for Technology, Policy & Industrial Development, "Report Summary Prepared for the EPA Office of Enforcement: Recent Experience in Encouraging the Use of Pollution Prevention in Enforcement Settlements," at 2 (1994) ("the enforcement context has two distinct advantages. First, firms can be motivated to innovate, *i.e.*, to overcome the barriers to

In addition, a violator may ordinarily be unwilling to undertake technical improvements due to the fears of “technical risk, temporary impacts on production rates during project implementation or a long payback period.”<sup>170</sup> Colorado’s SEP guidelines take this possibility into account, and the state’s Department of Public Health and Environment uses SEPs as a means of inducing progressive pollution prevention/energy efficiency projects.<sup>171</sup> In turn, because regulators often lack resources to pursue cutting edge environmentally beneficial projects, state SEP programs provide a laboratory for innovation. For example, the Pennsylvania Department of Environmental Protection states that the use of SEPs allows more efficient funding of projects than the agency could normally pursue.<sup>172</sup>

Affected communities stand to benefit from SEPs as well, particularly as SEPs may promote restorative justice. The nexus requirement in most SEP policies results in local or regional environmental projects that help the area that suffered from the violation in the first place, instead of simply being deposited in the general treasury.<sup>173</sup> A particular example of restorative justice is the policy goal of environmental justice.<sup>174</sup> Historically, communities that endure significant pollution exposure are disproportionately minority and/or low-income populations.<sup>175</sup> Judicious use of SEPs with geographical nexus helps ensure that the communities bearing the burden of environmental degradation will have the opportunity to directly benefit from enforcement actions against violators.<sup>176</sup> Moreover, SEPs can also be

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pollution prevention innovation that often exist in firms, through penalty reduction improved relations with the Agency, and improved public relations.... Second, since the firm has committed to implement the innovative project in its consent agreement with the Agency...there is a strong incentive to stick with the project even when technical difficulties arise. Enforcement thus creates a “window of opportunity” in which options for technological change receive more serious consideration than usual.”).

<sup>170</sup> Colorado Dept. of Public Health and Environment, *Final Agency-Wide Supplemental Environmental Projects Policy*, at 3 (June 2003), *formerly available at* <http://www.cdphe.state.co.us/sep/CDPHESEPPolicy.pdf> (last visited Nov. 11, 2004).

<sup>171</sup> *Id.*

<sup>172</sup> Pennsylvania Dept. of Environmental Protection, *Policy for the Acceptance of Community Environmental Projects in Conjunction with Assessment of Civil Penalty*, at 2 (Sept. 18, 1999) (on file with authors)[hereinafter, “*Policy for the Acceptance of Community Environmental Projects*”].

<sup>173</sup> Nghiem, *supra* note 159, at 566.

It should be noted that the nexus requirement in the U.S. EPA *Final SEP Policy* may not adequately serve environmental justice interests as it defines the “immediate geographic area” as within a fifty mile radius of the violation’s location: such a broad geographic nexus could leave affected communities unaided by the SEP. U.S. EPA, *Final SEP Policy*, *supra* note 5, at fn 5.

<sup>174</sup> Michigan, Massachusetts, Oregon, New Mexico, Connecticut, Colorado, Utah, Florida and Virginia expressly reference environmental justice in their SEP policies.

<sup>175</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 2.

<sup>176</sup> At the same time, a too tightly applied nexus requirement could result in SEPs that do not address cumulative impacts to a broader environmental justice community; also mere geographic proximity does not satisfy the federal nexus requirement. *Id.* at fn. 5. Similarly, a nexus requirement applied solely to the media or pollutant could result in SEPs not redressing harm experienced by a geographically proximate environmental justice community, particularly as EPA considers the “immediate geographic area” to be a 50 miles radius around the violation’s site.

designed to go beyond the relief obtainable in a traditional, punitive enforcement action, to rectify past environmental degradations beyond mere compliance with current standards.<sup>177</sup>

In conjunction with positive community reaction, regulators may also benefit from the perspective of the public choice theory of assessing the actions of government officials. The community may recognize that regulators have helped create tangible environmental benefits; additionally, regulators may meet with greater approval from local government and community representatives. “[T]hat political backing,” according to one enforcement attorney, “may translate into more resources for the regional or local offices responsible for the SEPs and perhaps even for the agency as a whole.”<sup>178</sup>

Finally, SEPs benefit violators themselves, by repairing images harmed by negative environmental publicity. SEPs may also lead to greater efficiencies by allowing businesses to re-evaluate and improve their current infrastructure in advance of regulatory requirements.<sup>179</sup> SEPs may also promote settlements, allowing businesses as well as regulators to avoid the risks and costs of litigation.<sup>180</sup> In sum, SEPs can give rise to a “win-win” situation for all parties involved: regulators, industry, the community, and the environment.

### **The Risks of SEPs**

Critics of SEPs argue that SEPs may be too much of a “win” for violators, and fail to maintain the deterrent effect that is the *raison d’être* of environmental regulation. SEPs raise the possibility of underdeterrence by opening up the possibility for opportunistic violators to reduce the actual cost of the environmental penalty, as well as creating the possibility of tax deductions for SEP costs.<sup>181</sup> To counteract this, many state SEP policies prevent the violators from benefiting too greatly from the performance of a SEP. For example, instead of allowing violators to benefit from a public perception that they are actually environmental benefactors through publicizing SEPs, SEP policies usually require violators to indicate that the SEPs have been undertaken as part of an enforcement agreement.<sup>182</sup>

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<sup>177</sup> Droughton, *supra* note 127, at 809.

<sup>178</sup> Dana, *supra* note 130, at 1200.

<sup>179</sup> Nghiem, *supra* note 159, at 566 (citations omitted).

<sup>180</sup> *Id.*

<sup>181</sup> While U.S. EPA’s *Final SEP Policy* penalty calculus takes into account the potential deductibility of SEP costs in valuing a SEP, state policies vary. EPA takes no formal position regarding the deductibility of federal SEP costs, nor does the Internal Revenue Service. Recently, the Internal Revenue Service ruled that a state-based SEP’s costs could not be included in the basis of assets, because the SEP was punitive in nature and “comparable to a penalty,” and accordingly the tax benefits are properly disallowed analogously to withholding deductibility of penalties and fines. Internal Revenue Service, “Certain Beneficial Environmental Project Costs Not Includable as Basis of Assets, Property” at 4-5 (March 31, 2006), 2006 TNT 157-17. The Internal Revenue Service has not opined on the deductibility of federal SEPs.

<sup>182</sup> See, e.g., U.S. EPA, *Final SEP Policy*, *supra* note 5, at 17; See, e.g., Idaho Dept. of Environmental Quality, *GD98-1: Supplemental Environmental Projects* (March 3, 1997), available at [http://www.deq.state.id.us/about/policies/gd98\\_1.cfm](http://www.deq.state.id.us/about/policies/gd98_1.cfm) (last visited Aug. 20, 2006)(requiring identification of fact that SEP is part of the settlement of an enforcement action, and citation to the statute violated); Oregon Dept. of

In addition, the allowance of a SEP as part of an enforcement action is a discretionary decision left up to the regulatory agency.<sup>183</sup> Under most SEP policies, if the agency believes that a proposed project would fail to provide a sufficient deterrent effect, then the agency will not permit the project and instead, demand the full payment of the civil penalty.<sup>184</sup> For example, if the proposed project primarily benefits the violator, rather than the environment or the public health, then it will not be approved as a SEP.<sup>185</sup> Similarly, if a project is approved but the agency finds that it still benefits the violator, those benefits will often be given a monetary value which the agency will then deduct from the mitigation amount of the SEP.<sup>186</sup>

The capacity for underdeterrence is particularly acute as the SEP cost itself is a new source of regulatory uncertainty: usually, SEP costs are assessed and reported by the violator, and the regulator has no mechanism for confirming the reported figures.<sup>187</sup> Opportunistic violators may overestimate SEP costs in order to receive greater relief from the calculated penalty, or they may underreport the business benefits of SEPs.<sup>188</sup> In order to track SEP implementation, many state SEP policies require the submission of detailed cost estimates and certifications of progress, as well as provide for stipulated penalties for SEPs that end up costing less than estimated. However, the literature has not quantified the efficacy of these measures against opportunistic violators.<sup>189</sup>

Apart from the problem of the opportunistic violator, another criticism of the SEP system is that it creates inconsistency in enforcement. Because regulators cannot accurately

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Environmental Quality, *Internal Management Directive – Civil Penalty Mitigation for Supplemental Environmental Projects*, at 4 (Sept. 26, 2000), available at

<http://www.deq.state.or.us/programs/enforcement/enforcementSEPDDir.pdf> (last visited Aug. 20, 2006).

<sup>183</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 3; Connecticut Dept. of Environmental Protection, *Policy on Supplemental Environmental Projects / Revised SEP Policy*, at 1 (Feb. 15 1996), available at <http://dep.state.ct.us/enf/policies/sep.pdf> (last visited Aug. 20, 2006) [hereinafter, “*Policy on Supplemental Environmental Projects*”].

<sup>184</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 3 (EPA may decide “that a SEP is not appropriate ... [when] the deterrent value of the higher penalty amount outweighs the benefit of the proposed SEP”).

<sup>185</sup> Connecticut Dept. of Environmental Protection, *Policy on Supplemental Environmental Projects*, *supra* note 183, at 5; Oregon Dept. of Environmental Quality, *Civil Penalty Mitigation for Supplemental Environmental Projects*, *supra* note 182, at 3.

<sup>186</sup> See, e.g., U.S. EPA, *Final SEP Policy*, *supra* note 5, at 15 (offsetting the value to the violator of the SEP from the SEP’s cost, before calculating the mitigation amount).

<sup>187</sup> Dana, *supra* note 130, at 1209.

<sup>188</sup> *Id.*; another commentator points out the related problem of a violator concealing plans to implement an environmental project, and receiving SEP mitigation credit. David L. Tananzhoz, “Supplemental Environmental Projects EPA’s Efforts to Transform the Invisible Hand into a Green Thumb,” 5 *Envl. Law* 633, 647-48 (1999)(citations omitted).

<sup>189</sup> California Environmental Protection Agency, *Cal/EPA Recommended Guidance on Supplemental Environmental Projects*, at 7-8 (Oct. 2003), available at <http://www.calepa.ca.gov/Enforcement/Policy/SEPGuide.pdf> (last visited Aug. 20, 2006) [hereinafter, “*Cal/EPA Recommended Guidance*”]; see also the U.S. EPA, *Final SEP Policy*, *supra* note 5, at 18 (stipulated penalties for underperformance).

assess all of the relevant variables for penalty calculations (or the collateral economic benefits conferred to the violator), the resulting inaccuracy of penalty assessments creates inconsistency in the application of regulations.<sup>190</sup> The addition of a SEP with its calculations of potential benefit to the violator superadds a layer of uncertainty and the possibility of error to this enforcement picture. Apart from the inherent inequity of inconsistent penalties across violators, overly light penalties effectively confer unfair economic advantage over competitors who have made the required expenditures to comply with environmental regulations.<sup>191</sup> In addition, the possibility that some violators might receive lighter penalties could induce risk-tolerant would-be violators to adopt a different compliance strategy.

While some proponents of SEPs argue that SEPs encourage early adoption of innovative pollution prevention technology (“anticipatory compliance”), others opine “SEP policies may actually discourage regulated entities from adopting environmental improvements on their own (that is, without government inducement).”<sup>192</sup> A violator that knows it may obtain reduced penalties through SEP settlements might delay investments in environmentally beneficial projects until it has a civil penalty to offset against. This violator may achieve a noncompliance benefit over its competitors by using those funds for other ventures; the violator then achieves its original plans for environmentally beneficial projects by carrying them out as a SEP.<sup>193</sup>

To address this concern, many SEP policies explicitly state that violators cannot perform SEPs that the violator had intended to implement prior to the enforcement action.<sup>194</sup> However, it is unclear how well this provision of a state’s SEP guidelines can be enforced. Regulators may be unable to accurately assess whether the violator would have undertaken the SEP proposed in absence of the enforcement action.<sup>195</sup> The danger of a violator benefiting from implementing pre-enforcement plans for an environmentally beneficial project as a SEP seems difficult to guard against completely.

Community groups also have several distinct criticisms of SEPs, closely mirroring complaints of community groups about the treatment of environmental justice concerns in

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<sup>190</sup> Dana, *supra* note 130, at 1208.

<sup>191</sup> See Marianne F. Adriatico, “The Good Neighbor Agreement: Environmental Excellence Without Compromise,” 5 *Hastings W.-N.W. J. Envtl. L. & Policy* 285, 302 (1999)(arguing that recapturing the economic benefit levels the playing field for compliant corporations).

<sup>192</sup> Dana, *supra* note 130, at 1216.

A related critique is community groups’ perception that some SEPs are projects that the violator should already be legally required to do, such as increased monitoring or additional control technologies. Electronic mail from Stephanie Kodish, Counsel, Environmental Integrity Project (Aug. 14, 2006)(on file with authors).

<sup>193</sup> *Id.*

<sup>194</sup> See, e.g., Maine Dept. of Environmental Protection, *Supplemental Environmental Projects Policy*, at 3 (June 15, 2000)(on file with authors). Other states specify that the SEP cannot have been implemented prior to the state agency’s identification of the violation. See, e.g., Michigan Dept. of Environmental Quality, *DEQ Policy and Procedures*, *supra* note 7, at 4

<sup>195</sup> Dana, *supra* note 130, at 1219.

environmental agency permitting decisions.<sup>196</sup> For one, they argue that community groups are not afforded the opportunity to provide timely, meaningful input into decisions to approve a settlement with a SEP, notwithstanding community input provisions in SEP policies.<sup>197</sup> Community groups argue that their lack of technical expertise renders their involvement in the SEP approval and implementation process less than meaningful, and that community groups receive late, if any, notice about impending SEP negotiations.<sup>198</sup> Moreover, at least on the federal level, the legal intricacies of the federal SEP requirements complicate community groups' attempts to generate project ideas for SEP libraries.<sup>199</sup>

A second community group critique emanates from the experience of EPA's implementation of Project XL — a front-end approach encouraging cooperative regulation, similar to the post-violation cooperative enforcement that the SEP process represents. In Project XL, regulators and regulated entities “negotiate site-specific environmentally-protective agreements to relieve regulated entities of relevant statutory requirements,” in advance of any enforcement action.<sup>200</sup> Community groups and others have questioned whether these forms of “contractarian regulation” satisfy process concerns and bring about measurable environmental benefits: community groups may perceive that their interests and

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<sup>196</sup> Professor Gauna observes that a “disparity in available resources persists: community residents enter the fray with less information and specialized knowledge concerning the legal, technical, and economic issues involved [in environmental decisionmaking].” “The Environmental Justice Misfit: Public Participation and the Paradigm Paradox,” 17 *Stan. Envtl. L.J.* 3, 14 (1998).

<sup>197</sup> Suzie Canales, *SEPs: The Most Affected Communities Are Not Receiving Satisfactory Benefits* (June 2006), available at [http://www.refineryreform.org/downloads/SEPs\\_report\\_061906.pdf](http://www.refineryreform.org/downloads/SEPs_report_061906.pdf) (last visited Aug. 8, 2006).

When a community group sued, challenging a settlement that allegedly failed to comply with the community input provisions of the U.S. EPA *Final SEP Policy*, the court observed that the provisions were only recommendations, hence the failure to implicate community input did not undo the validity of the settlement accord. *United States v. Atofina Chems., Inc.*, 55 ERC (BNA) 1283, 2002 U.S. Dist. LEXIS 15137, at \*17 (U.S. Dist. Aug. 5, 2002). For a fuller discussion of the legal significance of guidelines and the *Atofina* decision, see the sidebar “The Legal Significance of Guidelines” at page 168, *infra*.

<sup>198</sup> Telephone interview with Veronica Eady, General Counsel, West Harlem Environmental Action (Jan. 5, 2005); U.S. EPA's *Interim Guidance for Community Involvement* provides oblique support for this proposition, in noting that “[a community group] proposed project may not be able to be approved because it may not have the required nexus to the underlying violation, or may violate other legal requirements.” *Supra* note 91, at 12.

Stephanie Kodish of the Environmental Integrity Project observes that the relative inability of violators to solicit community input argues for the creation of a “best practices” manual. This would assuage the concerns of violators, which often argue that soliciting community viewpoints is difficult, time-consuming and costly; at the same time, the quality and weight of the community input could only increase. Electronic mail from Stephanie Kodish, *supra* note 192.

<sup>199</sup> *Id.* See also, Canales, *supra* note 197, at 8-10 (documenting the inability of well-funded community groups to influence the SEP negotiation process). At the same time, EPA notes that community groups have submitted many SEP projects for U.S. EPA's “Project Ideas for Potential Supplemental Environmental Projects,” available at <http://www.epa.gov/compliance/resources/policies/civil/seps/sepprojectidealists063005.pdf> (last visited Aug. 2, 2006).

<sup>200</sup> Grodsky, *supra* note 22, at 1061; see also Thomas E. Caballero, *Project XL: Making It Legal, Making It Work*, 403 *17 Stan. Envtl. L.J.* 399,403 (1998); Rena I. Steinzor, “Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control,” 22 *Harv. Envtl. L. Rev.* 103, 122-23 (1998).

viewpoints are being shouldered aside as regulators and the regulated industry make decisions about environmental standards and increasingly, the enforcement process itself.<sup>201</sup> A final complaint holds that even if SEP policies are strictly adhered to, the projects implemented may bear little benefit to the community affected by the violations: projects may benefit distant “wildlife” projects or the violator itself.<sup>202</sup>

Thus, in the eyes of community or environmental activist organizations, prosecution to its conclusion, rather than settlement with SEPs, may be a preferred option.<sup>203</sup> These critics are quick to note the propensity of regulators to “become beholden to private interest, undermining the [regulatory] agency’s legitimacy.”<sup>204</sup> The broad regulatory discretion and “opacity” of enforcement settlements prevent “third parties from effectively monitoring enforcement and allows agencies to favor industry without fear of reprisal.”<sup>205</sup> Without the input of environmentalists or community groups to balance violators’ demands, the regulator is more likely to favor the regulated industry.<sup>206</sup> At a minimum, the devolution of decision making power away from popularly elected and beholden institutions to administrative agencies itself raises questions about the legitimacy of agency action, questions that are partly addressed by the elevation of public participation as a “sacrosanct” value in the recent history

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<sup>201</sup> Grodsky, *supra* note 22, at 1057-62. The environmental justice community is deeply skeptical that the traditional “environmental interests” and industrial interests (or “technocratic model of environmental regulation”) yields results that are fair to minority and low-income populations, as it “neglects the distributional consequences of environmental regulation.” Gauna, *supra* note 196, at 8-9.

<sup>202</sup> Canales, *supra* note 197, at 9, 20. The Canales report considers it inequitable that the violators get to choose their own punishment, but recognizes that the constraints giving rise to this problem would require legislative action to be undone.

<sup>203</sup> Zinn, *supra* note 162, at 101. Zinn goes on to observe that the close interaction between regulators and the regulated industry may also give the impression of collusion: to reduce friction with industry, regulators may be more willing to compromise with industry to the detriment of their policy goals, according to one skeptical state attorney. *Id.* at 99. The possibility of so-called “agency capture” is broad-based, and extends well beyond the specific negotiation of SEPs, and applies to all reductions of penalties.

A unique vulnerability of SEPs to regulatory malfeasance lies in the (rare) possibility of regulators approving SEPs that further their own ambitions. An example of this lies in the case of the former insurance commissioner of California, Charles Quackenbush, who mitigated claims against insurance companies in exchange for their donations to a network of non-profit organizations under his control, the proceeds of which were used to finance commercials supportive of his re-election bid. Rone Tempet, “Quackenbush Overstepped, Counsel Says,” *Los Angeles Times* (April 22, 2000). The details of the Quackenbush affair are notable: agency lawyers recommended fines of \$112 M, of which only \$100,000 was ultimately paid as a penalty, with \$12.5 M in funds allocated to “outreach and education” project. More than \$800,000 was used to make an earthquake awareness video featuring the former Los Angeles Laker basketball star, Shaquille O’Neal, as well as Quackenbush. California State Assembly, Committee on Insurance, *Quackenbush Report* (undated), at 5, available at <http://www.assembly.ca.gov/acs/committee/c14/publications/QuackenbushReport.doc> (last visited Nov. 12, 2006). Some of this report’s recommendations are apposite for the topic of this report, including increased legislative and public access to settlement documents, and stronger limits on “public education” styled SEPs, which might be especially prone to abuse. *Id.* at 2.

<sup>204</sup> Zinn, *supra* note 162, at 111.

<sup>205</sup> *Id.* at 102, 127.

<sup>206</sup> *Id.* at 109.

of the administrative state.<sup>207</sup> U.S. EPA's *Final SEP Policy* and its extensions, as well as some state policies, respond to this concern with the recommendation of community input as a curative counterweight.<sup>208</sup>

Finally, SEP opponents argue that government grants (financed out of an environmental penalty fund, as in Delaware) to regulated entities for environmentally beneficial projects would be a better means of promoting environmentally beneficial projects and would not weaken deterrence.<sup>209</sup> Grant programs compel regulators to reject projects "that do not offer a high level of environmental return per dollar expenditure" and to disfavor applicants without demonstrated competence in implementing environmentally beneficial projects.<sup>210</sup> By only accepting projects that offer a higher rate of environmental return, "regulators conserve resources in their limited grant budget for more promising projects," and help ensure that SEPs redound to the public benefit.<sup>211</sup>

### **SEPs and the Separation of Powers**

Legislatures are the only branch of government with control over the appropriation of funds. One commentator argues that environmental agencies circumvent the will of state legislatures by implementing SEPs and effectively augmenting their budgets to fund regulators' pet projects.<sup>212</sup> In Florida, violators provide "in kind" grants of materials and labor directly to the state agency's environmental restoration projects; on the other hand, the Florida state legislature expressly sanctions this independent financing of agency programs.<sup>213</sup>

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<sup>207</sup> David L. Markell, "Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State," 36 *Env'tl. L.* 651, 653-54 (2006)(citations omitted). Markell argues that citizen participation serves a protective role, enhancing the "quality of governance" while simultaneously improving citizens' subjective perception of the fairness of governmental decisionmaking, or "procedural justice," regardless of the nature of the decision's outcome. *Id.* at 677-78. In particular, four criteria for procedural justice are deemed paramount: "1) the nature of opportunities to participate, 2) whether the authorities are neutral, 3) the degree to which people trust the motives of the authorities, 4) and whether people are treated with dignity and respect during the process." *Id.* at 680-81, *citing* Tom R. Tyler, "Social Justice: Outcome and Procedure," 35 *Int'l J. Psychol.* 117, 121-22 (2000).

<sup>208</sup> Colorado, Michigan and Utah both factor community input into their calculations of the mitigation ratio accorded SEPs. See Chapter IV "Model Practices of the Fifty States," *infra* at notes 311-14, and accompanying text.

<sup>209</sup> Dana, *supra* note 130, at 1216. See the Chapter IV, "Model Practices of the Fifty States," *infra* at 257-66, and accompanying text, for a fuller description of the Delaware program and its mandated community input for project selection.

<sup>210</sup> Dana, *supra* note 130, at 1219.

<sup>211</sup> *Id.*

<sup>212</sup> Droughton, *supra* note 127, at 811. ("Of particular concern is that the EPA could use SEPs to realize agency goals which go beyond addressing the violation, thus circumventing the appropriations process in contravention of the [Anti-Deficiency Act].").

<sup>213</sup> The environmental agencies in Kansas and Pennsylvania also envision SEPs as a means of filling "gaps" in the execution of their mission to protect the environment. See the Chapter V, "State by State Survey," *infra*, for a fuller discussion of the SEP policies of these three states.

The issue cuts more deeply, however, in states where there is no express authorization of agency augmentation of their budgets.

The fact that administrative agencies commingle the disparate roles of modern governance further complicates the separation of powers issue. Environmental agencies act as legislative bodies when they make regulations; act as executives when they investigate statutory violations and enforce the laws; and once the legal process ensues, take on a judicial role in adjudging culpability and sculpting penalties. However, the principle of the separation of powers is predicated on each branch's interest in checking the other branches of powers. Administrative agencies have no such internal checks.

On the federal level, EPA's nexus requirement responds to this separation of powers concern.<sup>214</sup> The nexus requirement justifies the SEP by connecting the SEP to the underlying objectives of the statute that has been violated. For example, if the stated purpose of a particular statute is to prevent pollution in the water, then it may be argued that a SEP intended to improve water conditions would arguably not usurp a legislature's appropriation's power because that SEP is *de facto* authorized by the organic statute.

In addition, EPA's *Final SEP Policy* specifies special procedural safeguards before certain settlement agreements with SEPs can be approved. For example, the *Final SEP Policy* requires the concurrence of the Assistant Administrator for Enforcement and Compliance Assurance, in cases where a SEP does not meet all the SEP guidelines.<sup>215</sup> A common requirement in state SEP policies is a detailed and public settlement agreement that outlines the violator's plans for the SEP.<sup>216</sup> Both requirements put the regulatory acts in the open, and invite the curative viewpoints of the legislature and affected communities.

### **Summation**

Formal, public state SEP policies directly address many of the policy concerns expressed in this chapter, due to the fact that state policies tend to mirror the EPA principles. Even though the states are not required to do so, by adopting a form of nexus requirement in their SEP guidelines, states ensure that only SEPs furthering the aims embedded in environmental statutes (reflecting the input of legislative bodies, community groups and others) are approved. And in those cases where the connection to a statutory purpose is weak, the involvement of community input and legislative oversight helps to restore the separation of powers through a simulation of the open process that attended the creation of

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<sup>214</sup> While the nexus requirement was devised in response to the dictates of the Miscellaneous Receipts Act (which requires any civil penalty to be paid to the U.S. Treasury), it also plays a role in addressing the concern for the separation of powers, and the preservation of the Congressional appropriations power, as do the requirements in the U.S. EPA *Final SEP Policy* as a whole.

<sup>215</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 20. Some requirements, such as the nexus requirement, cannot be waived by the Assistant Administrator, however.

<sup>216</sup> See, e.g., *Cal/EPA Recommended Guidance*, *supra* note 189, at 7.

those laws and regulations.<sup>217</sup> This helps ensure that SEPs benefit the public, and not exclusively private or regulatory interests.

However, twenty-one states approve SEPs without a formal, published SEP policy on the books to set out the parameters, standards and procedures for SEP approvals. Without a formal SEP policy, the application of hidden standards to individual cases may create a perception of irrationality and unfairness by creating unbalanced costs and benefits.<sup>218</sup> In addition, without a formal policy or guidelines, individual violators may be treated differently and unfairly relative to other violators in similar positions.

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<sup>217</sup> See, e.g., Illinois's SEP program, affording the Illinois legislature an opportunity to comment on proposed SEPs. Interview with William Ingersoll, Manager of Enforcement Programs, Illinois EPA (March 25, 2004).

<sup>218</sup> Zinn, *supra* note 162, at 99-100. The particular problem that some critics point to is the asymmetry between the open process by which environmental statutes are enacted, and the closed-door negotiations where the settlement negotiations take place. Naturally, SEP policies such as the EPA's, which encourage public participation and community input in the SEP process, rebut this concern.

## IV. Model Practices of the Fifty States

### A Look Inside Chapter 4: Values and Model Practices

#### **Value: building a new enforcement model**

- ❖ Individuated, negotiated regulatory standards, a departure from “command and control” enforcement.
- ❖ Aligning environmental projects for the enhancement of the environment and public health to the communities harmed by the violations.

#### **Practices**

1. Facilitating Environmental Justice: protecting at-risk minority and low-income populations, and strengthening ties between communities and industry.
2. SEP Libraries: pre-approved SEPs from a variety of sources, reducing transaction costs for all stakeholders.
3. Towards a New Compliance Model: encouraging self-reporting of violations and reserving SEPs for good faith violators.
4. State SEP Funds: segregating environmental penalties for the benefit of the environment, an option unique to the states.

#### **Value: the states’ stakes**

- ❖ Smaller violators, incapable of negotiating, managing SEPs; smaller penalties, incapable of funding, managing freestanding SEPs.
- ❖ More jurisdictional boundaries complicating the administration of SEPs.
- ❖ Enforcement personnel’s competence is in enforcement, not negotiating and overseeing SEPs.

#### **Practices**

1. Third Party Contributions: allowing small violators to enhance the environment without having to undertake SEPs on their own.
2. Small Violators and Violations: facilitating SEPs for smaller violators.
3. Cross-border SEPs: facilitating SEPs across jurisdictional boundaries.
4. Outsourcing Project Management: tapping third party resources to ensure successful SEPs.

#### **Value: preserving effective and efficient enforcement of environmental laws**

- ❖ Maintaining the openness of the legislative and rulemaking environments.
- ❖ Imposing checks and balances on administrative agency operations with external and internal oversight.
- ❖ Preserving the deterrent effect of environmental laws.

#### **Practices**

1. Oversight and Enforceability: building in assurances of successful SEP management.
2. SEP Approval Processes: improving transparency and interjecting third parties.
3. Community Input: curing potential perils to SEPs and boosting procedural justice.

In the body of this report, the authors set out the SEP policies and laws found in the fifty states and the District of Columbia. Forty-eight states and the District of Columbia currently allow violators to perform some form of supplemental environmental project to reduce their civil penalty. While many have followed the EPA's articulation of federal SEP policy, some states have instituted significantly different approaches to SEPs. Of particular interest are policies that permit states to use their freedom from some of the strictures of the federal system, notably the strict nexus requirement and the prohibition against third party payments. This section of the report will examine in detail some of the unique policies and programs of the several states, with a view towards providing policymakers, state regulators, the affected communities, and the regulated community with a palette of model practices. These practices meet the (often) competing values of fidelity to the underlying federal and state environmental statutes that gave rise to the violation, the intent to promote restorative justice to the community affected by the underlying violations, and the unique challenges states confront in enforcing environmental laws.

This section will lead off by articulating the various sets of values that justify the model SEP practices.<sup>219</sup> The first set of values is the most aspirational, utilizing SEPs to further larger goals and processes, including restorative justice, environmental justice and a new model of environmental enforcement. The second set of values asks the fundamental question: what issues are unique to the states in their enforcement of state and federal environmental laws with smaller violations and numerous jurisdictional boundaries? The third set of values seeks to ensure that SEPs “first, do no harm”<sup>220</sup> to the goals of environmental laws, their enforcement and the orderly process of administrative action. Within each set of values, model practices will be identified that are consistent with those values. The order of their presentation does not represent any attempt at ranking the practices according to any quantitative or qualitative measure.

## **1. Towards a New Enforcement Model**

“... as a matter of public policy, simply depositing civil penalties into the vast reaches of the United States Treasury does not seem to be the most effective way of combating environmental problems caused by a specific polluter.”

--*United States v. Smithfield Foods, Inc.*, 982 F. Supp. 373, 375 (E.D.Va. 1997)

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<sup>219</sup> In the business context, the usage of the term “best practices” is justified by benchmarking, or metrics that elevate one practice over another. Regarding SEPs, however, the authors did not isolate any such metrics, but expressly have laid out the values that may be advanced by the model practices. It is hoped that readers will be able to assess for themselves how each model practice might advance values prioritized by their organization, state or group.

<sup>220</sup> This medical maxim is attributed variously to Hippocrates's OF THE EPIDEMICS, or to the Roman physician, Galen. See W.A. Drew Edmondson, “HEALTHCARE AND THE LAW: Improving End-of-Life Care: The Role of Attorneys General,” 27 Okla. City U.L. Rev. 911, n.4 (2002).

The first set of values is concerned with extending environmental enforcement beyond the punitive to the remedial, and encompassing the collaborative model of engagement between the regulator and the regulated community. These values share the common element of reconceptualizing environmental violations as being against a particular community, and not solely against the common good. The older model is characterized by centralized regulation, with penalty schemes resulting in fines based on localized violations being funneled to the general treasury.<sup>221</sup> The emerging, collaborative model emphasizes corporate self-regulation, disclosure and collaborative problem-solving, reshaping the government's primary role into "catalyzing and enforcing such self-regulation."<sup>222</sup> These themes of collaboration and restoration are both furthered by SEPs, which have the capacity to improve the environment, reinforce the "good neighbor" obligations of industry, and involve community groups in the protection of their own neighborhoods.

Various notions of justice may be furthered through SEPs: the doctrines of restorative and social justice from criminology are particularly relevant. In addition, as noted in Chapter 3, proponents of SEPs consider them vital in the effort to build greater compliance through better relationships among the regulator, the regulated community and local communities.

### **Restorative and Environmental Justice**

SEPs present an opportunity to achieve restorative justice, a term borrowed from criminal justice theory, with goals more restitutionary than retributive in treating crime and the communities affected by crime. One implication of restorative justice is that "government should surrender its monopoly over responses to crime to those who are directly affected by the crime --the victim, the offender, and the community."<sup>223</sup> Another is the focus on restoring the offender to being a productive member of a community. In the context of environmental violations, the concept of restorative justice dovetails with the use of SEPs, which can focus on restoring and improving the environmental quality of the affected community. In addition, SEPs, can also help reconceptualize the relationship between regulator, violator and the affected community, and open the door to the participation of community groups and citizens in sculpting environmental remedies.

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<sup>221</sup> Daniel A. Farber, "Symposium: Innovations in Environmental Policy: Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection," 2000 U. Ill. L. Rev. 61 (2000).

<sup>222</sup> *Id.* at 62, 69. *See also*, Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought," 89 Minn. L. Rev. 342 (2004)(charting the transition from traditional "top down" regulation to a multi-stakeholder and collaborative "governance" approach to environmental law).

This re-imagined relationship is also seen in recent EPA policies such as "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (April 11, 2000), 65 Fed. Reg. 19,618, *available at* <http://www.epa.gov/compliance/resources/policies/incentives/auditing/auditpolicy51100.pdf> (last visited Aug. 8, 2006)(violators independently discovering and reporting violations are potentially eligible for mitigation of the entire gravity component of the assessed penalty, in cases where the violation is discovered through an environmental audit; the preferential treatment is accorded only to violators who have not established a pattern of violations).

<sup>223</sup> Leena Kurki, "Restorative and Community Justice in the United States," 27 Crime & Just. 235, 236 (2000).

Environmental justice,<sup>224</sup> which seeks to protect minority and low-income communities from disproportionate amounts of environmental degradation, represents a sub-category of restorative justice.<sup>225</sup> One commentator has styled environmental justice as “an ethical challenge to the existing environmental regulation paradigm.”<sup>226</sup> Use of SEPs to redress environmental injustices resolves a tension inherent in the majoritarian aims of environmental regulation (protecting the common good as a whole against bad actors) and the race and class-based aims of the civil rights movement.<sup>227</sup> SEPs present an opportunity for affected communities to regain environmental equity.

Open questions remain, however, as to how the “community” should be defined and what an acceptable standard for justice might be, as the government no longer monopolizes the negotiation of sanctions. Violators are interested in seeing procedural safeguards against inequities in the imposition of penalties as the government’s monopoly on sanction recedes.

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<sup>224</sup> One noted commentator defines “environmental justice,” as a “political and social movement to address the disparate distribution of environmental harms and benefits in our society, and to reform the processes of environmental decision making so that all affected communities have a right to meaningful participation.” Clifford Rechtschaffen, “Advancing Environmental Justice Norms,” 37 U.C. Davis L. Rev. 95, 96 (2003).

<sup>225</sup> The Executive Order on Environmental Justice directs federal agencies, including U.S. EPA, “[t]o greatest extent practicable and permitted by law . . . [to] make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” Exec. Order No. 12898, *supra* note 4.

<sup>226</sup> Rechtschaffen (2003), *supra* note 224, at 96.

<sup>227</sup> Tseming Yang, “The Form and Substance of Environmental Justice: the Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation,” 29 B.C. Env’tl. Aff. L. Rev. 143 (2002).

The two movements are not always in conflict: open information about environmental risks promotes both the environmental justice movement and the majoritarian political process, but environmental justice advocates would argue that majority rule has failed minority and low-income populations, resulting in disproportionate concentrations of toxins and health risks in those communities.

## Social Justice

In contrast to restorative justice, the theory of “social justice” operates more broadly, stemming from the belief that there exists “a societal obligation (not just an individual one) to provide appropriate remedies for harm to others caused by legal, moral, or cultural structures instituted by society.”<sup>228</sup> At its broadest, this notion of justice could justify a wide variety of SEP projects at the state and local level, particularly in states not restricting SEPs to the nexus requirement. The value promoted would support a wide variety of SEP policies and practices, but may run counter to the notion of protection of the commons, which lies at the heart of traditional environmental regulation. By loosening the connection between a specific injustice and its remedies, the broad notion of social justice could operate in a redistributive fashion, potentially cutting against the goals of more tightly focused restorative justice principles.

## Practices

### Facilitating Environmental Justice

A variety of regulatory mechanisms can ensure that affected communities receive environmental benefits from SEPs. For one, the nexus requirement can be tightened to be a tool to achieve restorative justice: SEPs could be required to have a close geographical connection to the community affected by the violation, at least in those cases where the violation affects a minority or low-income population.<sup>229</sup> In mandating a tighter nexus than the EPA, states could further the aims of the environmental justice movement: even though North Dakota does not expressly invoke environmental justice, its policy favors SEPs that will benefit the persons or community most affected by the environmental violation.<sup>230</sup>

At the same time, other commentators suggest that the nexus requirement may interfere with SEPs promoting environmental justice, and advise that the EPA nexus requirement be relaxed in cases where the SEP promotes environmental justice.<sup>231</sup> The project would not be required to have a nexus with the violation, but would be justified instead by its role in “advancing the SEP goals of protecting and enhancing public health and the

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<sup>228</sup> David A. Brennan, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 B.Y.U.L. Rev. 167, at fn. 14 (2001).

<sup>229</sup> This proposal emanates from several sources, including a representative of a regulated industry as well as from the federal enforcement attorneys. Interview with Robert L. Harris, Vice President of Environmental Affairs, PG&E (Nov. 17, 2004); conference call with John Cruden, Deputy Assistant Attorney General, U.S. Dept. of Justice (May 13, 2004).

The Canales report observes that “SEPs routinely are awarded to wildlife or other projects; left out of the equation is the impacted community itself that had to bear the burden to their health from these violations.” *Supra* note 197, at 9. This point underscores the perennial tension between the environmental justice communities and mainstream environmental groups.

<sup>230</sup> Electronic mail from Chuck McDonald, Chief of Compliance, North Dakota Dept. of Environmental Services, Air Quality Division (April 2, 2004) (on file with authors).

<sup>231</sup> Meredith L. Flax and Benjamin F. Wilson, “Use of Supplemental Environmental Projects to Address Environmental Justice,” *available at* <http://www.bdlaw.com/assets/attachments/98.pdf> (last visited Aug. 20, 2006).

environment.”<sup>232</sup> While states are largely at liberty to relax the nexus requirement, the authors found only one instance of a state pursuing this strategy, New York state, which in its now-superseded 1997 SEP policy permitted the relaxation of the 25-mile geographical nexus requirement for projects that could remedy an environmental injustice.

In practice, efforts by the states to promote environmental justice fall into two categories, either providing a preference for projects that advance environmental justice, or extending bonus mitigation credit for SEPs promoting environmental justice. The first approach, followed by Massachusetts, Oregon, New York and Connecticut, promotes environmental justice through a “soft” preference for SEPs with environmental justice components.<sup>233</sup> For example, Connecticut’s SEP policy favors pollution prevention projects, “especially a pollution prevention project that positively impacts communities where environmental equity may be an issue.”<sup>234</sup> And while these states indicate that environmental justice is an “overarching goal,” these states do not list environmental justice as a category of SEP nor consider it as a formal factor in determining whether to allow a SEP or mitigate a penalty.<sup>235</sup>

Mirroring EPA’s approach, Michigan, New Mexico, Colorado, Utah, Florida and Virginia use environmental justice as a factor in determining the appropriate penalty mitigation that a violator will receive for its SEP.<sup>236</sup> SEPs that perform well on the environmental justice factor will earn a higher mitigation ratio.<sup>237</sup> In Colorado and Utah, projects that “mitigate damage or reduce risk to minority or low-income populations that have been disproportionately exposed to pollution, or are at environmental risk,” are accorded a greater degree of penalty reduction.<sup>238</sup> In order for a SEP to be approved in Virginia, the “appropriateness and value” of the project must be taken into account. In so doing, the Virginia statute requires that the impact on “minority or low-income populations be taken into consideration, among other factors.”<sup>239</sup>

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<sup>232</sup> *Id.*

<sup>233</sup> Selket Cottle, “State Supplemental Environmental Project Laws and Policies that Address Environmental Justice,” available at <http://www.abanet.org/irr/committees/environmental/newsletter/dec03/StateSEPS.html> (last visited Aug. 20, 2006).

<sup>234</sup> Connecticut Dept. of Environmental Protection, *Policy on Supplemental Environmental Projects*, *supra* note 183, at 6.

<sup>235</sup> *E.g.*, Massachusetts Dept. of Environmental Protection, *Interim Policy on Supplemental Environmental Projects*, available at <http://www.mass.gov/dep/service/enf97005.pdf> (last visited Aug. 20, 2006); this language resembles EPA’s explanation that “[b]ecause 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.” U.S. EPA, *Final SEP Policy*, *supra* note 5, at 2.

<sup>236</sup> Cottle, *supra* note 233; *See also*, New Mexico Air Quality Board, *Civil Penalty Policy* at 29, available at [http://www.nmenv.state.nm.us/aqb/enforce\\_compliance/Civil%20Penalty%20Policy%2010-20-05%20Version.pdf](http://www.nmenv.state.nm.us/aqb/enforce_compliance/Civil%20Penalty%20Policy%2010-20-05%20Version.pdf) (last visited Aug. 20, 2006).

<sup>237</sup> *Id.*

<sup>238</sup> Colorado Dept. of Public Health and Environment, *Final Agency-Wide SEPs Policy*, *supra* note 170, at 7; Utah Dept. of Environmental Quality, Division of Air Quality, *Supplemental Environmental Projects Policy*, at 7 (on file with authors).

<sup>239</sup> VA. CODE ANN. § 10.1-1186.2(C) (West 2004).

## SEP Idea Libraries<sup>240</sup>

The EPA principles are premised on a violator voluntarily agreeing, as part of a settlement, to perform a SEP. Some states have adopted this model and mandate that violators voluntarily propose SEPs, born of a concern for the separation of powers between the legislative branch with its power of the purse and the executive agencies charged with implementation.<sup>241</sup> Consequently, the administrator is protected against charges that she is implementing her own programmatic agenda under the guise of environmental enforcement. Some states eschew this “voluntary” model, and solicit the cooperation of violators in implementing SEPs that meet agency goals, leading to the funding of projects for which the agency would not otherwise have funding or staffing (e.g., Florida).<sup>242</sup>

Other states take a middle position, in creating “SEP idea banks” or pre-approved lists of possible SEPs for violators to choose from, as described below. Regulators avoid the perception that the department is indirectly appropriating funds for projects that the legislature has not authorized, particularly when the project ideas emanate from non-governmental organizations (NGOs) or local government agencies. The states are following the lead of regional EPA offices. EPA has defined SEP libraries as “an inventory of potential SEPs that can be consulted in individual cases where the defendant requests assistance in identifying appropriate SEPs.”<sup>243</sup> In the *Interim Guidance*, EPA notes that a “SEP library can include specific projects identified as priorities by communities, non-governmental organizations and others. SEP libraries can be developed from project ideas obtained from the affected community through town meetings, publications, the internet [*sic*], or public hearings.”<sup>244</sup>

The states of Delaware, Maine, and Illinois have “SEP libraries.”<sup>245</sup> Each encourages local environmental and community groups to submit proposed projects, usually through web-based forms. The Illinois Environmental Protection Agency has established procedures to determine whether projects are needed and desired.<sup>246</sup> The agency receives feedback from

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<sup>240</sup> U.S. EPA updates its Project Ideas List regularly. *Project Ideas for Potential Supplemental Environmental Projects*, *supra* note 199.

<sup>241</sup> Washington Dept. of Ecology, *Settlement Guidelines*, at 4 (Feb. 1995)(on file with authors) (agency staff is barred from proposing specific projects and may only inform the violator about the types of activities the agency has agreed to previously).

<sup>242</sup> Florida Dept. of Environmental Protection, *Settlement Guidelines for Civil and Administrative Penalties*, at 19-20 (Jan. 24, 2002), available at <http://www.dep.state.fl.us/admin/depdirs/pdf/923.pdf> (last visited Aug. 20, 2006).

<sup>243</sup> *Interim Guidance for Community Involvement*, *supra* note 91.

<sup>244</sup> *Id.*

<sup>245</sup> Maine Dept. of Environmental Protection, *SEP Project Registration*, available at <http://www.maine.gov/dep/oc/sep/index.htm> (last visited Aug. 20, 2006); Illinois EPA, “Supplemental Environmental Project Idea Bank,” <http://www.epa.state.il.us/enforcement/sep/> (last visited Aug. 20, 2006); Delaware Dept. of Natural Resources & Environmental Control, *Policy on Penalty Assessments Associated with Administrative Enforcement Actions*, available at <http://www.dnrec.state.de.us/dnrec2000/admin/enforcement/penaltyassessment/penaltyassessmentpolicy.htm> (last visited Aug. 20, 2006)(Delaware caps the cost of any project at \$100,000). Delaware is phasing out this program, however, as it transitions to its new Community Environmental Projects fund, see *infra*, notes 257-66, and accompanying text.

<sup>246</sup> Interview with William Ingersoll, Manager of Enforcement Programs, Illinois EPA (March 25, 2004).

the state legislature, environmental groups, and the regulated community, with the benefit that the agency is seen as only approving SEPs that have been validated by the larger community. Under the Illinois model of SEP libraries, local community groups may assume responsibility for implementing these projects.<sup>247</sup> Notably, the Illinois idea bank sets out detailed project descriptions, including cost projections as well as potential pitfalls to the projects (e.g., special permitting requirements).<sup>248</sup>

The benefits of SEP libraries are two-fold. First, they ensure that projects actually redound to the benefit of local communities by soliciting community group proposals. Whereas community groups may lack the technical expertise to respond to a myriad of possible projects proposed by violators, the community groups are likely capable of marshalling the resources to identify a few discrete environmental projects and put forward a short description of the projects' benefits and timetable.<sup>249</sup> Second, the proposals reduce transaction costs for all parties, as there is no need to make under-informed and uncertain predictions about the risks and benefits of projects as they arise in the course of settlement negotiations. Since the projects have already been developed, violators may select and implement a project free of the risks of delay and additional negotiation. One commentator has also noted that the "[d]evelopment of SEP [libraries] would help eliminate defendants' reluctance to participate in the SEP process by reducing the amount of resources defendants would have to spend on outreach efforts and by giving defendants an idea of a potential SEP project without involving the community and thus potentially raising expectations."<sup>250</sup>

### Towards a New Cooperative Compliance Model

Scholarly journals and policy articles discuss the possibility of reshaping the relationship among the regulator, the regulated community and the affected community to increase joint efforts at effective and efficient stewardship of the environment.<sup>251</sup> SEPs are highlighted as a tool in this collaborative effort through their use as a negotiated settlement, their community involvement and the prospect for the creation of innovative environmental

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<sup>247</sup> Illinois EPA, "Supplemental Environmental Projects Idea Bank," [http://www.epa.state.il.us/cgi-bin/en/sep/sep.pl?rm=show\\_list&Submit=View+Projects](http://www.epa.state.il.us/cgi-bin/en/sep/sep.pl?rm=show_list&Submit=View+Projects) (last visited Aug. 20, 2006).

<sup>248</sup> *Id.*

<sup>249</sup> Insufficient technical and financial resources have compromised effective public participation by community groups in EPA's Project XL, as well as, in the permitting decisions that concern the environmental justice movement, generally. See, e.g., Environmental Law Institute, *Building Capacity to Participate in Environmental Protection Agency Activities: A Needs Assessment and Analysis*, at 3 (1999), available at [http://www.elistore.org/reports\\_detail.asp?ID=463](http://www.elistore.org/reports_detail.asp?ID=463) (last visited Aug. 20, 2006) (citing John Clayton Thomas, *Public Participation in Public Decisions: New Skills and Strategies for Public Managers*, at 25-26 (1995)).

<sup>250</sup> Flax and Wilson, *supra* note 231, at 4.

<sup>251</sup> See, e.g., Droughton, *supra* note 127, at 823-824; Christopher D. Carey, "Negotiating Environmental Penalties: Guidance on the Use of Supplemental Environmental Projects," 44 A.F. L. Rev. 1, 3 (1998) ("A benefit shared by the regulator and the regulated entity is the enhancement of the regulatory relationship that is generally achieved during the negotiation and accomplishment of a SEP."), cited by Dana, *supra* note 130, at 1211 (Dana notes that there is no verified substantiation of "SEPs producing attitudinal transformations").

solutions by the regulated community, in contrast to penalties meted out by enforcement personnel.<sup>252</sup>

The SEP policy of the New Hampshire Department of Environmental Services exemplifies this new model of environmental regulation, treating polluters who self-report violations preferentially. Under the New Hampshire guidelines, self-reporting violators may receive a greater mitigation amount for their SEPs: they pay either the greater of economic benefit received from the violation or 15% of the gravity component for self-reported violations, as opposed to the higher penalties for violations not self-reported — the greater of the economic benefit plus 10% of the gravity component or 25% of the gravity component, if a SEP is included in the settlement.<sup>253</sup> Oregon also favors self-reported violators for SEPs, although no preferential mitigation is accorded.<sup>254</sup>

The new compliance model is not extended to all violators. Oregon withholds SEPs from violators that have willfully or intentionally breached environmental laws, or are recidivists.<sup>255</sup> Kansas presents a variation on this model, as its Bureau of Waste Management affords an escalating mitigation ratio scale for repeat offenders: ordinarily, corporate violators receive a 3:1 mitigation ratio, while repeat offenders only receive a must spend \$5 before offsetting \$1 from their assessed penalties.<sup>256</sup>

#### State SEP Funds

A 2004 law in Delaware authorizes the funding of SEP-styled projects by using violators' penalties.<sup>257</sup> The Delaware legislature created the Community Environmental Projects Fund ("CEPF"), authorizing the Delaware Department of Natural Resources & Environmental Control (DNREC) to dedicate 25% of all civil and administrative environmental penalties into the CEPF.<sup>258</sup> DNREC uses the funds for environmentally beneficial projects redressing environmental degradation within the same community where

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<sup>252</sup> Kathleen Boergers, "The EPA's Supplemental Environmental Projects Policy," 26 Ecology L.Q. 777, 784-85 (1999).

<sup>253</sup> New Hampshire Dept. of Environmental Services, *Compliance Assurance Response Policy*, at Chapter VI-15, 16, available at <http://www.des.state.nh.us/legal/carp/carp-ch-6.pdf> (last visited Aug. 20, 2006)[hereinafter, "CARP"].

<sup>254</sup> Oregon Dept. of Environmental Quality, *Civil Penalty Mitigation for Supplemental Environmental Projects*, *supra* note 182, at 2 ("SEPs will be looked on most favorably when a Respondent has self-reported the violation and shown willingness and effort to correct violations in a timely manner once they are discovered.").

<sup>255</sup> *Id.*

<sup>256</sup> Kansas Dept. of Health and Environment, *Bureau of Waste Management Policy 00-03 Related to Supplemental Environmental Projects*, at 2 (July 20, 2000), available at [http://www.kdhe.state.ks.us/waste/policies/BWM\\_00-03\\_SEP.pdf](http://www.kdhe.state.ks.us/waste/policies/BWM_00-03_SEP.pdf) (last visited Aug. 20, 2006).

<sup>257</sup> DEL. CODE ANN. tit. 7, §6041 (West 2004).

Although on a smaller scale, Washington state has a similar program in place: penalties collected by the Water Quality Program and Spills programs do not go into the State General Fund, but rather are used to finance grants for coastal protection. Electronic mail from Marc Pacifico, Independent Permit Compliance Specialist, Washington Dept. of Ecology (Aug. 10, 2006) (on file with authors).

<sup>258</sup> *Id.*

the penalized violations occurred.<sup>259</sup> The law further specifies project categories similar to the EPA *Final SEP Policy*, in requiring that projects must effect “pollution elimination, minimization, or abatement, or improving conditions within the environment so as to eliminate or minimize risks to human health, or enhancement of natural resources for the purposes of improving indigenous habitats or recreational opportunities.”<sup>260</sup> Eligible applicants to perform CEPF projects include “Delaware civic and community organizations, non-profit entities, educational institutions, counties, municipal governments, state agencies, and quasi-state agencies that represent the community where the infraction or violation occurred.”<sup>261</sup>

Significantly, the Secretary of DNREC has a statutory responsibility to consult with the Community Involvement Advisory Council (CIAC) in deciding which projects should be funded.<sup>262</sup> CIAC’s overarching mission is to serve as a liaison between the DNREC and affected communities, with the further charge that it ensure that “no community in the State is disparately affected by environmental impacts.”<sup>263</sup> CIAC’s membership includes representatives of communities that potentially may be adversely impacted by environmental factors or conditions.<sup>264</sup> CIAC prefers to approve CEPF projects “that have demonstrated community participation and support (e.g., volunteer hours, matching funds, donated in-kind services),” while the DNREC Community Ombudsman provides assistance to community groups in determining their eligibility to propose and implement a project.<sup>265</sup> DNREC must submit quarterly reports to the Governor and the Legislature on the progress of projects funded by the statute; the statute also requires annual reports on the expenditures and the selection process for the projects.<sup>266</sup>

This provision of law is not a SEP, of course, as penalties are actually collected and appropriated to perform environmentally beneficial projects. Nevertheless, this practice illustrates the possibility of bringing restorative justice to the fore, while minimizing all parties’ transaction costs. It also achieves a significant level of community input into and community benefit from projects funded by the proceeds of environmental penalties. It

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<sup>259</sup> DEL. CODE ANN. tit. 7, §6041(d).

<sup>260</sup> *Id.* at §6041(b).

<sup>261</sup> Delaware Dept. of Natural Resources and Environmental Control, “CIAC Seeks Applications for Community Environmental Projects” (May 5, 2006), *available at* <http://www.dnrec.state.de.us/dnrec2000/Admin/Press/Story1.asp?offset=100&PRID=2036> (last visited Aug. 12, 2006)(soliciting projects from community groups and noting that the fund has granted \$240,000 in two years, with another \$1.67 million available for projects).

<sup>262</sup> The CIAC has a consultative role in the assessment of whether a CEP grant affects the community that was the geographic focus of the violation. Delaware Dept. of Natural Resources and Environmental Control, “Community Involvement Advisory Council,” <http://www.dnrec.state.de.us/ciac/> (last visited Aug. 20, 2006).

<sup>263</sup> DEL. CODE ANN. tit. 29, §8016A (West 2004).

<sup>264</sup> DEL. CODE ANN. tit. 29, §8016A(d). The current CIAC membership is drawn from government, academia, community groups and industry and is listed on the Internet. Delaware Dept. of Natural Resources, “Community Involvement Advisory Council,” *supra* note 262.

<sup>265</sup> Delaware Dept. of Natural Resources and Environmental Control, “CIAC Seeks Applications,” *supra* note 261.

<sup>266</sup> DEL. CODE ANN. tit. 7, §6041(f).

should be noted, however, that violators lose the public relations benefit of superintending and publicizing an environmentally beneficial project.

## 2. SEPs for States

States may diverge from the EPA because states tend to deal with smaller violators, and smaller enforcement penalties, as well as the greater likelihood of environmental violations that cross jurisdictional boundaries. Smaller violators may require special SEP treatment, as they tend to have smaller assessed fines, less ability to pay, and less funding to make systematic changes. An official at Georgia's Department of Natural Resources noted that SEPs may not benefit small companies as much as larger companies because they tend to lack the technical and financial abilities to implement SEPs.<sup>267</sup> Small companies also may not benefit as much from good press. Furthermore, mitigation caps may be too restrictive to implement a SEP with smaller penalties.<sup>268</sup> Regulators in small states in particular, are faced with the prospect of violations that spread over state boundaries, triggering an imperative to sculpt remedies that equitably treat neighboring communities. In addition, in contrast to U.S. EPA, state agencies may not have the institutional resources necessary to negotiate the parameters for SEPs, or oversee progress over the course of the project.<sup>269</sup>

## Practices

### Contributions to Third Parties to Implement SEPs

The practice of cash or in-kind contributions to third parties may facilitate SEPs for

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<sup>267</sup> Telephone Interview with John Fonk, Acting Coordinator, Remedial Site Unit (March 2004).

<sup>268</sup> *Id.*

<sup>269</sup> See also, tactics underneath the third category of model practices, "Efficient and Effective Administration of Environmental Laws," immediately below, setting out other mechanisms for ensuring successful oversight of SEPs. In particular, the state of Maine utilizes the state college system to provide independent oversight of SEP implementation. See note 296-97, *infra*, and accompanying text.

One state environmental official notes that the negotiation of SEP terms in settlement accords burdens agency's resources. Conference call with Les Carlough, Esq., Senior Policy Advisory, Oregon Dept. of Env'tl. Quality (Sept. 21, 2006). Another official notes that some SEPs are turned down because the project oversight requirements on the agency would be prohibitive. Conference call with Marc Pacifico, Permit Compliance Specialist, Washington Dept. of Ecology (Sept. 21, 2006).

Further evidence for this problem of limited agency resources is found in the SEP policies of the states. For instance, Connecticut's SEP policy, states that a SEP should not "impose a burden on a DEP program which that program is unable to assume because of resource constraints" and Arizona's policy notes that SEPs may be disapproved when the cost of reviewing the SEP proposal is too high or the cost of oversight of the project is too high, or the violator may not have the ability or reliability to conduct the SEP. Connecticut Dept. of Environmental Protection, *Policy on Supplemental Environmental Projects / Revised SEP Policy*, *supra* note 183, at 3; Arizona Dept. of Environmental Quality, *Compliance and Enforcement Handbook*, *infra* note 353, at 8-8. Arizona's concern that violators may not be well-positioned to implement SEPs effectively also animates California's SEP policy which expressly requires that SEPs be performed by competent third parties in cases where violators may lack the technical expertise to conduct SEPs. *Cal/EPA Recommended Guidance on Supplemental Environmental Projects*, *supra* note 189, at 7. This concern is particularly relevant for the smaller violators seen on the state level.

small violators. This permits a small violator to make a small SEP contribution and leaves the implementation to an organization with proven competencies in managing environmental projects, relieving the regulator of some of the burden of reviewing SEP proposals and overseeing their execution. Additionally, third parties may have experience in consulting with affected communities, a competence the violator may not possess. This practice represents a departure from the EPA's guidelines, which specifically prohibit cash contributions to third parties in settlements between EPA and violators.<sup>270</sup>

The Arkansas Department of Environmental Quality allows violators to make cash contributions to mitigate civil penalties so long as the project advances environmental interests, although this may result in a contribution at a considerable geographical remove from the violation.<sup>271</sup> In Vermont, a penalty for an environmental violation can include a "contribution toward other projects related to the violation, which the respondent and the secretary or the board agree will enhance the natural resources of the area affected by the violation, or their use and enjoyment."<sup>272</sup> California also allows third party contributions that satisfy its "enforcement project" category.<sup>273</sup> For example, a SEP may include contributions to nonprofit organizations, such as the California District Attorneys Association. New Hampshire requires that the SEP be either a non-tax-deductible direct cash payment to an approved charity or other non-profit organization, or the purchase of a conservation easement or a parcel of land that is then made subject to a conservation easement.<sup>274</sup>

Other states, notably Pennsylvania, have heightened criteria to ensure that the contributions will benefit the environment as well as the affected community. Pennsylvania requires that the donation be dedicated to a specified project, and not merely to the general accounts of the non-profit organization.<sup>275</sup> In addition, the contribution must fund projects related to the public health or the environment.<sup>276</sup>

Not all states have chosen to permit these kinds of SEPs: the Delaware statute specifically prohibits payment to charities or other entities as SEPs.<sup>277</sup> It prohibits performance by third parties in part because the state would have no direct legal leverage over third parties, in case of underperformance.<sup>278</sup>

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<sup>270</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 14; *Guidance Concerning the Use of Third Parties*, *supra* note 112, at 4.

<sup>271</sup> Arkansas Dept. of Environmental Quality, *Supplemental Environmental Project (SEP) Policy and Proposal Guidelines*, available at <http://www.adeq.state.ar.us/legal/sep.htm> (last updated Aug. 20, 2006).

<sup>272</sup> 10 VT. STAT. ANN. tit 10, § 8007(b)(2) (2004).

<sup>273</sup> *Cal/EPA Recommended Guidance*, *supra* note 189, at 4.

<sup>274</sup> New Hampshire Dept. of Environmental Services, *CARP*, *supra* note 253, at VI-17.

<sup>275</sup> Pennsylvania Dept. of Environmental Protection, *Policy for the Acceptance of Community Environmental Projects*, *supra* note 172, at 5.

<sup>276</sup> *Id.*

<sup>277</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide, Chapter 8: Environmental Improvement Projects Associated with Enforcement Actions*, at 4, available at <http://www.dnrec.state.de.us/dnrec2000/admin/enforcement/guide/chapter%20eight.pdf> (last visited Aug. 20, 2006) [hereinafter, "*Compliance and Enforcement Response Guide*"]. (Delaware refers to SEPs as "environmentally beneficial projects"); DEL. CODE ANN. tit. 29 § 8003 (West 2003).

<sup>278</sup> *Id.* at 4.

### Facilitating SEPs for Small Violators

Several states have shown an interest in facilitating small violators' access to SEPs. One possibility is to allow the SEP to mitigate the entire civil penalty, in contrast to the EPA which always requires a minimum civil penalty.<sup>279</sup> On the other hand, Indiana generally does not allow SEPs for penalties under \$10,000, which may effectively prevent small violators from performing SEPs.<sup>280</sup>

Some states, such as Utah, permit full mitigation of the penalty for all violators.<sup>281</sup> The Kansas Bureau of Waste Management restricts waiver of the entire penalty to small businesses, preserving deterrence by requiring the cost of the SEP to equal or exceed twice the calculated penalty without the SEP.<sup>282</sup> The Bureau defines a small business as either a facility with fewer than 100 full-time employees generating fewer than 1000 kilograms of hazardous waste per month, or a solid waste processing facility accepting not more than twenty tons of solid waste per day.<sup>283</sup>

### Accommodating Transboundary SEPs

Unlike the federal government, the states continually confront boundary issues with surrounding jurisdictions that may share the burden of environmental violations. A few states have taken the lead in ensuring that the other jurisdictions also benefit from SEPs. For instance, the Texas SEP policy allows for the performance of SEPs in Mexico, subject to certain limitations.<sup>284</sup> Because natural resources are shared between Texas communities and their sister cities in Mexico, “[i]t makes sense for these communities to work together to preserve the environment they share.”<sup>285</sup> The project must benefit the environment on the Texas side of the border, and cannot benefit the Mexican city at the expense of the Texas sister city.<sup>286</sup> The project must also address a cross-border issue that is a problem of strong concern to Texans. To ensure the successful implementation of a transboundary project, there must be both an existing infrastructure in Mexico through which the project can be

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<sup>279</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 15.

<sup>280</sup> Indiana Dept. of Environmental Management, *Nonrule Policy Document, Supplemental Environmental Policy*, at 7, available at <http://www.state.in.us/idem/oe/nrp/supplemental.html> (last visited Aug. 20, 2006).

<sup>281</sup> The Utah Division of Air Quality policy allows 100% of the gravity component to be offset by a SEP for small businesses and nonprofit entities. Utah Division of Air Quality, *Supplemental Environmental Projects Policy*, *supra* note 238, at 1.

<sup>282</sup> Kansas Dept. of Health and Environment, *Bureau of Waste Management Policy*, *supra* note 256, at 2 (last visited March 28, 2004).

<sup>283</sup> *Id.*

<sup>284</sup> Texas Commission on Environmental Quality, Litigation Division, *Supplemental Environmental Projects (SEPs): Putting Fines to Work Closer to Home*, at 3 (May 2006), available at [http://www.tceq.state.tx.us/comm\\_exec/forms\\_pubs/pubs/gi/gi-352\\_1501164.pdf](http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-352_1501164.pdf) (last visited Aug. 20, 2006).

<sup>285</sup> Texas Commission on Environmental Quality, *Use of Supplemental Environmental Projects*, at 5, formerly available at [http://www.tceq.state.tx.us/comm\\_exec/forms\\_pubs/pubs/rg/rg-367\\_201416.pdf](http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/rg/rg-367_201416.pdf) (last visited March 8, 2004).

<sup>286</sup> Texas Commission on Environmental Quality, *Supplemental Environmental Projects (SEPs): Putting Fines to Work Closer to Home*, *supra* note 284, at 3.

performed and channels for international communication about the project.<sup>287</sup> The violator remains responsible for the primary oversight and implementation of the project.<sup>288</sup>

### Outsourcing Project Negotiation and Management

Responding to the concern that state agencies often have limited enforcement resources to oversee SEP projects, one state has built a relationship with a nonprofit organization that has a history of selecting and overseeing environmentally beneficial projects. The StEPP Foundation (StEPP) in Colorado allows the Colorado Department of Public Health and Environment (DPHE) to outsource these functions.<sup>289</sup> Of particular import is StEPP's expertise in project management and the solicitation of community input (either through finding a community group to implement the project, or by convening community panels to decide on a suitable SEP). It currently oversees twenty-eight SEPs: the SEPs all follow DPHE's SEP Policy. The violator remains liable under the settlement agreement for the successful implementation of the SEP. The chief oversight of StEPP itself lies in DPHE's providing continued referrals; StEPP also reports back to DPHE and the violator/client with progress reports and post-project audits. StEPP operates primarily in the state of Colorado, but is expanding operations to other states, including New Mexico.

DPHE generally recommends StEPP's services early in the negotiation process. StEPP can be involved in defining the parameters of the SEP; selecting the SEP implementer; negotiating the contract (and performance metrics) with the SEP implementer; serving as a conduit for community and local government input; overseeing the SEP and the stage-gating of disbursements ("pay as they perform"), and reporting interim and final project outcomes. As is implied by its name, StEPP serves as a library for SEP projects, with a database of projects representing all fifty states and numbering almost 2000. This library, coupled with their process for working in conjunction with community groups, reduces the often costly effort of soliciting and screening SEP project ideas.<sup>290</sup> The StEPP website features a guided, and comprehensive project submittal process for would-be SEP implementers. Both regulators and violators benefit from this independent source of project ideas. StEPP's fee ranges from 12 to 20% of the SEP's costs, paid by the violator.<sup>291</sup>

The use of StEPP, and its catalog of pre-existing project description, increases the number of SEPs that may be implemented, in light of scarce agency resources for negotiating and overseeing SEPs. Violators may also be more comfortable relying upon StEPP, a proven manager of environmentally beneficial projects, to oversee a SEP that may be beyond the

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<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> The StEPP Foundation's website is found at <http://www.Steppfoundation.org> (last visited Oct. 22, 2006). This section relies on an interviews with and electronic mails from Frank Stewart, former Executive Director, StEPP Foundation (Sept. 22, 2006), Rachel Wilson-Roussel, Colorado Dept. of Public Health and Environment (Sept. 8, 2006), and Ben Dines, Executive Director, StEPP Foundation (Nov. 20, 2006).

<sup>290</sup> Electronic mail from Ben Dines, *id.*

<sup>291</sup> It is not evident how StEPP's fee impacts the penalty mitigation calculation.

violator's core competencies and require additional staffing, in addition to reducing their exposure to penalties for failed SEPs. StEPP may also be able to gather more community input since StEPP maintains relationships with local community groups, in likely contrast to violators and enforcement personnel. DPHE gives StEPP guidance on the degree of community development required, ranging from the minimalist -- requesting proposals from community groups to be the implementers of SEPs -- through convening community advisory boards to select and participate in the SEP process. The authors believe that one downside to this tactic could be the possibility of losing some "government in sunshine" safeguards, such as the requirements of open meetings acts. At the same time, the flexibility gained allows StEPP to accept volunteer services and donations in mobilizing community resources in furtherance of the SEP.

### **3. Efficient and Effective Administration of Environmental Laws ("First, do no harm")**

Responding to many of the concerns set out in Chapter 3, "The Policy Implications of SEPs," the authors have found that some states have been particularly solicitous of the open, transparent and orderly administration of enforcement authority in crafting their SEP policies. A preponderance of states with published SEP policies already strives to maintain the deterrent effect of the underlying environmental laws by following some of the EPA's guidelines. The specific measures used include: a minimum civil penalty to recapture the economic benefit of noncompliance; the SEP is not otherwise required to be performed and the SEP was not previously planned by the violator; the performance of the SEP is voluntary, but once agreed upon becomes an enforceable commitment; and the SEP is not inconsistent with the violated statute.

Underneath this overarching goal of the orderly execution of enforcement authority are such sub-values as ensuring the enforceability of a particular SEP across its life cycle, achieved through front-end screening, oversight mechanisms, and post-SEP certifications of completion. Similarly, some states have focused upon improving the approval process, *inter alia*, creating openness in a process that does not merit confidentiality given the public nature of harms created by the violation of environmental law. Commentators term this value "procedural justice," referring to "fairness in the decision-making process, including the right of all members of the public to meaningful participation in all aspects of agency decisions."<sup>292</sup>

Another value, reduction of transaction costs, has as many dimensions to it as there are stakeholders to the SEP itself -- the regulator, the violator, and the affected communities. Each has an interest in minimizing the costs of negotiating, implementing, and overseeing SEPs. Some within the environmental justice community contend that violators' "unclean hands" render their transaction costs unworthy of concern, but violators rejoin that they require expeditious resolution of SEP negotiations to permit them to clear their books of outstanding liabilities without incurring significant increases in attorneys' fees.<sup>293</sup> In any

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<sup>292</sup> Rechtschaffen (2003), *supra* note 224, at 99 (citing Robert R. Kuehn, "A Taxonomy of Environmental Justice," 30 *Env'tl. L. Rep.* 10,681 (2000)).

<sup>293</sup> Conference call with Chris Davis, Esq. (May 13, 2004).

event, should transaction costs and undue delays attend the process of the SEP cycle, the number of SEPs and their environmental benefits would likely decline.

## **Practices**

### Oversight and Enforceability

An abiding concern for state regulators and the regulated community alike is the conversion of a dollar-certain and time-bound enforcement penalty into a project of indefinite liability and timeline. Some states have anticipated the need for finality by implementing policies that rule out projects with indefinite timelines, as well as projects that are possibly detrimental to the environment if left unfinished. Connecticut's example is noteworthy, as the Department of Environmental Protection examines the "worst case" scenario in determining whether a SEP poses too many risks if "done poorly or ... left uncompleted at any time during implementation."<sup>294</sup> This stringent front-end requirement can prevent the double blow of an environmental violation compounded by further environmental degradation from an ill-conceived or poorly executed SEP. Maine also scrutinizes a violator's capacity to bring about a successful SEP, predicated approval upon demonstrated technical and economic resources needed for implementation.<sup>295</sup> Maine may "require a letter of credit, escrow agreement, or third-party oversight as part of this demonstration."<sup>296</sup> By outsourcing the oversight of SEPs to the University of Maine or another branch of state government and by charging those oversight costs back to the violator, Maine increases the possibility of successful outcomes through the project management expertise and neutrality of the third party.<sup>297</sup>

In Pennsylvania, the DEP might reject projects with implementation schedules of a year or more that require continued DEP oversight, projects that require significant continuing DEP review and approval or oversight, overly complex or time-consuming projects, and projects that are difficult to value.<sup>298</sup> In addition, to guard against the risk that the SEP's estimated cost might not be borne out in the implementation, projects with difficult to quantify costs may receive a lesser mitigation ratio.<sup>299</sup>

Similar to Pennsylvania's structuring of SEPs to reflect the risks of oversight, Maryland's SEP policy lays down requirements that work to ensure successful SEPs. SEPs must be defined with particularity as to deadlines, so that they may be enforced, and the agreement must specify "objective quantifiable deliverables with deadlines and consequences."

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<sup>294</sup> Connecticut Dept. of Environmental Protection, *Policy on Supplemental Environmental Projects*, *supra* note 183, at 2.

<sup>295</sup> Maine Dept. of Environmental Protection, *supra* note 194, at 3, 6.

<sup>296</sup> *Id.* at 3.

<sup>297</sup> *Id.*

<sup>298</sup> Pennsylvania Dept. of Environmental Protection, *Policy for the Acceptance of Community Environmental Projects*, *supra* note 172, at 5. This provision parallels U.S. EPA's, *Final SEP Policy*, *supra* note 5, at 3.

Connecticut expressly requires an estimate of the amount of agency time required to negotiate and oversee SEPs in determining whether to approve the SEP. *Policy on Supplemental Environmental Projects*, *supra* note 183.

<sup>299</sup> Pennsylvania Dept. of Environmental Protection, *Policy for the Acceptance of Community Environmental Projects*, *supra* note 172, at 5.

<sup>300</sup> This type of requirement enhances enforceability of SEPs in two ways: for one, it sets up discrete performance hurdles that must be met along the way to successful completion of the SEP. In addition, it appears to compel SEP implementers to devise performance indicators for the projects' efficacy in improving the environment. This latter point is a vital component of transparency, and useful in building support for the use of SEPs among the regulated community, the affected community, and legislatures.

#### Transparency and Neutrality in the SEP Approval Process

Transparency and the interposition of neutral third parties into the approval process are critical success factors for SEPs, in part due to a need to preserve the symmetry between the openness of the legislative and rulemaking process that sets environmental standards and sanctions and the enforcement process that may end up not imposing the full weight of those sanctions.<sup>301</sup> Several states have actively promoted transparency through a variety of means, thereby combating the perception that environmental agencies are letting violators off too lightly, as well as rebutting the appearance of agency impropriety. Several states interpose independent committees and legislative bodies into the SEP approval process, in part to inform and circumscribe the discretion of environmental agency personnel. For instance, Florida's version of SEPs, pollution prevention projects, may require a more stringent approval procedure, *i.e.* approval by both the Office of General Counsel and notification of the settlement to the Division Director.<sup>302</sup>

Paralleling the EPA practice of publishing notice of impending consent decrees in the Federal Register, the Louisiana legislature requires that proposed environmental settlement agreements be published in the newspaper closest to the site of the environmental violation, giving the public 45 days to comment.<sup>303</sup> The Louisiana Department of Environmental Quality provides a website documenting proposed settlements, clearly identifying those with beneficial environmental projects.<sup>304</sup> In addition, the Louisiana statute requires any settlement agreements with beneficial environmental projects and their justifications be forwarded to the Attorney General for approval.<sup>305</sup>

#### Community Input

While discussed earlier as a means of furthering restorative justice, community input

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<sup>300</sup> Maryland Dept. of the Environment, *Annual Enforcement and Compliance Report Fiscal Year 2004*, at 23-24, available at [http://www.mde.state.md.us/assets/document/AboutMDE/enf\\_comp\\_04.pdf](http://www.mde.state.md.us/assets/document/AboutMDE/enf_comp_04.pdf) (last visited Aug. 20, 2006).

<sup>301</sup> The so-called "pluralistic" model "holds that all participants are equally qualified to participate in [regulatory] decisions," rooted "in the belief that one group's vision of what is best is not inherently superior to another's." Gauna, *supra* note 196, at 21 (citations omitted). In the context of rulemaking, multipolar representation addresses "the concern that agency bias would arise from granting access only to the regulated community." *Id.* at 20. This concern similarly animates opening the enforcement process to the input of affected communities.

<sup>302</sup> Florida Dept. of Environmental Protection, *Settlement Guidelines for Civil and Administrative Penalties*, *supra* note 242, at 19-20.

<sup>303</sup> Louisiana Dept. of Environmental Quality, "Beneficial Environmental Projects – FAQs," available at <http://www.deq.louisiana.gov/portal/tabid/2206/Default.aspx> (last visited Aug. 20, 2006).

<sup>304</sup> Louisiana Dept. of Environmental Quality, "Settlement Agreements," available at <http://www.deq.louisiana.gov/portal/Default.aspx?tabid=226> (last visited Aug. 20, 2006).

<sup>305</sup> LA. STAT. ANN. § 30:2050.7(E)(2)(a)(2004).

serves a different purpose, that of ensuring that the process of negotiating SEPs remains balanced and fair.<sup>306</sup> Community input is vital during various stages of SEP implementation. The U.S. EPA's *Final SEP Policy* notes that "EPA should make special efforts to seek input on project proposals from the local community that may have been adversely impacted by the violations," particularly in cases with a great range of possible SEPs.<sup>307</sup> EPA only solicits community input after the violator indicates the intent to perform a SEP and to seek community input. EPA believes that community input will promote environmental justice, by yielding SEPs improving both the affected community's environment and the relationship between the community and the violator.<sup>308</sup> To guarantee effective and meaningful community input, EPA provides information about the SEP process to the community.<sup>309</sup> Companies that welcome public input on the selection of projects are eligible for a greater mitigation of their assessed penalties.<sup>310</sup>

Several states have extended EPA's community input framework to their own SEP process. The Colorado Department of Public Health and Environment considers both community input and environmental justice in determining the degree of penalty mitigation.<sup>311</sup> Specifically, the violator must actively solicit and incorporate input into the SEP.<sup>312</sup> The environmental justice factor addresses damage or risk to minority or low-income communities disproportionately affected by the violation.<sup>313</sup> Michigan's 2005 revisions to its SEP policy go the furthest, perhaps, in developing "SEQ Quality Rating Matrixes," which assign a numerical value for the degree to which a SEP achieves the familiar mitigation factors such as innovativeness, environmental justice, community input, and multimedia impacts. The summation of the numerical values yields the awarded mitigation percentage, ranging from a low of 25% to a high of 80%. This transparent process (the rating criteria are specified in detail) prompts violators to devise SEPs that return benefits to the community and attain high levels of restorative and procedural justice.<sup>314</sup>

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<sup>306</sup> Recent research indicates that public participation itself increases the public's perceived fairness in administrative processes even if the distributional outcomes of a decision run counter to the group interest. See Markell (2006), "Understanding Citizen Perspectives," *supra* note 207, at 678-79.

<sup>307</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 13; see also, U.S. EPA, *Interim Guidance for Community Involvement*, *supra* note 91.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 16; see also, U.S. EPA, *Interim Guidance for Community Involvement*, *supra* note 91, at 14. While EPA encourages violators to gather community input, community groups are not party to the SEP negotiations at the federal level.

<sup>311</sup> Colorado Dept. of Public Health and Environment, *Final Agency-Wide SEPs Policy*, *supra* note 170, at 6-7 (last visited May 6, 2004). Also, Arizona's SEP guidelines specify when and how the solicitation of community input may be sought, without providing for preferential mitigation of expenditures on SEPs with community input. <http://www.adeq.state.az.us/function/forms/download/handbook/fullhandbookw.pdf>, *infra* note 353 and accompanying text, at 8-8 to 8-9.

<sup>312</sup> Colorado Dept. of Public Health and Environment, *Final Agency-Wide SEPs Policy*, *supra* note 170, at 7.

<sup>313</sup> *Id.*

<sup>314</sup> Michigan Dept. of Environmental Quality, *DEQ Policy and Procedures – Supplemental Environmental Projects for Penalty Mitigation*, *supra* note 7, Appendix C and "SEP Quality Rating Procedure."

As noted in greater detail above, some states have created SEP project libraries. One variant of SEP library actively solicits project descriptions from community groups typically affected by environmental violations, building in front-end input. This mechanism imposes fewer costs upon community groups, as they need not respond to a myriad of distinct project proposals, nor do the violators need to delay settlements by engaging in protracted negotiations with community groups. A related phenomenon is seen in New York state's new SEP policy, with its escrow accounts for "unspecified projects." This device decouples the enforcement settlement process from the determination of an acceptable SEP, and may meet the concern of corporate violators in coming to a quick resolution of the outstanding environmental liability (see description of New York's SEP policy, at page 139, below), while preserving the opportunity for community groups to voice their concerns later on.

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The Utah Division of Air Quality also looks at the extent to which community input was considered in the SEP as a factor to determine the mitigation percentage. Utah Division of Air Quality, *Supplemental Environmental Projects Policy*, *supra* note 238, at 6.

## V. State by State Survey

### Alabama

In 1994, the Alabama Department of Environmental Management (“ADEM”) began approving Supplemental Environmental Projects (“SEPs”), loosely following the federal SEP guidelines.<sup>315</sup> Generally, the mitigation ratio was three SEP dollars to one penalty dollar.<sup>316</sup> Also, the SEP had to achieve more than minimum compliance and not be legally required.<sup>317</sup>

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<sup>315</sup> Alabama Dept. of Environmental Management, *Supplemental Environmental Projects*, at 1 (2003) (on file with authors); electronic mail from Olivia Rowell, Office of the General Counsel, Alabama Dept. of Environmental Management (April 19, 2004) (on file with authors).

<sup>316</sup> Alabama Dept. of Environmental Management, *Supplemental Environmental Projects*, at 5.

<sup>317</sup> *Id.* at 1.

In 2001, ADEM formalized its own internal principles. The new principles generally track the 1998 EPA *Final SEP Policy*, with the exception that ADEM requires only that a project be related to environmental protection, and does not require an EPA-styled nexus.<sup>318</sup> ADEM envisions SEPs as another enforcement mechanism to achieve compliance and ultimately improve the environment.<sup>319</sup> Unlike other enforcement tools, SEPs allow the violator to voluntarily perform a project beyond compliance, thus promoting environmental awareness.<sup>320</sup> Through voluntary projects, ADEM hopes to reshape violators' attitudes towards environmental compliance.<sup>321</sup>

#### Definition of SEPs

A SEP is a project a violator agrees to undertake in a settlement agreement to reduce the calculated penalty, but which the violator is not otherwise legally required to perform.<sup>322</sup>

#### Legal Principles

ADEM cannot manage or control SEPs or their funds.<sup>323</sup>

#### Categories of SEPs

ADEM permits a subset of the federal SEP categories.<sup>324</sup>

1. *Pollution Prevention*;
2. *Pollution Reduction*;
3. *Environmental Restoration and Protection*;
4. *Emergency Planning and Preparedness*; and
5. *Other* - referring to projects otherwise that protect public health.<sup>325</sup>

ADEM also specifies the types of projects that will not qualify as acceptable SEPs.<sup>326</sup> It does not allow general public awareness projects, contributions to environmental research at a college, contributions to an environmental group, projects unrelated to environmental protection, projects funded by federal or state monies, or projects resulting in increased production capacity for the facility.<sup>327</sup>

#### Calculation of the Final Penalty

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<sup>318</sup> *Id.* at 1-8; telephone interview with Olivia Rowell (April 22, 2004).

<sup>319</sup> Interview with Olivia Rowell, *supra* note 316.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> Alabama Dept. of Environmental Management, *Supplemental Environmental Projects*, *supra* note 315, at 1.

<sup>323</sup> *Id.* at 7.

<sup>324</sup> *Id.* at 2-5; U.S. EPA, *Final SEP Policy*, *supra*, note 5, at-8.

<sup>325</sup> Alabama Dept. of Environmental Management, *Supplemental Environmental Projects*, *supra* note 315, at 2-5.

<sup>326</sup> *Id.* at 4-5.

<sup>327</sup> *Id.*

To determine the final penalty, ADEM calculates the total penalty without the SEP, the cost of the SEP, and the mitigation ratio based on the benefits of the SEP.<sup>328</sup> The SEP cost offsets a portion of the final cash penalty, but the SEP cost must be at least equal to or greater than the mitigated penalty.<sup>329</sup> ADEM prefers at least a three SEP dollar to one penalty dollar mitigation ratio (*i.e.*, to reduce the calculated penalty by one dollar, the violator must spend three SEP dollars).<sup>330</sup> However, if the SEP has exceptional environmental benefit, it may offset the final cash penalty at a lower ratio.<sup>331</sup>

#### Oversight and Drafting Enforceable SEPs

The settlement agreement should accurately and completely describe the SEP.<sup>332</sup> It should include performance requirements, a schedule, and objective means to verify the project's completion.<sup>333</sup> The violator has to submit a final report to certify completion and may have to submit periodic progress reports to ADEM.<sup>334</sup>

#### Failure to Perform a SEP and Stipulated Penalties

If a SEP is not satisfactorily completed, then the violator should pay a "substantial" penalty as specified in the settlement.<sup>335</sup> A substantial penalty should be at least 100% of the original mitigated amount.<sup>336</sup> However, the violator may avoid paying a penalty if it made a good faith effort to complete the project and used at least 90% of the funds budgeted for the SEP.<sup>337</sup>

#### Comparison with U.S. EPA Principles

ADEM's principles track the U.S. EPA *Final SEP Policy*, diverging on the SEP categories and nexus requirement.<sup>338</sup> ADEM modified the federal categories of unacceptable SEPs.<sup>339</sup> It does not accept SEPs that increase production capacity.<sup>340</sup> ADEM does not set out a nexus requirement, but does require that a SEP must be related to environmental protection.<sup>341</sup>

#### Other Research

The authors found no case law or administrative decisions on SEPs in Alabama.

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<sup>328</sup> *Id.* at 5.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 6.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 7-8.

<sup>336</sup> *Id.* at 7.

<sup>337</sup> *Id.* at 7-8.

<sup>338</sup> Alabama Dept. of Environmental Management, *Supplemental Environmental Projects*, *supra* note 315, at 1-5; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5, 7-12.

<sup>339</sup> Alabama Dept. of Environmental Management, *Supplemental Environmental Projects*, *supra* note 315, at 4-5; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 7-12.

<sup>340</sup> Alabama Dept. of Environmental Management, *Supplemental Environmental Projects*, *supra* note 315, at 5.

<sup>341</sup> *Id.* at 5.

## Alaska

The Alaska Department of Environmental Conservation (“ADEC”) uses SEPs as an alternative enforcement tool.<sup>342</sup> ADEC has an internal SEP policy that substantially tracks the EPA *Final SEP Policy*.<sup>343</sup> ADEC uses SEPs in its settlement agreements.<sup>344</sup> This policy has been in existence for at least ten years and likely followed the 1991 EPA Policy.<sup>345</sup> Since 2001, it has accepted eight SEPs.<sup>346</sup>

### Definition of SEPs

A SEP is a voluntary project that prevents or reduces pollution, educates the public on environmental issues, or improves environmental quality.<sup>347</sup>

### Comparison with U.S. EPA Principles

ADEC generally adheres to the EPA principles in the media of air and water, for which the EPA has delegated enforcement authority to ADEC.<sup>348</sup> Alaska requires a tighter nexus between the project and the violation, however.<sup>349</sup> The project should be designed to reduce the likelihood that similar violations will occur in the future. The project should also reduce the risk to public health or the environment.<sup>350</sup>

Similar to the federal policy, either the violator or ADEC can suggest using a SEP to reduce the magnitude of the penalties.<sup>351</sup> However, in Alaska, SEPs may be used in the settlement of either civil or criminal environmental violations.<sup>352</sup>

### Other Research

There are no cases or administrative decisions on SEPs in Alaska.

## Arizona

The Arizona Department of Environmental Quality (“ADEQ”) has formal SEP principles and uses SEPs as a compliance and enforcement tool, integrated into its civil penalty policy.<sup>353</sup> The primary purpose of SEPs is to “encourage and obtain environmental and public

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<sup>342</sup> Alaska Dept. of Environmental Conservation Statewide Environmental Crimes Unit, *Enforcement Report FY 2004*, at Ch.2-4 (Fiscal Year 2003), available at <http://www.dec.state.ak.us/das/pdfs/enfreport.pdf> (last visited Aug. 20, 2006).

<sup>343</sup> Electronic mail from James Bowden, Chief Criminal Investigator, Alaska Statewide Environmental Crimes Unit (Aug. 7, 2006) (on file with authors).

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> Electronic mail from James Bowden, *supra* note 343.

<sup>348</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 4-5.

<sup>349</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5-9.

<sup>350</sup> Electronic mail from James Bowden, *supra* note 343.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> Arizona Dept. of Environmental Quality, *Compliance and Enforcement Handbook*, Ch. 8-3, (Dec. 1, 2003), available at <http://www.adeq.state.az.us/function/forms/download/handbook/fullhandbookw.pdf> (last visited

health protection and improvements that may not otherwise have occurred without the settlement incentives provided by the use of SEPs.”<sup>354</sup> The ADEQ principles substantially track the EPA principles with no significant differences.

### Definition of SEPs

Following U.S. EPA’s formulation, ADEQ defines a SEP as an environmentally beneficial project undertaken in the settlement of an enforcement action, which project was not otherwise legally required to perform. The project must primarily benefit the public health or the environment, and not the violator, although incidental benefits to the violator are permissible. Also, the SEP cannot include actions that correct the underlying violation.<sup>355</sup>

### Legal Principles

1. The SEP must be consistent with the provisions of the statutes giving rise to the enforcement action, and must advance at least one of their objectives.
2. There must be a nexus between the SEP and the violation, taking the form of either a reduction in likelihood of a similar violation occurring in the future; or a reduction in the adverse impact to public health or the environment to which the violation contributed; or reduction in overall risk to public health or the environment potentially affected by the violation.<sup>356</sup>
3. ADEQ may not control SEP funds, nor directly manage or administer the SEP itself, although it may oversee to ensure that the project is completed as specified.
4. SEPs may not be used to satisfy ADEQ’s statutory obligations to perform an activity, nor may SEPs be used to conduct activities that state law prohibits ADEQ to perform.
5. Any publicity accompanying the SEP must identify that the project was performed pursuant to the settlement of an enforcement action.

### Categories of SEPs

ADEQ has seven categories of SEPs: *Public Health* (providing care or data collection incident to the harm caused by the violation), *Pollution Prevention* (reducing the generation of pollutants that would otherwise enter the waste stream), *Pollution Reduction* (pertaining to controlling pollutants that have entered the waste stream), *Environmental Restoration* (beyond repairing the damage caused by the violation), *Assessments and Audits* (reviews of the violator’s internal procedures, or of sites unrelated to the violator’s facilities), *Environmental Compliance Promotion* (training the regulated community in better compliance methods), and

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Aug. 20, 2006). ADEQ weighs the violation’s economic benefit, its gravity, and prior compliance history in coming to a final settlement penalty, in addition to a violator’s willingness and ability to perform a SEP.

<sup>354</sup> *Id.* at 8-3.

<sup>355</sup> *Id.* at 8-4.

<sup>356</sup> *Id.* at 8-4 to 8-5.

*Environmental Planning and Preparedness.*<sup>357</sup> Projects falling outside the above categories may also be approved, provided that they otherwise comply with all the other SEP guidelines.

#### Calculation of the Final Penalties

A SEP cannot mitigate the entire calculated penalty. While ADEQ has the authority to provide different mitigation ratios, the after tax cost of the SEP should be twice the amount of the penalty mitigated: for every two after tax dollars spent on a SEP, one dollar may be mitigated from the initially calculated penalty.<sup>358</sup>

#### Community Input

The ADEQ principles set out guidelines for soliciting meaningful community input, noting that when input is being sought, ADEQ “should provide information 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.”<sup>359</sup> ADEQ expressly limits community input to instances where the violator has expressed a willingness to seek community input, and rules out the solicitation of community-initiated SEP proposals and direct involvement of community groups in settlement negotiations.<sup>360</sup>

#### Other Research

Research yielded one consent order imposing a SEP.<sup>361</sup> The consent order detailed the SEP plan for the collection and disposal of hazardous chemicals from the Phoenix Union High School District, status report requirements, penalty payment, and stipulated penalties for failure to implement the SEP.<sup>362</sup>

### **Arkansas**

The Arkansas legislature expressly authorizes the use of SEPs in the Arkansas Water and Air Pollution Control Act, the Solid Waste Management Act, and the Hazardous Waste Management Act.<sup>363</sup> Since February 21, 1991, the Arkansas Department of Environmental Quality (“ADEQ”) had utilized SEPs as an offshoot of the EPA’s Office of Solid Waste and Emergency Response Directive #9832.20-1a.<sup>364</sup> In 2001, ADEQ adopted department-wide SEP principles.<sup>365</sup> The purpose of the policy is to provide a mechanism for allowing facilities that are the subject of formal enforcement actions to make an in-kind service or cash contribution to a project designed to advance environmental interests in a settlement agreement.<sup>366</sup>

ADEQ principles differ from the EPA *Final SEP Policy* in several key areas: ADEQ allows cash contributions to third parties and does not necessarily require an EPA-like nexus,

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<sup>357</sup> *Id.* at 8-5 to 8-8.

<sup>358</sup> *Id.* at 8-8.

<sup>359</sup> *Id.* at 8-3.

<sup>360</sup> *Id.* at 8-8 to 8-9.

<sup>361</sup> *In Re Superior Special Services, Inc.* 2002 Ariz. ENV LEXIS 39 (2002). Consent decrees are generally not included in the report.

<sup>362</sup> *Id.*

in instances where the SEP would provide an “overriding” public and environmental good.<sup>367</sup> ADEQ recognizes two different types of projects that a violator can implement to mitigate penalties: SEPs and in-kind services, with ADEQ requiring SEPs to meet the statutory requirements imposed on in-kind services mitigating penalties.<sup>368</sup>

### Definition of SEPs

Following the statutory language, ADEQ defines SEPs to be either “an in-kind service or cash contribution to a project designed to advance environmental interests” and which a party “agrees to perform in partial settlement of an enforcement action, but which the [party] is not otherwise legally required to perform, and retains no monetary benefit.”<sup>369</sup>

### Legal Principles

Although ADEQ has statutory authority to perform SEPs, Arkansas law specifies that the services must not “duplicate or augment services already provided by the department through appropriations of the General Assembly.”<sup>370</sup> In addition, the statutes clarify that all monies collected as civil penalties shall be deposited in the Emergency Response Fund.<sup>371</sup>

1. A project must correct violations and ensure future compliance.
2. A project must remediate any pollution that resulted from violations.
3. A project must deter future occurrence generally and for the specific party or violation.
4. A project must either meet the nexus requirement or serve an “overriding” public and environmental benefit.
5. ADEQ may deny the SEP based on prior history of non-compliance.
6. A party must show its ability to perform the SEP. In addition, it must follow up with the ADEQ and complete the SEP within the specified time period.

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<sup>363</sup> ARK. CODE ANN. §§ 8-4-103 (f)(3), 8-6-204 (e)(3), and 8-7-204 (e) (West 2004).

<sup>364</sup> ASTSWMO, Hazardous Waste Enforcement Task Force, *Supplemental Environmental Projects (SEPs) Survey of States and Territories*, *supra* note 1, at 15.

<sup>365</sup> Arkansas Dept. of Environmental Quality, “Supplemental Environmental Project (SEP) Policy and Proposal Guidelines,” <http://www.adeq.state.ar.us/legal/sep.htm> (last visited Aug 15, 2006) [hereinafter, “SEP Policy and Proposal Guidelines”]; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 4-5; Electronic mail from Melanie Foster, Enforcement Section Manager, Arkansas Hazardous Waste Division, (April 9, 2004) (on file with authors).

<sup>366</sup> *Id.*

<sup>367</sup> Walter G. Wright and Mary Ellen Henry, “The Arkansas Air Pollution Control Program: Past, Present and Future,” 51 Ark. L. Rev. 227, 401 (1998); Walter G. Wright, Albert J. Thomas, III, “The Federal/Arkansas Water Pollution Control Programs: Past, Present, and Future,” 23 U. Ark. Little Rock L. Rev. 541, 751-52 (2001).

<sup>368</sup> *Id.*

<sup>369</sup> Arkansas Dept. of Environmental Quality, “SEP Policy and Proposal Guidelines,” *supra* note 365.

<sup>370</sup> ARK. CODE ANN. §§ 8-4-103 (f)(3)(C), 8-6-204 (e)(3)(C), 8-7-204 (e)(3)(C).

<sup>371</sup> *See, e.g.*, ARK. CODE ANN. §§ 8-4-103 (f)(2)(clearly establishing a distinction between collected penalties and SEPs; in addition, subsection (f)(1)carves out a reimbursement provision for costs and damages borne by state agencies and subdivisions of the state).

7. The violator must provide additional staff or procedure to monitor performance.<sup>372</sup>

#### Categories of SEPs

1. *Pollution Prevention and/or Reduction* projects – decreasing pollutants beyond the minimum compliance amount as required by law;
2. *Environmental Restoration* projects – repairing damages and enhancing the surrounding environment where the violation took place;
3. *Technical Assistance* projects – helping other regulated entities that face economic and/or technological hardships;
4. *Environmental Education and/or Engineering Assistance* projects – providing assistance to regulated entities or the public; and,
5. *Other* projects – funding public works for a neighbor municipality and benefiting the environment beyond the minimum compliance as required by law.<sup>373</sup>

U.S. EPA allows two categories not permitted by ADEQ: *Public Health and Assessments and Audits*.<sup>374</sup> ADEQ has combined *Pollution Prevention* and *Pollution Reduction* into one category.<sup>375</sup> It does not have a category equivalent to EPA's *Assessments and Audits*. EPA's *Environmental Compliance Promotion* category has been divided into two ADEQ categories.<sup>376</sup> ADEQ has included elements of EPA's *Emergency Planning and Preparedness* in its catch-all *Other* category.<sup>377</sup>

#### Calculation of the Final Penalty

Although ADEQ encourages the use of SEPs, the final cash penalty must have a deterrent effect on both the specific violator and potential violators in similar positions.<sup>378</sup> In addition, it should negate the unjust enrichment of the polluting activity and weigh the gravity of the violation.<sup>379</sup> ADEQ may also deny the SEP if the facility is a repeat offender or recalcitrant.<sup>380</sup>

There are two dimensions to the Arkansas penalty mitigation program: 1) a mitigation percentage, which specifies the percentage of a penalty that can be mitigated, (*i.e.* an 80% mitigation percentage sets a ceiling on mitigation so that a SEP could not mitigate more than 80% of the penalty.); and 2) a mitigation ratio, which describes how many SEP dollars are needed to mitigate one penalty dollar. In Arkansas, a SEP can mitigate up to 35% of the calculated penalty, but ADEQ may allow a higher mitigation percentage with the approval of

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<sup>372</sup> Arkansas Dept. of Environmental Quality, "SEP Policy and Proposal Guidelines," *supra* note 365.

<sup>373</sup> *Id.*

<sup>374</sup> Electronic mail from Melanie Foster, *supra* note 365; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 7-12.

<sup>375</sup> Electronic mail from Melanie Foster, *supra* note 365.

<sup>376</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 10-11.

<sup>377</sup> Electronic mail from Melanie Foster, *supra* note 365; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 11-12.

<sup>378</sup> Arkansas Dept. of Environmental Quality, "SEP Policy and Proposal Guidelines," *supra* note 365.

<sup>379</sup> *Id.*

<sup>380</sup> Electronic mail from Melanie Foster, *supra* note 365.

the ADEQ director.<sup>381</sup> State law, however, does not allow the SEP to offset the entire penalty.<sup>382</sup>

The mitigation ratio ranges from 1:1 to 3:1 SEP dollars expended to penalty dollar mitigated, depending on the environmental impact of the project. Generally, SEPs that directly remediate environmental contamination or reduce pollution enjoy a 1:1 mitigation ratio -- each dollar spent on a SEP mitigates a penalty dollar.<sup>383</sup> SEPs with an indirect environmental benefit receive a 3:1 mitigation ratio.<sup>384</sup>

There are two major exceptions to the above guidelines.<sup>385</sup> First, governmental entities are eligible to mitigate up to 50% of their penalties and to receive a 1:1 mitigation ratio, regardless of the extent of environmental impact.<sup>386</sup> Second, a project may receive a dollar-for-dollar credit if it will discernibly benefit and change the environment, such as a pollution prevention project that goes beyond legal requirement.<sup>387</sup>

#### Comparison with U.S. EPA Principles

Notably, both the ADEQ and U.S. EPA policies give preferential treatment to governmental entities and pollution prevention projects in terms of penalty mitigation.<sup>388</sup> Although the ADEQ generally tracks the EPA principles, there are several significant differences between the two programs.<sup>389</sup> First, ADEQ SEP principles tend to be broader in scope because ADEQ does not have a strict nexus requirement.<sup>390</sup> Although the project must “advance environmental interests,” this is broader than EPA’s nexus definition.<sup>391</sup> The EPA *Final SEP Policy* specifies that the project must be directly related to the violation in terms of substantive impact, geographic location, or likelihood of reducing future violations.<sup>392</sup> ADEQ also allows cash contributions to third parties to mitigate penalties, but the contribution to the environment must be justified.<sup>393</sup>

Second, EPA and ADEQ also diverge in terms of penalty mitigation. ADEQ generally allows a mitigation percentage of up to 35% while EPA allows up to 80%.<sup>394</sup> ADEQ also has more discretion than the EPA to deviate from the general guidelines on a case-by-case

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<sup>381</sup> Arkansas Dept. of Environmental Quality, “SEP Policy and Proposal Guidelines,” *supra* note 365; Electronic mail from Melanie Foster, *supra* note 365.

<sup>382</sup> Electronic mail from Melanie Foster, *supra* note 365.

<sup>383</sup> Arkansas Dept. of Environmental Quality, “SEP Policy and Proposal Guidelines,” *supra* note 365

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 16.

<sup>389</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5-18.

<sup>390</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5-6.

<sup>391</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5.

<sup>392</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5.

<sup>393</sup> Arkansas Dept. of Environmental Quality, “SEP Policy and Proposal Guidelines,” *supra* note 365; electronic mail from Melanie Foster, *supra* note 365.

<sup>394</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 16.

basis.<sup>395</sup> Third, regarding stipulated damages, ADEQ requires that any leftover money from the agreed SEP shall be paid as a penalty.<sup>396</sup> The EPA principles are more lenient and may institute a small penalty only when the violator spends less than 90% of the budget.<sup>397</sup>

Finally, other differences include acceptable projects and drafting SEP proposals. In Arkansas, SEPs cannot monetarily benefit the violator whereas EPA may permit such projects under limited circumstances.<sup>398</sup> EPA requires signed settlement agreement to outline the type and scope of the project.<sup>399</sup> ADEQ only requires commitment to a SEP in the signed settlement agreement and allows a subsequent submission of the SEP details or plans. Further, the Director of ADEQ must approve all SEP details and plans.<sup>400</sup>

### Community SEP Proposals

ADEQ has issued a “Guideline for Community Proposals,” according to which local government agencies and community groups may submit project proposals in the event that an enforcement action settlement negotiation is undertaken in that area.<sup>401</sup> The community group’s proposal should include a project description, line-item budget, reckoning of the environmental benefits, and project schedule, *inter alia*.<sup>402</sup> Given that ADEQ’s SEP laws allow third party cash contributions, the Guideline recognizes that the project requester may bear the ultimate responsibility for the success of the SEP, and may be required to submit progress reports. ADEQ envisions that other, non-SEP funding sources may be aggregated by project requesters.<sup>403</sup>

### Other Research

There are no cases or administrative decisions on SEPs in Arkansas. Research yielded two articles that discuss SEPs in Arkansas.<sup>404</sup>

## **California**

The California Environmental Protection Agency (“Cal/EPA”) issued formal SEP principles in October of 2003, updating its 1998 SEP policy. California has a decentralized system of environmental protection and management. There are six bureaus, departments and offices under the aegis of Cal/EPA – air, toxics, pesticides, solid waste, risk assessment, and

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<sup>395</sup> Arkansas Dept. of Environmental Quality, “SEP Policy and Proposal Guidelines,” *supra* note 365; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 12-17.

<sup>396</sup> Arkansas Dept. of Environmental Quality, “SEP Policy and Proposal Guidelines,” *supra* note 365.

<sup>397</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 18.

<sup>398</sup> Interview with Melanie Foster, *supra* note 365; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 15.

<sup>399</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 17.

<sup>400</sup> Arkansas Dept. of Environmental Quality, “SEP Policy and Proposal Guidelines,” *supra* note 365.

<sup>401</sup> Arkansas Dept. of Environmental Quality, “Guideline for Community Proposals,” <http://www.adeq.state.ar.us/legal/sep.htm#community> (last visited Aug. 20, 2006).

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> Wright and Henry, *supra* note 367, at 322-327 (1998); Timothy T. Jones, Walter G. Wright, Jr.; Mary Ellen Ternes, “Environmental Compliance Audits: The Arkansas Experience,” 21 U. Ark. Little Rock L. Rev. 191, fn. 25 (1999).

water – and beneath the divisions are over three hundred local agencies that perform the enforcement function. The Cal/EPA’s principles serve as recommendations to these various state and local entities that enforce environmental regulations.<sup>405</sup>

Only the water division has express statutory authority to implement SEPs as part of an enforcement action.<sup>406</sup> In a separate context, however, the California Attorney General has ruled that administrative agencies may settle cases prior to trial with agreements that contain sanctions that the agencies do not have express power to impose directly.<sup>407</sup> Any settlements must not violate public policy, and must further the goals of the agency; furthermore, the agency may not enter into a settlement that requires the payment of funds that support activities unrelated to the regulatory enforcement responsibilities of the agency.<sup>408</sup>

California mirrors the EPA *Final SEP Policy* with its legal principles and categories, but takes a less structured, more discretionary approach on penalty mitigation. Cal/EPA expressly requires that SEPs be performed by competent third parties, in cases where the violator does not have technical expertise in conducting the SEP. The violator remains liable should the third party contractor not perform according to the agency’s satisfaction.<sup>409</sup>

#### Legal Principles

1. The project cannot be one that the violator is already legally required to perform.
2. SEPs can include activities that the violator will be legally required to perform two or more years in the future, but not if the regulation provides a benefit to the violator for accelerated compliance.<sup>410</sup>
3. The SEP cannot be inconsistent with any underlying statute and must advance an objective of the statute giving rise to the violation.

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<sup>405</sup> Electronic mail from Lisa Brown, Assistant General Counsel for Enforcement, California Environmental Protection Agency (Aug. 8, 2006).

<sup>406</sup> CAL. WATER CODE §§ 13385(l), 13399.35 (West Supp. 2004)(defining a SEP as “an environmentally beneficial project that a person agrees to undertake, with the approval of the regional board, that would not be undertaken in the absence of an enforcement action under this section”). The cost of the SEP may not exceed 50% of the penalty amount that exceeds \$15,000, plus \$15,000 CAL. WATER CODE §13385(l)(1).

<sup>407</sup> Cal. Op. Attorney General 00-510 (July 25, 2000). The opinion relies in part upon decisions by California courts affirming that officials in California may exercise powers not necessarily accorded them explicitly by the legislature: [a]dministrative “officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by state or as *may fairly be implied* from the statute granting the powers.” *Calfarm Ins. Co v. Deukmejian*, 771 P.2d 1247 (Cal. 1989); *20th Century Insurance Company v. Quackenbush*, 74 Cal. Rptr. 2d 113, 115 (Cal. Ct. App. 1998)(holding that the state insurance commissioner could publicize opinion letters written in response to insured parties’ questions, notwithstanding an absence of unambiguous statutory authority).

<sup>408</sup> California Environmental Protection Agency, *Cal/EPA Recommended Guidance on Supplemental Environmental Projects* (Oct. 2003), available at <http://www.calepa.ca.gov/Enforcement/Policy/SEPGuide.pdf> (last visited Nov. 22, 2006).

<sup>409</sup> *Id.* at 7.

<sup>410</sup> *Id.* at 2.

4. Adequate nexus exists if the project “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.”<sup>411</sup>
5. The type and scope of the project must be defined in the signed settlement agreement.<sup>412</sup>

#### Categories of SEPs

California has eight categories of SEPs:

1. *Environmental Compliance Promotion* - providing training and support to other members of the regulated community;
2. *Enforcement Projects*- including third party donations;
3. *Emergency Planning and Preparedness*- providing assisting state agencies;
4. *Pollution Prevention*;
5. *Pollution Reduction*;
6. *Environmental Restoration and Protection* - going beyond repairing damages caused by the violation;
7. *Public Health*; and
8. *Other* projects.

California differs from the EPA with its category for *Enforcement* projects, and lacks the EPA’s category for *Assessments and Audits*. *Enforcement* projects “may include contributions to environmental enforcement, investigation and training programs as provided in Penal Code section 14300 and/or contributions to nonprofit organizations such as the California District Attorneys Association, the Californian Hazardous Materials Investigators Association and the Western States Project.”<sup>413</sup>

#### Calculation of the Final Penalty

A monetary penalty must be assessed in order to “provide a deterrent effect as well as remove any unfair competitive advantage or economic benefit gained by the [violator’s] prior noncompliance.”<sup>414</sup> Generally, the project should not mitigate more than 25% of the

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<sup>411</sup> *Id.* at 3.

<sup>412</sup> *Id.*

<sup>413</sup> *Id.* at 4.

<sup>414</sup> *Id.* at 6.

calculated penalty without the SEP. The amount of penalty mitigation is “strictly within the discretion of the administering agency.”<sup>415</sup>

#### Oversight and Drafting Enforceable SEPs

Cal/EPA has stringent requirements for ensuring that SEPs are performed satisfactorily, starting with an express reckoning of the type, scope and timing of the SEP within the settlement agreement. Subsequently, agreements should include means for verification of completion, as well as specify that corporate officials must produce final reports certifying completion.<sup>416</sup>

#### Failure to perform a SEP and Stipulated Penalty

If the violator fails to complete the SEP to the discretionary satisfaction of the enforcing agency, the violator must pay stipulated penalties for its failure pursuant to the terms of the settlement agreement.<sup>417</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in California. The research yielded one article that addressed the legislative amendment that added a SEP provision to California Water Code § 13385.<sup>418</sup>

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<sup>415</sup> *Id.* at 2.

<sup>416</sup> *Id.* at 7.

<sup>417</sup> *Id.* at 8.

<sup>418</sup> David S. Wilgus, “Environmental Protection: Nonpoint Source Pollution and the “Semi-Clean” Water Enforcement and Pollution Prevention Act of 1999,” 31 *McGeorge L. Rev.* 447 (2000).

## Colorado

Colorado's Department of Public Health and Environment ("DPHE") first issued a Supplemental Environmental Project Policy in 1996 and last updated the policy in June of 2003.<sup>419</sup> The legal guidelines adopted by DPHE take a more flexible approach than U.S. EPA's. Most significantly, DPHE does not have a nexus requirement and permits contributions to third party organizations and, in certain circumstances, research projects. DPHE's SEP program seeks to encourage the implementation of pollution preventing and energy efficient technology that industries may be reluctant to undertake due to technical or economic concerns.<sup>420</sup> DPHE requires the violator to subtract any economic benefits received from the SEP to ensure that performing a SEP does not end up rewarding violators.<sup>421</sup>

### Legal Principles

1. DPHE does not require a media or violation nexus: the SEP can be unrelated to the violation if it provides for an environmental or public health benefit.
2. An acceptable SEP either: provides a significant environmental or public health benefit, is a cross-media or facility-wide activity that provides widespread environmental benefit, or is a donation to a third party for the management of projects beneficial to either the environment or public health.<sup>422</sup>
3. The main beneficiary of a SEP must be the public health or the environment and not the violator, although the violator may derive some benefit from the SEP.
4. DPHE also requires that "[a] project cannot be inconsistent with any underlying statute."<sup>423</sup>
5. The SEP cannot be an already legally required activity or a project that the violator intended to do before the enforcement action.<sup>424</sup>

### Categories of SEPs

DPHE provides for six categories of SEPs: *Pollution Prevention*, *Pollution Reduction*, *Environmental Restoration and Protection*, *Environmental Assessments*, *Environmental Awareness or Public Health* and *Other* projects, which may be approved as SEPs as long as they meet all the other SEP requirements.<sup>425</sup> DPHE differs from U.S. EPA in that it does not specify a category for *Emergency Planning and Preparedness* projects.

SEPs for research are permitted "if the study investigates innovative practical pollution prevention or reduction solutions with direct applicability to the violation. In addition, the

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<sup>419</sup> Colorado Dept. of Public Health and Environment, *Final Agency-Wide Supplemental Environmental Projects Policy* (June 2003), available at <http://www.cdphe.state.co.us/sep/CDPHESEPPolicy.pdf> (last visited Nov. 11, 2004). DPHE is currently rewriting its SEP policy, to be issued in early 2007.

<sup>420</sup> *Id.* at 3.

<sup>421</sup> *Id.* at 9.

<sup>422</sup> *Id.* at 7.

<sup>423</sup> *Id.*

<sup>424</sup> *Id.* at 2, 7.

<sup>425</sup> *Id.* at 3-6.

company must commit to implement the results of the study, as feasible, and make available the technology or solution to other interested facilities.”<sup>426</sup>

#### Calculation of the Final Penalties

First, DPHE calculates the penalty without a SEP. Next, the mitigation ratio, or the cost of the SEP divided by the amount of penalty offset. The mitigation ratio of an in-house (*i.e.*, completed within exclusively in violator’s facilities) SEP is usually 1.5:1: that is, for each \$1.50 spent on the SEP, the violator may offset \$1 of the calculated penalty. The ratio can be as low as 1:1 for pollution prevention or energy efficiency SEPs. Also, SEP donations to third parties typically receive a 1:1 ratio. The mitigation ratio “recognizes the potential environmental benefit that goes beyond compliance, as well as the potential favorable tax treatment and public relations benefits associated with SEP expenditures.”<sup>427</sup> Notably, DPHE takes into consideration the following factors when determining the mitigation ratio: benefits to the public or environment at large, the development and implementation of innovative processes, environmental justice effects, multimedia impacts, pollution prevention, community input, and the compliance history of the violator.<sup>428</sup>

Independent of the mitigation ratio, the minimum cash penalty must equal or exceed 100% of the economic benefit component of the calculated penalty plus 20% of the gravity component, or 25% of the gravity component where there is no economic benefit.<sup>429</sup>

#### Failure to perform a SEP and Stipulated Penalty

If the violator fails to complete the SEP according to the terms of the agreement or to the satisfaction of DPHE, “the remaining penalty mitigation attributed to the SEP and/or a stipulated penalty shall be paid to the Department as an administrative penalty.” A stipulated penalty is a penalty for the violator’s failure to meet the specific requirements of the SEP, and can be imposed in addition to the cash penalty without the SEP amount.<sup>430</sup>

#### Oversight and Drafting Enforceable SEPs

DPHE cannot manage or control SEP funds, or manage or administer the SEP. However, “DPHE may provide oversight to ensure that a project is implemented pursuant to the provisions of the settlement and will retain legal recourse if the SEP is not adequately performed.”<sup>431</sup> The SEP must be detailed in a signed settlement agreement, including descriptions of specific actions to be performed. The violator must also publicize the SEP and the results of the SEP, specifying that the SEP was undertaken as part of an enforcement action.<sup>432</sup>

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<sup>426</sup> *Id.* at 6.

<sup>427</sup> *Id.* at 7.

<sup>428</sup> *Id.* at 6-7.

<sup>429</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 12.

<sup>430</sup> Colorado Dept. of Public Health and Environment, *Final Agency-Wide Supplemental Environmental Projects Policy*, *supra* note 419, at 9.

<sup>431</sup> *Id.* at 8.

<sup>432</sup> *Id.*

### The Strategic Environmental Project Pipeline Foundation (“StEPP”)<sup>433</sup>

The nonprofit StEPP Foundation acts as a clearinghouse and project manager for environmentally beneficial projects; currently it oversees some twenty-eight projects negotiated in the settlement of enforcement actions. Operating primarily in Colorado, StEPP receives referrals from DPHE once a violator expresses interest in a settlement with a SEP. StEPP can be involved in defining the parameters of the SEP in the consent decree; selecting of the SEP implementer; negotiating the contract (including performance metrics) with the SEP implementer; serving as a conduit for community and local government input; overseeing the SEP and tying successive disbursements to the achievement of project milestones, as well as reporting on interim and final project outcomes.<sup>434</sup> In short, StEPP relieves the state agency as well as the violator from having to manage the project.

StEPP staff is typically retired project managers, with expertise in project management and interaction with community groups. Any SEPs managed by StEPP remain bound by the DPHE SEP guidelines, including liability for underperformance. StEPP itself serves at the discretion of DPHE.

The advantages of outsourcing project management to StEPP are several. For one, it lowers the labor burden on state environmental agencies, which often have limited enforcement resources to negotiate and oversee SEP projects.<sup>435</sup> Enforcement personnel often do not have direct experience in project management.<sup>436</sup> Moreover, enforcement personnel may have limited familiarity with community groups that might be interested in commenting upon and participating in the negotiation of the SEP, whereas StEPP personnel have a track record of interacting with community groups. Another significant advantage is the time savings provided during the negotiation process. DPHE stipulates the violator to send SEP funds directly to StEPP. This carries two advantages: 1) StEPP serves as an escrow agent for the SEP funds, tracking and reporting on funds throughout the project lifecycle, and 2) StEPP is the named beneficiary for SEP allocations in the settlement agreement, obviating the need to have a “fully developed project plan” in advance of the final settlement.<sup>437</sup> StEPP will do the sourcing, and recommend SEPs to which the funds will be applied.<sup>438</sup>

DPHE gives StEPP guidance on the degree of community development required, ranging from the requesting SEP proposals from community groups to be the implementers of SEPs through convening community advisory boards to aid in project selection and

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<sup>433</sup> StEPP’s website is found at [www.Steppfoundation.org](http://www.Steppfoundation.org) (last visited Oct. 22, 2006).

<sup>434</sup> Telephone interview with Frank Stewart, former Executive Director, StEPP Foundation (Sept. 22, 2006).

<sup>435</sup> Other states note that enforcement personnel may lack the resources to negotiate SEPs or oversee their implementation. Conference call with Les Carlough, Esq., Senior Policy Advisory, Oregon Dep’t of Envtl. Quality and Marc Pacifico, Independent Permit Compliance Specialist, Washington Dept. of Ecology (Sept. 21, 2006).

<sup>436</sup> Unlike DPHE and U.S. EPA, few states have full-time SEP staff dedicated to assisting enforcement personnel in the crafting and overseeing of settlements with SEPs.

<sup>437</sup> Electronic mail from Ben Dines, Executive Director, StEPP Foundation (Nov. 20, 2006).

<sup>438</sup> This technique of speeding up the settlement itself is also seen in the escrow provisions of New York state’s SEP policy, *infra* note 811 and accompanying text.

oversight.<sup>439</sup> StEPP manages the project through site visits and meetings with the implementer, as well as a “pay as they perform” disbursements, safeguarding against poorly implemented SEPs. StEPP’s overhead ranges from 12 to 20% (in pilots, StEPP may provide a money back guarantee on its services, after the final audit).

DPHE also gives StEPP guidance on the degree of community development required, ranging from requesting SEP proposals from community groups (to serve as co-implementers of SEPs), all the way through to convening community advisory boards to aid in project selection and oversight.<sup>440</sup> In addition to sourcing the project options, selecting the project(s) (in communication with DPHE) and developing a project scope, StEPP manages the project through site visits and meetings with the implementer, as well as “pay as they perform” disbursements, safeguarding against poorly implemented SEPs. StEPP’s overhead ranges from 12 to 20% (in pilots, StEPP may provide a money back guarantee on its services, after the final audit).

Another advantage is StEPP’s ability to leverage funding through aggregation of funds from non-SEP resources towards the same environmental benefit. Finally, StEPP’s media relations office publicizes completed SEPs, an opportunity that is often unrealized in the implementation of SEPs.<sup>441</sup>

#### Comparison with U.S. EPA Principles

The legal guidelines adopted by DPHE take a more flexible approach than the EPA. DPHE does not have a nexus requirement. Unlike the EPA, DPHE permits SEP contributions to third party organizations and in certain circumstances, SEPs for research projects.

#### Other Research

There are no cases or administrative decisions on SEPs in Colorado.

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<sup>439</sup> Interview with Frank Stewart, *supra* note 434.

<sup>440</sup> Interview with Frank Stewart, *supra* note 434.

<sup>441</sup> Electronic mail from Ben Dines, *supra* note 437.

## Connecticut

Connecticut General Statutes Annotated §22a-16a authorizes the Connecticut courts to order defendants to perform and fund SEPs as part of the penalties for an environmental enforcement action.<sup>442</sup> Connecticut's Department of Environmental Protection ("DEP") issued implementing guidelines in 1996, diverging from the EPA's *Final SEP Policy* in allowing SEPs with "indirect" nexus.

### Legal Principles

DEP allows SEPs if they meet certain criteria.

1. The SEP cannot have the potential to negatively impact the environment, public health or safety. DEP will look at the worst case scenario to determine whether there is a possibility that the SEP will be "done poorly or ... left uncompleted at any time during implementation."<sup>443</sup>
2. The SEP must have a direct or indirect nexus with the violation. DEP is flexible with its nexus standard, preferring SEPs with a "direct nexus," but also permitting projects with an "indirect nexus" if they "further the Department's statutory mission or reduce the likelihood of future violations similar to those at issue."<sup>444</sup> In contrast, a project with direct nexus either improves the environment harmed by the violation, reduces public health or environmental risks caused by the violation, restores the natural or man-made environments from the damage caused by the violation, or protects the environment from actual or potential damage caused by the violation.
3. The SEP cannot already be legally required, nor can it be a project that the violator already intended or was likely to do.<sup>445</sup>
4. The SEP cannot be "inconsistent with any of DEP's ongoing programs or ... impose a burden on a DEP program which that program is unable to assume because of resource constraints."<sup>446</sup>
5. The violator must have the technical and economic resources necessary to successfully complete the SEP.<sup>447</sup> The SEP must follow a timetable and be completed by the deadline specified in the consent order.<sup>448</sup>

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<sup>442</sup> C.G.S.A. § 22a-16a (West 2003).

<sup>443</sup> Connecticut Dept. of Environmental Protection, *Policy on Supplemental Environmental Projects / Revised SEP Policy*, at 2 (Feb. 15, 1996), available at <http://dep.state.ct.us/enf/policies/sep.pdf> (last visited Aug. 14, 2006).

<sup>444</sup> *Id.* at 4.

<sup>445</sup> *Id.* at 2.

<sup>446</sup> *Id.* at 3.

<sup>447</sup> *Id.* at 3-4.

<sup>448</sup> *Id.* at 5.

6. The main beneficiary of the SEP cannot be the violator; the project must benefit public health or the environment. However, a project will not be disapproved simply because the violator may derive some benefit from it.<sup>449</sup>
7. The SEP cannot be used to obtain additional resources for DEP that DEP may obtain through ordinary legislative or administrative means.<sup>450</sup>

#### Categories of SEPs

DEP has eight categories of SEPs:

1. *Pollution Prevention*;
2. *Pollution Reduction/Waste Minimization*;
3. *Public Health*;
4. *Environmental Restoration and Protection (Environmental Enhancement)*;
5. *Environmental Assessment and Auditing*;
6. *Enforcement-related Environmental Public Awareness*;
7. *Emergency Planning and Preparedness*; and,
8. *Indirect Nexus*.

DEP shares the same categories as the EPA, with an additional category for *Indirect Nexus* projects.<sup>451</sup> The *Enforcement-Related Environmental Public Awareness* category is similar to the EPA's *Environmental Compliance Promotion* category, but broadens it by allowing media campaigns, which are not permitted by U.S. EPA.<sup>452</sup>

#### Calculation of the Final Penalty

Penalty mitigation is largely left to the discretion of DEP. To ensure that the SEP retains a deterrent effect, a monetary penalty must be part of the settlement agreement.<sup>453</sup> As long as the SEP cost does not entirely displace the monetary penalty, "the degree to which the gravity component of the monetary penalty shall be adjusted to reflect the cost of the SEP and shall be left to the discretion of the Department."<sup>454</sup>

#### Failure to perform a SEP and Stipulated Penalty

If the SEP is not satisfactorily completed, then the violator is "liable for the amount by which the assessed penalty was reduced, with interest, plus an additional 10% charge to cover

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<sup>449</sup> *Id.*

<sup>450</sup> *Id.* at 6.

<sup>451</sup> *Id.* at 6-11.

<sup>452</sup> Michele N. Gagnon, "Creative Settlements: A Comparison of Federal and State SEP Policies," 17 No. 1 NAAG NEEJ 3 (Feb. 2002) (notes omitted).

<sup>453</sup> Connecticut Dept. of Environmental Protection, *supra* note 443, at 2-3.

<sup>454</sup> *Id.* at 3.

the administrative costs incurred by the Department in reviewing and approving the failed SEP.”<sup>455</sup>

### Other Research

The research yielded one case in which an environmental intervener sued to contest the stipulated judgment between DEP and the defendants, Northeast Nuclear Energy Company. The judgment provided that the defendants would pay \$1.2 million, consisting of a \$700,000 civil penalty and a \$500,000 supplemental environmental project for the clean up of allegedly contaminated wastewater from a nuclear power electric generating facility. The Connecticut Supreme Court affirmed the judgment, holding that the stipulation promoted the state's public policy of eliminating water pollution.<sup>456</sup>

### **Delaware**

The Delaware Department of Natural Resources and Environmental Control (“DNREC”) allows a violator to carry out a project to mitigate penalties in a settlement agreement.<sup>457</sup> DNREC utilizes Environmental Improvement Projects (“EIPs”) to encourage and obtain environmental and public health protection where such result may not be possible without the settlement incentives.<sup>458</sup> While recognizing the importance of monetary penalties, DNREC envisions EIPs as a way to improve the environment and also to promote community responsibility by the violator.<sup>459</sup>

For nearly fifteen years, DNREC has permitted the performance of an environmentally beneficial project to mitigate penalties, without a formal SEP policy.<sup>460</sup> DNREC routinely considered settlement offers that included either a reduced or waived penalty if the violator performed a project that equaled or exceeded the calculated penalty without the SEP.<sup>461</sup> In addition, DNREC allowed contributions to non-profit environmental groups to reduce the assessed penalty.<sup>462</sup> In the late 1990s, the Delaware legislature prohibited monetary contributions to third parties.<sup>463</sup>

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<sup>455</sup> *Id.* at 5.

<sup>456</sup> *Rocque v. Northeast Utils. Serv. Co.*, 254 Conn. 78 (Conn., 2000).

<sup>457</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide, Chapter 8: Environmental Improvement Projects Associated with Enforcement Actions*, at 80 (Sept. 19, 2002) available at [http://www.dnrec.state.de.us/dnrec2000/admin/enforcement/guide/cerg%20-%20final%20sept%202002\\_011.pdf](http://www.dnrec.state.de.us/dnrec2000/admin/enforcement/guide/cerg%20-%20final%20sept%202002_011.pdf) (last visited Aug. 15, 2006) [hereinafter, “*Compliance and Enforcement Response Guide*”].

<sup>458</sup> *Id.* at 80.

<sup>459</sup> *Id.*

<sup>460</sup> Telephone interview with Robert Zimmerman, Environmental Administrator, Office of the Secretary, Delaware Dept. of Natural Resources and Environmental Control (April 22, 2004).

<sup>461</sup> Electronic mails from Jennifer Bothell, Environmental Enforcement Coordinator, Office of the Secretary, Delaware Dept. of Natural Resources and Environmental Control and Robert Zimmerman, Environmental Administrator, Office of the Secretary (May 4, 2004) (on file with authors).

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

In September 2002, DNREC formalized written procedures with the publication of its *Compliance and Enforcement Response Guide* regarding settlements. DNREC renamed SEPs<sup>464</sup> as EIPs to avoid confusion with the EPA principles.<sup>465</sup> Even though the DNREC principles are similar to the federal policy, there are several significant differences.<sup>466</sup>

### Definition of EIP

An EIP is an environmentally beneficial project, which a violator agrees to undertake in settlement of an enforcement action, but which the violator is not otherwise legally required to perform.<sup>467</sup>

### Legal Principles

DNREC substantially adopted the EPA's guidelines.<sup>468</sup>

### Categories of EIPs

1. *Public Health*;
2. *Pollution Prevention*;
3. *Pollution Reduction*;
4. *Environmental Restoration and Protection* – similar to the EPA category, but emphasizes that the project must go beyond repairing the underlying violation's damage to environment;
5. *Assessments and Audits*
  - a. *Pollution Prevention Assessment* – generally adopted the EPA sub-category
  - b. *Site Assessments* – investigating a site's environmental conditions, site's impact on the environment, and/or threats to human health or the environment related to a site
  - c. *Environmental Management System Audit* – evaluating a party's environmental policies, practices, and controls
  - d. *Environmental Compliance Audit*;
6. *Environmental Compliance Promotion* – adopted the EPA category, but added an extra category of projects that promote violation avoidance; and,

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<sup>464</sup> Delaware Dept. of Natural Resources and Environmental Control, "Department of Natural Resources and Environmental Control Enforcement Action History 1994 through March 2000 Explanation of Terms," <http://www.dnrec.state.de.us/dnrec2000/Admin/Enforcement/EADefinitions.htm> (last visited Nov. 5, 2006). A SEP was defined as a "category [which] shows monies expended by a violator that finances a project designed to improve the environment."

<sup>465</sup> Electronic mails from Jennifer Bothell and Robert Zimmerman, *supra* note 461.

<sup>466</sup> *Id.*

<sup>467</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide*, *supra* note 457 at 81.

<sup>468</sup> *Id.* at 80-89.

7. *Emergency Planning and Preparedness* – generally adopted the EPA category, but does not prohibit projects where the DNREC has provided financial assistance to achieve the same purposes.<sup>469</sup>

In addition, some slight differences exist between the EPA and DNREC project categories.<sup>470</sup> Under the *Assessments and Audits* category, the DNREC authorizes *Site Assessments* and *Environmental Management System Audits* as subcategories.<sup>471</sup> The EPA sets more limits on these projects by distinguishing whether the violator owns or operates the site.<sup>472</sup> DNREC authorizes independent audits regardless of whether the facility is owned or operated by the violator.<sup>473</sup> DNREC’s *Environmental Compliance Promotion* category is broader than the EPA’s because it permits projects that help the regulated community avoid violations.<sup>474</sup> Unlike the EPA, DNREC does not have a catch-all “*Other*” category.<sup>475</sup>

#### Calculation of the Final Penalty

Monetary penalties are a necessary part of any settlement, and cannot be fully waived.<sup>476</sup> The EIP ceiling is set at 75%, meaning that an EIP cannot mitigate more than 75% of the penalty.<sup>477</sup> In cases involving governmental agencies or non-profit organizations, DNREC may allow the cash penalty to be less than the economic benefits of noncompliance.<sup>478</sup>

#### Approval Process

The assigned DNREC staff must review the EIP proposal to ensure that the project meets the basic definition, satisfies all guidelines, fits within at least one category, and satisfies implementation and all criteria.<sup>479</sup> The staff must forward its recommendation through the Division Director to the DNREC Secretary, as all EIPs require specific approval by the Secretary.<sup>480</sup>

#### Comparison with U.S. EPA Principles

DNREC has substantially adopted the EPA’s stated background, definition, applicability, legal guidelines, categories, and stipulated penalties.<sup>481</sup> Notably, both EPA and

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<sup>469</sup> *Id.* at 85-89.

<sup>470</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 7-12.

<sup>471</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide*, *supra* note 457, at 87-88.

<sup>472</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 9-10.

<sup>473</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide*, *supra* note 457, at 87-88.

<sup>474</sup> *Id.* at 88-89.

<sup>475</sup> *Id.* at 85-89; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 11-12.

<sup>476</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide*, *supra* note 457, at 82-83.

<sup>477</sup> *Id.*

<sup>478</sup> *Id.* at 82.

<sup>479</sup> *Id.* at 85.

<sup>480</sup> *Id.*

<sup>481</sup> *Id.* at 82, 84-89; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 3-14, 20.

DNREC require that public statements made by the violator about the SEP must identify it as part of an enforcement settlement agreement.<sup>482</sup> Neither accepts cash donations to organizations as acceptable penalty mitigation.<sup>483</sup>

Although DNREC adopted an abbreviated version of the EPA's legal guidelines, DNREC's policy retains greater flexibility by not adopting the nexus requirement.<sup>484</sup> The project need only advance one of the objectives of the statutes underlying the violation and avoid inconsistency with the provisions of the statute.<sup>485</sup> This flexibility permits EIPs to address gaps in the current environmental services or provide much needed assistance.<sup>486</sup>

DNREC and EPA differ in terms of how the civil (monetary) penalty is calculated. DNREC requires that at least 25% of the initially assessed penalty should be paid as a monetary fine, in addition to the costs of the SEP itself.<sup>487</sup> On the other hand, U.S. EPA requires that the minimum civil penalty be the greater of (a) the economic benefit conferred plus 10% of the gravity component, or (b) 25% of the gravity component of the initially assessed penalty.<sup>488</sup> In terms of penalty mitigation, DNREC does not provide additional mitigation incentives for pollution prevention projects as does EPA.<sup>489</sup>

Regarding stipulated penalties, DNREC has substantially adopted the EPA principles with two significant differences.<sup>490</sup> First, under the first category where the violator did not satisfactorily complete the project and has to pay a substantial stipulated penalty, DNREC defines a substantial stipulated penalty as between 50 and 100% of the mitigated penalty whereas the EPA defines substantial as between 75 and 150%.<sup>491</sup> Secondly, when a project is not satisfactorily completed, but the violator can show good faith effort and spend at least 90% of the project budget, DNREC requires the violator to pay the mitigated penalties as a stipulated penalty.<sup>492</sup> The EPA does not require stipulated damages in such a situation.<sup>493</sup>

### Project Bank

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<sup>482</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide*, *supra* note 457, at 84; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 17.

<sup>483</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide*, *supra* note 457, at 83; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 12.

<sup>484</sup> Interview with Robert Zimmerman, *supra* note 460; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5.

<sup>485</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide*, *supra* note 457, at 82.

<sup>486</sup> Interview with Robert Zimmerman, *supra* note 460.

<sup>487</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide*, *supra* note 457, at 83; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 13.

<sup>488</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 13.

<sup>489</sup> *Id.* at 16.

<sup>490</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide*, *supra* note 457, at 84; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 18.

<sup>491</sup> *Id.*

<sup>492</sup> Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide*, *supra* note 457, at 84.

<sup>493</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 18.

In 2001, DNREC created a “project bank” from which violators could choose a pre-formulated project reflecting the input of environmental groups.<sup>494</sup> A DNREC Advisory Council approved projects submitted by public or private non-profits, after which the Secretary of DNREC would select projects for implementation as part of the settlement of an enforcement action.<sup>495</sup> These projects could not exceed \$100,000 in cost, and may have been implemented by entities other than the violator, serving as grants to public and private non-profit organizations. The Project Bank is now defunct, with many of its goals and processes having been subsumed into Delaware’s new Community Environmental Project Fund.

### Community Environmental Project Fund

The Delaware legislature created a “Community Environmental Project Fund” in February of 2004.<sup>496</sup> Twenty-five percent of all civil and administrative penalties collected by DNREC are to be dedicated to Community Environmental Projects, which must improve the geographically proximate community affected by the violation.<sup>497</sup> CIAC, a community advisory board, consults with DNREC to approve projects solicited from affected communities and ensure that the project will affect the same community harmed by the underlying violation. Also, DNREC staff will assist community groups in tailoring project proposals and determining their eligibility to implement a project.<sup>498</sup> This initiative applies to any environmental penalty collected, even those associated with a settlement that includes a SEP.<sup>499</sup> DNREC anticipates that the Community Environmental Project program will supplant the project bank, in part due to the overlap between the two programs.<sup>500</sup>

### Other Research

Research yielded no case law or administrative decisions on EIPs or SEPs in Delaware.

## **District of Columbia**

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<sup>494</sup> Interview with Robert Zimmerman, *supra* note 460; Gagnon, *supra* note 452; Delaware Dept. of Natural Resources and Environmental Control, *Compliance and Enforcement Response Guide*, *supra* note 457, at 90.

<sup>495</sup> Delaware Dept. of Natural Resources and Environmental Control, *Policy on Penalty Assessments Associated with Administrative Enforcement Actions*, available at <http://www.dnrec.state.de.us/dnrec2000/admin/news/01breakingnews/0126projectbank.htm> (last visited July 22, 2004).

<sup>496</sup> House Bill #192, An Act to Amend Title 7 of the Delaware Code Establishing a Community Environmental Fund, available at <http://www.legis.state.de.us/LIS/LIS142.NSF/vwLegislation/HB+192?Opendocument> (last visited April 27, 2004). The statute requires that the project be located in the same community as the violation, but leaves the definition of “community” unresolved.

<sup>497</sup> *Id.* See also, Delaware Dept. of Natural Resources and Environmental Control, “CIAC Seeks Applications for Community Environmental Projects” (May 5, 2006), available at <http://www.dnrec.state.de.us/dnrec2000/Admin/Press/Story1.asp?offset=100&PRID=2036> (last visited Aug. 12, 2006)(soliciting projects from community groups and noting that the fund has granted \$240,000 in two years, with another \$1.67 million available for projects).

<sup>498</sup> *Id.*

<sup>499</sup> Interview with Jennifer Bothell (April 20, 2004).

<sup>500</sup> Electronic mail from Jennifer Bothell, *supra* note 461.

The District of Columbia Department of Environmental Health's Environmental Health Administration ("EHA") uses SEPs as an enforcement tool.<sup>501</sup> Each division oversees its own enforcement actions, which include the implementation of SEPs.<sup>502</sup> All the divisions follow principles based on the EPA principles.

#### Air Quality Division ("AQD")

In 2002, AQD formalized its own SEP principles, which closely follow the EPA's guidelines and are incorporated into the division's enforcement guidelines.<sup>503</sup> AQD utilizes SEPs to control pollution, and encourages facilities to make long term changes to improve the environment.<sup>504</sup> AQD's disfavours polluters simply paying a monetary penalty and passing the cost on to consumers.<sup>505</sup> During an enforcement action, AQD generally tries to implement either a SEP or an Environmental Management Plan, where the facility has to draft and sign a compliance plan. Each requirement promotes education and accountability of the violator.<sup>506</sup> The D.C. programs may also be particularly amenable to SEPs because many potential polluters are federal facilities with immunity from paying punitive penalties (the courts are split as to whether the Clean Air Act waives sovereign immunity for punitive damages).<sup>507</sup>

#### Definition of SEPs

A SEP is an environmentally beneficial project that the violator is not required to perform.<sup>508</sup> A SEP "must improve, protect, or reduce risks to public health or the environment," and primarily benefit the public health or the environment.<sup>509</sup>

#### Legal Principles

1. A relationship must exist between the SEP and the violation.
2. A SEP must be voluntary.
3. A SEP must be committed and started after EHA identifies the violation.
4. The Department of Health cannot manage or control the SEP or its funding.<sup>510</sup>

#### Categories of SEPs

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<sup>501</sup> Telephone interview with Kimberly Katzenbarger, Counsel with the Air Quality Division, D.C. Dept. of Health, Environmental Health Administration (April 2, 2004).

<sup>502</sup> *Id.*

<sup>503</sup> Doreen Thompson, Chief, Kimberly Katzenbarger, Counsel to the Air Quality Division, The Office of Enforcement, Compliance & Environmental Justice & Leela Sreenivas, Branch Chief, Donald Wambsgans, Manager, Air Quality Division, Compliance & Enforcement Branch, Air Quality Division, *Air Quality Division Enforcement Guidelines*, at 12-13 (March 2003) (on file with authors); interview with Kimberly Katzenbarger, *supra* note 501.

<sup>504</sup> Interview with Kimberly Katzenbarger, *supra* note 483.

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*

<sup>507</sup> Electronic mail from Kimberly Katzenbarger (Oct. 14, 2004).

<sup>508</sup> Office of Enforcement, Compliance & Environmental Justice, *supra* note 503, at 12.

<sup>509</sup> *Id.*

<sup>510</sup> *Id.* at 13.

1. *Public Health* – including examining residents to determine if violations have caused health problems;
2. *Pollution Prevention*;
3. *Pollution Reduction*;
4. *Environmental Restoration and Protection* – improving the environment in the geographic area damaged by the violation;
5. *Emergency Planning and Preparedness*;
6. *Assessments and Audits*;
7. *Environmental Compliance Promotion*; and,
8. *Other* projects.<sup>511</sup>

#### Stipulated Penalty

A stipulated penalty must be imposed if a SEP is not completed satisfactorily, which is determined by the department.<sup>512</sup> Stipulated penalties for failing to satisfactorily perform a SEP range between 75% and 150% of the mitigation value originally granted.<sup>513</sup> Even if the SEP is not completed satisfactorily, no stipulated penalty is required if the proponent made good faith and timely efforts to complete the project and at least 90% of the funds budgeted for the SEP were spent.<sup>514</sup>

#### Comparison with U.S. EPA Principles

The EHA principles are an abbreviated version of the EPA *Final SEP Policy*. According to its drafter, they mirror the EPA principles.<sup>515</sup>

#### Hazardous Waste Division (“HWD”)

Currently, HWD permits SEPs on a case-by-case basis and follows informal principles loosely based on the federal SEP guidelines.<sup>516</sup> In 2004, it issued a draft Notice of Proposed Rulemaking for a formal SEP policy.<sup>517</sup> HWD encourages SEPs because implementation of an environmentally beneficial project goes beyond a cure for the violation and promotes changes in the violator’s behavior and attitude towards environmental compliance.<sup>518</sup>

#### Legal Principles: Draft Proposed Rules

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<sup>511</sup> *Id.* at 12-13.

<sup>512</sup> *Id.*

<sup>513</sup> *Id.*

<sup>514</sup> *Id.*

<sup>515</sup> Interview with Kimberly Katzenbarger, *supra* note 501.

<sup>516</sup> Telephone interview with Marie Sansone, Counsel with the Hazardous Waste Division, D.C. Dept. of Health, Environmental Health Administration (April 19, 2004).

<sup>517</sup> Electronic mail from Marie Sansone, Interim Deputy Chief, Office of Enforcement, Compliance, and Environmental Justice, D.C. Dept. of Health, Environmental Health Administration (Oct. 21, 2004) (on file with authors).

<sup>518</sup> *Id.*

A SEP must satisfy the following criteria:

1. The project must be directly related to preventing or correcting the problems that led to the violation;
2. The project must incorporate pollution prevention practices;
3. The project must exceed minimum legal requirement when it involves capital improvement, new pollution control equipment, or employee training;
4. The violator must demonstrate financial and technical ability to complete the SEP;
5. The violator must demonstrate good faith and willingness to change;
6. The project must not delay or frustrate compliance;
7. The total settlement value with the SEP must reflect the penalties, damages and cost recovery;
8. The final cash penalty must compensate for damages, costs, and expenses incurred in connection with the violation; and
9. The project must benefit the public more than the economic value received by the violator.<sup>519</sup>

#### Water Quality Division (“WQD”)

WQD follows informal SEP principles loosely based on the federal and neighboring states’ guidelines, in particular Virginia’s model.<sup>520</sup> SEPs are rarely implemented because WQD enforcement penalties are generally less than \$500.<sup>521</sup> However, WQD encourages SEPs because such projects serve dual purposes of benefiting the environment and educating violators.<sup>522</sup>

#### Other Research

The authors found no case law or administrative decisions on SEPs in D.C.

### **Florida**

The Florida legislature has authorized the Florida Department of Environmental Protection (“FDEP”) to mitigate environmental enforcement penalties.<sup>523</sup> FDEP has two

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<sup>519</sup> Draft – from Notice of Proposed Rulemaking for District of Columbia Hazardous Waste Management Regulations (issued Oct. 29, 2004, for codification in 20 DCMR) at 1-2 (on file with authors).

<sup>520</sup> Telephone interview with Caroline Burnett, Counsel with the Water Quality Division, D.C. Dept. of Health, Environmental Health Administration (April 20, 2004).

<sup>521</sup> *Id.*

<sup>522</sup> Telephone interview with Jerusalem Bekele, Program Manager, Water Quality Division, D.C. Dept. of Health, Environmental Health Administration (April 23, 2004).

<sup>523</sup> FLA REV. STAT. § 403.121 (2004)(FDEP “has the authority to enter into a settlement, either before or after initiating a notice of violation, and the settlement may include a penalty amount different from the administrative penalty schedule”).

separate programs permitting the mitigation of civil environmental penalties.<sup>524</sup> Shortly after adopting its settlement policy in 1983, FDEP began approving in-kind penalty projects (“IPPs”) as part of settlements of civil enforcement actions. The IPP program enlists the support of violators in furthering the mission and environmental programs of FDEP.<sup>525</sup>

Around the 1990s, FDEP started approving pollution prevention projects (“PPPs”) as a matter of department policy, and accordingly, implemented PPPs designed to reduce the environmental impact of the violations.<sup>526</sup> In addition, the Florida Department of Community Affairs has separately agreed to abide by EPA’s *Final SEP Policy* in accepting a Clean Air Act delegation, memorialized in the Florida Accidental Release Prevention and Risk Management Planning Act.<sup>527</sup> In contrast, FDEP has adopted portions of the 1998 EPA *Final SEP Policy*, but there are major differences between the two programs, as outlined below.

### Definition of IPP

An IPP is a project which a violator agrees to undertake in a settlement agreement to reduce the penalty, but which the violator is not otherwise legally required to perform.<sup>528</sup> In general, IPPs promote FDEP activities and goals.<sup>529</sup>

### Legal Principles

1. FDEP allows government entities to perform IPPs.
2. FDEP allows private parties to perform IPPs with the additional requirement that the project restores or enhances the environment.
3. FDEP allows other private parties to perform IPPs that do not involve environmental restoration or enhancement if the calculated penalty without the SEP is over \$10,000.<sup>530</sup>

### Categories of IPPs

1. *Environmental Enhancement or Restoration* – providing material and/or labor to support environmental enhancement or restoration projects, preferably to

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<sup>524</sup> Florida Dept. of Environmental Protection, *Settlement Guidelines for Civil and Administrative Penalties*, at 12, 14 (Jan. 24, 2002), available at <http://www.dep.state.fl.us/legal/Enforcement/appendix/dep923.doc> (last visited Aug. 20, 2006).

<sup>525</sup> Prior to the use of IPPs, FDEP held cash penalties in a trust fund, awaiting legislative approval for specific environmental projects, often creating a 2-3 year delay between violations and implementation. FDEP also found that violators paying large penalties preferred to know how the penalties were spent.

<sup>526</sup> Telephone interview with Larry Morgan, Deputy General Counsel, Enforcement Section of the Florida Dept. of Environmental Protection (May 11, 2004).

<sup>527</sup> FLA. REV. STAT. §252.940(d)(3) (West 2004)(the Dept. of Community Affairs can coordinate “the use of emergency planning, training, and response-related Supplemental Environmental Projects, consistent with the guidelines established by the United States Environmental Protection Agency”).

<sup>528</sup> Florida Dept. of Environmental Protection, *Settlement Guidelines for Civil and Administrative Penalties*, *supra* note 524, at 12.

<sup>529</sup> *Id.* at 13-14.

<sup>530</sup> *Id.* at 13.

government-sponsored projects. Conservation easements must be granted to FDEP when the restoration project is on private land held by the violator;

2. *Environmental Information/Education* – enhancing FDEP’s pollution control activities by increasing public awareness;
3. *Capital or Facility Improvements* – enhancing FDEP’s pollution control activities; and,
4. *Property* – donating environmentally sensitive property to FDEP.<sup>531</sup>

#### Calculation of the Final Penalty

The violator may perform a project in lieu of paying the monetary penalty, but the IPP should cost 1 ½ times the amount of the calculated penalty without the project (a 1.5:1 ratio).<sup>532</sup>

#### Definition of PPP

The violator may perform a PPP to reduce the penalty in a settlement agreement.<sup>533</sup>

#### Categories of PPPs

A PPP is a process improvement that satisfies the requirement of one of the following categories:

1. *Source Reduction* – eliminating the source of pollution;
2. *Waste Minimization* – conserving materials which are pollution sources; or,
3. *On-site Recycling* – reusing materials which are pollution sources.<sup>534</sup>

#### Calculation of the Final Penalty

A PPP can fully offset the penalty dollar-for-dollar.<sup>535</sup>

#### Approval Process for IPPs and PPPs

Generally, district and division directors can approve PPPs before or after entering into the agreement.<sup>536</sup> However, there are three situations where prior approval by the Office of General Counsel is required.<sup>537</sup> The first situation involves proposed penalties over \$25,000 for cases not governed by the Resource Conservation and Recovery Act (“RCRA”) and penalties over \$50,000 for RCRA cases.<sup>538</sup> The second situation involves proposed penalties

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<sup>531</sup> *Id.* at 13-14.

<sup>532</sup> *Id.* at 14.

<sup>533</sup> *Id.*

<sup>534</sup> *Id.* at 15-17.

<sup>535</sup> *Id.* at 18.

<sup>536</sup> *Id.* at 19-20.

<sup>537</sup> *Id.*

<sup>538</sup> *Id.*

over \$10,000 for IPPs that do not enhance or restore the environment.<sup>539</sup> The third situation involves cases designated as having significant public interest or legal precedent.<sup>540</sup>

### Comparison with U.S. EPA Principles

Although FDEP adopted portions of the EPA *Final SEP Policy*, there are major differences between the two programs. Both FDEP and EPA emphasize and encourage pollution prevention.<sup>541</sup> Overall, FDEP has much broader categories. Projects allowed by FDEP are much more tailored towards fulfilling department goals and activities, mainly pollution prevention. Unlike EPA, FDEP allows projects that educate and inform the public, but such projects must directly further pollution control.<sup>542</sup>

### Other Research

Research yielded one administrative hearing final order that addressed whether the FDEP settlement guidelines constitute a “rule,” which must satisfy statutory rulemaking procedures.<sup>543</sup> The Hearing Officer found that the guidelines are similar to EPA’s *Final SEP Policy* and are not rules because they are “internal management memorandum.”<sup>544</sup> Furthermore, the guidelines do not impose external and immediate burden on the persons outside the agency.<sup>545</sup> The guidelines are settlement proposals and violators can freely reject them and pay the penalty.<sup>546</sup>

## **Georgia**

Georgia’s Department of Natural Resources (“DNR”) does not have a written SEP policy, but Georgia informally follows the EPA Policy.<sup>547</sup> Unlike the EPA, Georgia allows site-specific deviation in some cases as long as the SEP provides a benefit to the environment.<sup>548</sup>

An official at DNR noted that SEPs might not be as beneficial for small companies that violate environmental statutes as they can be for larger companies.<sup>549</sup> Small companies are not always able to implement SEPs, and do not always reap public relations benefits by implementing SEPs. Further, mitigation caps make the use of SEPs too restrictive in cases involving small penalties, as the size of the supported SEP might be too small for mounting a project.

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<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> *Id.* at 14; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 16.

<sup>542</sup> Florida Dept. of Environmental Protection, *Settlement Guidelines for Civil and Administrative Penalties*, *supra* note 524, at 13-17; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 12.

<sup>543</sup> *Envirochem Environmental Services v. State of Florida Dept. of Environmental Protection*, Agency Final Order, Fla. Div. Adm. Hear. LEXIS 5443, at 2 (1994).

<sup>544</sup> *Id.* at 29.

<sup>545</sup> *Id.* at 32-33.

<sup>546</sup> *Id.*

<sup>547</sup> Telephone Interview with John Fonk, Acting Coordinator, Remedial Site Unit (Aug. 7, 2006).

<sup>548</sup> *Id.*

<sup>549</sup> *Id.*

### Other Research

There are no cases or administrative decisions on SEPs in Georgia.

### **Hawaii**

The Hawaii Department of Health, Environmental Health Administration uses SEPs and follows informal principles loosely based on the federal program.<sup>550</sup> Although each branch conducts separate enforcement actions including SEPs, the divisions generally negotiate and approve SEPs on a case-by-case basis.<sup>551</sup>

### Other Research

There are no cases or administrative decisions on SEPs in Hawaii.

### **Idaho**

Under the Environmental Protection and Health Act or the Hazardous Waste Management Act of 1983, a violator may perform a SEP and reduce its monetary penalties. The statutes define the requirements of a SEP and provide the legal authority; the Idaho Department of Environmental Quality (“IDEQ”) set out the particulars of the state SEP policy in 1998.<sup>552</sup> Although Idaho generally follows the EPA principles, there are several significant differences between IDEQ and EPA SEP policies.<sup>553</sup>

### Definition of SEPs

A SEP is a project which “prevents pollution, reduces the amount of pollutants reaching the environment, contributes to public awareness of environmental matters, or enhances the quality of the environment.”<sup>554</sup>

### Legal Principles

1. A project must comply with all provisions of the underlying statutes that were violated.
2. A project cannot conflict with Idaho Const. Art. VII, § 13 (“No money shall be drawn from the treasury, but in pursuance of appropriations made by law”).
3. A project must also comply with Idaho Code § 67-3516(2), which states that an agency cannot augment its appropriation without prior approval from the division of financial management.

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<sup>550</sup> Telephone interview with Kathy Hendricks, Enforcement Section Supervisor, Hawaii Dept. of Health, Environmental Health Administration, Air Quality (April 20, 2004).

<sup>551</sup> *Id.*; telephone interview with Keith Kawaoka, Program Manager, Hawaii Dept. of Health, Environmental Health Administration, Hazard Evaluation and Emergency Response (April 20, 2004).

<sup>552</sup> IDAHO CODE §§ 39-108(5)(b), 39-4414(1)(c) (West 2003); Idaho Dept. of Environmental Quality, *DEQ Guidance Document #GD98-1*, at 1 (March 3, 1997), available at [http://www.deq.state.id.us/policies/gd98\\_1.htm](http://www.deq.state.id.us/policies/gd98_1.htm) (last visited March 5, 2004).

<sup>553</sup> *DEQ Guidance Document #GD98-1*, at 1-3; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5-17.

<sup>554</sup> IDAHO CODE §§ 39-108(5)(b), 39-4414(1)(c).

4. A project must not “involve an activity a state agency is already legislatively required to perform.” The SEP must be a voluntary project for the violator and not required by any law or order in another legal action. It must also go beyond what a violator is required to do for compliance.
5. A project must not “provide a state agency with additional resources to perform an activity for which the Legislature has specifically appropriated funds.
6. A project must not “appear to expand existing state programs.”
7. IDEQ will not manage, control, or provide substantial oversight for the SEP.
8. IDEQ prefers SEPs that satisfy one of the following nexus requirements:
  - a. a project that benefits the environment,
  - b. a project that relates to the violation or objectives of the underlying statute (substantive nexus), or
  - c. a project that improves the environment near the location of the violation (geographic nexus).
9. A SEP is a project that the violator is not required to perform.<sup>555</sup>

#### Categories of SEPs

1. *Pollution Prevention* – reducing the pollutants at the source;
2. *Pollution Reduction* – reducing the amount of pollutants already in the environment;
3. *Public Awareness* – contributing to public awareness of pollution prevention, pollution reduction, and environmental compliance;
4. *Environmental Enhancement* – enhancing the quality of the environment beyond repairing damages; and,
5. *Study or Assessment* – examining pollution reduction or prevention with high likelihood of implementation.<sup>556</sup>

#### Calculation of the Final Penalty

When calculating the final cash penalty, IDEQ will consider the gravity of the violation, the compliance effort, and enforceability of the SEP.<sup>557</sup> To deter future violations, the SEP generally cannot offset more than 75% of the calculated penalty without the SEP.<sup>558</sup> For every two dollars spent on the SEP, IDEQ will generally reduce the penalty by one dollar

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<sup>555</sup> Idaho Dept. of Environmental Quality, *DEQ Guidance Document #GD98-1*, *supra* note 552, at 1.

<sup>556</sup> *Id.* at 2.

<sup>557</sup> *Id.* at 3.

<sup>558</sup> *Id.*

(a 2:1 mitigation ratio).<sup>559</sup> In addition, the final cash penalty plus the penalty mitigation cannot exceed the statutory administrative penalty limit.<sup>560</sup>

#### Failure to perform a SEP and Stipulated Penalties

If a SEP is not timely or satisfactorily completed according to the settlement agreement, the violator must pay a portion of the mitigated penalty as a stipulated penalty.<sup>561</sup>

#### Approval Process

The Attorney General's Office and IDEQ Administrator must review the SEP proposal.<sup>562</sup>

#### Comparison with U.S. EPA Principles

Although Idaho generally follows the EPA *Final SEP Policy*, there are several significant differences between IDEQ and EPA SEP policies.<sup>563</sup> First, EPA has three additional categories of permissible SEPs: *Public Health, Emergency Planning and Preparedness*, and *Other* projects.<sup>564</sup> Second, IDEQ has a lower mitigation ceiling, *i.e.* less of the calculated penalty can be mitigated by SEP costs.<sup>565</sup> Third, IDEQ allows donations to a local government or charity under its *Environmental Enhancement* category, while EPA does not allow third party payments.<sup>566</sup> Finally, IDEQ and EPA give different weight to the nexus requirement.<sup>567</sup> IDEQ also favors SEPs with either geographic or "substantive" nexus, in contrast to the EPA absolute requirement.<sup>568</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in Idaho.

### **Illinois**

In the 2003 amendment to its Environmental Protection Act, the Illinois legislature codified the use of SEPs.<sup>569</sup> SEPs, defined as environmentally beneficial projects, may be considered as a factor in mitigation of a civil penalty.<sup>570</sup>

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<sup>559</sup> *Id.*

<sup>560</sup> *Id.*

<sup>561</sup> *Id.*

<sup>562</sup> *Id.* at 4.

<sup>563</sup> *Id.* at 1-3; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5-17.

<sup>564</sup> Idaho Dept. of Environmental Quality, *DEQ Guidance Document #GD98-1*, *supra* note 552, at 2; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 7-12.

<sup>565</sup> Idaho Dept. of Environmental Quality, *DEQ Guidance Document #GD98-1*, *supra* note 552, at 3; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 16.

<sup>566</sup> Idaho Dept. of Environmental Quality, *DEQ Guidance Document #GD98-1*, *supra* note 552, at 3.

<sup>567</sup> *Id.* at 1; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5.

<sup>568</sup> Idaho Dept. of Environmental Quality, *DEQ Guidance Document #GD98-1*, *supra* note 552, at 1; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5-6.

<sup>569</sup> 415 ICLS 5/42(h)(7)(West Ann. 2004).

<sup>570</sup> *Id.*

Since the early 1990s, the Illinois Environmental Protection Agency (“IEPA”) has used SEPs as an alternative enforcement tool.<sup>571</sup> IEPA follows internal SEP principles that track the EPA principles, although they differ in the treatment of nexus and allowable categories of SEPs.<sup>572</sup>

### Definition of SEPs

A SEP is an environmentally beneficial project that a violator agrees to undertake in a settlement agreement, but that the violator is not otherwise legally required to perform.<sup>573</sup> It must improve, restore, protect, or reduce risks to public health and/or the environment beyond minimum legal compliance.<sup>574</sup>

### Categories of SEPs

1. *Pollution Prevention and Resource Efficiency* – providing better environmental protection;
2. *Pollution Reduction* – reducing pollution at a facility beyond minimum legal compliance;
3. *Green Schools* – assisting schools to improve their indoor environment, reduce waste, conserve energy, or minimize bus emissions;
4. *Environmental Restoration and Protection* – improving or restoring environments damaged by contamination;
5. *Emergency Planning and Preparedness* – assisting a state or local emergency response or planning organization on emergency preparation and response;
6. *Technical Assistance and Outreach* – providing technical assistance to other facilities to improve environmental performance;
7. *Environmental Education and Public Awareness* – providing environmental educational assistance to educators or conducting public awareness programs to promote community involvement;
8. *Special Waste Collection Events and Ongoing Community Waste Programs* – conducting waste collection events or providing ongoing waste management; and,
9. *Other* – including projects that will improve the environment.<sup>575</sup>

### Calculation of the Final Penalty

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<sup>571</sup> Interview with William Ingersoll, Manager of Enforcement Programs, Illinois EPA (March 25, 2004); Illinois EPA, “Supplemental Environmental Project Idea Bank,” <http://www.epa.state.il.us/enforcement/sep/> (last visited March 28, 2004).

<sup>572</sup> Interview with William Ingersoll, *id.*

<sup>573</sup> Illinois EPA, “Supplemental Environmental Project Idea Bank,” *supra* note 571; 415 ICLS 5/42 (West 2003).

<sup>574</sup> Illinois EPA, “Supplemental Environmental Project Idea Bank,” *supra* note 571.

<sup>575</sup> Illinois EPA, “Instructions for SEP Deposit Form,” <http://www.epa.state.il.us/enforcement/sep/instructions.html> (last visited Aug. 20, 2006).

To maintain the deterrence effect, IEPA generally does not allow a dollar-for-dollar mitigation ratio.<sup>576</sup> The Illinois statute specifies that the entire assessed civil penalty, including the portion attributed to the economic benefits of the violation, may be offset by the SEP.<sup>577</sup> Instances of a complete offset of a calculated penalty are reserved for exceptional circumstances, for example, when the SEP costs far exceed any calculated penalty, or where the SEP is agreed to notwithstanding considerable uncertainty as the outcome of litigation.<sup>578</sup>

### Comparison with U.S. EPA Principles

Although the IEPA program generally tracks the EPA principles, it is more flexible.<sup>579</sup> It accepts SEPs that have indirect nexus between the violation and the project.<sup>580</sup> This flexibility is also reflected in IEPA's permitted SEP categories: IEPA has more categories which are also broader than the EPA's categories.<sup>581</sup> In particular, IEPA specifies a category for *Environmental Education* and *Public Awareness* while EPA specifically asserts that such projects are not acceptable.<sup>582</sup> IEPA also has a *Special Waste Collection* category and a *Green Schools* category, which are akin to public works projects.<sup>583</sup>

### SEP Idea Bank

To further encourage the use of SEPs, violators can choose a formulated project from the IEPA's SEP idea bank.<sup>584</sup> This program arose after IEPA representatives and the Attorney General's Office met with environmental groups to exchange ideas for supplemental environmental projects in the Chicago area.<sup>585</sup> IEPA currently solicits project requests from environmental groups, local government organizations and environmental justice groups.<sup>586</sup> The Illinois idea bank has several notable features: 1) detailed project descriptions are available, setting out cost projections as well as pitfalls to the projects (*e.g.*, special permitting requirements); and 2) projects not executed within two years of proposal are removed from the approved list. The current web-based list covers more than forty projects, sorted by region.<sup>587</sup>

### Other Research

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<sup>576</sup> Interview with William Ingersoll, *supra* note 553.

<sup>577</sup> 415 ICLS 5/42(h).

<sup>578</sup> Electronic mail from William Ingersoll (Oct. 12, 2004)(on file with authors).

<sup>579</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5-12.

<sup>580</sup> Interview with William Ingersoll, *supra* note 571.

<sup>581</sup> Illinois EPA, "Supplemental Environmental Project Idea Bank," *supra* note 571.

<sup>582</sup> *Id.*

<sup>583</sup> *Id.*

<sup>584</sup> *Id.*; Illinois EPA maintains a public database of current proposed projects, "Supplemental Environmental Project Idea Bank: Project Listings by Region, sorted by Date Submitted," <http://www.epa.state.il.us/cgi-bin/en/sep/sep.pl> (last visited Dec 22, 2006).

<sup>585</sup> Gagnon, "Creative Settlements: A Comparison of Federal and State SEP Policies," *supra* note 452 (notes omitted).

<sup>586</sup> Illinois EPA, "Environmental Progress – Fall 2003," <http://www.epa.state.il.us/environmental-progress/v28/n5/sep.html> (visited Aug. 20, 2006).

<sup>587</sup> Illinois EPA, "Supplemental Environmental Project Idea Bank," *supra* note 571.

Research yielded thirty-five Illinois Pollution Control Board decisions that reviewed settlement agreements or stipulated judgments containing SEPs.<sup>588</sup> The research also yielded one article, which provides an overview of Illinois law applicable to civil penalty assessments, clarifies the EPA *Final SEP Policy*, and gives examples of how SEPs are used in actual enforcement cases.<sup>589</sup>

## Indiana

On April 5, 1999, the Indiana Department of Environmental Management (“IDEM”) adopted its Supplemental Environmental Project Policy, which details the use of SEPs in conjunction with its civil penalty policy.<sup>590</sup> By its terms, the policy is “intended solely as guidance and does not have the effect of law.”<sup>591</sup> As of August 2006, IDEM was in the process of updating its SEP policy, which it hoped to finalize by the end of 2006. Possible changes include adding *Public Health* and *Community Involvement* as SEP categories.<sup>592</sup>

### Definition of SEPs

A SEP is an environmentally beneficial project that a violator agrees to undertake in a settlement agreement that is not otherwise legally required.<sup>593</sup> A SEP should “improve the environment beyond the existing legal requirements.”<sup>594</sup>

### Categories of SEPs

1. *Pollution Prevention*;
2. *Pollution Control* – reducing pollution at a facility below minimum legal compliance;
3. *Environmental Restoration*;
4. *Public Awareness* – educating the regulated industries about environmental compliance;
5. *Environmental Audits* – identifying deficiencies in management and/or environmental practices, but must cover multi-media and must include all Indiana facilities owned by the violator; and,

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<sup>588</sup> See e.g., *People v. Interstate Brands Corp*, 2004 Ill. ENV LEXIS 106 (Ill. Poll. Ctrl. Bd. 2004); *People v. City of Lawrenceville*, 2001 Ill. ENV LEXIS 495 (Ill. Poll. Ctrl. Bd. 2001).

<sup>589</sup> Jon S. Falsetto, “Negotiating Resolution of Environmental Enforcement Actions,” 18 N. Ill. U. L. Rev. 527 (1998).

<sup>590</sup> Indiana Dept. of Environmental Management, *Nonrule Policy Document, Supplemental Environmental Policy*, at 1 (April 5, 1999), available at <http://www.in.gov/idem/rules/policies/enforcement/0003.pdf> (last visited Aug. 20, 2006) [hereinafter, “*Nonrule Policy Document*”]; telephone interview with Felicia Robinson, Deputy Commissioner of Legal Affairs, Indiana Dept. of Environmental Management (April 16, 2004).

<sup>591</sup> Indiana Dept. of Environmental Management, *Nonrule Policy Document*, *id.* at 1.

<sup>592</sup> Electronic mail from Paul Cluxton, Indiana Dept. of Environmental Management (Aug. 7, 2006) (on file with authors).

<sup>593</sup> Indiana Dept. of Environmental Management, *Nonrule Policy Document*, *supra* note 590, at 1.

<sup>594</sup> *Id.*

6. *Comprehensive Environmental Training* – providing significant and ongoing training for the violator’s employees on environmental responsibilities.<sup>595</sup>

#### Calculation of the Final Penalty

Although the policy encourages SEPs, IDEM specifies that penalties should be a part of the settlement in order to achieve a sufficient deterrent effect on the regulated community. A settlement should recover the economic benefit of noncompliance and reflect the seriousness of the violation: “[g]enerally, a settlement which recovers economic benefit plus twenty percent (20%) of the gravity penalty is acceptable.”<sup>596</sup> IDEM typically allows a two SEP dollar to one penalty dollar mitigation ratio. In addition, IDEM will not offset smaller assessed civil penalties (less than \$10,000).<sup>597</sup>

#### Approval Process

The Assistant Commissioner of the Office of Enforcement must approve each settlement agreement that includes a SEP.<sup>598</sup> A pre-selected SEP committee, comprised of individuals with technical expertise, reviews the details of the proposal to ensure that the project is valid and feasible.<sup>599</sup>

#### Comparison with U.S. EPA Principles

There are significant differences between the IDEM and EPA *Final Policy* SEP categories.<sup>600</sup> First, IDEM does not have a *Public Health* category. Second, it permits SEPs that educate the public and the violator.<sup>601</sup> Third, under the *Pollution Control* category, IDEM allows accelerated compliance projects even if the violator will become legally obligated to undertake the project in one year, while the EPA requires at least two years.<sup>602</sup> In addition, results of *Environmental Audits* are completely confidential whereas under the federal policy, SEP audits are public documents unless they consist of business confidential information pursuant to 40 C.F.R. Part 2, Subpart B.<sup>603</sup> Even though IDEM does not specify a catch-all *Other* category, it allows projects that do not fit under the named categories if they will significantly improve the environment or protect human health.<sup>604</sup>

Similar to the EPA, IDEM also treats pollution prevention projects differently from other projects.<sup>605</sup> IDEM generally does not allow SEPs which represent a “sound business

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<sup>595</sup> *Id.* at 2-5.

<sup>596</sup> *Id.* at 6-7.

<sup>597</sup> *Id.*

<sup>598</sup> *Id.* at 1.

<sup>599</sup> Interview with Felicia Robinson, *supra* note 590.

<sup>600</sup> Indiana Dept. of Environmental Management, *Nonrule Policy Document*, *supra* note 590, at 2-5; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 7-12.

<sup>601</sup> Indiana Dept. of Environmental Management, *Nonrule Policy Document*, *supra* note 590, at 4.

<sup>602</sup> *Id.* at 3-4; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 6-7.

<sup>603</sup> Indiana Dept. of Environmental Management, *Nonrule Policy Document*, *supra* note 590, at 5; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 20-21.

<sup>604</sup> Indiana Dept. of Environmental Management, *Nonrule Policy Document*, *supra* note 590, at 2.

<sup>605</sup> Indiana Dept. of Environmental Management, *Nonrule Policy Document*, *supra* note 590, at 6; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 16.

practice,” or capital expenditures by which the violator, and not the public, may accrue the substantial share of the benefits, unless the project facilitates pollution prevention.<sup>606</sup>

### Other Research

Research yielded no case law or administrative decisions on SEPs in Indiana.

## **Iowa**

Iowa’s Department of Natural Resources (“IDNR”) has a formal SEP policy pending final authorization. The new policy will greatly expand Iowa’s current SEP policy on a number of topics.<sup>607</sup> However, until the formal policy is finalized, IDNR subscribes to an internal SEP policy for implementing SEPs that loosely follow EPA’s guidelines.<sup>608</sup> The main difference is EPA’s requirement of a nexus between the project and the violation; IDNR only sets forth an order of preferences for relationships between the project and violation. Further, IDNR has more discretion to make SEP decisions: mitigation of penalties, the appropriateness of a facility to undertake a SEP, and the types of SEPs are all made on a case-by-case basis.<sup>609</sup>

### Definition of SEPs

A SEP cannot be an action required by any federal, state or local law or regulation and cannot include acts that the violator was carrying out before the violation was identified.<sup>610</sup>

### Legal Principles

IDNR employs a number of preferences designed to maintain the legality of SEPs.<sup>611</sup>

1. IDNR prefers that projects advance the objectives of the environmental statutes that are the basis of the enforcement action.<sup>612</sup>
2. IDNR generally prefers well-understood technology but is open to innovative technology.<sup>613</sup>

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<sup>606</sup> Indiana Dept. of Environmental Management, *Nonrule Policy Document*, *supra* note 590, at 6.

<sup>607</sup> Electronic mail from Ed Tormey, Iowa Dept. of Natural Resources (Aug. 17, 2006) (on file with authors).

<sup>608</sup> Iowa Dept. of Natural Resources, *Supplemental Environmental Projects: Internal Guidance* (Aug. 25, 2000) (on file with authors) [hereinafter, “*SEPs: Internal Guidance*”].

<sup>609</sup> *Id.* at 1. The perils of ad hoc decisionmaking are not unique to Iowa, but common to all informal SEP states. Chief among the downsides of informal SEP practices are a lack of transparency and regularity, disadvantaging violators who may receive less preferential treatment, possibly causing them to eschew SEP negotiations entirely. More discussion of this topic appears in Chapter III, “The Policy Implications of SEPs.”

<sup>610</sup> *Id.* at 1.

<sup>611</sup> *Id.*

<sup>612</sup> *Id.*

<sup>613</sup> Iowa Dept. of Natural Resources, *SEPs: Internal Guidance*, *supra* note 608, at 2.

At first glance, the preference for well-understood technology over innovative technology compromises the ability of SEPs to be used as technology proving ground, one of the appealing features of SEPs for many states and commentators (*see e.g.*, Droughton, *supra* note 127). Yet, the preference for proven technologies is understandable, given the desire to prevent a compounding of the original injury to the environment with an unsuccessful SEP.

3. IDNR uses nexus principles to create a direct relationship between the violation and the proposed projects.<sup>614</sup> The nexus principles lay out an order of preferences for projects, arranged according to the relationship between the project and the violation.<sup>615</sup> IDNR prioritizes (in order) projects that:
  - a. address remediation of the source of the problem or the greatest environmental benefit;
  - b. address same pollutant that caused the problem but not directly associated with the violation; and
  - c. address same media affected by the problem but not directly associated with the violation; and
  - d. other types of projects.<sup>616</sup>

#### Categories of SEPs

The allowable categories of SEPs mirror the U.S. EPA principles, yet, unlike EPA, IDNR permits direct cash payments to third parties as SEPs. Within the *Environmental Restoration and Protection* category is the option of paying money to local agencies to implement stream improvement projects as restitution for fish kills.<sup>617</sup> Additionally, IDNR allows contributions to local County Conservation Boards,<sup>618</sup> which may use the funds for outdoor environmentally beneficial projects such as planting projects, fish restocking, wetland projects, education programs and shuttle services to parks.<sup>619</sup> This arrangement may lead to a loss of geographical nexus between the violation and proposed projects since there is no requirement that a County Conservation Board spend the funds in the vicinity of the violation.

Further, while the principles list *Pollution Prevention* and *Environmental Quality Assessments* as possible SEPs,<sup>620</sup> the department prefers that SEPs include more than just an assessment.<sup>621</sup> On the other hand, in some cases a limited assessment could be required to insure that a SEP proposal fully considers all impacts of the project.<sup>622</sup>

#### Oversight and Drafting Enforceable SEPs

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<sup>614</sup> Iowa Dept. of Natural Resources, *SEPs: Internal Guidance*, *supra* note 590, at 2.

<sup>615</sup> *Id.*

<sup>616</sup> *Id.*

<sup>617</sup> *Id.*

<sup>618</sup> *Id.*

<sup>619</sup> *Id.*

<sup>620</sup> *Id.* (pollution prevention assessments are systematic, internal reviews of specific processes and operation designed to identify and provide information about opportunities to reduce the use, production, and generation of toxic and hazardous materials and other wastes. Environmental quality assessments are investigations of the conditions of the environment or a facility, in accordance with recognized protocols applicable to the type of assessment to be undertaken).

<sup>621</sup> Iowa Dept. of Natural Resources, *Considerations for Reviewing SEPs* (on file with authors).

<sup>622</sup> *Id.* at 1.

IDNR guidelines explain that the Waste Reduction Assistance Program (“WRAP”) and the Attorney General’s Office are available to provide technical evaluation and advice,<sup>623</sup> but WRAP will not assume the responsibility for designing the SEP.<sup>624</sup>

#### Comparison with U.S. EPA Principles

IDNR’s policy does not include other U.S. EPA principles, such as those used to calculate penalties, mandates for oversight and drafting of SEPs, the consequences of a failure of a SEP, and directives for community involvement. Although U.S. EPA’s guidelines were examined in depth, they were not incorporated because IDNR has limited resources with which to manage a comprehensive SEP program.<sup>625</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in Iowa.

### **Kansas**

The Kansas Department of Health and Environment (“KDHE”) allows the violator to perform a SEP in lieu of paying a penalty under an administrative penalty order.<sup>626</sup> Although it does not specifically refer to SEPs, the Kansas Administrative Procedures Act permits settlement of administrative orders.<sup>627</sup> Through an administrative order, KDHE may order the violator to pay penalties, undertake measures, or create procedures to reduce or eliminate the threat to human health and environment caused by the violation.<sup>628</sup> Each division has its own compliance and enforcement rules and SEP principles.

#### Bureau of Waste Management (“BWM”)

BWM has used SEPs for approximately ten years.<sup>629</sup> The original initiator of the project wanted to create a more effective negotiation tool with violators.<sup>630</sup> Although it adopted some of the federal SEP concepts, BWM principles are much more flexible.<sup>631</sup> In particular, EPA has raised concerns that BWM should include a cash penalty component in its enforcement actions.<sup>632</sup> BWM, however, requires that the SEP’s costs be at least three times as

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<sup>623</sup> *Id.*

<sup>624</sup> *Id.*

<sup>625</sup> Electronic mail from Mike Murphy, Iowa Dept. of Natural Resources (March 23, 2004) (on file with authors).

<sup>626</sup> Kansas Dept. of Health and Environment, *Bureau of Waste Management Policy 00-03 Related to Supplemental Environmental Projects*, at 1 (July 20, 2000), available at [http://www.kdhe.state.ks.us/waste/policies/BWM\\_00-03\\_SEP.pdf](http://www.kdhe.state.ks.us/waste/policies/BWM_00-03_SEP.pdf) (last visited Aug. 19, 2006) [hereinafter, “*Bureau of Waste Management Policy*”].

<sup>627</sup> KANSAS STAT. ANN. § 77-505 (West ANN. 2003).

<sup>628</sup> Kansas Dept. of Health and Environment, *supra* note 607, at 1.

<sup>629</sup> Electronic mail from William Bider, Director, Bureau of Waste Management, Kansas Dept. of Health and Environment (Aug. 7, 2006).

<sup>630</sup> *Id.*

<sup>631</sup> *Id.*

<sup>632</sup> *Id.*

great as the calculated penalty without the SEP. BWM believes that this requirement addresses any deterrence concerns.<sup>633</sup>

### Definition of SEPs

A SEP is a project that improves the “damaged environment or reduce[s] the total risk posed to human health and the environment” caused by the violator but which the violator is otherwise not legally required to perform.<sup>634</sup>

### Legal Principles

1. SEP results must be verifiable and measurable.<sup>635</sup>
2. A SEP must not primarily benefit the violator or improve its economic interest.<sup>636</sup>
3. Violators must bear oversight costs.<sup>637</sup>
4. Violators must substantiate SEP costs.<sup>638</sup>
5. Violators must detail SEP scope in the proposal.<sup>639</sup>
6. Violators must submit a final report detailing performance, costs, and environmental benefit.<sup>640</sup>

### Categories of SEPs

1. *Waste Prevention* – eliminating pollution or hazardous waste;
2. *Waste Reduction* – reducing the amount and/or toxicity of waste already released;
3. *Environmental Restoration and Protection* – enhancing the condition or geographic area;
4. *Environmental Audits* – including audits designed to identify problems or improve existing corporate management or environmental practices;
5. *Public Awareness* – educating the regulated community on the importance of compliance or disseminating technical information on compliance;
6. *Environmental Compliance Promotion* – providing training or technical support to the regulated community on maintaining compliance or reducing pollution; and,
7. *Emergency Planning and Preparedness* – helping the state or local emergency response or planning entity.<sup>641</sup>

### Calculation of the Final Penalty

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<sup>633</sup> *Id.*

<sup>634</sup> Kansas Dept. of Health and Environment, *Bureau of Waste Management Policy*, *supra* note 626, at 2.

<sup>635</sup> *Id.* at 3.

<sup>636</sup> *Id.* at 2.

<sup>637</sup> *Id.* at 5.

<sup>638</sup> *Id.*

<sup>639</sup> *Id.* at 3.

<sup>640</sup> *Id.*

<sup>641</sup> *Id.* at 3-4.

The entire assessed penalty may be mitigated, provided that the SEP costs equal or exceed the calculated penalty by a 3:1 ratio.<sup>642</sup> If the violator meets the definition of a small business, then the maximum mitigation ratio is reduced to 2:1.<sup>643</sup>

#### Failure to perform a SEP and Stipulated Penalties

BWM may reinstate the assessed penalties if the violator failed to complete the SEP.<sup>644</sup>

#### Comparison with U.S. EPA Principles

Unlike U.S. EPA, BWM generally does not require a nexus between the violation and the SEP.<sup>645</sup> Under the *Environmental Restoration and Protection* category, BWM does not require the geographic area to be immediate.<sup>646</sup> BWM also allows *Public Awareness* projects; however, under the *Public Awareness* category, the SEP should be related to the violation.<sup>647</sup> BWM's SEP policy may also be narrower in scope.<sup>648</sup> First, BWM requires a very tight nexus: "the proposed SEP must improve the damaged environment or reduce the total risk posed to human health and the environment caused by the respondent's business or operations."<sup>649</sup> Second, it does not have a catch-all *Other* category of permissible SEPs like the EPA.<sup>650</sup> At the same time, BWM's policy is more expansive than many other states' policies, as it permits repeat offenders to perform SEPs, but with a less generous mitigation ratio (varying from 4:1 to 5:1, in cases where the violation actually damaged the environment).<sup>651</sup>

#### Bureau of Water ("BW")

BW has utilized SEPs for at least fifteen years.<sup>652</sup> It follows informal principles that loosely correspond to EPA principles and prior projects implemented by the bureau.<sup>653</sup> It is currently in the process of writing its own policy.<sup>654</sup> BW uses SEPs because they achieve more than mere compliance with the law, and promote future compliance and departmental goals.<sup>655</sup> Even in the context of early compliance projects, BW encourages SEPs because the updated facility will serve as a model for the regulated community.<sup>656</sup>

Although SEPs allow BW to conduct programming that it otherwise would not be able to perform, SEPs require additional staff time and resources. BW balances the benefit of a particular SEP with the potential drain on agency resources to ensure that the SEP benefits

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<sup>642</sup> *Id.* at 2.

<sup>643</sup> *Id.*

<sup>644</sup> *Id.* at 4.

<sup>645</sup> *Id.* at 1-2; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5-6.

<sup>646</sup> Kansas Dept. of Health and Environment, *Bureau of Waste Management Policy*, *id.* at 1-2.

<sup>647</sup> *Id.* at 4.

<sup>648</sup> *Id.* at 1-2; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5-12.

<sup>649</sup> Kansas Dept. of Health and Environment, *Bureau of Waste Management Policy*, *id.* at 2.

<sup>650</sup> *Id.* at 3-4; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 11-12.

<sup>651</sup> Kansas Dept. of Health and Environment, *Bureau of Waste Management Policy*, *id.* at 2.

<sup>652</sup> Telephone interview with Ed Dillingham, Environmental Scientist IV, Bureau of Water (April 23, 2004).

<sup>653</sup> *Id.*

<sup>654</sup> *Id.*

<sup>655</sup> *Id.*

<sup>656</sup> *Id.*

both the environment and the Bureau.<sup>657</sup> BW uses SEPs around two to three times a year. The average fine is also small, making SEPs less practical.<sup>658</sup>

#### Bureau of Air (“BA”)

BA utilizes SEPs and generally follows the EPA *Final SEP Policy* because it fits the regulatory needs and the criteria are easy to understand. However, BA is planning to draft its own SEP policy.<sup>659</sup> BA may diverge from EPA guidelines on a case-by-case basis. Generally, BA and the environment receive more benefits from SEPs than from a mere penalty, as BA typically grants less than a dollar’s credit for each SEP dollar, and the SEPs create projects that might not otherwise have been funded. BA agrees to about five SEPs a year.<sup>660</sup>

#### Bureau of Environmental Remediation (“BER”)

BER permits the use of SEPs to reduce penalties and generally follows the federal guidelines.<sup>661</sup> However, BER rarely implements SEPs because they do not fit well within the structure of environmental remediation.<sup>662</sup> The fines are relatively small and calculated on a per day basis corresponding to the violation. The violators also tend to be small entities.<sup>663</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in Kansas.

### **Kentucky**

The Kentucky Department for Environmental Protection (“KDEP”) regularly utilizes SEPs as an enforcement tool. KDEP encourages its Division of Enforcement to use SEPs as a component of case resolutions whenever appropriate, and has internal principles following the federal guidelines.<sup>664</sup> Under various memoranda of agreements with KDEP, EPA encourages the use of SEPs, particularly for federally funded programs under the CAA, CWA, and RCRA.<sup>665</sup> Kentucky is not bound by U.S. EPA’s SEP guidelines and, therefore, has more latitude to concentrate on environmentally beneficial projects without the requirement to act within strict guidelines.<sup>666</sup> However, like U.S. EPA, Kentucky has appropriation laws that prohibit KDEP from using SEP money to support or fund KDEP activities.<sup>667</sup>

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<sup>657</sup> *Id.*

<sup>658</sup> *Id.*

<sup>659</sup> Telephone interview with David Peter, Enforcement Unit Chief, Bureau of Air (April 23, 2004).

<sup>660</sup> *Id.*

<sup>661</sup> Telephone interview with Gary Blackburn, Director, Bureau of Environmental Remediation (April 26, 2004).

<sup>662</sup> *Id.*

<sup>663</sup> *Id.*

<sup>664</sup> Telephone interview with Barbara Cornett, Acting Manager, Enforcement Branch, Division of Waste Management, Dept. for Environmental Protection (April 8, 2004).

<sup>665</sup> *Id.*

<sup>666</sup> Electronic mail from Susan Green, Director, Division of Enforcement, Kentucky Dept. for Environmental Protection (Aug. 21, 2006) (on file with authors).

### Other Research

Research yielded one Kentucky Public Service Commission decision in which a water district agreed to perform a SEP in order to reduce its penalties for water violations.<sup>668</sup>

### **Louisiana**

In 1999, the Louisiana legislature provided the statutory authority for beneficial environmental projects (“BEPs”).<sup>669</sup> The Office of Environmental Assessment’s Environmental Planning Division within the Louisiana Department of Environmental Quality (“LDEQ”) promulgated the formal BEP rule in August 2000.<sup>670</sup>

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Recent examples of SEPs in Kentucky include the following: after several universities in Kentucky experienced environmental compliance problems, a SEP was approved for one of these state universities to offer free environmental training to university and college personnel across the state; public health screenings were provided at no cost to area residents with the parameters of the screening focused on types of health issues most commonly associated with living in close proximity to industrialized areas; the conversion of a landfill into an area for public use for active or passive recreational activities for area residents was approved as a SEP; funding will be provided for the extension of sewer lines to eligible residential areas without sewers, as well as the repair and replacement of residential private lateral sewer connection lines and the removal of illicit connections for eligible area residential property owners; additional examples of SEPs approved in Kentucky include restoration of riparian buffers, implementation of sustainable landscaping for urban areas (specifically schools in low income housing areas), outdoor classroom projects and other environmental education projects.

<sup>667</sup> Interview with Barbara Cornett, *supra* note 664.

<sup>668</sup> *In the matter of: The Application of the Cumberland Water District*, 2003 Ky. PUC LEXIS 362 (2003).

<sup>669</sup> LA. STAT. ANN. §§30.2011(D)(1), 2031, and 2050.7(E)(West 2003).

<sup>670</sup> Louisiana Dept. of Environmental Quality, “Beneficial Environmental Projects – FAQs,” <http://www.deq.louisiana.gov/portal/Default.aspx?tabid=2206> (last visited Aug. 14, 2006); the rule is *codified at* LA. ADM. CODE tit. 33.I.2501 (West 2003).

### Definition of BEP

A BEP is an environmental mitigation project that the violator agrees to undertake in a settlement agreement, but the violator is not otherwise legally required to perform.<sup>671</sup> Environmental mitigation is defined as “that which tends to lead in any way to the protection from, reduction of, or general awareness of potential risks or harms to public health and the environment.”<sup>672</sup>

### Categories of BEPs

1. *Public Health;*
2. *Pollution Prevention;*
3. *Pollution Reduction;*
4. *Environmental Restoration and Protection;*
5. *Assessments and Audits*
  - a. Four types
    - i. *Pollution Prevention Assessments,*
    - ii. *Site Assessments,*
    - iii. *Environmental Management System Audits, and*
    - iv. *Compliance Audits*

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<sup>671</sup> Louisiana Dept. of Environmental Quality, “Propose a BEP,” <http://www.deq.louisiana.gov/portal/Default.aspx?tabid=2207> (last visited Aug. 14, 2006).

<sup>672</sup> *Id.*; LA. ADM. CODE tit. 33.I.2503.

- b. The violator must provide the LDEQ with a copy of the assessment or audit and an implementation report. The violator must either implement the changes suggested by the report or defend the reasons for forgoing implementation;
6. *Environmental Compliance Promotion* – projects aimed at increasing compliance by educating the regulated community as to risks and harms to the environment and public health;
7. *Emergency Planning, Preparedness, and Response* – assisting government agencies in emergency preparedness; and,
8. *Other projects.*<sup>673</sup>

### Approval Process

Under the Louisiana code, LDEQ must submit a description and justification of the BEP to the Attorney General for approval.<sup>674</sup> Simultaneously, all proposed settlement agreements must be published in the newspaper closest to the site of the environmental violation.<sup>675</sup> The violator must also place notice in the “official journal” of the parish in which the facility is located.<sup>676</sup> The public has forty-five days to comment on the proposed settlement.<sup>677</sup>

### Comparison with U.S. EPA Principles

Although LDEQ follows the general structure of U.S. EPA’s SEP guidelines, its regulations are more flexible.<sup>678</sup> First, Louisiana does not have a nexus requirement.<sup>679</sup> The project merely has “to be related to improving the environment.”<sup>680</sup> For example, under the *Environmental Compliance Promotion* category, the BEP need not primarily advance compliance in the same regulatory program that was violated.<sup>681</sup> Second, under the *Environmental Restoration and Protection* BEP category, LDEQ does not require the project to redress damages in the surrounding geographic area, as U.S. EPA requires.<sup>682</sup>

### Other Research

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<sup>673</sup> LA. ADM. CODE tit. 33.I.2505.

<sup>674</sup> LA. STAT. ANN. § 30.2050.7(E)(2)(a).

<sup>675</sup> Louisiana Dept. of Environmental Quality, “Beneficial Environmental Projects- FAQs,” *supra* note 670.

<sup>676</sup> Electronic mail from Cheryl Easley, Louisiana Dept. of Environmental Quality (Aug. 8, 2006)(on file with authors).

<sup>677</sup> Louisiana Dept. of Environmental Quality, “Beneficial Environmental Projects- FAQs,” *supra* note 670; LDEQ provides a website of proposed settlements, identifying those with BEPs. “Settlement Agreements,” <http://www.deq.louisiana.gov/portal/Default.aspx?tabid=226> (last visited Aug. 14, 2006).

<sup>678</sup> LA. PRAC. ENVIRONMENTAL COMPL. § 3:8 (West 2002).

<sup>679</sup> Louisiana Dept. of Environmental Quality, “Beneficial Environmental Projects- FAQs,” *supra* note 670.

<sup>680</sup> *Id.*

<sup>681</sup> Louisiana Dept. of Environmental Quality, “Propose a BEP,” *supra* note 671.

<sup>682</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 8-9.

Research yielded a 1999 Louisiana Department of Environmental Quality administrative law judgment that mentioned a supplemental environmental project to mitigate penalties.<sup>683</sup>

## **Maine**

In 1995, the Maine Department of Environmental Protection (“DEP”) adopted a policy to provide guidance for individuals who seek to incorporate environmentally beneficial projects into enforcement settlements to mitigate the penalties imposed. The policy became effective August 1, 1996. In 1998, the Maine legislature gave DEP the statutory authority to implement SEPs as part of an enforcement action.<sup>684</sup>

### Legal Principles

1. DEP does not allow SEPs in cases where: the violator is a repeat violator whose prior violation occurred within the past five years; the proposed project is for an activity that is already or will be a legally required action; the proposed project is for an action that was planned by the violator prior to the enforcement action; the case involves a knowing, intentional, or reckless violation; or if the project primarily benefits the violator.<sup>685</sup>
2. Like the EPA, DEP cannot administer or manage the SEP beyond “an oversight role.”
3. The SEP must have “timely and defined goals and milestones for implementing the project,” and “adequately provide for progress reporting and a final accounting to the Department or its designee.”<sup>686</sup>

### Categories of SEPs

Maine has seven categories for SEP projects:

1. *Pollution Prevention*;
2. *Pollution Reduction*;
3. *Environmental Enhancement*;
4. *Environmental Awareness*;
5. *Scientific Research and Data Collection*;
6. *Emergency Planning and Preparedness*; and,
7. *Public Health*.

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<sup>683</sup> *Department of Environmental Quality, In Re: Superior Service, Inc., Enforcement No. AE-P-97-0114*, 1999 La. ENV LEXIS 3 (La. ENV 1999).

<sup>684</sup> 38 MAINE REV. STAT. ANN. § 349 (West 2001); *see also* 12 MAINE REV. STAT. ANN. § 8870 (authorizing SEPs in the settlement of forestry code violations).

<sup>685</sup> Maine Dept. of Environmental Protection, *Supplemental Environmental Projects Policy*, at 3 (Sept.17, 2004), available at [http://www.maine.gov/dep/pubs/sep\\_pol.pdf](http://www.maine.gov/dep/pubs/sep_pol.pdf) (last visited Aug. 10, 2006).

<sup>686</sup> *Id.*

Unlike the EPA, DEP does not have categories for Assessments and Audits or a catch-all “*Other*” category. DEP’s category for *Scientific Research and Data Collection* allows projects that “significantly advance the scientific bases upon which regulatory decisions will be made.”<sup>687</sup> This differs from the EPA, which does not allow studies or assessments, unless they fall under the category of *Assessments and Audits* as a pollution prevention assessment, *Environmental Quality Assessments*, or *Environmental Compliance Audits*.

#### Calculation of the Final Penalty

Out-of-pocket expenses incurred by a SEP will mitigate the penalty. If a violator received an economic benefit due to its violation, that economic benefit will be assessed as part of the penalty, that is, no mitigation is allowed to offset the economic portion of a penalty.<sup>688</sup> In addition, the SEP can mitigate up to 80% of the non-economic benefit portion of the initially assessed penalty.<sup>689</sup>

#### Failure to perform a SEP and Stipulated Penalty

To ensure the timely and satisfactory completion of the SEP, the SEP settlement agreement should detail stipulated penalties for failure to complete the SEP. If the SEP is not completed to the satisfaction of DEP, the settlement may be void and the violator may be subject to other remedies.<sup>690</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in Maine.

### **Maryland**

The Maryland Department of the Environment (“MDE”) has informally allowed SEPs since 1998 and follows the U.S. EPA *Final SEP Policy*.<sup>691</sup> MDE has issued a policy statement on SEPs, which is included in its Fiscal Year 2005 *Annual Enforcement and Compliance Report*.<sup>692</sup> The MDE policy has an atypical slant on the traditional nexus requirement, venturing that “there should not be a direct relationship between the SEP and the underlying violation” as SEPs “are intended to create improvements that go beyond technical compliance.”<sup>693</sup> Although MDE is not bound to follow the U.S. EPA *Final SEP Policy*, MDE is careful to follow it in order to avoid EPA overfiling: in fact, MDE uses the EPA model for calculating

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<sup>687</sup> *Id.* at 2.

<sup>688</sup> *Id.* at 3, 5.

<sup>689</sup> *Id.* at 5.

<sup>690</sup> *Id.* at 6.

<sup>691</sup> Telephone interview with Bernard Penner, Director of Special Programs, Maryland Dept. of the Environment (May 3, 2004).

<sup>692</sup> Maryland Dept. of the Environment, *Annual Enforcement and Compliance Report Fiscal Year 2005*, at 22, available at [http://www.mde.state.md.us/assets/document/AboutMDE/enf\\_comp\\_05.pdf](http://www.mde.state.md.us/assets/document/AboutMDE/enf_comp_05.pdf) (last visited Aug. 8, 2006).

<sup>693</sup> *Id.* The MDE departs from many state SEP policies in being as explicit as U.S. EPA that a SEP should not merely correct the violation, but create improvements that go beyond technical compliance. See Chapter IV, “Model Practices of the Fifty States,” for an elaboration of this theme that SEPs may be used as an innovative tool to achieve environmental improvements that cannot be attained through traditional penalties.

the cost of a SEP, as well as the penalty mitigation.<sup>694</sup> In fiscal year 2004, MDE approved six settlements with SEPs, but in fiscal year 2005, this number swelled to 39.<sup>695</sup>

### Legal Principles

1. MDE disfavors SEPs that the violator was already under an obligation to perform or for which funding had already been committed before the violation had been discovered.<sup>696</sup>
2. There should not be a direct relationship between the SEP and the underlying violation. The SEP is not a corrective action designed to bring a violator back into compliance, but rather intended to further environmental improvements beyond compliance.<sup>697</sup>
3. SEPs must be defined with particularity as to deadlines so that they may be enforced, laying out “objective quantifiable deliverables with deadlines and consequences.”<sup>698</sup>

### Calculation of the Final Penalty

MDE requires that the final settlement amount (the cash penalty plus the cost of the SEP) must equal or exceed the traditional penalty settlement without the SEP.<sup>699</sup> MDE often relies on the EPA’s formulae for calculating the actual cost of the SEP and the amount of penalty mitigation permitted.<sup>700</sup>

### Failure to perform a SEP and Stipulated Penalty

When the objective requirements of a SEP are not met, a stipulated penalty or “other enforcement consequence” must be available.

### Other Research

There are no cases or administrative decisions on SEPs in Maryland.

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<sup>694</sup> Maryland Dept. of the Environment, *Annual Enforcement and Compliance Report 2005*, *supra* note 674, at 22.

Overfiling describes the situation when EPA determines that a state’s exercise of federally delegated administrative and enforcement authority has been inadequate, and the EPA’s brings its own, parallel enforcement action, even if a state action is pending, or has been concluded. See Wendy Zeff, “Harmon v. Browner: A Flawed Interpretation of EPA Overfiling Authority?” 14 *Vill. Envtl. L. J.* 179, 179 (2003). The concern that states risk overfiling in pursuing distinct SEP policies is likely overly cautious, as the authors discovered no instances of U.S. EPA’s overfiling regarding an overly permissive settlement with a SEP.

<sup>695</sup> Electronic mail from Bernard Penner, Director of Special Programs, Maryland Dept. of the Environment (Nov. 8, 2004) (on file with authors); Maryland Dept. of the Environment, *Annual Enforcement and Compliance Report 2005*, *supra* note 674, at 23; Maryland Dept. of the Environment, *Annual Enforcement and Compliance Report Fiscal Year 2004*, at 24, available at [http://www.mde.state.md.us/assets/document/AboutMDE/enf\\_comp\\_04.pdf](http://www.mde.state.md.us/assets/document/AboutMDE/enf_comp_04.pdf) (last visited Aug. 8, 2006).

<sup>696</sup> Maryland Dept. of the Environment, *Annual Enforcement and Compliance Report 2005*, *supra* note 692, at 22.

<sup>697</sup> *Id.*

<sup>698</sup> *Id.* Maryland’s program is noteworthy in this requirement of holding violators to a schedule of performance hurdles.

<sup>699</sup> *Id.*

<sup>700</sup> *Id.*

## Massachusetts

Massachusetts's Department of Environmental Protection ("DEP") seeks to protect public health, safety and welfare, and the environment. In line with these goals, DEP has a formal policy to ensure that SEPs further statutory objectives and advance the goals of pollution prevention and environmental justice. DEP principles follow EPA's in requiring a nexus and in forbidding DEP oversight or funding of the SEP. The principles differ in that third parties can perform SEPs, unlike the EPA, and that the categories diverge from EPA categories.

### Legal Principles

1. The SEP must have an adequate nexus. Accordingly, the SEP must either advance a statutory objective of the environmental law violated; remediate or reduce the environmental or public health impacts or risks that the violation impacted within "the immediate geographic area, the same ecosystem, watershed or economic target area;" or reduce the likelihood of similar violations occurring in the future at the site of the violation, at other sites operated by the violator, or "within industrial sectors subject to the same regulatory program requirements" that were violated.<sup>701</sup>
2. A SEP cannot be a project planned prior to the SEP proposal, or a project that the violator is legally required to do.<sup>702</sup>
3. The SEP must be performed by the violator or by a third-party contracted by the violator. The third-party must have an enforceable agreement with the violator.<sup>703</sup>
4. DEP retains an oversight role over the SEP, although DEP cannot manage the SEP or administer SEP funds.
5. The SEP cannot be a project that DEP itself is legally required to do. The SEP also cannot provide DEP with additional resources to perform an activity that already has specifically appropriated public funds.<sup>704</sup>

### Categories of SEPs

Massachusetts has seven categories of SEPs:

1. *Pollution Prevention*;
2. *Pollution Reduction*;
3. *Environmental Conservation*;

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<sup>701</sup> Massachusetts Dept. of Environmental Protection, *Interim Policy on Supplemental Environmental Projects POLICY ENF-97.005*, at 7 (April 26, 1997), available at <http://www.mass.gov/dep/service/enf97005.pdf> (last visited Aug. 17, 2006). DEP sets out its annual enforcement report at <http://www.mass.gov/dep/enf/enfpubs.htm>, with estimates of the values of SEPs and commitments to implement environmental management systems.

<sup>702</sup> *Id.* at 2.

<sup>703</sup> *Id.* at 8.

<sup>704</sup> *Id.* Presumably, the rationale behind this rule is to avoid the appearance of an unauthorized expansion of any existing programs administered by DEP.

4. *Protection and Restoration;*
5. *Emergency Planning and Preparedness;*
6. *Environmental Compliance Promotion;* and
7. *Public Health.*

Unacceptable SEPs are general educational or public environmental awareness projects; contributions to environmental research at a school of higher learning for an unspecified use; projects unrelated to environmental protection or environmental justice; and publicly funded projects.

#### Calculation of the Final Penalty

At a minimum, DEP will either collect at least 25% of the initial calculated penalty without the SEP amount, or collect the total economic benefit of the violation.<sup>705</sup> However, DEP can collect a greater portion of the penalty amount if DEP allocates significant resources to monitor and review the SEP or if the violator will receive an economic benefit from the SEP.<sup>706</sup>

#### Failure to perform a SEP and Stipulated Penalty

If a SEP fails to be completed to DEP's satisfaction or DEP discovers that the violator materially misrepresented the SEP costs, the violator must pay a stipulated penalty. At a minimum, the stipulated penalty should be between 50-100% of the mitigation amount. However, "all or part of the stipulated penalty may be waived if the [violator] made a good faith and timely effort to complete the SEP successfully."<sup>707</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in Massachusetts.

### **Michigan**

On April 15, 2005, the Michigan Department of Environmental Quality ("DEQ") issued a revision of its 1997 SEP policy.<sup>708</sup> The revised policy substantially follows the U.S. EPA *Final SEP Policy*, with some added details, notably its structured "SEP Quality Rating Matrixes" for calculating the percentage of penalty mitigation. The principal purpose of the new policy is to ensure that SEPs "secure environmental and/or public health benefits to the general public that would not otherwise have been realized except through the Settlement."<sup>709</sup> SEPs will not be approved for repeat violators or mitigating stipulated penalties.

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<sup>705</sup> *Id.* at 15.

<sup>706</sup> *Id.*

<sup>707</sup> *Id.*

<sup>708</sup> Michigan Dept. of Environmental Quality, *DEQ Policy and Procedures – Supplemental Environmental Projects for Penalty Mitigation* (April 15, 2005), available at <http://www.deq.state.mi.us/documents/deq-ocec-sup-env-projects-penalty-mitigation.pdf> (last visited Aug. 12, 2006).

<sup>709</sup> *Id.* at 1.

### Legal Principles

1. The SEP must advance an objective in the violated statute and bear an adequate nexus to the alleged violation. DEQ has adopted U.S. EPA's three pronged definition of nexus, while noting that proximity to the violation most readily establishes nexus for the project;<sup>710</sup>
2. The SEP cannot be inconsistent with any statutes, and cannot otherwise be legally required;
3. The project must primarily benefit the public health or the environment, although the violator may be provided with "limited benefits," and implementation of the project cannot antedate the identification of the violation;<sup>711</sup> and
4. The SEP cannot provide DEQ with additional resources to perform its mandated activities nor may DEQ manage the project or control its funds.<sup>712</sup>

### Categories of SEPs

The current policy lists the acceptable SEP categories:

1. *Pollution Prevention*;
2. *Pollution Reduction*;
3. *Environmental Restoration and Protection*;
4. *Public Health*;
5. *Environmental Assessments*;
6. *Environmental Awareness*;
7. *Emergency Planning and Preparedness*; and,
8. *Other projects*.<sup>713</sup>

### Calculation of the Final Penalty

Following U.S. EPA's lead, the final monetary fine must be the greater of (a) the economic benefit of noncompliance plus 10% of the gravity component of the initially calculated fine, or (b) 25% of the gravity component of the initially calculated fine.<sup>714</sup> The revised policy sets out a close facsimile of U.S. EPA's five-step calculation of the final monetary fine, including reference to the PROJECT model for evaluating the cost of a SEP. In figuring the mitigation percentage, however, DEQ has quantified the effect of the familiar factors such as innovativeness, environmental justice, community input and multimedia impacts: DEQ's "SEQ Quality Rating Matrixes" assign a numerical value to the degree that a factor is met, the summation of which results in the mitigation percentage, ranging from a

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<sup>710</sup> *Id.* at 3.

<sup>711</sup> *Id.* at 4.

<sup>712</sup> *Id.* at 4.

<sup>713</sup> *Id.*, Appendix B, at 2.

<sup>714</sup> *Id.* at 6-7.

low of 25% to a high of 80%.<sup>715</sup> Violators exhibiting a cooperative spirit during negotiations may receive a two point bonus, as well. The transparency of this process (the rating criteria is specified in a detailed document) is commendable, sharpening the incentive for violators to devise SEPs that return benefit to the community and attain high levels of restorative and procedural justice.

#### Oversight and Enforceability

The DEQ policy requires that the settlement agreement contain provisions to ensure that the SEP will be successful. In addition to possibly requiring violators to prove financial ability to consummate the project, DEQ requires that a detailed description identify the scope and schedule of the project, as well as a quantification of the benefits associated with the project.<sup>716</sup> DEQ also requires the submission of a final report detailing project expenditures, and includes a provision for stipulated penalties for failure to implement the SEP.

#### Other Research

There are no cases or administrative decisions interpreting or analyzing the use of SEPs in Michigan.

### **Minnesota**

The Minnesota Pollution Control Agency (“MPCA”) encourages the use of SEPs as a means of reducing pollution. MPCA bases its SEP guidelines on the now superseded EPA 1995 Interim Revised Policy.<sup>717</sup> MPCA shares the EPA’s categories and requires a nexus between the project and the violation, although the connection does not have to be as direct as under the EPA *Final SEP Policy*. Further, only the gravity portion of the penalty is eligible for mitigation.

#### Legal Principles

1. The SEP must be a project that the violator is not already legally required to do.
2. The nexus requirement can be met if the SEP advances a statutory objective of the environmental law violated, and the project takes place in Minnesota.<sup>718</sup> A direct relationship between the violation and the proposed SEP is not required.

#### Categories of SEPs

MPCA allows the following categories of SEPs, in order of preference:

1. *Pollution Prevention*;

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<sup>715</sup> *Id.*, Appendix C and “SEP Quality Rating Procedure.”

<sup>716</sup> *Id.* at 7-8.

<sup>717</sup> Minnesota Pollution Control Agency, *Discussion of Supplemental Environmental Projects (SEPs) as a means to achieve Pollution Prevention or Other Environmental Gains*, at 1, available at <http://www.pca.state.mn.us/programs/pubs/p2sepguide.pdf> (last visited Aug. 19, 2006) [hereinafter, “*Discussion of SEPs*”].

<sup>718</sup> *Id.*

2. *Pollution Reduction*;
3. *Environmental Restoration and Protection*;
4. *Public Health*;
5. *Assessments and Audits*;
6. *Emergency Planning and Preparedness*; and,
7. *Other environmental projects*<sup>719</sup>

#### Calculation of the Final Penalty

The calculated penalty without the SEP amount can be reduced by a fraction of the total cost of implementing a SEP. “The gravity-based penalty and any adjustments to the gravity-based penalty are the only portions of the overall penalty which are eligible for a reduction.”<sup>720</sup> However, if the SEP would significantly reduce pollution well beyond compliance, the economic benefit portion of the calculated penalty may be reduced as well.

#### Failure to perform a SEP and Stipulated Penalty

If the SEP is not completed to the satisfaction of MPCA, the violator must pay a stipulated penalty.<sup>721</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in Minnesota.

### **Mississippi**

Although the Mississippi Department of Environmental Quality (“MDEQ”) uses SEPs, it has not formalized its own SEP principles.<sup>722</sup> MDEQ currently follows the EPA *Final SEP Policy* and is in the process of drafting its own policy.<sup>723</sup>

#### Other Research

The authors found no case law or administrative decisions on SEPs in Mississippi.

### **Missouri**

Until 2004, the Missouri Department of Natural Resources (“MDNR”) would only infrequently use SEPs upon the advice and concurrence of the Missouri Attorney General’s Office.<sup>724</sup> In the summer of 2004, the Attorney General’s Office issued a Missouri

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<sup>719</sup> *Id.* at 1-2; Minnesota Pollution Control Agency, *Using Supplemental Environmental Projects to Achieve Environmental Results*, at 2 (Sept. 1998), available at <http://www.pca.state.mn.us/hot/koch/sepguide.pdf> (last visited Aug. 19, 2006).

<sup>720</sup> Minnesota Pollution Control Agency, *Discussion of SEPs*, *supra* note 717, at 3.

<sup>721</sup> *Id.* at 4.

<sup>722</sup> Electronic mail from Don Watts, Compliance Enforcement Manager, Mississippi Dept. of Environmental Quality (Aug. 7, 2006) (on file with authors).

<sup>723</sup> *Id.*

<sup>724</sup> Electronic mail from Michael Warrick, General Counsel, Missouri Dept. of Natural Resources (Oct. 14, 2004).

supplemental environmental performance project (“MOSEPP”) policy that roughly tracks the EPA *Final SEP Policy* regarding penalty mitigation, with a far more limited set of permissible project categories.<sup>725</sup> The Missouri Attorney General’s Office (“AGO”) seeks to use MOSEPPs as part of its enforcement actions to deter noncompliance, create a level playing field between competitors, and prevent pollution.<sup>726</sup> The AGO has broad discretion to accept or reject a project and set a value on the penalty mitigation.<sup>727</sup> The purpose of the policy is to induce companies to operate in a more environmentally responsible manner than otherwise required by law – that is, to go beyond regulatory minimums.<sup>728</sup>

#### Definition of MOSEPPs

A MOSEPP is defined as a readily verifiable environmentally beneficial project with an acceptable MOSEPP purpose and nexus to the violation.<sup>729</sup>

#### Categories of MOSEPPs

Acceptable MOSEPP purposes include:<sup>730</sup>

1. *Pollution Prevention* – reducing the generation of pollution through “source reduction”;
2. *Pollution Recycling Treatment or Containment* – A pollution control project decreases 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”;
3. *Environmental Restoration* – enhancing the condition of the ecosystem or immediate geographic area adversely affected;
4. *Public Health* – providing diagnostic and 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; and,
5. *Other Types of Projects* – which must otherwise be fully consistent with all other provisions of the policy.

Unacceptable purposes include: Assessments and Audits, Environmental Compliance Promotion, Emergency Planning and Preparedness Response, General public educational or public environmental awareness, contributions or payments to any third parties unrelated to environmental protection, and projects which the violator was already planning or

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<sup>725</sup> Missouri Attorney General’s Office, *Attorney General’s Office Policy: Missouri Supplemental Environmental Performance Projects (‘MOSEPP’) Policy*, (on file with authors) [hereinafter, “*MOSEPP Policy*”]; electronic mail from Joe Bindbeutel, Chief Counsel, Missouri Attorney General’s Office (Oct. 14, 2004)(on file with authors).

<sup>726</sup> Electronic mail from Joe Bindbeutel (2004), *supra* note 725.

<sup>727</sup> Missouri Attorney General’s Office, *MOSEPP Policy*, *supra* note 725, at 9.

<sup>728</sup> Electronic mail from Joe Bindbeutel, Chief Counsel, Missouri Attorney General’s Office (Aug. 16, 2006)(on file with authors).

<sup>729</sup> Missouri Attorney General’s Office, *MOSEPP Policy*, *supra* note 725, at 3.

<sup>730</sup> *Id.* at 4-5.

considering.<sup>731</sup> These projects are prohibited as they “do not necessarily provide for more sustainable company operations.”<sup>732</sup>

### Legal Principles

1. The MOSEPP must have an acceptable environmentally beneficial purpose. It must materially improve, protect, or reduce existing harm or potential for harm to Missouri’s environment through improvements to the entities’ actual operations.<sup>733</sup>
2. MOSEPPs which were already being considered by the violator previous to enforcement action are unacceptable.<sup>734</sup>
3. The MOSEPP cannot otherwise be legally required.<sup>735</sup>
4. The violator is solely responsible and legally liable for ensuring that the MOSEPP is completed satisfactorily. The violator may not transfer this responsibility and liability to a third party.<sup>736</sup>
5. The MOSEPP must have a nexus to the violation. The nexus requirement is satisfied only if: (1) the MOSEPP is designed to all but eliminate the likelihood that similar violations will occur in the future; (2) the MOSEPP reduces the adverse impact to public health or the environment to which the violation at issue contributed; or (3) the MOSEPP reduces the overall risk to public health or the environment potentially affected by the violation at issue.<sup>737</sup>
6. Nexus is easier to establish if the primary impact of the MOSEPP is at the site where the alleged violation occurred or within the immediate geographic area. The cost of the MOSEPP is not relevant to whether there is an adequate nexus.<sup>738</sup>
7. The MOSEPP must be readily verifiable. The MOSEPP must be tracked and documented. Environmental benefits must be measured or estimated using an acceptable methodology.<sup>739</sup>
8. A MOSEPP may provide the alleged violator with benefits, but the project must primarily benefit the environment. Any cost savings or other economic benefit accruing to the violator will be accounted for in the monetary penalty paid.<sup>740</sup>

### Calculation of Final Penalty

Factors used in determining the appropriate civil penalty include the economic benefit associated with the violations, the gravity or seriousness of the violations, and prior

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<sup>731</sup> *Id.* at 6.

<sup>732</sup> Electronic mail from Joe Bindbeutel (2004), *supra* note 725.

<sup>733</sup> Missouri Attorney General’s Office, *MOSEPP Policy*, *supra* note 725, at 4.

<sup>734</sup> *Id.* at 7.

<sup>735</sup> *Id.*

<sup>736</sup> *Id.* at 10.

<sup>737</sup> *Id.* at 7.

<sup>738</sup> *Id.* at 8.

<sup>739</sup> *Id.*

<sup>740</sup> *Id.* at 3.

compliance history of the responsible facility. A penalty may also be reduced if the violator has demonstrated a commitment to quickly and thoroughly achieve compliance and commit to necessary remediation.<sup>741</sup>

The amount of any penalty mitigation that may be given for a particular MOSEPP is purely within the AGO's discretion subject to consultation with MDNR. However, a MOSEPP's cost must be a greater than the original penalty. Factors to determine the percentage of penalty reduction include, but are not limited to: the cost expended by the violator of implementing the MOSEPP, the environmental benefit that will result from the implementation of the MOSEPP where the MOSEPP ranks on the pollution prevention hierarchy, benefits accruing to the environment and local community, and the "innovativeness" of the MOSEPP.<sup>742</sup> MOSEPPs involving pollution prevention processes are preferred over other types of reduction or control strategies, and this will be reflected in the amount of penalty mitigation.<sup>743</sup> Any cost savings or other economic benefit accruing to the violator will be accounted for in the monetary penalty paid.<sup>744</sup>

#### Comparison with U.S. EPA Principles

The MOSEPP policy embraces the core principles of the EPA *Final SEP Policy* with two important caveats. First, Missouri insists on strict nexus between the MOSEPP project and both the company's day-to-day environmental operations as well as with the underlying violation. Second, Missouri law carefully circumscribes state agencies' authority to expend state resources without express legislative (budgetary) authorization. By its constitution, Missouri directs that the proceeds of penalty claims be placed in its school fund (See Missouri Constitution, Art. IX, Section 7). Accordingly, a MOSEPP project cannot be the mere redirection of penalty sums from the state's school fund to some other destination.<sup>745</sup>

The EPA *Final SEP Policy* guides the AGO policy. The guidance promulgated by EPA in support of its SEP policy should be helpful in understanding how the AGO's MOSEPP policy operates.<sup>746</sup> However, the range of acceptable projects is more limited than that available to EPA under its SEP policy. The MOSEPP policy excludes *Assessments and Audits*, *Environmental Compliance Promotion*, and *Emergency Planning and Preparedness*. In general, unlike SEPs, MOSEPPs must materially improve the environment by enhanced environmental performance in the responsible parties' actual operations.<sup>747</sup>

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<sup>741</sup> *Id.* at 2.

<sup>742</sup> *Id.* at 8.

<sup>743</sup> *Id.* at 2.

<sup>744</sup> *Id.*

<sup>745</sup> Electronic mail from Joe Bindbeutel (2006), *supra* note 728.

<sup>746</sup> Missouri Attorney General's Office, *MOSEPP Policy*, *supra* note 725, at 1.

<sup>747</sup> *Id.*

### Other Research

The authors found no case law or administrative decisions on SEPs in Missouri.

### **Montana**

Since 1997, the Montana Department of Environmental Quality (“DEQ”) has followed internal SEP principles that generally mirror the EPA principles.<sup>748</sup> DEQ has deviated from the federal policy in the areas of nexus and penalty mitigation.<sup>749</sup> For example, to mitigate a portion of a penalty for water quality violations, DEQ allowed a violator to provide funds to a local cooperative for the purchase of a glass pulverizer that converted waste glass into recyclable materials.<sup>750</sup> Legislation passed in 2005 specifically authorizes the DEQ to accept SEPs as mitigation for a portion of a penalty.<sup>751</sup> Further, DEQ plans to write its own formal guidelines.<sup>752</sup>

Through an enforcement agreement with U.S. EPA, EPA provides oversight and guidance for defining violations and determining when the DEQ should take penalty action.<sup>753</sup> The enforcement agreement between EPA and DEQ states that the DEQ will utilize the EPA *Final SEP Policy* for general guidance.<sup>754</sup> The DEQ, however, is not bound by the specific provisions of the EPA *Final SEP Policy* and does not require EPA approval of its SEPs.<sup>755</sup>

### Other Research

The authors found no case law or administrative decisions on SEPs in Montana.

### **Nebraska**

The Nebraska Department of Environmental Quality (“NDEQ”) accepts SEPs on a case-by-case basis.<sup>756</sup> The Nebraska Attorney General and NDEQ regularly consider SEPs in their enforcement cases.<sup>757</sup> NDEQ generally endorses the philosophy expressed in the EPA *Final SEP Policy*. The Nebraska constitution requires that all fines and penalties go to local

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<sup>748</sup> Telephone interview with John Arrigo, Enforcement Division Administrator, Montana Dept. of Environmental Quality (April 1, 2004).

<sup>749</sup> *Id.*

<sup>750</sup> Electronic mail from John Arrigo, Enforcement Division Administrator, Montana Dept. of Environmental Quality (Aug. 18, 2006) (on file with authors).

<sup>751</sup> MONT. CODE ANN. § 75-1-1001(3) (2005); *see also* MONT. CODE ANN. § 76-4-1001 and § 82-4-1001.

<sup>752</sup> Electronic mail from John Arrigo, *supra* note 750.

<sup>753</sup> Telephone interview with John Arrigo, *supra* note 748; *Consolidated Cooperative Enforcement Agreement between U.S. Environmental Protection Agency Region III and State of Montana Department of Environmental Quality* (Sept. 2000) at 10, (on file with authors).

<sup>754</sup> *Consolidated Cooperative Enforcement Agreement, id.*

<sup>755</sup> *Id.*; telephone interview with John Arrigo, *supra* note 748.

<sup>756</sup> Telephone interview with Annette Kovar, Legal Counsel, Nebraska Dept. of Environmental Quality (April 15, 2004).

<sup>757</sup> Electronic mail from Annette Kovar, Legal Counsel, Nebraska Dept. of Environmental Quality (Aug. 14, 2006) (on file with authors).

schools in the county where the action is brought. However this has not hindered the use of SEPs in settlement agreements.<sup>758</sup>

### Other Research

Research yielded no case law or administrative decisions on SEPs in Nebraska.

## **Nevada**

The Nevada Department of Conservation and Natural Resources (“NDCNR”) has a formal SEP policy that generally tracks the EPA principles.<sup>759</sup> NDCNR determines whether the SEP is appropriate on a case-by-case basis.<sup>760</sup> Promulgated by the Nevada Division of Environmental Protection (“Division”), Nevada’s SEP policy closely mirrors the EPA’s. “The Division’s approach to SEPs is intended to be generally consistent with U.S. EPA’s Revised SEP Policy, May 1995.”<sup>761</sup> The Division has discretion to include a SEP as part of an enforcement case settlement.

### Definition of SEPs

A SEP is “[an] environmentally beneficial project[] ... undertake[n] in settlement of an enforcement action, but which the [violator] is not otherwise legally required to perform.”<sup>762</sup>

### Legal Principles

1. A SEP must have an adequate nexus with the violation. A project meets this requirement if it either reduces the overall environmental or public health impacts or risks to which the violation contributes, or it reduces the likelihood of similar violations in the future.
2. The SEP must advance a statutory objective of the environmental law violated.
3. The Division will provide oversight of the SEP implementation, to ensure accordance with the settlement agreement. However, the Division cannot play a role in managing or controlling funds to be set aside for performance of SEPs.
4. The settlement agreement must specify the type and scope of the SEP, and cannot contain a provision stating that the amount of money to be spent on the project will be determined later.
5. A SEP cannot be something that the Division is otherwise legally required to perform. The SEP also cannot provide funding for Division activities for which the legislature has already provided funds.<sup>763</sup>

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<sup>758</sup> *Id.*

<sup>759</sup> Telephone interview with John Walker, Executive Secretary, Nevada Environmental Commission (March 3, 2004).

<sup>760</sup> *Id.*

<sup>761</sup> Nevada Division of Environmental Protection, *Policy Statement – Supplemental Environmental Projects 2906.0* (on file with authors).

<sup>762</sup> *Id.*

<sup>763</sup> *Id.*

### Categories of SEPs

The Division allows similar categories of SEPs as those in the EPA *Final SEP Policy*:

1. *Public Health*;
2. *Pollution Prevention*;
3. *Pollution Reduction*;
4. *Environmental Restoration and Protection*;
5. *Assessments and Audits*; and
6. *Environmental Compliance Promotion*.

However, unlike the EPA, the Division does not include an *Emergency Planning and Preparedness* category or a catch-all *Other* category. The Division does not permit SEPs for: education or public environmental awareness; environmental research contributions; projects unrelated to environmental protection; studies or assessments without a commitment to implement the results; projects that are funded by state or federal loans, contracts, or grants; projects that the violator is already legally required to perform.<sup>764</sup>

### Calculation of the Final Penalty

The value of the SEP should equal 125% of the penalty to be mitigated. The value of the SEP is determined only by capital costs, one-time non-depreciable costs, and operating costs (excluding labor).

A SEP can mitigate 100% of the penalty if the SEP results in pollution prevention or if the violator is a small business (fewer than 100 employees), government agency or entity, or nonprofit organization. “A lower mitigation percentage... may be assigned if the benefits of the SEP have limited environmental value or if the Division must allocate significant resources to monitoring and reviewing the SEP.”<sup>765</sup>

### Other Research

There are no cases or administrative decisions on SEPs in Nevada.

## **New Hampshire**

The New Hampshire Department of Environmental Services (“DES”) has formal guidelines based on U.S. EPA’s SEP guidelines. DES uses the EPA principles as a guide, but does not strictly adhere to its provisions.<sup>766</sup> “In particular, DES usually is more flexible on the

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<sup>764</sup> *Id*

<sup>765</sup> *Id*.

<sup>766</sup> New Hampshire Dept. of Environmental Services, *Compliance Assurance Response Policy*, Chapter VI: Penalty Calculations and Documentation, at VI-16 (Sept. 27, 2000) available at <http://www.des.state.nh.us/legal/carp/carp-ch-6.pdf> (last visited Aug. 17, 2006) [hereinafter, “CARP”].

nexus requirement.”<sup>767</sup> Interestingly, DES encourages violators to self-report and undertake SEPs by allowing a smaller final cash penalty.

#### Legal Principles

1. The SEP must primarily benefit the public health or the environment, not the violator.
2. The SEP cannot be an activity that the violator would have otherwise conducted, and cannot be part of achieving compliance.
3. The SEP must be privately funded, and cannot use any public funds.<sup>768</sup>

#### Categories of SEPs

DES favors SEPs that involve pollution prevention; pollution reduction at the site or facility at which the violation occurred; land conservation; Brownfields redevelopment; or projects that are consistent with anti-sprawl or smart growth policies.<sup>769</sup> SEP categories are:

1. *Public Health;*
2. *Pollution Prevention/Reduction;*
3. *Environmental Restoration and Protection;*
4. *Assessments and Audits;*
5. *Environmental Compliance Promotion;* and,
6. *Emergency Planning and Preparedness.*<sup>770</sup>

Unacceptable SEPs are general education or public environmental awareness projects, contributions to environmental research at a school of higher learning, projects unrelated to environmental protection, and studies conducted without a commitment to implement the results.<sup>771</sup>

#### Calculation of the Final Penalty

New Hampshire encourages both SEPs and self-reporting by violators through its calculation of final cash penalties. Violators who do not voluntarily self-report must pay a minimum cash penalty of the greater of (1) the economic benefit plus 10% of the gravity component; (2) 50% of the gravity component if no SEP is performed; or (3) 25% of the gravity component if a SEP is undertaken.<sup>772</sup> Violators who voluntarily self-report their violations pay the greater of (1) the economic benefit received from the violation; (2) 30% of

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<sup>767</sup> *Id.*

<sup>768</sup> *Id.*

<sup>769</sup> New Hampshire Dept. of Environmental Services, *CARP*, Appendix VI-5: Evaluation Checklist for Supplemental Environmental Projects, at 2-3, available at <http://www.des.state.nh.us/legal/carp/carp-app-6-5.pdf> (last visited Aug. 17, 2006).

<sup>770</sup> *Id.*

<sup>771</sup> *Id.* at 3.

<sup>772</sup> New Hampshire Dept. of Environmental Services, *CARP*, *supra* note 748, at VI-16.

the gravity component if no SEP is undertaken; or (3) 15% of the gravity component if a SEP is undertaken.

#### Comparison with U.S. EPA Principles

DES has not bound itself to U.S. EPA's nexus requirement, and consequently has more latitude to accept SEPs that might not qualify under EPA's policy. DES also allows dollar-for-dollar matching for SEPs that include non-tax-deductible direct cash payments to an approved charity or other non-profit, or the purchase of a conservation easement or a parcel of land that is then made subject to a conservation easement.<sup>773</sup> As noted above, DES also provides an incentive for self-reporting of environmental violations by reducing the minimum cash penalty paid.

#### Other Research

There are no cases or administrative decisions on SEPs in New Hampshire.

### **New Jersey**

The New Jersey Department of Environmental Protection ("DEP") has an informal, unwritten SEP policy. DEP uses the EPA *Final SEP Policy* for guidance but does not adhere to it.<sup>774</sup> DEP deviates from the EPA guidelines in that there are no defined categories of allowable SEPs or guidelines for the calculation of final penalties. These decisions are left to departmental discretion.

#### Categories of SEPs

DEP has no set list of categories, but prefers SEPs that produce a tangible benefit, such as pollution prevention projects, compared to projects that produce a less tangible benefit, such as education and awareness projects.<sup>775</sup>

#### Calculation of the Final Penalty

DEP has no set formula for penalty mitigation. Penalty mitigation is determined on a case-by-base basis. Generally, DEP's approach is more lenient than the EPA's.<sup>776</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in New Jersey.

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<sup>773</sup> *Id.* at VI-17.

<sup>774</sup> Telephone interview with Peg Hannah, Policy Advisor in Compliance and Enforcement, New Jersey Dept. of Environmental Protection (May 7, 2004).

<sup>775</sup> *Id.*

<sup>776</sup> *Id.*

## New Mexico

The New Mexico Environment Department (“NMED”) generally follows the EPA principles, yet leaves more decisions to departmental discretion.<sup>777</sup> NMED has utilized SEPs since 1992.<sup>778</sup> Each division has its own compliance and enforcement rules and SEP principles.<sup>779</sup>

### Air Quality Bureau (“AQB”)

AQB has formal SEP principles, which substantially track the EPA principles.<sup>780</sup> In 2001, AQB revised its enforcement policy and expanded the categories of allowable SEPs to include *Environmental Audit/Assessments*.<sup>781</sup>

### Definition of SEPs

A SEP is an environmentally beneficial project that a violator agrees to undertake in a settlement agreement, but which the violator is not otherwise legally required to perform.<sup>782</sup>

### Legal Principles

AQB substantially adopted the EPA’s guidelines.<sup>783</sup>

### Categories of SEPs

AQB substantially adopted the federal categories. It allows for projects in the areas of:

1. *Public Health*;
2. *Pollution Prevention*;
3. *Pollution Reduction*;
4. *Renewable Energy*;
5. *Environmental Restoration*;
6. *Environmental Compliance Promotion* - including projects that promote violation avoidance); and,
7. *Assessments and Audits*
  - a. *Pollution Prevention Assessments*,

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<sup>777</sup> ASTSWMO, Hazardous Waste Enforcement Task Force, *Supplemental Environmental Projects (SEPs) Survey of States and Territories* (Oct. 1997), *supra* note 1, at 30.

<sup>778</sup> *Id.* at 15.

<sup>779</sup> Telephone interview with John Volkerding, Air Quality Bureau Compliance Program Manager, New Mexico Environment Dept. (March 30, 2004).

<sup>780</sup> New Mexico Environment Dept., *Air Quality Bureau Civil Penalty Policy*, at 23-32 (2005), available at [http://www.nmenv.state.nm.us/aqb/enforce\\_compliance/Civil%20Penalty%20Policy%2010-20-05%20Version.pdf](http://www.nmenv.state.nm.us/aqb/enforce_compliance/Civil%20Penalty%20Policy%2010-20-05%20Version.pdf) (last visited Aug. 19, 2006) [hereinafter, “*Air Quality Bureau Civil Penalty Policy*”].

<sup>781</sup> Interview with John Volkerding, *supra* note 779.

<sup>782</sup> New Mexico Environment Dept., *Air Quality Bureau Civil Penalty Policy*, *supra* note 780, at 23.

<sup>783</sup> *Id.*

- b. *Site Assessments* – investigating public health at a site adversely affected by the violator,
- c. *Environmental Management System Audits* – evaluating a violator’s environmental infrastructure, such as its policies, practices, and controls, and,
- d. *Environmental Compliance Audits*.<sup>784</sup>

Unlike the EPA, AQB does not have an *Emergency Planning and Preparedness* category or a catch-all *Other* category.<sup>785</sup> AQB also allows for *Environmental Compliance Promotion* projects, which assist potential violators in avoiding future violations.<sup>786</sup>

#### Calculation of the Final Penalty

AQB substantially adopted the EPA principles.<sup>787</sup>

#### Comparison with U.S. EPA Principles

Although the AQB principles appear to be an abbreviated version of the EPA *Final SEP Policy*, there are several significant differences between the two. The principal difference may be that that AQB has more discretion in permitting a SEP. For example, it does not specify the required nexus and leaves the determination to the discretion of AQB.<sup>788</sup> Also, AQB requires a stipulated penalty provision similar to the EPA’s requirement, yet the AQB has sole discretion to determine the amount.<sup>789</sup>

Notably, AQB modified the EPA’s Policy in its treatment of small businesses. First, unlike the EPA, AQB does not specify that the *Environmental Compliance Audit* projects are limited to small businesses and communities.<sup>790</sup> Second, it does not allow small businesses to receive greater penalty mitigation.<sup>791</sup>

#### Hazardous Waste Bureau (“HWB”)

HWB utilizes SEPs as an enforcement tool and follows the EPA principles, but has not approved a SEP in the last five years.<sup>792</sup>

#### Solid Waste Bureau (“SWB”)

On a case-by-case basis, SWB allows SEPs to reduce civil penalties and uses SEPs as an incentive to settlement.<sup>793</sup> However, they are restricted to pre-litigation situations, unless

<sup>784</sup> *Id.* at 25-29.

<sup>785</sup> *Id.*; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 7-12.

<sup>786</sup> New Mexico Environment Dept., *Air Quality Bureau Civil Penalty Policy*, *supra* note 780, at 26-27.

<sup>787</sup> *Id.*

<sup>788</sup> *Id.* at 24-25; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5-6.

<sup>789</sup> New Mexico Environment Dept., *Air Quality Bureau Civil Penalty Policy*, *supra* note 780, at 30; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 18.

<sup>790</sup> New Mexico Environment Dept., *Air Quality Bureau Civil Penalty Policy*, *supra* note 780, at 28-29; U.S. EPA, *Final SEP Policy* *supra* note 5, at 10-11.

<sup>791</sup> New Mexico Environment Dept., *Air Quality Bureau Civil Penalty Policy*, *supra* note 780, at 29-30

<sup>792</sup> Telephone interview with Barry Birch, Chief, Hazardous Waste Bureau, Compliance (April 2, 2004).

there are extraordinary circumstances. The proposed SEP must be designed primarily to benefit the environment or the public rather than the violator or the department.<sup>794</sup> SWB imposes a loose nexus requirement in that the project must discernibly respond to the violation.<sup>795</sup>

SEPs are an exception to the general requirement that violators pay the full penalty for environmental violations.<sup>796</sup> Each enforcement action should include a substantial monetary component.<sup>797</sup> SWB should also make every effort to eliminate any potential misperception that the violator is not fully punished.<sup>798</sup> The mitigation percentage should not exceed 75% unless there are special circumstances.<sup>799</sup> SWB requires the violator to initiate the SEP, and one test of the required good faith commitment to compliance is whether the violator takes the initiative in identifying and proposing specific and credible environmental projects.<sup>800</sup>

### Other Research

No case law or administrative decisions on SEPs in New Mexico.

### **New York**

New York refers to supplemental environmental projects as “environmental benefit projects” (“EBPs”). New York’s Department of Environmental Conservation (“DEC”) first issued its EBP policy in 1995, updated in 1997. In 2005, DEC promulgated a substantial revision titled *Environmental Benefits Project Policy* (“2005 EBP Policy”).<sup>801</sup> The early versions of DEC’s policies closely tracked the familiar EPA principles, but the latest version avails itself of the freedom that states enjoy to create policies that meet local political and environmental needs. Instances of this “new look” policy include express provisions for third party oversight of SEPs, escrow accounts for funding specified and unspecified future SEPs, and a geographically focused nexus requirement.

New York case law allows DEC to settle environmental enforcement actions with special conditions “not expressly required by law...where such conditions are rationally

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<sup>793</sup> New Mexico Environment Dept., *Solid Waste Civil Penalty Assessment Policy*, at 28-29 (Nov. 1994) (on file with authors).

<sup>794</sup> *Id.* at 29.

<sup>795</sup> *Id.*

<sup>796</sup> *Id.*

<sup>797</sup> *Id.*

<sup>798</sup> *Id.*

<sup>799</sup> *Id.* at 28.

<sup>800</sup> *Id.* at 29.

<sup>801</sup> New York Dept. of Environmental Conservation, *Environmental Benefit Project Policy: Enforcement Guidance Memorandum* (May 27, 1997), formerly available at <http://www.dec.state.ny.us/website/ogc/egm/ebp.html> (last visited Oct. 15, 2005)[hereinafter, “1997 Guidance Memorandum”]; New York Dept. of Environmental Conservation, *Environmental Benefit Projects Policy* (CP-37) [hereinafter, “2005 EBP Policy”] (dated Nov. 14, 2005), available at <http://www.dec.state.ny.us/website/ogc/egm/ebp.html> (last visited November 22, 2006).

related to protecting the environment.” In addition, DEC relies on its authority under the Environmental Conservation Law to settle environmental cases with conditions.<sup>802</sup>

#### Legal Principles<sup>803</sup>

1. The EBP must “provide an environmental benefit beyond the benefits of full compliance,” and cannot be a project already required by law;
2. The benefit to the environment must be “discernible” and any benefit to the violator must be only incidental;
3. The project must be within the capacity of DEC or an approved third party to review and oversee;
4. The project cannot be an activity that the violator planned to perform at the time of the violation’s detection;
5. DEC cannot use the project to cover ordinary departmental costs or to generate revenue for the Department.
6. The EBP could not have been required by DEC, pursuant to law regulation or other enforcement authority.

#### Nexus

The 2005 policy substantially reworks New York’s nexus requirement: now, the EBP must have a geographic nexus to “the area or community adversely affected by the violation(s).”<sup>804</sup> This requirement substantially changes the former standard that the EBP meets the nexus requirement if it “addresses the environmental effects of the violations being resolved or improves the injured environment...[or] reduces the total risk posed to public health or the environment by the violations or the facility... [or] benefits the communities or the general public adversely impacted by the violation.”<sup>805</sup> Among projects with a geographic nexus, the revised policy prefers EBPs with a “direct programmatic nexus to the violation” and those that benefit an “Environmental Justice area” that is within the impacted area.<sup>806</sup>

#### Categories of SEPs

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<sup>802</sup> New York Dept. of Environmental Conservation, *2005 EBP Policy*, at II.A, *id.*

<sup>803</sup> *Id.* at II.

<sup>804</sup> *Id.* at II.C.5. The former provision closely tracked the U.S. EPA *Final SEP Policy* stating that “nexus exists only if the project 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.” U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5; New York Dept. of Environmental Conservation, *1997 Guidance Memorandum*, *supra* note 801, at 5; *see also* U.S. EPA, *Importance of the Nexus Requirement*, *supra* note 17, at 1.

The *1997 Guidance Memorandum* language was broad enough to permit the approval of SEPs that benefit the environment without addressing the immediate geography or the impacts of the violation on neighboring communities, while the newer, more restrictive language increases the likelihood that the SEP will benefit the community affected by the violation.

<sup>805</sup> New York Dept. of Environmental Conservation, *1997 Guidance Memorandum*, *supra* note 801, at 5-7.

<sup>806</sup> New York Dept. of Environmental Conservation, *2005 EBP Policy*, *supra* note 801, at II.C.5.

Under its revised policy, DEC does not expressly set out categories of acceptable EBPs, but unacceptable EBPs include “assessments without a commitment to implement the results,” the surrender of environmental “credits,” projects seeking to resolve criminal violations, and educational projects implemented by the violator. An acceptable educational project must either prevent adverse impacts to the environmental resource, or assist an affected community in understanding and preventing negative environmental impacts.<sup>807</sup>

#### Oversight and Drafting Enforceable SEPs

The revised *EBP Policy* also sets out specific provisions that should be included in the consent decree or order, most of which ensure that EBPs are successfully completed and benefit the environment. For instance, should the actual costs of an EBP exceed the estimate, the model language requires the violator to make the necessary payments to ensure completion. Violators are also required to certify the veracity of some of the factual predicates for the EBP approval, such as the facts that the violator did not plan to and is not otherwise required to perform the project.

#### Calculation of the Final Penalty

DEC “may consider the implementation of an approved EBP as a mitigating factor during the calculation of the monetary penalty in an enforcement action,” while retaining discretion to disapprove even those EBP proposals that meet all the terms and conditions of the *EBP Policy*.<sup>808</sup>

To calculate the penalty, DEC will:

1. Calculate the economic benefit and gravity components of the penalty using the Department’s penalty policies;
2. Determine the cost of the EBP, or determine the fixed amount of money to be deposited into an EPB escrow account;
3. Determine a suitable percentage of the EBP cost to reduce the payable penalty from Step 1: no more than 50% for private businesses, and 100% for government agencies, with smaller percentages in cases of violator’s history of non-compliance or egregious conduct; and
4. Deduct the mitigation amount from Step 3 from the payable penalty from Step 1, with the proviso that 20% of the penalty as calculated in Step 1 must be paid as a cash penalty.<sup>809</sup>

Violators must also agree not to claim any tax benefits for expenditures associated with the EBP within the consent order or decree.<sup>810</sup>

#### Escrow Accounts

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<sup>807</sup> *Id.* at II.C.6.

<sup>808</sup> *Id.* at II.B.

<sup>809</sup> *Id.* at II.G.

<sup>810</sup> *Id.* at III.C.2.

DEC has created the possibility of “unspecified future projects” for circumstances where violators may not have a specific EBP in mind at the time of the settlement negotiations. Violators are then required to deposit a fixed amount of funds into a distinct escrow account, administered by the violator or by independent escrow agents.<sup>811</sup> The escrow accounts may also be used to fund projects specified in the consent decree, but in both cases, any leftover funds together with accumulated interest convert to penalties upon the project’s completion, and are forfeited to DEC. While DEC prefers “specified” projects, the mechanism of escrow accounts for “unspecified future projects” enables violators to settle pending enforcement actions expeditiously, decoupling the often time-consuming process of firming up an acceptable EBP from the settlement process, and taking the outstanding liability off the corporate books. The model consent decree provisions also specify that there be a specific date by which all escrow funds shall be expended or forfeited to DEC. The model language also binds the violator to the terms of the *EBP Policy*, including the nexus requirement, so that the future projects remain governed by its principles.

The escrow accounts require quarterly reports to DEC itemizing and explaining disbursements from the accounts.<sup>812</sup>

#### Other Research

Research found no cases or administrative decisions on SEPs or EBPs in New York.

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<sup>811</sup> *Id.* at II.F.

<sup>812</sup> *Id.*

## North Carolina

The North Carolina Department of Environment and Natural Resources (“DENR”) has discontinued its policy of allowing SEPs as part of settlement agreements, in response to decisions of the North Carolina courts in *Craven County Board of Education v. Boyles* and *North Carolina Schools Boards Assn. v. Moore*.<sup>813</sup> In *Craven County*, the North Carolina Supreme Court held that the North Carolina constitution prohibited a payment from an environmental violator to DENR within a settlement agreement. Despite the fact that payment was not characterized as a fine or penalty, the nature of the payment was still punitive because the payment fell under the requirement that the “proceeds of civil penalties” be directed to a state trust fund for education.<sup>814</sup> Subsequently, the *Moore* court concluded that payments by an environmental violator to support a SEP as part of a settlement agreement fall within the same legal framework, and must be paid to the Civil Penalty and Forfeiture Fund.

For North Carolina courts, the critical point is not the form of the settlement agreement, but rather the nature of the underlying violation at law: “it is neither 'the label attached to the money' nor 'the [collection] method employed,' but 'the nature of the offense committed' that determines whether the payment constitutes a penalty.”<sup>815</sup> Specifically, the environmental statutes of North Carolina are considered punitive, rather than remedial, in nature, and any payments accruing from the execution of those laws may not be diverted from the Civil Penalty and Forfeiture Fund.<sup>816</sup>

## North Dakota

The North Dakota Department of Environmental Services (“NDES”) follows informal SEP principles to implement environmentally beneficial projects as an enforcement tool. Although each division oversees and monitors its own compliance, including SEPs, NDES

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<sup>813</sup> Electronic mail from Helen Cotton, Technical Resource Unit Supervisor, North Carolina Dept. of Environment and Natural Resources, Division of Waste Management (Aug. 9, 2006) (on file with authors); *Craven County Bd. of Edu. v. Boyles*, 343 N.C. 87, 468 S.E.2d 50 (1996); *North Carolina Schools Boards Assn. v. Moore*, 160 N.C. App. 253, 585 S.E.2d 418 (N.C. Ct. App., 2003) (a \$50,125 SEP paid to Lenoir Community College by the City of Kinston in 1998 was subject to the state constitution provision requiring penalties to be used for the maintenance of free public schools).

<sup>814</sup> N.C. GEN. STAT. § 115C-457.2 (2004); Article IX, Section 7 (requiring that civil penalties be used to finance free public education).

<sup>815</sup> *Craven County*, 343 N.C. at 92, 468 S.E.2d at 53 (citation omitted).

<sup>816</sup> The stance of the North Carolina courts is not unfamiliar to the reader of the early 1990s GAO opinions on the EPA’s initial articulations of SEP policy (see Chapter II “Federal Law Affecting SEPs”), and the emphasis upon the accrual of penalties as triggering the requirement that proceeds of enforcement actions be remitted to the federal Treasury. This distinction between punitive and remedial recurs in a recent Internal Revenue Service Technical Assistance Memorandum, holding that a state SEP could not be added to the basis of an investment, as it was comparable to a penalty and hence not deductible under § 162(f) of the Internal Revenue Code. “Certain Beneficial Environmental Project Costs Not Includable as Basis of Assets, Property,” *supra* note 181.

uses the federal SEP guidelines for guidance.<sup>817</sup> For example, the Air Quality Division does not have written principles and follows the EPA's *Final SEP Policy*.<sup>818</sup>

In general, NDES will allow SEPs to mitigate up to 50% of the assessed penalty. The SEP should also benefit the persons or community most impacted by the environmental violation.<sup>819</sup>

### Other Research

There are no cases or administrative decisions on SEPs in North Dakota.

## **Ohio**

The Ohio Environmental Protection Agency ("Ohio EPA") has six divisions that conduct enforcement activities.<sup>820</sup> The divisions "generally operate independently of each other in enforcement proceedings."<sup>821</sup> Of these divisions, the divisions of Air Pollution Control ("DAPC"), Drinking and Ground Waters, Hazardous Waste Management ("DHW"), Solid and Infectious Waste Management ("DSIWM"), and Surface Water ("DSW") incorporate SEPs in their enforcement policies. Because no agency-wide SEP policy exists, each division determines its own SEP guidelines. The Division of Emergency and Remedial Response does not use SEPs in its enforcement actions.

DDGW and DSW follow the U.S. EPA's *Final SEP Policy*. DSIWM does not follow a formal SEP policy, but considers projects that are beneficial to the solid waste program and its goals. DAPC and DHW administer SEPs under an internal policy similar to the EPA's.

Currently, the Agency's various Enforcement Coordinators are working on creating a set of SEP guidelines that will apply to all Ohio EPA programs. They hope to have SEP guidelines established by the end of 2006.<sup>822</sup>

### Statute

Ohio EPA has developed by statute "a specific SEP project designed to provide SEP money to school districts to retrofit diesel buses to control particulate emissions." Since 2005,

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<sup>817</sup> Telephone interview with Lyle Witham, Assistant Attorney General assigned to the North Dakota Dept. of Environmental Services (Aug. 17, 2006).

<sup>818</sup> Electronic mail from Chuck McDonald, Chief of Compliance, North Dakota Dept. of Environmental Services, Air Quality Division (April 2, 2004) (on file with authors).

<sup>819</sup> *Id.*

<sup>820</sup> Office of Pollution Prevention, Ohio Environmental Protection Agency, *Pollution Prevention in Ohio Environmental Enforcement Settlements – Analysis and Update*, at 7-8 (Sept. 1995) (on file with authors).

<sup>821</sup> *Id.* at 8.

<sup>822</sup> Electronic mail from Bill Fischbein, Ohio Environmental Protection Agency (Aug. 9, 2006) (on file with authors).

20% of all programs penalties have generally gone into this account.”<sup>823</sup> The first grant awards were made to 9 school districts and totaled \$424,157.78.<sup>824</sup>

#### Calculation of the Final Penalty

DHWM calculates the penalty settlement according to the following strictures. The SEP cost can only reduce the “gravity” portion of the calculated penalty without the SEP. The amount that can be mitigated depends on the type of project performed. At a maximum, pollution prevention assessments projects can mitigate the gravity portion of a penalty by 15%. Pollution prevention projects or third-party projects can mitigate the gravity portion by 25%, at a maximum. The economic benefit portion of the calculated penalty without the SEP cannot be mitigated.<sup>825</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in Ohio.

### **Oklahoma**

Since 1995, the Oklahoma Department of Environmental Quality (“ODEQ”) has utilized SEPs as an enforcement tool.<sup>826</sup> ODEQ uses the federal guidelines as a model for its own policy because it has a partnership with the EPA and agrees with the precepts of the EPA’s *Final SEP Policy*.<sup>827</sup>

The approval of SEPs is within the discretion of ODEQ. The mitigation ceiling (the maximum amount of the assessed penalty that may be mitigated) is generally set at 75%. In addition, ODEQ may deny repeat offenders from performing a SEP or reduce mitigation percentage based on prior conduct.<sup>828</sup>

#### Definition of SEPs

A SEP is an environmentally beneficial project that a violator agrees to undertake in a settlement agreement, but which the violator is not otherwise legally required to perform.<sup>829</sup>

#### Categories of SEPs

ODEQ uses the eight federal SEP categories:<sup>830</sup>

##### 1. *Pollution Prevention and Reduction;*

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<sup>823</sup> *Id.*; OHIO REV. CODE §3704.114.

<sup>824</sup> Electronic mail from Bill Fischbein, *supra* note 822.

<sup>825</sup> Ohio Environmental Protection Agency, *Department of Hazardous Waste Management Enforcement Procedures Manual* (May 7, 2004) (on file with authors).

<sup>826</sup> Electronic mail from Kendal Stegmann, Supervising Attorney, Air Quality Division, Dept. of Environmental Quality (Aug. 7, 2006).

<sup>827</sup> *Id.*

<sup>828</sup> Oklahoma Dept. of Environmental Quality, *Administrative Procedures Manual, Supplemental Environmental Projects*, at 1 (2003) (on file with authors).

<sup>829</sup> *Id.*

<sup>830</sup> *Id.* at 1-3.

2. *Environmental Restoration and Protection*;
3. *Assessments and Audits*;
4. *Environmental Compliance Promotion*;
5. *Public Health*;
6. *Emergency Planning and Preparedness* projects; and,
7. Projects which satisfy the catch-all, *Other* category.<sup>831</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in Oklahoma.

### **Oregon**

DEQ has the general authority to remit or mitigate civil enforcement penalties “upon such terms and conditions” as considered “proper and consistent with the public health and safety.”<sup>832</sup> In June of 2005, DEQ reissued its guidelines for the use of SEPs in settlements.<sup>833</sup> The DEQ policy has similar legal guidelines as those in the EPA *Final SEP Policy*, but DEQ has a “soft” nexus requirement. Additionally, DEQ prefers SEPs for initially assessed penalties greater than \$2,000.

#### Legal Principles

Staff are directed to accept SEPs only where the proposed SEP:

1. Will not mitigate a violation that is willful, flagrant or done with criminal intent;
2. Is not an activity already required by law or one that will become required by law in the future;
3. Primarily benefits the public health or the environment in Oregon;
4. Is not funded by government contracts, loans or grants;
5. Does not result in DEQ’s controlling the funds, or implementing the SEP, nor can the SEP fulfill statutory obligations of DEQ; and
6. Does not create significant economic advantage for the violator, although projects with incidental advantages are permissible but will receive less favorable mitigation.

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<sup>831</sup> *Id.*

<sup>832</sup> OR. REV. STAT. §468.130(3)(West 2004); *see also* Oregon Adm. Rule (OAR) 340-012-0047(e)(2004)(in determining whether a penalty should be mitigated, the Director may take into account whether the violator is willing to employ extraordinary measures to maintain compliance and whether the settlement protects the public health and environment).

<sup>833</sup> Oregon Dept. of Environmental Quality, *Internal Management Directive on Supplemental Environmental Projects*, at 1 (June. 2, 2005), *available at* <http://www.deq.state.or.us/programs/enforcement/guidance/div12/DirectiveSEP6205.pdf> (last visited Aug. 17, 2006).

Further, DEQ prefers SEPs when:

1. The violator is not a chronic violator, and when the violator self-reports and expeditiously addresses the violation;<sup>834</sup>
2. The SEP relates to the same environmental program and is implemented in “the same geographic area as the violation;<sup>835</sup>
3. The SEP has a “measurable environmental outcome”; and
4. The SEP proposal does not burden DEQ’s resources. The SEP proposal should be submitted in a timely fashion and meet all procedural requirements and not require significant amounts of staff time to review or monitor the SEP.<sup>836</sup>

#### Categories of SEPs

DEQ prefers that SEPs fall into the following:

1. *Pollution Prevention/Reduction*;
2. *Public Health Protection* (e.g., medical screenings);
3. *Environmental Restoration and Protection*;
4. *Emergency Planning and Preparedness*;
5. *Assessments and Audits*;
6. *Environmental Compliance Promotion* (i.e., educating the regulated industry about compliance issues); and,
7. *Other Projects*.

DEQ expressly references EPA’s definitions of the categories.<sup>837</sup>

#### Calculation of the Final Penalty

DEQ’s penalty calculation method has several noteworthy features: for one, DEQ computes the SEP’s “qualifying costs,” or the costs of implementing the SEP less the costs of preparing the SEP proposal, employee time spent on the SEP, or incidental entertainment/refreshment costs. In contrast, nonprofits may include the cost of employee time, however.<sup>838</sup> Moreover, DEQ may reduce the value of the SEP by the amount of economic benefit conferred to the violator.

Most significantly, DEQ rewards some categories of SEPs with higher mitigation ratios, permitting a dollar-for-dollar offset for pollution prevention and reduction, as well as public health protection.<sup>839</sup> Environmental compliance brochures are at the other end of the

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<sup>834</sup> *Id.* at 2

<sup>835</sup> *Id.*

<sup>836</sup> *Id.* at 3.

<sup>837</sup> *Id.* at 2-3.

<sup>838</sup> *Id.* at 3.

<sup>839</sup> *Id.*

scale, with an offset of only three dollars for every four dollars of qualifying costs. Innovative projects, or those implicating environmental justice or community input may receive a higher offset ratio, while SEPs necessitating the expenditure of DEQ resources may receive a lower ratio.<sup>840</sup> The calculated offset value is subtracted from the initial calculated penalty, with a minimum cash penalty of 20%, generally.

#### Process and Oversight

DEQ requires violators to submit SEP proposals along with a summary of expected costs, a schedule for completion, and significantly, a description of expected benefits with proposed metrics for evaluating the success of the SEP. Upon completion, the violator must submit a final report, laying out the costs with receipts, an explanation of measurable results and certification of completion. Failure to complete a SEP may result in the initial unmitigated penalty being imposed, plus statutory interest.

The violator must agree not to deduct SEP costs from its income or use the SEP costs as part of a tax credit application, and must state that the SEP was performed as a part of a settlement agreement when publicizing the SEP's results.<sup>841</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in Oregon.

### **Pennsylvania**

On September 18, 1999, the Pennsylvania Department of Environmental Protection ("DEP") issued a revision of its 1997 SEP principles. DEP refers to supplemental environmental projects as "community environmental projects" ("CEPs").

Under various state environmental statutes, DEP has the general authority to settle civil enforcement actions and to collect civil penalties.<sup>842</sup> The payment of civil penalties usually goes into a specific fund, such as the Clean Water Fund. DEP then uses these funds for various purposes, including the funding of projects that benefit the public health or the environment. In some cases, having a violator instead of DEP fund or perform those projects accomplishes the task with greater efficiency and better funding.<sup>843</sup>

DEP, like U.S. EPA, allows third parties to implement CEPs. DEP's principles differ from EPA's, in that DEP allows a looser nexus, potentially approving CEPs with statewide benefits, rather than more geographically constrained effects.

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<sup>840</sup> *Id.* at 4.

<sup>841</sup> *Id.* at 5.

<sup>842</sup> *See, e.g.*, the Air Pollution Control Act, 35 P.S. §§4001, *et seq.* (West 2003) and the Hazardous Sites Cleanup Act, 35 §§ 6020.101, *et seq.* (West 2003); Interview with Julia Anastasio, Executive Policy Specialist, Dept. of Environmental Protection (April 2, 2004); Pennsylvania Dept. of Environmental Protection, *Policy for the Acceptance of Community Environmental Projects in Conjunction with Assessment of Civil Penalty*, at 1 (Sept. 18, 1999)(on file with authors).

<sup>843</sup> *Id.* at 2.

### Legal Principles

1. The project must primarily benefit the public health or environment, and cannot be required by law.
2. Preference is given to projects that create a permanent benefit rather than a temporary one.
3. A geographic nexus between the project and the violation should exist, unless the project has a regional or statewide benefit. A media nexus should also exist: “projects should... benefit the environmental medium (air, water, or land) related to the violation.”<sup>844</sup> DEP cannot manage CEP funds, but will maintain an oversight role or arrange for a third-party to oversee the CEP.
4. Violators are ineligible for a CEP if: the violation was committed intentionally, willfully, or with gross negligence; the violation caused severe harm to the environment or public health; or the violator is a repeat offender or has a poor compliance history.
5. The violator must make it clear in any publicity that the CEP has been undertaken as part of an enforcement action.
6. The violator cannot receive a tax benefit from performing the CEP, and must agree to this restriction in the settlement agreement.<sup>845</sup>
7. Factors that might make a project inappropriate for a CEP: projects with long implementation schedules of a year or more that require continued DEP oversight, projects that require significant continuing DEP review and approval or oversight, overly complex or time-consuming projects, and projects that are difficult to value.<sup>846</sup>

### Categories of CEPs

Pennsylvania’s policy does not contain CEP categories. Instead, it gives examples of acceptable CEPs, such as the remediation of polluted natural resources, the purchase or donation of land for a public environmental purpose, public health projects, environmental compliance education projects, projects that promote sustainable development, pollution prevention projects, and funding public research by academic, governmental or non-profit organizations.<sup>847</sup>

Unacceptable CEPs are contributions to a non-environmental charity projects unrelated to public health or the environment, contributions to an environmental organization for general purposes instead of a specified project, and general educational or

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<sup>844</sup> *Id.* at 3.

<sup>845</sup> *Id.* at 4.

<sup>846</sup> *Id.* at 5.

<sup>847</sup> *Id.* at 4.

public environment awareness projects, unless they are an integral part of a specific project otherwise acceptable under the Pennsylvania policy.<sup>848</sup>

#### Calculation of the Final Penalty

At a minimum, the cash component of the settlement with the CEP should recover the economic benefit of noncompliance. When the economic benefit cannot be determined, the value of the CEP cannot mitigate the penalty by more than 75%.<sup>849</sup> However, government agencies or non-profit organizations can mitigate the economic benefit of their noncompliance or mitigate their penalty by more than 75%.<sup>850</sup>

In determining the mitigation amount, DEP will consider, on a case-by-case basis, all relevant factors, including: the total calculated penalty without the CEP, what the whole penalty amount could be used for, the type of violation, the nature of the CEP proposed, and DEP's confidence in the costs attributed to the CEP.<sup>851</sup> Generally, the mitigation ratio is 1:1, up to the mitigation percentage of 75%. In cases where the cost of the CEP is uncertain, the violator may receive less than a 1:1 credit for the CEP.<sup>852</sup>

#### Other Research

There are no cases or administrative decisions on CEPs in Pennsylvania.

### **Rhode Island**

The Rhode Island Department of Environmental Management ("DEM") has issued a policy that allows SEPs to be part of the settlement of an administrative enforcement case. DEM has the general discretionary authority to settle enforcement cases under Rhode Island General Law § 42-17.7-2. The policy loosely follows the EPA *Final SEP Policy*, but allows third party oversight of projects and adds an *Outreach and Education* category.

#### Legal Principles

1. DEM requires nexus, which "exists if the project 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."<sup>853</sup>
2. The SEP cannot be inconsistent with any provision of law.
3. The SEP must be financially independent from DEM or any state agency; no state agency can manage or control SEP funds.<sup>854</sup> However, like the EPA principles,

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<sup>848</sup> *Id.* at 5.

<sup>849</sup> *Id.*

<sup>850</sup> *Id.* at 6.

<sup>851</sup> *Id.* at 5.

<sup>852</sup> *Id.* at 6.

<sup>853</sup> Rhode Island Dept. of Environmental Management, *Policy on Supplemental Environmental Projects*, at 2, available at <http://www.dem.ri.gov/programs/benviron/compinsp/pdf/seppolcy.pdf> (last visited Aug. 19, 2006).

<sup>854</sup> *Id.*

DEM can “provide oversight to ensure that a project is implemented pursuant to the provisions of the settlement.”<sup>855</sup> A SEP can also be overseen by an independent third-party, but the violator must provide for third-party oversight costs.<sup>856</sup>

4. The scope of the project is established in the signed settlement agreement, and must be a new initiative, not something that DEM is required to do.
5. The SEP must primarily benefit the public health or the environment.<sup>857</sup>

#### Categories of SEPs

The DEM lists the following as acceptable SEP categories:

1. *Public Health*;
2. *Pollution Prevention*;
3. *Pollution Reduction*;
4. *Environmental Restoration and Protection*;
5. *Assessments and Audits*;
6. *Environmental Compliance Promotion*;
7. *Emergency Planning and Preparedness*; and,
8. *Outreach and Education*.<sup>858</sup>

Rhode Island shares the same categories as the EPA with the exception of EPA’s *Other* category and the addition of an *Outreach and Education* category, which the EPA lacks.

Unacceptable SEPs are general educational or public environmental awareness projects unrelated to the regulations violated, contributions to environmental research at an institute of higher learning, a project that is unrelated to public health or environmental protection, projects that were already planned by the violator or are already required by law, projects that will include public funding, projects that are “likely to cause additional damage to the environment or public health if done poorly or if left uncompleted at any time during implementation,” projects that DEM had no opportunity to help plan before implementation, and site assessments for properties where the violator is a responsible party.<sup>859</sup>

#### Calculation of the Final Penalty

To maintain a deterrent effect, the violator must always pay a cash penalty. At a minimum, the monetary penalty must recover the economic benefit of the violation, the costs incurred by DEM for the investigation and resolution of the violation, and “some negotiated

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<sup>855</sup> *Id.*

<sup>856</sup> *Id.* at 9.

<sup>857</sup> *Id.* at 2.

<sup>858</sup> *Id.* at 3-7.

<sup>859</sup> *Id.* at 7.

portion of the gravity component of the penalty based upon the impacts of the violation(s) and the scope of the SEP.”<sup>860</sup>

If the violator receives any tax benefits from performing a SEP, DEM may reduce the value of the SEP by the tax benefit amount.

#### Other Research

There are no cases or administrative decisions on SEPs in Rhode Island.

### **South Carolina**

The South Carolina Department of Health and Environmental Control (“DHEC”) does not permit SEPs due to concerns that violators will significantly benefit from performing SEPs. Instead, DHEC requires violators to pay the penalty amount and restore the area that suffered from environmental damage under a court order or consent decree.<sup>861</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in South Carolina.

### **South Dakota**

The South Dakota Department of Environmental and Natural Resources (“DENR”) does not have a formal SEP Policy, although DENR allows SEPs informally.<sup>862</sup> DENR’s Penalty Assessment Guidelines set forth criteria for reducing environmental penalties.<sup>863</sup> Mitigating factors include “any off-site mitigation projects which are environmentally sound and have been agreed upon by the Department and the violator.”<sup>864</sup> This broad authority allows DENR to mitigate penalties in exchange for violators’ implementation of environmentally beneficial projects. However, DENR has not implemented formal principles on the process for negotiating and determining “off-site mitigation projects.”

In informally allowing SEPs, South Dakota follows the EPA *Final SEP Policy*.<sup>865</sup> One official at DENR noted that the EPA’s nexus requirement was too restrictive in some cases.<sup>866</sup> As South Dakota law does not have an analog to the federal Miscellaneous Receipts Act,<sup>867</sup> so DENR is not bound, as a legal matter, to require a nexus between a project and a violation.

#### Other Research

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<sup>860</sup> *Id.* at 8.

<sup>861</sup> Electronic mail from Michael Rowe, DHEC Director of Planning and Control, South Carolina Dept. of Health and Environmental Control (Aug. 8, 2006).

<sup>862</sup> South Dakota Dept. of Natural Resources, *Penalty Assessment Guidelines* (on file with authors).

<sup>863</sup> *Id.* at 6.

<sup>864</sup> *Id.* at 6.

<sup>865</sup> Telephone interview with Vonni Kallemeyn, Administrator for Waste Management Program, Dept. of Environmental and Natural Resources (March 26, 2004).

<sup>866</sup> *Id.*

<sup>867</sup> 31 U.S.C. §3302(b).

There are no cases or administrative decisions on SEPs in South Dakota.

## **Tennessee**

Tennessee's Department of Environment and Conservation ("TDEC") largely follows the EPA principles on SEPs, yet allows more flexibility.

### Legal Principles

1. The SEP must improve, protect, or reduce risks to public health or the environment.
2. The SEP cannot be an activity the violator is already legally required to do, or an activity that the violator already planned to do.
3. The violator must make it clear in any publicity that the SEP has been undertaken as part of an enforcement action.<sup>868</sup>

### Categories of SEPs

TDEC allows the following types of SEPs:

1. *Pollution Prevention*;
2. *Pollution Reduction*;
3. *Restoration and Protection*; and,
4. *Environmental Compliance Promotion*.<sup>869</sup>

However, this is not an exhaustive list and TDEC retains the discretion to allow the violator to perform a project that does not fall within these categories as a SEP.<sup>870</sup> Of the given categories, Tennessee differs in its definition of *Restoration and Protection* projects, underscoring that SEPs must go beyond mere correction of the underlying violation. A *Restoration and Protection* SEP "implements remedial activity that extends beyond repairing the harm caused by the violation and actually enhances the condition of the ecosystem or the geographical area."<sup>871</sup>

### Calculation of the Final Penalty

The payment of a cash penalty is still required to maintain the deterrent value of the enforcement action and eliminate any benefits the violator might have gained from the violation. The extent to which a SEP can mitigate a penalty amount is determined on a case-by-case basis. At a maximum, the SEP cost can mitigate the calculated penalty without the SEP at a mitigation ratio of 2:1.<sup>872</sup>

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<sup>868</sup> Tennessee Dept. of Environment and Conservation, *Supplemental Environmental Projects in lieu of or in Addition to a Civil Penalty*, at 1 (April 12, 2004) (on file with authors).

<sup>869</sup> *Id.* at 2.

<sup>870</sup> *Id.*

<sup>871</sup> *Id.*

<sup>872</sup> *Id.* at 1.

## Other Research

There are no cases or administrative decisions on SEPs in Tennessee.

### **Texas**

The Texas legislature has provided express statutory authority for SEPs.<sup>873</sup> “In determining the appropriate amount of a penalty for settlement of an administrative enforcement matter,” the Texas Commission on Environmental Quality (“TCEQ”) may “consider a respondent’s willingness to contribute to supplemental environmental projects. In May 2006, TCEQ, issued a revised policy on the discretionary use of SEPs.<sup>874</sup> The policy is similar to the EPA *Final SEP Policy*, yet has significant differences. Most notably, the acceptability of cross-border projects as well as the addition of four categories making the nexus requirement more flexible.

#### Legal Principles

1. Before a SEP is approved, TCEQ will consider: the violator’s compliance history; the violator’s “good-faith participation in the settlement of the enforcement action”; and the violator’s “degree of culpability for the violations at issue.”<sup>875</sup>
2. The SEP must be environmentally beneficial, with preference given to those that produce a direct environmental benefit rather than those which only offer an indirect benefit. Indirect benefit projects include public-awareness and technical-assistance projects.<sup>876</sup>
3. The project cannot be one that the violator already planned to do or is legally required to do.<sup>877</sup>
4. However, approval remains within the discretion of TCEQ. If the project fails to meet the above requirements and benefits the violator, the project will only be approved if the environmental benefits of the project significantly outweigh the value of the project to the violator.<sup>878</sup>
5. In deciding whether to approve a SEP, TCEQ will consider the existence of a geographic or media (air, water, or waste) nexus between the violation and the proposed SEP; whether the project meets state, local and community environmental priorities; and whether the project takes place near the area where the violation occurred.<sup>879</sup>

#### Categories of SEPs

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<sup>873</sup> TEX. WATER CODE ANN. §7.067 (Vernon 2004).

<sup>874</sup> Texas Commission on Environmental Quality, Litigation Division, *Supplemental Environmental Projects (SEPs): Putting Fines to Work Closer to Home*, at 1 (May 2006), available at [http://www.tceq.state.tx.us/comm\\_exec/forms\\_pubs/pubs/gi/gi-352\\_1501164.pdf](http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-352_1501164.pdf) (last visited Aug. 10, 2006).

<sup>875</sup> *Id.* at 1.

<sup>876</sup> *Id.* at 1-2, 4.

<sup>877</sup> *Id.* at 2.

<sup>878</sup> *Id.*

<sup>879</sup> *Id.*

TCEQ focuses on SEPs that result in direct environmental benefits, and allows the following types of projects:

1. *Pollution Prevention and/or Reduction* projects;
2. *Environmental Restoration* projects that enhance the environment around the violating facility;
3. *Funding* of public works for a neighboring municipality or county that will benefit the environment in a way that is beyond ordinary compliance with the law; and,
4. Projects to clean up illegal municipal and industrial solid waste dumps.<sup>880</sup>

#### Calculation of the Final Penalty

Corporations and for-profit entities can mitigate their penalty amount by 50%. Nonprofit organizations and governmental entities can mitigate 100% of their initially assessed penalties.<sup>881</sup>

#### Third-Party Projects

A violator can also perform a SEP through a third-party, which will conduct and manage the project. The project should directly benefit the environment. Eligible third-party organizations must have Section 501(c)(3) status as a nonprofit organization or be a governmental organization; have the ability to receive, manage, and report to TCEQ on the use of SEP funds; and have a history of implementing and managing environmental enhancement projects.<sup>882</sup>

#### Transboundary SEPs

The Texas SEP policy allows for the performance of SEPs in Mexico because natural resources are shared between Texas communities and their sister cities in Mexico. The project must benefit the environment on the Texas side of the border, and cannot benefit the Mexican city at the expense of its Texas sister city. The project must also address a cross-border issue that is a problem of strong concern to Texans. The project should directly benefit the U.S.-Mexico border environment and ensure that the impact of the project will be substantial enough to benefit the Texas environment. To ensure that a transboundary project can be implemented, there must be both an existing infrastructure in place in Mexico through which the project can be performed, and channels for international communication about the project. The project goals should be capable of quick realization. The violator is responsible for the primary oversight and implementation of the project.<sup>883</sup>

#### Other Research

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<sup>880</sup> *Id.* at 7.

<sup>881</sup> Electronic mail from Sharon Blue, Texas Commission on Environmental Quality (Aug. 14, 2006) (on file with authors).

<sup>882</sup> Texas Commission on Environmental Quality, *Supplemental Environmental Projects (SEPs): Putting Fines to Work Closer to Home*, *supra* note 874, at 3-4.

<sup>883</sup> *Id.* at 3.

There are no cases or administrative decisions on SEPs in Texas. The research yielded one article that discussed the Texas Natural Resource Conservation Commission's authority to mitigate administrative penalties through SEPs.<sup>884</sup>

## Utah

Currently, the Utah Department of Environmental Quality ("UDEQ") does not have a formal department-wide SEP Policy.<sup>885</sup> Informally, UDEQ follows the EPA's SEP guidelines,<sup>886</sup> and is evaluating the need for a department-wide formal policy.<sup>887</sup>

The Utah Division of Air Quality ("UDAQ"), a division within UDEQ, adopted a formal SEP Policy in February of 2003, defining SEPs as "environmentally beneficial projects that a violator agrees to undertake as a way to offset some or all of a civil penalty."<sup>888</sup> The UDAQ Policy is similar to the EPA *Final SEP Policy*, but allows an indirect nexus between the project and the violation.<sup>889</sup> Additionally, the UDAQ Policy does not preclude the use of the EPA *Final SEP Policy*, so UDAQ can pick and choose between the policies.<sup>890</sup> The Division of Drinking Water also permits the use of SEPs in settlement of civil enforcement actions, and includes a brief discussion of SEP principles in its Administrative Penalty guidelines.<sup>891</sup>

### Legal Principles

1. A SEP will not be approved if the violator is otherwise legally required to perform the proposed activity.
2. SEPs should have a clear relationship to the violation. This relationship exists if the project reduces the overall environmental or public health impacts or risks to which the violation contributes, or is designed to reduce the likelihood of similar violations in the future. A SEP may not be directly related to the violation if the project is either:

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<sup>884</sup> Scott D. Deatherage, Caroline M. LeGette, Lisa K. Bork, "Environmental Law," 47 SMU L. Rev. 1131 (Spring 1994).

<sup>885</sup> Electronic mail from Frances Bernards, Division of Policy and Planning, Dept. of Environmental Quality (March 29, 2004) (on file with authors).

<sup>886</sup> *Id.*

<sup>887</sup> *Id.*

<sup>888</sup> Telephone Interview with Jeff Dean, Compliance Manager, Division of Air Quality (April 5, 2004); Utah Dept. of Environmental Quality, Division of Air Quality, "Utah Division of Air Quality," [http://www.airquality.utah.gov/Public-Interest/annual-report/Compliance/Inspection\\_Enforcement\\_2005.htm](http://www.airquality.utah.gov/Public-Interest/annual-report/Compliance/Inspection_Enforcement_2005.htm) (last visited Nov. 22, 2006).

<sup>889</sup> *Id.*

<sup>890</sup> *Id.*

<sup>891</sup> Utah Dept. of Environmental Quality, Division of Drinking Water, *R309-405. Compliance and Enforcement: Administrative Penalty*, at 5 (March 8, 2006), available at [http://www.drinkingwater.utah.gov/documents/rules\\_ddw\\_version/R309-405\\_3-8-06.pdf](http://www.drinkingwater.utah.gov/documents/rules_ddw_version/R309-405_3-8-06.pdf) (last visited Nov. 22, 2006). The project must have a connection to the "issues" in the violation, and must benefit drinking water, as well. Another noteworthy provision states that the "project must not generate the public perception favoring violations of the laws and rules." *Id.*

- a. A pollution prevention project that provides significant environmental benefit; or
  - b. Some other multi-media or facility-wide activity that provides widespread environmental benefit.
3. A project cannot be inconsistent with any underlying statute and must advance at least one of the declared objectives of state or federal regulations.
  4. Projects started before UDAQ identifies a violation are not eligible as SEPs, although they may mitigate the penalty in other ways.
  5. The division may neither play a role in managing or controlling funds to be set aside for performance of SEPs, nor retain authority to manage or administer the SEP.<sup>892</sup>

#### Categories of SEPs

UDAQ allows similar categories of SEPs as those in the EPA Policy,<sup>893</sup> though UDAQ does not include an *Environmental Compliance Promotion* category or an *Emergency Planning and Preparedness* category in its policy. UDAQ's policy does include an *Environmental Awareness* category for projects such as publications, broadcasts, or seminars that underscore the importance of complying with environmental laws.<sup>894</sup> This category is similar to EPA's *Environmental Compliance Promotion* category. UDAQ also allows SEPs for research if the study investigates innovative pollution prevention or reduction solutions that have direct applicability to the violation.<sup>895</sup> The choice of the project is usually left to the violator.<sup>896</sup>

#### Calculation of the Final Penalty

The UDAQ Policy states that the first step in determining the penalty is calculation of the minimum cash component of the assessed penalty. The minimum cash component must equal or exceed 100% of the economic benefit component plus 20% of the gravity component or 25% of the gravity component where there is no economic benefit.<sup>897</sup>

The second step is to determine the mitigation ratio, which cannot be less than 1.5:1 (e.g., a violator must spend \$150,000 on a SEP to receive \$100,000 in penalty mitigation). This ratio recognizes possible tax benefits and public relations benefits associated with SEPs. The ratio may be lower than 1.5:1, and at times as low as 1:1, when a violator proves that there are no tax or public relations benefits associated with the project.<sup>898</sup> Other factors to be considered in determining the penalty offset include: benefits to the public or the environment at large; innovative technologies used; how well a SEP addresses environmental

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<sup>892</sup> Utah Dept. of Environmental Quality, Division of Air Quality, *Supplemental Environmental Projects Policy*, at 1 (Feb. 2003) (on file with authors).

<sup>893</sup> *Id.* at 2-5.

<sup>894</sup> *Id.*

<sup>895</sup> *Id.* at 5.

<sup>896</sup> Interview with Jeff Dean, *supra* note 888.

<sup>897</sup> Utah Division of Air Quality, *Supplemental Environmental Projects Policy*, *supra* note 892, at 7.

<sup>898</sup> *Id.*

justice; whether the SEP impacts more than one medium; how well a SEP develops and implements pollution prevention; and the extent to which community input was considered in performing a SEP.<sup>899</sup> Projects that perform exceptionally well in these categories will receive the maximum offset.

The UDAQ Policy seems particularly concerned that the violator does not receive an economic benefit as a result of the SEP. The policy indicates that SEPs are not intended to reward the violator for undertaking activities that are in its economic self-interest.<sup>900</sup> The cash component calculation also addresses this concern as it reduces the amount of penalty mitigation when a violator receives an economic benefit for implementing a SEP. The policy makes an exception for small businesses and nonprofit entities, allowing 100% of the gravity component to be offset by a SEP.<sup>901</sup>

#### Comparison with U.S. EPA Principles

UDAQ's policy substantially tracks EPA's guidelines with respect to drafting enforceable SEPs and stipulated penalties for failure of a SEP, although UDAQ retains more discretion in determining the amount of the stipulated penalties. UDAQ does not include principles on community input, although such input is considered as a mitigating factor in the determination of the cash component of a violation.<sup>902</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in Utah.

### **Vermont**

On August 1, 1997, the Enforcement Division of the Vermont Agency of Natural Resources ("ANR") issued a memorandum that revised its previous SEP principles. The Division is statutorily authorized to implement SEPs.<sup>903</sup> In addition, the Division uses the EPA *Final SEP Policy* for guidance but does not strictly adhere to its terms. Currently, ANR is updating its SEP policy. The new policy will greatly expand Vermont's current SEP policy on a number of topics.<sup>904</sup>

#### Legal Principles

1. Vermont requires a nexus between the violation and the SEP.<sup>905</sup>
2. The SEP must be clearly detailed in a proposal submitted by the SEP recipient.<sup>906</sup>
3. The Division will not manage SEP funds or participate in the administration of the SEP.

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<sup>899</sup> *Id.*

<sup>900</sup> *Id.*

<sup>901</sup> *Id.*

<sup>902</sup> *Id.*

<sup>903</sup> 10 V.S.A. § 8007(b)(2).

<sup>904</sup> Electronic mail from Sal Spinosa, Vermont Agency of Natural Resources (Aug. 18, 2006) (on file with authors).

<sup>905</sup> Vermont Agency of Natural Resources, *SEP Memorandum*, at 2 (Aug. 1, 1997) (on file with authors).

<sup>906</sup> *Id.*

4. The SEP cannot be an activity that the violator is already required by law to perform.<sup>907</sup>

#### Categories of SEPs

Vermont does not have a list of categories for SEPs. It uses the EPA *Final SEP Policy* for guidance “when necessary,” but does not strictly adhere to it. In contrast to the EPA guidelines, Vermont does not permit *Pollution Prevention* SEPs.<sup>908</sup> “Clear and finite educational or research projects, including those which involve institutions of higher learning, are appropriate as SEPs. Contributions toward vaguely defined education or research projects, or their related budgets, remain unacceptable.”<sup>909</sup>

#### Calculation of the Final Penalty

ANR’s policy memorandum does not specify its mitigation formula, but ANR has an informal, unwritten policy for civil penalty mitigation by a SEP. Generally, Vermont mitigates penalties at a ratio of 1:1.<sup>910</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in Vermont.

### **Virginia**

Virginia’s Department of Environmental Quality (“DEQ”) follows a comprehensive SEP statute that generally follows the EPA’s guidelines.<sup>911</sup> A SEP is “an environmentally beneficial project undertaken as partial settlement of a civil enforcement action and not otherwise required by law.”<sup>912</sup> DEQ is instructed to consider, among other things, “the appropriateness and value” of the SEP.<sup>913</sup> DEQ updated its SEP Guidance in September 2006.<sup>914</sup>

#### Legal Principles

1. Virginia requires a “reasonable geographic nexus” between the SEP and the violation.<sup>915</sup> A reasonable geographic nexus exists if the project benefits the “general area” in which the violation occurred. This “general area” can consist of the immediate geographic area, the same river basin, the same air quality control region, the same planning district, or the same ecosystem, as long as the area is

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<sup>907</sup> *Id.*

<sup>908</sup> *Id.*

<sup>909</sup> *Id.*

<sup>910</sup> Electronic mail from Catherine Gjessing, Environmental Enforcement attorney, Vermont Agency of Natural Resources (Oct. 12, 2004)(on file with authors).

<sup>911</sup> VA. CODE ANN. §10.1-1186.2 (Michie 2006).

<sup>912</sup> VA. CODE ANN. §10.1-1186.2 (A).

<sup>913</sup> VA. CODE ANN. §10.1-1186.2 (C).

<sup>914</sup> Virginia Dept. of Environmental Quality, *Enforcement Guidance Memorandum No. 3-2006* (September 19, 2006), *available at* [http://www.deq.virginia.gov/enforcement/documents/Enf%20Guidance%203006%20\\_cor.pdf](http://www.deq.virginia.gov/enforcement/documents/Enf%20Guidance%203006%20_cor.pdf) (last visited Nov. 24, 2006).

<sup>915</sup> VA. CODE ANN. §10.1-1186.2 (B).

- within 50 miles of the violation.<sup>916</sup> If no such geographic nexus exists, then a SEP may be approved if it advances the declared objectives of the environmental law or regulation that is the basis of the enforcement action.<sup>917</sup>
2. The SEP cannot be required by any federal, state or local law or regulation, or include actions that the violator is required to perform as injunctive relief in the instant case, as part of a settlement or order in another legal action, or by other federal, state or local requirements.<sup>918</sup>
  3. When determining the appropriateness of a SEP, the following factors must be taken into consideration: net project cost, the project's benefit to the public or the environment, the technologically innovative nature of the SEP, the impact on minority or low income populations, the project's multimedia features (*i.e.*, will the SEP positively affect more than one media), and the extent to which the project will develop and implement pollution prevention techniques and practices.<sup>919</sup>

#### Categories of SEPs

The SEP may fall under the following categories:

1. *Public Health;*
2. *Pollution Prevention;*
3. *Pollution Reduction;*
4. *Environmental Restoration and Protection;*
5. *Environmental Compliance Promotion;* and,
6. *Emergency Planning and Preparedness.*<sup>920</sup>

Virginia's categories resemble those of the EPA. Unacceptable SEPs are projects that only generally promote environmental awareness projects; contributions to environmental research that does not serve the geographic nexus area of the violation; projects that benefit a community but do not relate to environmental protection; studies that do not address environmental problems; a SEP that is "offered in satisfaction of an unsuspended or stipulated penalty"; or "anything that must otherwise be performed by the [state] or the federal government."<sup>921</sup>

#### Calculation of the Final Penalty

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<sup>916</sup> Virginia Dept. of Environmental Quality, *Enforcement Guidance Memorandum No. 3-2006*, *supra* note 914, at 5-3 to 5-4.

<sup>917</sup> VA. CODE ANN. §10.1-1186.2 (B).

<sup>918</sup> Virginia Dept. of Environmental Quality, *Enforcement Guidance Memorandum No. 3-2006*, *supra* note 914, at 5-3.

<sup>919</sup> VA. CODE ANN. §10.1-1186.2 (C).

<sup>920</sup> *Id.*

<sup>921</sup> Virginia Dept. of Environmental Quality, *Guidance Memorandum No. 3-2006*, *supra* note 904, at 5-8.

The violator must pay a portion of the initially calculated penalty, either the economic benefit of the violation plus 10% of the calculated penalty, or 25% of the calculated penalty, whichever is greater.<sup>922</sup> However, violators who are government agencies or non-profit organizations may pay less; penalty amounts are left to the discretion of DEQ.<sup>923</sup>

After this portion of the calculated penalty has been paid, the remainder of the calculated penalty amount can be offset by a SEP. A SEP cannot offset 100% of the calculated penalty. If the SEP provides the violator with any economic benefits such as tax savings or energy cost reductions, the value of the SEP will be reduced by those amounts when calculating the SEP cost.<sup>924</sup>

### Other Research

There are no cases or administrative decisions on SEPs in Virginia. The research yielded one article that discussed the history of the Virginia SEP policy.<sup>925</sup>

## **Washington**

Washington's Department of Ecology ("DOE") allows SEPs as part of its innovative settlements program, adopted in February 1995.<sup>926</sup> The DOE's policy is different from the EPA's in that DOE allows cash donations to third parties and has slightly different categories of allowable SEPs.

### Legal Principles

DOE's settlement program includes a list of principles to follow in settling SEPs. These principles are made to provide flexibility in the settlement process.<sup>927</sup>

1. A proposal must result in environmental benefits beyond correcting existing violations and providing assurances regarding future compliance.
2. There should be a relationship between the nature of the violation and the environmental benefit sought through the proposal.
3. Penalty reductions will not be given for actions or activities already required by law or for actions or activities identified by a law, regulation, or government register that are set to become enforceable at a later date.
4. A project must be in compliance with regulatory requirements.
5. A project must be measurable and place the burden of proof for completion of negotiated items on the violator.

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<sup>922</sup> *Id.* at 5-9 to 5-10.

<sup>923</sup> *Id.* at 5-10.

<sup>924</sup> *Id.*

<sup>925</sup> Kelley A. Kinney, Andrea West Wortzel, "Environmental Law," 32 U. Rich. L. Rev. 1217 (Nov. 1998).

<sup>926</sup> Electronic mail from Marc Pacifico, Independent Permit Compliance Specialist, Washington Dept. of Ecology (April 19, 2004) (on file with authors).

<sup>927</sup> Washington Dept. of Ecology, *Settlement Guidelines*, at 2 (Feb. 1995)(on file with authors).

6. Any violator can propose a project; however, approval should be reserved for violators that demonstrate a good faith effort to come into compliance.
7. Violators must have the technical and financial ability to successfully complete the actions proposed. The project must avoid rewarding noncompliance to prevent the effect of creating market advantage.
8. Donations of money or services made to local government or nonprofit agencies should not be considered a charitable contribution or business expense for purpose of computing taxes.

#### Categories of SEPs

The DOE SEP categories are comparable to EPA's categories, but omit the *Public Health* and *Emergency Planning and Preparedness* categories.<sup>928</sup> DOE's *Environmental Restoration* category allows violators to donate money to a local government or nonprofit agency to assist a specific environmental project, program, or research project, whereas the EPA's principles do not. DOE also has a *Public Awareness* category that allows informational broadcasts, publications or seminars aimed at the regulated community that underscore the importance of compliance and pollution prevention.

#### Calculation of the Final Penalty

DOE's settlement program gives little guidance on penalties. However, the program tracks the EPA requirement that the mitigation percentage should not exceed 80%.<sup>929</sup> Further, the penalty paid plus the net cost of the innovative proposal must reflect the gravity of the violation and the economic benefit of noncompliance.<sup>930</sup>

#### Accountability of SEPs

DOE's settlement program contains several procedures based on EPA's guidelines including:

1. Settlements of \$10,000 or more must be accompanied by a press release;
2. Settlements must include a project completion date;
3. The manager who signed the original penalty or order and the Assistant Attorney General assigned to the case must sign the settlement agreement.

Other procedural principles are rooted in a concern for appropriations issues and unease about diversion of state funds. Principles directed towards appropriations concerns require that the appealing party must initiate settlement negotiations and that the staff must not propose specific innovative settlement activities or projects.<sup>931</sup> The staff may only inform the appealing party about the types of activities DOE has agreed to in the past.<sup>932</sup> Further, the

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<sup>928</sup> *Id.*

<sup>929</sup> *Id.* at 1; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 16.

<sup>930</sup> Washington Dept. of Ecology, *Settlement Guidelines*, *supra* note 927, at 1.

<sup>931</sup> *Id.* at 4.

<sup>932</sup> *Id.*

staff should not suggest the contribution of money or resources to a specific nonprofit organization or local government agency during settlement negotiations.<sup>933</sup> By prohibiting staff from initiating or proposing specific projects, the department avoids the perception that DOE is indirectly appropriating funds for projects that the Legislature has not authorized.

Additionally, the procedural principles require that settlements are not signed until after an administrative appeal has been filed.<sup>934</sup> This requirement is partly directed towards a concern that state funds are being diverted: the principles explain that penalties under appeal are not considered debts to the state and hence are not being diverted from the state treasury.<sup>935</sup> This understanding of diversion of funds parallels the way that SEPs are viewed in the federal courts.<sup>936</sup>

A DOE official offered another way in which the state may have dealt with concerns about the diversion of state funds:<sup>937</sup> in Washington, penalties for environmental violations go to grants for coastal protection and not to the Treasury.<sup>938</sup> DOE appears more attuned to some of the legal concerns surrounding SEPs than other states.

### Other Research

In 1997, the Department of Ecology issued Rempel Brothers Concrete, Inc., a ready mix concrete plant, a \$9,000 penalty for exceeding permit discharges. Rempel later agreed to pay a \$1,500 cash penalty to the Department of Ecology and to perform a SEP costing \$9,200. The Washington Pollution Control Hearings Board held that the agreement and penalty were reasonable in light of the violator's extraordinary record of non-compliance.<sup>939</sup>

## **West Virginia**

The West Virginia Department of Environmental Protection ("DEP") has an informal, unwritten SEP policy, which it uses on a case-by-case basis. The extent to which a SEP will

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<sup>933</sup> *Id.*

<sup>934</sup> *Id.* at 3.

<sup>935</sup> *Id.* at 4.

<sup>936</sup> Federal courts seem to agree that SEPs may be instituted as a part of a settlement, since such settlements do not implicate civil penalties, yet the courts maintain that once liability has been established on the part of a defendant, the imposition of a civil penalty requires the defendant to direct its payment to the Treasury. See Quan Nghiem, *supra* note 159, at 573-76 (1997)(citing *Sierra Club v. Electronic Controls Design, Inc.*, 909 F.2d 1350 (9<sup>th</sup> Cir. 1990); *Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.* 498 U.S. 1109 (1991)).

The Washington settlement principles ensure that settlements are signed at a point in which they are not considered "penalties," or debts to the state, and therefore the settlements do not divert funds from the state. See *Rempel Bros. Concrete, Inc. v. Washington, Dept. of Ecology*, PCHB No. 99-063, 1999 WA ENV LEXIS 177 (WA ENV, Oct. 6, 1999)(Washington Pollution Control Board decision finding appellant in violation of discharge permit limits and finding SEP signed before the imposition of penalties reasonable).

<sup>937</sup> Electronic mail from Marc Pacifico (Aug. 10, 2006) (on file with authors).

<sup>938</sup> *Id.* This is only the case for penalties collected by the Water Quality and the Spills programs; other penalties go into the State General Fund.

<sup>939</sup> *Rempel Bros. Concrete*, 1999 WA ENV LEXIS 177, at \*7.

mitigate a penalty is also determined on a case-by-case basis. DEP follows the U.S. EPA principles for general guidance, but does not strictly adhere to them. Although SEPs have historically been performed in the same general geographic area as that of the violation, DEP does not require a nexus between the SEP and the violation. In general, DEP does not actively pursue the use of SEPs as part of a settlement agreement.<sup>940</sup>

#### Other Research

There are no cases or administrative decisions on SEPs in West Virginia.

### **Wisconsin**

Wisconsin's Department of Natural Resources ("DNR") informally follows the EPA *Final SEP Policy*, mostly because the DNR was familiar with and comfortable with the EPA guidelines. Although DNR has considered and accepted a few SEPs in the past two years, its use of SEPs remains limited.<sup>941</sup>

#### Other Research

Research yielded no cases or administrative decisions on SEPs in Wisconsin.

### **Wyoming**

The Wyoming Department of Environmental Quality ("WDEQ") has an Alternative Penalty Program that informally allows the use of SEPs.<sup>942</sup> As an alternative to paying penalties, violators may implement environmental clean-up projects or contribute money to the University of Wyoming to be used for environmental engineering interns.<sup>943</sup> In allowing environmental clean-up projects, the state generally follows the EPA guidelines.<sup>944</sup> However, WDEQ deviates from the EPA guidelines by allowing a dollar-for-dollar credit in mitigating penalties.<sup>945</sup>

#### Other Research

There are no cases or administrative decisions on either SEPs or "alternative penalty programs" in Wyoming.

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<sup>940</sup> Telephone interview with Charlie Moses, Environmental Inspector Supervisor, West Virginia Dept. of Environmental Protection (April 1, 2004).

<sup>941</sup> Electronic mail from Steven Sisbach, Environmental Enforcement Section Chief, Dept. of Natural Resources (April 6, 2004) (on file with authors).

<sup>942</sup> Electronic mail from Bob Breuer, Manager of Inspection & Compliance, Solid and Hazardous Waste (Aug. 8, 2006) (on file with authors).

<sup>943</sup> *Id.*

<sup>944</sup> *Id.*

<sup>945</sup> *Id.*

## VI. Sidebars

### Nexus in *Nollan/Dolan*

The EPA requires a nexus between a violation and a proposed SEP.<sup>946</sup> EPA argues that if there is a direct relationship between the violation, which EPA has authority over, and the SEP, then it is within EPA's discretion to take the SEP into account as a mitigating factor when determining the appropriate penalty.

Discussions regarding this essential "nexus" may trigger law school recollections of the two famous Supreme Court cases, *Nollan v. California Coastal Commission*<sup>947</sup> and *Dolan v. City of Tigard*,<sup>948</sup> finding impermissible takings under the 5<sup>th</sup> Amendment. In *Nollan*, the California Coastal Commission demanded a lateral public easement across the Nollans' beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house.<sup>949</sup> The Supreme Court held that there must be a nexus between the legitimate state interest and the permit condition.<sup>950</sup> The Court stated, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"<sup>951</sup> Since the easement would not eliminate the problems that the new construction would cause, the Court declared the permit a taking under the Fifth Amendment.<sup>952</sup>

In *Dolan*, the petitioner applied to the city of Tigard for a permit to redevelop her business.<sup>953</sup> The city granted the permit conditioned on petitioner dedicating some of her property to the city in furtherance of its land use plan.<sup>954</sup> On appeal, the Supreme Court held that there must be an essential nexus existing between the legitimate state interest and the permit condition by the city.<sup>955</sup> Further, if a nexus existed, then exactions imposed by the city must be "roughly proportionate" to the projected impact of the proposed development.<sup>956</sup> The Court stated, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."<sup>957</sup> The Supreme Court declared the city's actions a taking because the city failed to establish that its property dedication requirement was roughly proportionate to the impact of petitioner's proposed development.<sup>958</sup>

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<sup>946</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 5.

<sup>947</sup> *Nollan v. California Coastal Com.*, 483 U.S. 825 (1987).

<sup>948</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>949</sup> *Nollan*, 483 U.S. at 828.

<sup>950</sup> *Id.* at 837.

<sup>951</sup> *Id.* (quoting *J. E. D. Associates, Inc. v. Atkinson*, 121 N. H. 581, 584, 432 A. 2d 12, 14-15 (1981)).

<sup>952</sup> *Id.* at 838-839. ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.")

<sup>953</sup> *Dolan*, 512 U.S. at 379.

<sup>954</sup> *Id.* at 380.

<sup>955</sup> *Id.* at 391.

<sup>956</sup> *Id.*

<sup>957</sup> *Id.*

<sup>958</sup> *Id.*

The superficial parallels with the SEP context are evident: the *Nollan* and *Dolan* cases concerned variances from building permit requirements offered in exchange for dedication of land for the public good. In the SEP context, a violator of an environmental statute undertaking a SEP, an environmental project for the public good, is offered a reduced penalty as part of a settlement agreement. The violator urged to implement a SEP may argue that such an arrangement constitutes a *Nollan/Dolan* violation of Fourth Amendment standards. However, there are responses that undercut the validity of this claim.

Most notably, the violator could not argue a taking since the *Nollan/Dolan* doctrine applies only to land use cases: in 1999, the Supreme Court explained that, “we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions -- land-use decisions conditioning approval of development on the dedication of property to public use.”<sup>959</sup> Therefore, a violator discontent with its promise to undertake a SEP could not invoke the *Nollan/Dolan* doctrine.

Another distinction that can be made between the *Nollan/Dolan* doctrine and the SEP context has to do with voluntariness. In both *Nollan* and *Dolan*, the conditions imposed were mandatory.<sup>960</sup> In *Nollan*, the Nollans were permitted to build their beachfront home only if they granted an easement between two public beaches; in *Dolan* the petitioner could only redevelop her business if she agreed to dedicate some of her land to the city.<sup>961</sup> In contrast, SEPs, like most settlement agreements, are considered voluntary acts.<sup>962</sup> The decision to enter into the settlement accord with the regulatory agency is voluntary; the violator can always choose to pay the full, unmitigated penalty instead.

Other, more practical considerations preclude the SEP-takings argument, including the argument that nothing is being “taken” from the violator. Violators of environmental statutes normally pay penalties, but agreeing to undertake a SEP results in a lower penalty, rendering a “takings” argument problematic. It is also unlikely that a violator would seek to undo an agreement that mitigated a potential cash penalty, as the regulator could impose the full

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<sup>959</sup> *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (U.S. 1999).

While there is some disagreement about whether the *Nollan/Dolan* doctrine applies to other forms of exactions besides those that require dedication of public land, there is little doubt that the doctrine is precluded outside the domain of land use. Mark Fenster, “Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity,” 92 Cal. L. Rev. 609, 636 (2004); Sharon Browne, “Administrative Mandamus as a Prerequisite to Inverse Condemnation: ‘Healing’ California’s Confused Takings Law,” 22 Pepp. L. Rev. 99, 116-117 (1994).

<sup>960</sup> *Nollan*, 483 U.S. at 828; *Dolan* 512 U.S. at 379-380.

<sup>961</sup> *Id.*

<sup>962</sup> See, e.g., *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986), where the Supreme Court held that a court may approve a decree that provides for relief that the court could not grant after a trial on the merits, precisely because of the voluntary nature of the consent decree.

measure of penalty. In addition, the EPA's *Final SEP Policy* requires nexus and "rough proportionality," and would likely satisfy the dictates of *Nollan/Dolan*.<sup>963</sup>

Taking a broader view, however, the recurrence of the concept of "nexus" in a different legal context, signals to the states the continuation of relating SEPs to the underlying violation. As seen in the *Nollan/Dolan* context, nexus protects government action from legal challenge: it relates government acts back to legitimate government purposes. Hence, legally and as a policy matter (discussed in the Chapter 3), states benefit from including at least a mild variant of nexus in their policies.

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<sup>963</sup> U.S. EPA, *Final SEP Policy*, *supra* note 5, at 15-16. The EPA's "mitigation percentage" automatically renders the SEP's cost proportional to the potential penalty, although there is no lower bound on the minimum mitigation percentage: hence it is conceivable that a project's cost could be double or even triple the amount of potential penalty.

## The Legal Significance of Guidelines

In viewing the range of state SEP laws and policies it becomes clear that specifying SEP guidelines rather than leaving decisions to ad hoc, departmental discretion is preferred. Such ad hoc decisions, as a policy matter, can be problematic as they can lead to possible abuses of the program and diminish predictability. That said, even when guidelines are specified, the meaning of those guidelines remains unclear. What happens when a consent decree does not comply with the EPA's or a state's SEP guidelines? Must a court enforce or reject the guidelines?

A 2002 decision from the U.S. District Court expressed confusion regarding the meaning and authority of SEP guidelines. In *Atofina*, a non-party community group objected to a proposed consent decree between the EPA and the defendant chemical company after numerous violations of environmental statutes.<sup>964</sup> The community group protested the SEP portion of the consent decree, objecting that no part of the SEP would be performed in the community where the violation occurred and did not allow for community input, in contradiction of the EPA *Final SEP Policy*. While the court held that an adequate nexus between the SEP and the violation did in fact exist, it also held that the EPA did not comply with its own guidelines regarding community input.

The court questioned its role in this case, where the plaintiffs alleged that the EPA *Final SEP Policy* was not followed. The court looked to the EPA *Final SEP Policy* and noted that, "the EPA policy states that it is 'not intended for use by EPA, defendants, respondents, courts of administrative law judges at a hearing or in trial.' The decision to accept an SEP is 'purely within EPA's discretion'...The Policy 'does not create any rights, duties, or obligations, implied or otherwise, in any third parties.'"<sup>965</sup> The court found it "unclear if violations of the Policy require, or allow a court to reject a consent decree."<sup>966</sup>

Tellingly, the court referred to the community input guideline as a recommendation: "there is no evidence the EPA held a public meeting with the local community, as the policy *recommends*." (emphasis added).<sup>967</sup> In short, the court treated the community input guideline as a suggestion with little binding authority. The court went on to find that, "[e]ven if the court had the clear authority to enforce the terms of the EPA policy, it lacks the power to modify the consent decree by striking the SEP and leaving the rest of the agreement intact."<sup>968</sup> So, given the choice of rejecting or accepting the consent decree, the court entered the decree, finding the public interest served by such action.

Although this case holds that a court may enter a consent decree despite non-compliance with the EPA *Final SEP Policy* recommendations on community input, questions

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<sup>964</sup> *United States v. Atofina Chems., Inc.*, 55 ERC (BNA) 1283, 2002 U.S. Dist. LEXIS 15137, at \*1 (U.S. Dist. Aug. 5, 2002).

<sup>965</sup> *Id.* at \*17; U.S. EPA, *Final SEP Policy*, *supra* note 5, at 3.

<sup>966</sup> *Atofina*, at \*17.

<sup>967</sup> *Id.* at \*19-20.

<sup>968</sup> *Id.* at \*17.

still remain. What if a more substantial *EPA Final SEP Policy* requirement, such as the adequate nexus, were not met? Nexus, unlike the community input provision, is clearly required under the *Final SEP Policy*. Further, what happens on the state level when state SEP policies are not followed? Many state SEP policies echo U.S. EPA's language about the policies not being meant for use in legal proceedings; hence it would follow that aggrieved community groups, and others will find little legal purchase accorded by SEP policies.