



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

VIA FAX AND FIRST CLASS U.S. MAIL

November 9, 1994

Captain W.A. Waters  
U.S. Department of the Navy  
Northern Division  
Naval Facilities Engineering Command  
10 Industrial Highway  
Code 1823, Mail Stop 82  
Lester, PA 19113-2090

Terrence Grey P.E., Chief  
State of Rhode Island and Providence Plantations  
Department of Environmental Management  
Division of Site Remediation  
291 Promenade Street  
Providence, RI 02908-5767

RE: Naval Education and Training Center Newport CERCLA Federal  
Facility Agreement, dated March 23, 1992, as amended--  
Settlement Agreement regarding EPA's May 4, 1994 Assessment  
of Stipulated Penalties

Dear Captain Waters and Mr. Grey:

Attached to this letter please find a copy of the draft agreement in principle which we reached in our telephone conference on November 1, 1994 in connection with the formal dispute resolution relating to EPA's May 4, 1994 assessment of stipulated penalties against the Navy under the above-referenced Federal Facility Agreement (FFA).

In order to bring the formal dispute resolution process to closure, we as members of the Dispute Resolution Committee are required to unanimously resolve this dispute through a written decision. I believe the attached draft agreement accurately reflects our collective decision reached on November 1, 1994. Please review the draft and let me know by November 15, 1994 if you believe any changes are required. I will then circulate the agreement to you for final signature.

I would like to reaffirm the significance of the SEP to the final agreement. EPA-New England believes that these projects, if carefully crafted and implemented, can serve a particularly useful role in promoting pollution prevention and pollution reduction within the Narragansett Bay area and encouraging innovative solutions to traditionally difficult, or otherwise unaddressed, instances of environmental harm.

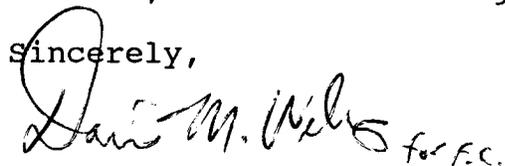


As stated during our conference call, in order to qualify as an SEP, a project must not be required by any regulatory requirements, and must comply with EPA SEP guidance documents. I am enclosing copies of the applicable guidance. I have provided in the attached draft agreement that the Navy's SEP proposals will be submitted by December 15, 1994.

In the conference call, the Navy proposed SEP projects at either Derecktor Shipyard at the Naval Education and Training Center-Newport or lead paint abatement, asbestos removal and building demolition at the Naval Construction Battalion Center-Davisville. If these projects meet the requirements of the SEP guidance, we would be happy to consider them as part of the final agreement.

I am looking forward to finalizing the attached draft agreement and continuing to focus our collective efforts on site assessment and remediation. If you have questions regarding this matter, please feel free to call me or have your staff call Andrew Miniuks, EPA Remedial Project Manager (617/573-9614).

Sincerely,



Director  
Waste Management Division

cc: Ira Leighton, EPA  
David Webster, EPA  
Mary Sanderson, EPA  
Andrew Miniuks, EPA  
Bob DiBiccaro, EPA/ORC  
Bill Frank, OFFE  
Warren Angell II, RIDEM/DSR  
Paul Kulpa, RIDEM/DSR

**DRAFT**  
**11/8/94**

### SETTLEMENT AGREEMENT

Reference is made to the following:

- Naval Education and Training Center Newport CERCLA Federal Facility Agreement, dated March 23, 1992, as amended (FFA),
- U.S. Environmental Protection Agency, Region I, (EPA) letter, dated May 4, 1994, assessing stipulated penalties against the Navy pursuant to FFA Section XXII, and
- Navy letter, dated May 5, 1994, invoking dispute resolution pursuant to FFA Section 22.2.

Pursuant to FFA Section 13.5, the undersigned, as members the Dispute Resolution Committee, hereby acknowledge and confirm that we have agreed as follows in order to resolve the dispute:

1. The Navy's final stipulated penalty assessment will be in the amount of a \$30,000 cash payment.
2. The Navy shall pay for a partnering session among the Navy, EPA and Rhode Island Department of Environmental Management (RIDEM) personnel at a time and location to be determined at a later date. The partnering session shall have a cash value of \$10,000.
3. In addition to the cash payment of the stipulated penalty, the Navy will perform a supplemental environmental project(s) with a value of no less than \$220,000. The project(s) will be for a purpose or purposes to be agreed to by the parties, and will be subject, to the extent determined by EPA, to the following EPA policies and guidance relating to supplemental environmental projects:
  - EPA Policy on the Use of Supplemental Environmental Projects in EPA Settlements, dated February 12, 1991;
  - EPA Interim Policy on the Inclusion of Pollution Prevention and Recycling Provisions in Enforcement Settlements, dated February 25, 1991; and
  - EPA Region I Guidance on Supplemental Environmental Projects, dated November 5, 1993.
4. The Navy will submit its proposed supplemental environmental project to EPA and RIDEM for approval by December 15, 1994.

5. The Navy will not use funds appropriated or allocated for the Installation Restoration Program and/or the Superfund clean-up at any Navy facility in EPA-New England as the source of funding for the stipulated penalty assessment, the partnering session, or the supplemental environmental project(s). In the event that funding is not obtained from current appropriations/allocations by December 31, 1994, the Navy shall request an appropriation from Congress for such funding as part of its FY 1996 budget. The Navy will provide EPA with documentation for the appropriation request by January 31, 1995.
6. The Navy shall propose to EPA and RIDEM, for their approval, a schedule which includes deadlines for the submission of the draft ecological risk assessments (and appropriate milestones) which are the subject of this dispute by December 15, 1994. The deadlines in the schedule approved by EPA and RIDEM will be enforceable as if they had been part of the Phase II Remedial Investigation Workplan.

\* \* \*

U.S. Environmental Protection Agency, Region I

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Frank W. Ciaviattieri  
Acting Director  
Waste Management Division

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Date

U.S. Department of the Navy

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CAPT W.A. Waters  
Commanding Officer  
Northern Division  
Naval Facilities Engineering Command

\_\_\_\_\_  
Date

Rhode Island Department of Environmental Management

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Terrence Gray, P.E. Chief  
Division of Site Remediation

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Date



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON DC 20460

FEB 25 1991

Trace 1500000002

MEMORANDUM

SUBJECT: Interim Policy on the Inclusion of Pollution Prevention and Recycling Provisions in Enforcement Settlements

FROM: James M. Strock *JMS*  
Assistant Administrator

TO: Regional Administrators  
Assistant Administrators  
General Counsel

This memorandum transmits the final interim policy on the use of pollution prevention and recycling conditions in Agency consent orders and decrees (see Attachment). It reflects your extensive comments on the draft version distributed on September 25, 1990, as well as the subsequent work of the Pollution Prevention/Settlement Policy Workgroup.

This interim policy is part of the Agency's overall strategy to make pollution prevention a major component of all Agency programs. It encourages the use of pollution prevention and recycling conditions in enforcement settlements, either as injunctive relief or as "supplemental environmental projects" incidental to the correction of the violation itself. When a pollution prevention condition is considered as a supplemental project, this interim policy should be used in conjunction with the recently-issued Policy on the Use of Supplemental Enforcement Projects in EPA Settlements (February 12, 1991).

This interim policy is effective immediately and should be used whenever a pollution prevention condition is being considered as part of a consent order or decree. Each national media compliance program may decide whether to develop its own more specific pollution prevention settlement guidance or continue to use this general guidance. The Agency plans to develop final guidance in FY 1993, after gaining further experience in negotiating pollution prevention settlement conditions.

I am confident that this interim policy will help the Agency secure the additional protection of human health and the environment which pollution prevention offers. Any questions you or your staff may have regarding its implementation should be addressed to Peter Rosenberg, the Workgroup Chairperson (Office of Enforcement, 382-7550).

Attachment

cc: Deputy Administrator  
Associate Deputy Administrator  
Deputy Regional Administrators  
Regional Counsels  
Regional Program Division Directors  
Program Compliance Directors  
Associate Enforcement Counsels  
OE Office Directors

INTERIM EPA POLICY ON THE INCLUSION OF POLLUTION PREVENTION  
AND RECYCLING PROVISIONS IN ENFORCEMENT SETTLEMENTS

I. Purpose

This document provides Agency enforcement personnel with a generic interim policy and guidelines for including pollution prevention and recycling provisions in administrative or judicial settlement agreements. It encourages pollution prevention and recycling both as a means of returning to compliance and as supplemental environmental projects by offering several incentives while preserving effective deterrence and accountability for compliance and environmental results.

II. Background

The Agency defines pollution prevention as the use of procedures, practices, or processes that reduce or eliminate the generation of pollutants and wastes at the source. Pollution prevention encompasses both the concepts of volume reduction and toxicity reduction. /1 Within the manufacturing sector, examples of pollution prevention include such activities as input substitution or modification, product reformulation, process modification, improved housekeeping, and on-site closed-loop recycling. The Agency's "hierarchy" of environmental protection practices consists of pollution prevention, followed by traditional recycling, treatment and control, respectively. /2

The Office of Enforcement's Pollution Prevention Action Plan (June 30, 1989), states that a strong enforcement program can promote pollution prevention goals by enhancing the desire of the regulated community to reduce its potential liabilities and resulting costs of resolving noncompliance. An emphasis on preventing pollution at the source can help reduce or eliminate

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1/ See the forthcoming Pollution Prevention Policy Guidance, especially pps. 3-6, for a full discussion of the considerations underlying the Agency's definition of pollution prevention. Both the Guidance and the Pollution Prevention Act of 1990 (P.L. 101 - 508) exclude "end of pipe" recycling from the formal definition of pollution prevention.

2/ Although non-closed loop (i.e., "end-of-pipe") recycling occupies the second tier of the "hierarchy" behind pollution prevention, it will, because of its environmental benefit, be included within the scope of this interim policy. All elements of this policy will apply to such recycling to the same extent as use and production substitution activities which constitute the formal definition of pollution prevention.

root causes of some violations and thereby increase the prospects for continuous compliance in the future. /3

In addition to this "indirect" incentive for pursuing pollution prevention, the Action Plan recognized that pollution prevention could be directly achieved by initiating enforcement actions against individual noncompliers. The Agency is constrained from requiring (i.e., imposing unilaterally) pollution prevention activities in the absence of statutory, regulatory, or permit language. Until the Agency commences an enforcement action, respondents are generally free to choose how they will comply with Federal environmental requirements. However, once a civil or administrative action has been initiated, the specific means of returning to compliance are subject to mutual agreement between the Agency and the respondent. 4/ The settlement process can be used to identify and implement pollution prevention activities consistent with the Agency's overall enforcement approach.

The Office of Enforcement chaired a workgroup, which included representation by the Program Compliance Offices and Regions III, IV, and VIII, to develop an interim policy on the use of pollution prevention conditions in enforcement settlements. In addition, OE and the Programs will receive funding from the Office of Pollution Prevention for technical support to develop and evaluate pollution prevention proposals in settlements in FY 1991-2 and to evaluate their utility for promoting long-term compliance and for permanently reducing the level of pollutants or toxic discharges into the environment.

### III. Statement of Interim Policy

It shall be a policy of the Environmental Protection Agency to favor pollution prevention and recycling as a means of achieving and maintaining statutory and regulatory compliance and of correcting outstanding violations when negotiating enforcement settlements. While the use of pollution prevention conditions is not mandatory (for either a program/Region to propose or for a defendant/respondent to accept), Agency negotiators are strongly encouraged to try to incorporate pollution prevention conditions in single and multi-media settlements when feasible. The policy is applicable to both civil and criminal enforcement settlements involving private entities, Federal facilities or municipalities.

3/ Office of Enforcement Pollution Prevention Action Plan, page 2

4/ Note that some pollution prevention-related activities, e.g., environmental auditing, can be sought as injunctive relief in appropriate circumstances. See, Final EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements (GM-52)

Among the types of situations which favor the use of pollution prevention conditions in enforcement settlements are:

- a. recurring patterns of violations which are unlikely to be corrected by additional "add on" controls or improved operations and maintenance, and elimination or substitution offers the best prospects for the permanent return to compliance;
- b. proposed solutions which do not create environmental problems in other media (i.e., have no negative cross-media impacts);
- c. effluent emissions or discharges for which technically and economically feasible pollution prevention options have been identified;
- d. violations which involve one or more pollutants listed on the target list of 17 chemicals the Agency will emphasize as part of the implementation of its Pollution Prevention Strategy (see appendix A for list of chemicals).

Pollution prevention settlement conditions can either be specific activities which correct the violation or activities which will be undertaken in addition to those necessary to correct the violation.

The interim policy should be implemented in concert with the Agency's new Pollution Prevention Guidance and Pollution Prevention Strategy, as well as Office of Enforcement policy documents, including the EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements (GM-52); A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (GM-22), and the newly issued Supplemental Environmental Projects Policy (February 12, 1991), which amends the "alternative payments" section of GM-22; the Office of Enforcement's Pollution Prevention Action Plan (6/30/89); and the Manual on Monitoring and Enforcing Administrative and Judicial Orders (2/14/90). /5

#### A. Pollution Prevention as a Means of Correcting the Violation

By definition, a use/source reduction or recycling activity which corrects the original violation will be media and facility specific. When conducting settlement negotiations, the Agency shall consider whether it is appropriate (e.g., technically and economically feasible) to correct the violation(s) through implementation of source reduction or recycling activities.

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5/ These documents are available through the Office of Enforcement General Enforcement General Policy Compendium and/or the Enforcement Docket Retrieval System (EDRS).

Examples include compliance with permit requirements by switching from a high to a lower toxic solvent which reduces excessive emissions or discharges or by recycling effluent. /6

Pollution prevention conditions may be proposed by either the Agency or the respondent. Inclusion of any condition rests upon the outcome of mutual negotiations between the two sides.

#### B. Pollution Prevention Conditions "Incidental" to the Correction of the Violation

During negotiations to resolve the violation, the Agency also may consider as settlement conditions supplemental pollution prevention projects in addition to the specific actions or injunctive relief needed to correct the violation. Potential examples include phasing out a pollutant within a specific period of time or a commitment by a facility to change production technology at more than one facility.

Pollution prevention settlement conditions which do not by themselves correct the violation will usually be negotiated as "supplemental environmental projects" and, as such, are subject to the criteria described in the recently-issued policy on the use of supplemental projects which amends part of the Agencywide Framework for Civil Penalties (GM-22) /7. The decision to consider, accept, or reject such projects rests exclusively with the Agency.

### IV. Specific Elements of the Interim Pollution Prevention Policy

#### A. Timelines for Implementing Pollution Prevention Conditions

EPA's enforcement policy calls for the "expeditious" return of the violator to compliance. /8 As a general rule,

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6/ A firm could theoretically return to compliance by reducing the scope of operations, i.e., by producing less and, therefore, reducing its discharge or emissions. Although this may return a facility to compliance, it is not "pollution prevention" within the Agency's definition nor the scope of this interim policy.

7/ The term "supplemental environmental project" replaces the term "alternative payments" used in GM-22. The Agency has recently issued a new policy on the use of these projects, Guidelines for Evaluating Supplemental Environmental Projects, which replaces the section on "alternative payments" on pps. 23-27 of GM-22. It provides detailed guidance on the "scope" of eligible supplemental projects, including ones which are related to pollution prevention. Also see Section IV B2, below.

8/ Civil Penalty Policy Framework (GM-22), page 13

there shall be no significant ("significant" to be defined by each program) extension of the "normal" time period for returning to compliance. Under no circumstances will a respondent be granted additional time to correct the violation in exchange for his conduct of a supplemental environmental project. (see IV B 2, below). For example, a facility which exceeds its effluent limit would have to return to compliance within the "normal" time period the NPDES program estimates for facilities of that size and type. This time period would not be extended if, as part of the overall settlement, the respondent also agreed to establish a sludge recycling system.

If a pollution prevention activity is presented as the means of correcting the violation, however, the Agency settlement team has some additional flexibility in negotiating an implementation schedule, given that pollution prevention alternatives sometimes add an element of complexity to a facility-specific compliance strategy, especially if it involves new or innovative technology.

The length of time which is deemed to be "expeditious" is ultimately a "best judgment" decision on the part of the EPA negotiators. It should be based upon their assessment of the ecological and public health-related risks and benefits involved in providing the additional time to return to compliance.

While Federal negotiators should consider the following factors in deciding whether to use innovative pollution prevention technology as injunctive relief at any time, they become even more relevant when deciding whether to extend the "normal" timeline for resolving a violation. If a decision is made to extend the timeline, the Federal negotiators should also establish interim milestones and controls to assure the adequate protection of public health and the environment while the pollution prevention relief is being implemented. (cf. Section C below):

#### 1. Seriousness of the Violation

Both the aggregate amount and toxicity of excess emissions or discharges affect the decision whether to extend the compliance timeline. Some violations (e.g., those which meet "imminent and substantial" endangerment definitions) must be corrected as quickly as possible, even when that involves foregoing a pollution prevention approach in favor of traditional treatment technology. Even when the violation has a much less potentially adverse impact, Federal negotiators should consider whether the risk allows a longer timeframe .

#### 2. Aggregate Gain in "Extra" Pollution Prevention

Schedules should be extended only where there is an important net permanent reduction in the overall amount or

toxicity of the pollution as a result of a pollution prevention project which requires a longer timeline to implement than would "end-of-pipe" controls. (Note: This consideration is appropriate only when a longer compliance timeline is at issue since, "all other things being equal," the Agency would prefer a pollution prevention approach to traditional treatment and/or disposal.)

### 3. Reliability/Availability of the Technology

The pollution prevention technology being used to implement the injunctive relief should (ideally) have been successfully applied or tested at other facilities. While not intended to discourage the use of innovative prevention or reduction technologies, the more "experimental" or "untried" the technology, the more rigorous Federal negotiators should be about extending the "normal" compliance timeline. The technology should also avoid the cross-transfer of pollutants.

### 4. Applicability of the Technology

The Federal negotiators should be more willing to extend the compliance timeline if the pollution prevention technology is applicable to other facilities, so that, if successful, the lessons learned can be disseminated industry-wide.

### 5. Compliance-related Considerations

The pollution prevention approach offers the best prospects for a permanent return to compliance.

## B. Penalty Assessments

### 1. General Considerations

Under EPA's general framework for assessing civil penalties (GM-22) and its program-specific applications, most formal enforcement actions are concluded with a penalty. The two elements of the penalty calculation are the gravity of the violation and the economic benefit of noncompliance. The former can be adjusted upward or downward depending several factors. The latter sets the penalty "floor." /9

The willingness of a respondent to correct the violation via a pollution prevention project can be one of the assessment factors used to adjust the "gravity" component of the penalty. The defendant/respondent's willingness to comply with permit requirements through pollution prevention activities can be seen as a "unique factor" (e.g., public policy

9/ See OE's Guidance on Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment, (GM-33)

10/ GM-22 pps. 3-4

considerations) which may warrant an adjustment of the gravity-based penalty factor consistent with program-specific penalty policies.

Calculation of the economic benefit of noncompliance may have particular consequences for the inclusion of pollution prevention conditions in settlements. For example, two of the variables used by the BEN Model to calculate the penalty are the time expected to elapse from the date of the violation until the date of compliance (i.e., the estimated future date at which the facility would be expected to return to full compliance) and the expected cost of returning to compliance. /11. This calculation could create a disincentive for a respondent to correct the violation with pollution prevention technology (i.e., the longer the facility is expected to be out of compliance and the higher the cost of returning to compliance, the larger the economic benefit of noncompliance and, ultimately, the larger the penalty).

In order to eliminate this possible disincentive, the penalty amount should be calculated using the costs and timeframes associated with both the pollution prevention approach and the conventional way of correcting the violation. The final penalty will be the smaller of the two calculations, so long as the Federal negotiators have decided to allow the "longer" timeframe for returning to compliance. However, the settlement agreement should also provide for stipulated penalties in the event the violation is not corrected or exceeds its compliance schedule.

Several other criteria currently contained in GM-22 will continue to apply to pollution prevention projects. For example, a minimum cash penalty shall always be collected (subject to program-specific guidance), regardless of the value of the project, and it generally should not be less than the economic benefit of noncompliance.

## 2. Supplemental Environmental Projects

When settling an enforcement action, the Agency also may seek additional relief in the form of activities which remediate the adverse health or environmental consequences of the original violation. The size of the final assessed penalty may reflect the commitment of the defendant/respondent to undertake these "supplemental environmental projects".

As noted previously, the Agency's recently issued Policy on the Use of Supplemental Environmental Projects, which amends and supersedes GM-22's discussion on "alternative payments," identifies pollution prevention projects as one of five general

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11/ GM-22, pps. 6-10

categories of projects eligible for consideration. /12. In order to be part of the consent order or decree, a proposed supplemental pollution prevention project must meet all of the criteria discussed in the policy, including those which relate to the "scope" of the projects, the amount of penalty reduction, and oversight requirements.

One important criterion involves the "nexus" between the violation and the supplemental project. Nexus," which is defined as "an appropriate...relationship between the nature of the violation and the environmental benefits to be derived from the type of supplemental environmental project," helps assure that the supplemental project furthers the Agency's statutory mandate to clean up the environment and deter violations of the law. /13

The policy also states that while studies are generally not eligible mitigation projects, this prohibition will be modified slightly only for pollution prevention studies. 14/ The policy specifically exempt pollution prevention projects from the "sound business practices" limitation which are in effect for the four other categories of supplemental environmental projects./15

Federal negotiators who are considering the adoption of supplemental pollution prevention projects should refer specifically to the Policy on the Use of Supplemental Environmental Projects to make sure that the proposed pollution prevention project meets all applicable criteria.

#### C. Tracking And Assessing Compliance With the Terms of the Settlement

The Agency places a premium on compliance with the terms of its settlements and several documents exist which outline procedures for enforcing final orders and decrees, which may range from modification of the order to stipulated penalties and

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12/ The five categories cover pollution prevention, pollution reduction, environmental restoration, environmental auditing, and public awareness.

13/ Policy, p. 1. The extended discussion of "nexus" and example of supplemental projects which meet the "nexus" requirement are on pps. 5 - 8.

14/ Policy, p. 9

15/ Policy, pps. 8 - 9

motions to enforce the order and contempt of Court. /16

A more difficult situation arises when the respondent -- despite his best "good faith efforts" -- fails to successfully implement a pollution prevention activity which is required to correct the violation (e.g., is the injunctive relief). Ultimately, the respondent must be responsible for full compliance. If the pollution prevention approach does not work, he will be required to return to compliance through traditional means.

In order to make sure that the violation is corrected (as well as minimize any additional liabilities which may accrue to the defendant/respondent) the consent order or decree will state that any pollution prevention project which is used to achieve compliance with a legal standard must have a "fall-back" schedule requiring the use of an proven technology agreed to by all parties to the settlement and which will be implemented, if necessary, by a time certain. The settlement agreement also should establish a systematic series of short term milestones so that preliminary "warning signs" can be triggered promptly and issues raised. If the Agency decides that the "innovative" pollution prevention approach will not succeed, the "traditional" remedy must be implemented according to the set schedule. Under these circumstances, as long as the "fall-back" (traditional) remedy is implemented on schedule, the defendant/respondent will only have to pay an additional penalty equal to the economic benefit of the further delay in compliance, offset by the actual expenditures incurred as a result of the unsuccessful effort to comply through pollution prevention. If the actual expenditures on pollution prevention equal or exceed the incremental economic benefit of noncompliance using conventional controls, there would be no additional penalty.

#### D. Delegations and Level of Concurrence

Settlement conditions which involve more than one program or Region (e.g., a multi-media or multi-facility case) usually require additional oversight, and the estimated amount of time and resources required for effective oversight is one criteria which the Agency will use to determine whether to include the project in the settlement agreement. The respondent should shoulder as much of the direct costs as feasible. (e.g., pay for

16/ The respondent's failure to carry out a pollution prevention activity which is a supplemental project shall be dealt with through procedures outlined in GM-22 and the Supplemental Environmental Projects Policy (e.g., reimposition of the full civil penalty and/or the assessment of stipulated penalties contained in the settlement once the Government determines that the conditions have not been fulfilled).

an independent auditor to monitor the status of the project and submit periodic reports, including a final one which evaluates the success or failure of the project).

Each Region should develop its own coordination procedures for negotiating and overseeing a multi-media pollution prevention condition which affects only that Region (i.e., applies only to the specific facility or other facilities within the Region).

The extent of coordination/concurrence required for a pollution prevention settlement which involves more than one Region will vary according to the nature and complexity of the proposal. The negotiation team should at a minimum notify and coordinate with other affected Regions about pollution prevention conditions which would have an impact on facilities in those Regions (e.g. an agreement for the respondent to conduct environmental audits; or an agreement for solvent substitution at other facilities not in violation).

However, the negotiation team would have to receive the concurrence of all affected Regions if the proposed pollution prevention condition involved significant oversight resources or activities (e.g., if it required major construction or process changes). For this type of situation, the settlement team must notify all affected Regions that it is considering the inclusion of such conditions as part of a proposed settlement prior to the completion of the negotiations. These Regions will then have the opportunity to comment on the substance and recommend changes to the scope of the proposal. Each entity will have to concur with the pollution prevention condition and agree to provide the necessary oversight in order for it to be included in the settlement agreement. The Programs and Regions must also agree on their respective tracking and oversight responsibilities before lodging the consent order or decree.

The Headquarters compliance programs and the Office of Enforcement will be available to help Regions coordinate this concurrence process, and to help the parties reach a consensus on oversight roles and responsibilities, where necessary. Concurrence by the Headquarters program office and the Office of Enforcement will be mandatory only where it is already required by existing delegations or for supplemental projects as described in the Supplemental Environmental Projects policy.

## V. Organizational Issues

### A. Copies of Settlements

The Regions should send copies of settlements with pollution prevention conditions to the respective national compliance officer (consent order) or Associate Enforcement Counsel (consent decree) for insertion to the Enforcement Docket Retrieval System

(EDRS). In addition, the Region should enter a brief descriptive summary of the settlement (1-2 pages) into the Pollution Prevention Information Clearinghouse (PPIC, 1-800-424-9346) enforcement settlement file which is being established. This will enable all the Programs and Regions to have "real time" information about pollution prevention settlements which have been executed, and will enable the Office of Enforcement and the programs to conduct an overall assessment of the impact of pollution prevention conditions in Agency settlements as part of the process of developing a final settlement policy in FY 1993.

#### B. Media-Specific Policies

The media programs and Regions have begun to implement their own pollution prevention strategies. Since they are still gaining experience in identifying and applying source reduction technologies to enforcement situations, and developing the technology and resources to track and evaluate these conditions, this interim policy adopts a phased approach that encourages, but does not require, them to try to incorporate pollution prevention conditions on a case-by-case basis where they enhance the prospects for long-term compliance and pollution reduction.

Each national program manager may decide whether to develop its own specific pollution prevention guidance (consistent with this interim guidance) or continue to use the general interim guidance. Program-specific guidance should discuss when to include pollution prevention conditions in settlements, and describe the categories of violations for which pollution prevention "fixes" are most encouraged and the specific types of source reduction or recycling activities considered appropriate for that program. The National Program Manager may also adopt additional reporting or concurrence requirements beyond those described in this interim policy. The Programs can develop specific policies on their own schedule, utilizing this general interim policy until they do so.

# INDUSTRIAL TOXICS PROJECT

## 17 TARGET CHEMICALS

1988 TRI Reporting Year

(in Pounds)

Chemical Name	U.S. Production 1988 (in 000 lbs)	Imports 1988 (in 000 lbs)	Number of Facilities	Release to Air	Release to Water	Deep-Well Injection	Release to Land	Transfer to POTW	Other Transfer	Annual Total Release + Transfer
BENZENE	11,630,000 <sup>a</sup>	956,800 <sup>b</sup>	453	28,117,955	46,589	636,314	221,192	1,102,265	2,972,877	33,097,192
CADMIUM & COMPOUNDS	4,189 <sup>c,1,2</sup>	5,512 <sup>c,1,2</sup>	168	119,412	4,382	2,409	541,530	20,115	1,360,967	2,048,815
CARBON TETRACHLORIDE	747,000 <sup>a</sup>	111,000 <sup>d</sup>	84	3,683,121	15,667	98,054	14,759	5,014	1,186,781	5,003,396
CHLOROFORM	523,600 <sup>a</sup>	27,000 <sup>b</sup>	166	22,974,156	1,089,285	36,002	68,483	1,226,573	1,467,914	26,862,413
CHROMIUM & COMPOUNDS	291,000 <sup>c,1,2</sup>	912,700 <sup>c,1,2</sup>	1,882	1,181,482	388,475	101,180	28,125,080	2,107,561	24,060,834	56,865,812
CYANIDE & COMPOUNDS	417,600 <sup>a,3</sup>	26,800 <sup>d,4</sup>	355	1,981,210	183,456	7,460,999	106,299	1,147,962	2,915,637	13,805,563
DICHLOROMETHANE	504,100 <sup>a</sup>	25,000 <sup>b</sup>	1,525	126,798,287	347,336	664,750	156,647	2,584,189	22,885,336	153,434,555
LEAD & COMPOUNDS	2,218,000 <sup>c,1,2</sup>	374,800 <sup>c,1,2</sup>	1,277	2,587,780	237,014	2,755	27,484,165	207,732	28,177,731	58,707,187
MERCURY & COMPOUNDS	1,026 <sup>c,1,2,5</sup>	760 <sup>c,1,2</sup>	43	25,629	1,406	27	13,779	2,136	275,224	318,201
METHYL ETHYL KETONE	482,000 <sup>a</sup>	20,000 <sup>b</sup>	2,284	127,875,717	78,503	213,982	155,049	932,567	30,002,775	159,056,663
METHYL ISOBUTYL KETONE	205,300 <sup>a</sup>	20,000 <sup>b</sup>	933	30,523,897	762,108	121,650	31,912	1,508,530	10,760,598	43,708,605
NICKEL & COMPOUNDS	100,000 <sup>c,1,2</sup>	320,000 <sup>c,1,2</sup>	1,253	539,864	209,887	152,925	3,644,070	881,506	14,000,659	19,428,911
TETRACHLOROETHYLENE	497,700 <sup>a</sup>	119,000 <sup>b</sup>	680	32,277,372	33,284	72,250	105,644	586,138	4,428,398	37,503,086
TOLUENE	6,300,000 <sup>a</sup>	886,800 <sup>b</sup>	3,606	273,752,712	254,175	1,431,916	882,691	3,544,407	64,762,046	344,627,947
1,1,1-TRICHLOROETHANE	723,700 <sup>a</sup>	22,000 <sup>b</sup>	3,518	170,420,900	94,310	1,000	187,396	293,219	19,480,645	180,477,470
TRICHLOROETHYLENE	200,000 <sup>b</sup>	13,000 <sup>b</sup>	868	49,071,464	13,550	390	20,940	78,758	6,231,064	55,416,166
XYLENES	6,572,000 <sup>a,6</sup>	225,000 <sup>b,7</sup>	3,187	155,888,584	299,375	122,977	834,174	4,213,788	40,215,081	201,573,979

a. Synthetic Organic Chemicals. USITC, 1989, Publication #2219.

b. Mannsville Chemical Product Synopsis, Mannsville Chemical Products Corp.

c. Mineral Commodity Summaries, U.S. Bureau of Mines, January, 1989.

d. Chemical Economics Handbook, SRI International.

1. Production from primary & secondary refining, no mining data.

Production and import data does not include metal compounds.

2. Metal content, except for gross weight of Chromium.

3. Hydrogen Cyanide only.

4. Sodium Cyanide only, 1987 data.

5. Includes secondary Mercury released from Dept. of Energy stocks.

6. Only ortho and para Xylene reported.

7. Only para Xylene reported.

REGION I GUIDANCE ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

NOVEMBER 5, 1993

REGION I GUIDANCE ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	1
II.	GENERAL REQUIREMENTS FOR SEPS . . . . .	2
	A. Public Benefit . . . . .	2
	B. Nexus . . . . .	2
	1. Vertical Nexus . . . . .	2
	2. Horizontal Nexus . . . . .	2
	C. Types of Projects . . . . .	3
	1. Pollution Prevention . . . . .	3
	2. Pollution Reduction . . . . .	3
	3. Remediation Project . . . . .	3
	4. Environmental Audits . . . . .	3
	5. Enforcement-related Environmental Public Awareness Project . . . . .	4
	6. Contingency Planning/Safety/Emergency Response Donations . . . . .	4
	D. Timing of Project . . . . .	4
	E. Oversight . . . . .	4
	F. Cash Penalty . . . . .	5
	1. Ratio of Cost to Credit . . . . .	5
	2. Percentage of Penalty . . . . .	5
	G. Environmental Equity . . . . .	6
III.	THE SEP PROPOSAL . . . . .	7
	A. Description of the Project . . . . .	7
	B. Conception of Project . . . . .	7
	C. Itemized Costs . . . . .	7
	D. Projected Savings to Company . . . . .	7
	E. Quantification of SEP's Environmental Benefit . . . . .	7
IV.	TECHNICAL CRITERIA FOR SEPS . . . . .	8
	A. Evaluation of SEP Potential . . . . .	8
	B. Examples of Pollution Prevention . . . . .	9
	1. Product Changes . . . . .	9
	2. Process Changes . . . . .	9
	a. Input Material Changes . . . . .	9
	b. Technology Changes . . . . .	9
	c. Improved Operating Practices . . . . .	10
V.	APPROVALS AND IMPLEMENTATION . . . . .	10
	A. Approvals . . . . .	10
	B. Implementation . . . . .	11
	C. Settlement Document Provisions . . . . .	11
VI.	TRACKING AND MONITORING . . . . .	13
	A. Tracking . . . . .	13
	B. Monitoring . . . . .	13
	C. Follow-up Inspections . . . . .	13

ATTACHMENTS

- Attachment I Definition of "Pollution Prevention"
- Attachment II Guidelines for SEP Proposals
- Attachment III Suggested Consent Agreement Provisions for SEPs
- Attachment IV SEP Data Form and SEP Data Fields
- Attachment V Checklist for OE Concurrence on SEPS

## REGION I GUIDANCE ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

### I. INTRODUCTION

In keeping with national EPA priorities, Region I is committed to increasing benefits to the environment, beyond those required by law, through the enforcement actions that we take against violators of environmental laws. Current Agency policy permits the granting of credit for "supplemental environmental projects" ("SEPs") against assessed penalties, and it specifically encourages the incorporation of projects that result in pollution prevention or pollution reduction into enforcement settlements. In order to increase the number of supplemental environmental projects resulting in pollution prevention undertaken in the Region, the Region has developed the following guidance document.

This guidance<sup>1</sup> is intended to supplement and summarize existing Agency policy on the use of supplemental environmental projects in Agency consent orders and decrees. In particular, it addresses issues raised in two Office of Enforcement memoranda signed by James M. Strock, "Policy on the Use of Supplemental Environmental Projects in EPA Settlements," dated February 12, 1991 (the "Feb. 12, 1991 Policy"), and "Interim Policy on the Inclusion of Pollution Prevention and Recycling Provisions in Enforcement Settlements," dated February 25, 1991 (the "Feb. 25, 1991 Policy"). In the event a discrepancy between the Regional and Headquarters directives arises, Headquarters guidance will control.

The guidance highlights legal and technical issues that are raised by the inclusion of SEPs as a condition of settlement in enforcement actions. It is thereby intended to facilitate the inclusion of such projects, particularly those that require facilities to undertake pollution prevention measures, in our settlements, while preserving effective deterrence and accountability for compliance and environmentally beneficial results.

Supplemental environmental projects included as conditions of settlement in enforcement or other penalty actions are a means for violators to mitigate the cash penalty paid to the United

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<sup>1</sup>This document is intended solely for the guidance of Government personnel. It is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with and change this guidance at any time without public notice.

States for environmental violations.<sup>2</sup> The credit given is based upon the amount to be spent by the violator on the project, in addition to other factors discussed below.

## II. GENERAL REQUIREMENTS FOR SEPS

A. Public Benefit: The project must be beyond statutory requirements, and the majority of the project's benefit must accrue to human health, safety and the environment, rather than to the benefit of the violator. The project should not be something the violator could reasonably be expected to do solely as a part of sound business practice. However, the Agency may make an exception for projects incorporating pollution prevention measures that could also reasonably be done solely for business purposes.

B. Nexus: There must be an appropriate relation, or "nexus," between the benefit produced by the SEP and the violation that is the subject of the enforcement action. According to Headquarters guidance, the nexus may either be vertical (in which case Headquarters approval is not required for the SEP) or horizontal (in which case Headquarters approval is required for the SEP), as described below.

### 1. Vertical Nexus

A "vertical" nexus exists when the SEP operates to reduce pollutant loadings of the same pollutant in the medium that was the basis of the violation in the enforcement action. (Feb. 12, 1991 Policy, p.6) In order to qualify as an SEP, the reduction made by the project must be beyond that required by law. Such reductions may be made at the facility responsible for the underlying violation, at a facility upstream on the same river, or through the alteration of a production process at a facility handling a portion of the manufacturing process antecedent to that which caused the violation, such that discharges of the offending pollutant are reduced or eliminated.

### 2. Horizontal Nexus

A "horizontal" nexus exists when the SEP involves either (a) relief for a different medium at a given facility or (b) relief for the same medium at a different facility. In such cases, the nexus requirement is only met if the SEP would

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<sup>2</sup>While such projects will not, in most instances, be appropriate for use in Superfund cases, in those Superfund cases involving the payment of a penalty, the possibility of including an SEP as a condition of settlement should be considered.

reduce the overall public health or environmental risk posed by the facility responsible for the violation or reduces the likelihood of future violations substantially similar to those that were the basis of the enforcement action. (See Feb. 12, 1991 Policy for examples of SEPs with "horizontal" nexus, p.7) Headquarters approval is required for SEPs with horizontal nexus to the violation.

C. Types of Projects: Six categories of projects will be considered as potential Supplemental Environmental Projects, subject to meeting the additional criteria set forth in this guidance. The following list generally sets out the categories of acceptable projects in order of priority; however, such priority is subject to the circumstances of the case or the particular requirements of the program involved.

1. Pollution Prevention

A project that substantially reduces or prevents generation of pollutants through use reduction or closed-loop processes. Innovative recycling is considered pollution prevention if pollutants are kept out of the environment in perpetuity. Reducing the use of toxic chemicals and replacing solvents with less toxic cleaners are examples of pollution prevention. See the definition of pollution prevention in "EPA Definition of 'Pollution Prevention,'" memorandum issued by F. Henry Habicht II, dated May 28, 1992. (Attachment I)

2. Pollution Reduction

A project that brings the facility substantially past the point at which it achieves compliance with existing discharge limitations. Improved operation and maintenance, more effective end-of-pipe technologies, scrubbers, recycling of residuals at "the end of a pipe," alarm and recovery systems for accidental releases, and accelerated compliance projects are examples of pollution reduction.

3. Remediation Project

A project that not only repairs the damage done to the environment as a result of the violation, but also goes beyond the repair to enhance the environment. Credit may not be granted for a project that is otherwise available to EPA as injunctive relief under the relevant statute.

4. Environmental Audits

Auditing practices designed to correct the environmental management practices that are leading to recurring or

potential violations. Such an audit must be in addition to audits undertaken as a good business practice or in order to comply with state toxic use reduction laws.

5. Enforcement-related Environmental Public Awareness Project

A project that may include publications, broadcasts or seminars. The company must announce the connection of the project to the enforcement action, and the project should be related to the importance of, or disseminate technical information about, complying with environmental laws. Such a project must go beyond merely training the employees of the violating facility how to comply with environmental laws.

6. Contingency Planning/Safety/Emergency Response Donations

Credit may be granted for donations of equipment or training to local or state entities where such donation reduces the risk of chemical releases to the community or promotes the reduction of chemical releases at facilities through enhanced planning, training or acquisition of hazardous materials response equipment.

D. Timing of Project: The SEP must be undertaken in connection with the settlement of the enforcement action. The SEP may not be a condition of another settlement with EPA or other regulator, nor may it be required by federal or other law or regulation. The company may not have initiated, implemented or completed the project prior to the filing of the complaint, although it will not be fatal to the project if background research or a pilot study was previously completed. A significant expansion or enhancement of an existing project may also qualify as an SEP if that expansion or enhancement would not have been undertaken but for EPA's enforcement action.

Where the project is implemented in order to meet statutorily mandated deadlines for eliminating the use or production of particular chemicals (e.g., the Montreal Protocol, which requires the cessation of CFC production by 1995), a case-by-case analysis should be made of the environmental value of early compliance with such requirements.

E. Oversight: An enforceable SEP should not require an inordinate amount of EPA oversight. In general, it is desirable that an SEP require no more than one year to complete, unless special circumstances such as the complexity or long-term nature of the project or inability to pay on the part of the violator dictate otherwise. Where a project requires more than six months to implement, explicit arrangements as to how the project will be

monitored should be developed by the case team.

F. Cash Penalty: Credit for the SEP cannot be applied against the economic benefit portion of the assessed penalty, and an "appreciable" portion of the gravity-based penalty must be collected in the settlement. In addition, the economic benefit to the company of the proposed project cannot cancel the current monetary impact of the penalty.

1. Ratio of Cost to Credit. In calculating the SEP credit, the penalty may not be reduced by more than the after-tax amount the violator spends on the project. In general, a minimum 2 to 1 reduction may be used as a rule of thumb: for every \$2 spent on the SEP, EPA could grant at most \$1 of credit against the adjusted penalty. This rule of thumb relieves the case team of the requirement of calculating the actual after-tax cost of the project.<sup>3</sup> The actual credit may often be at a ratio greater than 2 to 1, for example, where \$1 of credit is granted for every \$3 or \$4 spent on the project.

A less than 2 to 1 reduction may be appropriate, however, where (i) the violator is a municipality or non-profit organization (there being no tax benefits to the project to take into account) or (ii) the SEP solely benefits the community at large (e.g., as with a donation of emergency response equipment to the Local Emergency Planning Committee). In the latter case, the consent agreement or decree must contain language expressly acknowledging that such expenditures are not deductible by the violator for tax purposes.

2. Percentage of Penalty. While the amount of credit granted for an SEP is discretionary on the part of the case team, the Region recommends that, regardless of the amount of the potential credit calculated on the basis of the 2 to 1 rule of thumb, the actual credit granted to the company be limited to 50% off the adjusted penalty or settlement amount. In other words, the SEP credit should not exceed 50% of the penalty amount resulting after all adjustments have been made to account for exculpatory evidence, "good faith" negotiation, litigation risk, and the like.

A project that is of extraordinary value to public health or the environment or the financial condition of the respondent may justify a penalty reduction of more than 50%. Conversely, where the SEP is of limited value to public health or the environment (although it still qualifies as an acceptable SEP), a credit of

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<sup>3</sup>To calculate the actual cost of the project, the Agency's BEN computer model may be used, with certain adjustments. Contact Jonathan D. Libber, BEN/ABEL Coordinator (202/260-8777), in the Office of Enforcement for guidance in this use of BEN.

less than 50% should be granted. In any case, however, the monetary penalty to be paid generally should not be reduced to less than the amount of economic benefit realized by the violator plus an "appreciable" portion of the gravity component included in the settlement amount.

The SEP credit should reflect Regional priorities with respect to the environmental benefits of the project, as well as the size of the company, the amount of the penalty, and type and cost of the project. It is anticipated, for example, that the maximum amount of credit (for example, a reduction of 50% or more) will be reserved for pollution prevention projects, and smaller percentage credits will reflect the priority of SEPs set forth on page 3. However, different EPA programs may have special concerns that are addressed by particular types of projects, and such concerns should be taken into account when evaluating the SEP and calculating the SEP credit.

In summary:

A reduction of up to 50% of the amount which the violator would have paid if the settlement did not include an SEP (i.e., the adjusted penalty or settlement amount) may be allowed, with the reduction calculated on a 2 to 1 ratio of dollar expended on the SEP to dollar reduction (or on a 1 to 1 ratio in the case of not-for-profit entities or donations benefiting only the community at large).

In those cases in which the SEP is of extraordinary value to public health or the environment or in which the amount to be expended in carrying out the SEP far exceeds any possible credit, a reduction in excess of 50% may be allowed.

It should be noted that if the actual cost of the project exceeds the estimates originally given to the Agency, the settlement agreement will not be renegotiated.

G. Environmental Equity: Region I is committed to promoting and supporting equitable environmental protection regardless of race, ethnicity, economic status, or community. Environmental equity embraces the belief that no segment of the population should bear a disproportionate share of the consequences of environmental pollution. When a violator proposes several possible SEPs, Region I will have a preference for projects that are likely to reduce current or future risks of pollution to those segments of the population bearing a disproportionate share of the consequences of environmental pollution.

### III. THE SEP PROPOSAL

During the first settlement negotiation meeting with the Respondent/Defendant, the case team may, if appropriate, furnish a guideline outlining requirements for an SEP proposal (Attachment II). The guideline sets forth the following requirements for an SEP proposal:

#### A. Description of the Project

A detailed description of the project, including identification of the affected process, media, waste stream or discharge, as well as a technical description of the work to be performed. A detailed description of how, by whom, and when the project will be completed should also be included.

#### B. Conception of Project

Information pertaining to when the project was first conceived by the company, as well as why the project was proposed. If research was conducted or a pilot project undertaken prior to EPA's enforcement action, a description of such research or pilot project should be provided, including when the work was performed and why the currently proposed project was not then implemented.

#### C. Itemized Costs

A projected budget for the project, including a detailed breakdown of equipment and other capital costs, as well as labor costs. (A proposal from a supplier or consultant should eventually be obtained in order to confirm the estimated cost of the project.) Consultants who will perform the work, if any, should be identified, and any contemplated allocation of labor costs between consultant and company employees should be described.

#### D. Projected Savings to Company

An estimate and itemization of the savings to the company that will result from the project. A calculation of the payback period (i.e., the time that it will take for the company to recoup the cost of the project through the savings that it achieves as a result of the project) should be included.

#### E. Quantification of SEP's Environmental Benefit

An estimation of the projected percentage and quantity of reduction of the pollutant, expressed in pounds/year, or a description of the benefit to the general public or the environment. (For example, the elimination of 2,500 pounds of 1,1,1-trichloroethane for off-site disposal; the elimination of 1,500 pounds of emissions by replacing a solvent; or an expanded

capacity for local emergency planning entities to respond to hazardous materials emergencies through donations of needed equipment.)

After the proposal is approved, EPA may require a more detailed workplan to be submitted, including a scope of work and a schedule of implementation. The workplan should include, if the project will take more than six months to complete, milestone events and interim reporting deadlines. This workplan will be subject to EPA approval.

It should be pointed out to the violator that, unless a business confidentiality claim is made pursuant to 40 C.F.R. § 2.203(b) at the time of a submittal, the information submitted to EPA may be made available to the public without further notice to the company.

#### IV. TECHNICAL CRITERIA FOR SEPs

##### A. Evaluation of SEP Potential

Where the violating facility is a potential candidate for an SEP that involves pollution prevention, pollution reduction or remediation, the following questions will help to stimulate ideas for projects or assess the projects proposed:

1. Has the entire facility been evaluated to determine all potential areas for SEPs?
2. What in the facility adversely affects human health and the environment most?
  - emissions to air, water, land, etc. (both inside and outside the facility)
  - transfers off-site to landfills, incinerators, etc.
3. What projects could eliminate some of the adverse affects?
4. Will the proposed projects:
  - eliminate a toxic/hazardous substance?
  - reduce the use of a toxic/hazardous substance?
  - transfer any chemicals to other media or produce any detrimental cross-media effects?
5. Are these projects going to incorporate the latest, technologically proven equipment and practices?

## B. Examples of Pollution Prevention

The Region views product changes and process changes as among the most desirable types of SEPs, insofar as they result in the elimination or prevention of pollution at the source rather than after damage has occurred. Such projects are often the most cost-effective way of mitigating the effects of pollution and can save companies large amounts in disposal costs and potential liabilities.

### 1. Product Changes

Product changes are changes made in the composition or use of the intermediate or end products. These changes are performed by the manufacturer with the purpose of reducing waste from manufacture (inputs), use, or ultimate disposal of the products.

Examples of product changes are:

- Eliminating lead as a stabilizer in plastics.
- Using recycled material.
- Using renewable natural resource materials.
- Using water-based inks instead of solvent-based ones.
- Producing goods and packaging reusable by the consumer.
- Manufacturing recyclable final products.
- Producing more durable products; increased product life.

### 2. Process Changes

Process changes are related to how the product is made. They include input material changes, technology changes, and improved operating practices. Such changes reduce worker exposure to pollutants and reduce potential environmental releases during the manufacturing process.

Examples of process changes are:

#### a. Input Material Changes

- Stopping use of heavy metal pigment.
- Using a less hazardous or less toxic solvent for cleaning.
- Purchasing raw materials that are free of trace quantities of hazardous or toxic impurities.
- Purchasing raw materials that are non-hazardous or non-toxic.

#### b. Technology Changes

- Changing to mechanical stripping or cleaning devices to avoid solvent use.
- Using more efficient motors.

- Installing speed control on pump motors to reduce energy consumption.
- Changing from traditional painting to a powder-coating system.
- Installing in-process reuse or recycling systems.

c. Improved Operating Practices

- Training operators in more efficient operations.
- Covering solvent tanks when not in use.
- Segregating waste streams to avoid cross-contaminating hazardous and non-hazardous materials.
- Improving control of operating conditions (e.g., flow rate, temperature, pressure, residence time, stoichiometry).
- Improving maintenance scheduling, recordkeeping or procedures to increase efficiency.
- Stopping leaks, drips, and spills.
- Using drip pans and splash guards.
- Building contingency systems to capture or recover chemicals that are accidentally released.

V. APPROVALS AND IMPLEMENTATION

A. Approvals

After the case team determines that an SEP proposal meets the guidance criteria, further approvals may be needed. If a project will affect another media, consultation should be made with the program associated with that media prior to acceptance. Additionally, cross-regional approval may be necessary if the project is proposed at a facility in another Region.

Where there is "horizontal" nexus between the violation and the SEP, and/or if the case is judicial, approval by the Office of Enforcement of the SEP must be obtained. Appended to this guidance as Attachment V is a checklist for the points that must be addressed in a request for OE approval of the SEP. Even though OE's review is theoretically limited to the adequacy of the nexus, providing the other data in the checklist enables the Agency to keep track of how the policy is being implemented in all the Regions.

If Headquarters approval is not required for the SEP, the executive summary or penalty justification memo for the consent agreement should contain a detailed explanation of how there is vertical nexus between the violation and the SEP.

If the project involves pollution prevention, it is recommended that a pollution prevention contact in the affected media be consulted prior to acceptance of the project. Consultation with

the Region's multi-media SEP advisory body, if any, may be appropriate for complex or problematic projects.

B. Implementation

Appropriate implementation of the accepted project is assured by including specific provisions in the settlement document. The following is a list of possible requirements and/or conditions which may be needed to implement the project through inclusion in the settlement document.

C. Settlement Document Provisions

The case team should consider inclusion of the following types of provisions in any consent agreement or consent decree which incorporates an SEP into the settlement. (Examples of such provisions, as well as other provisions relating to the SEP, are set forth in Attachment III to this guidance.)

1. The SEP proposal or a workplan may be incorporated as an attachment to the Consent Agreement, detailing the scope of work and schedule for implementation, including milestone events, interim reporting requirements and completion date.
2. If the use of the SEP's substitute chemical must be discontinued for some reason, the replacement chemical may not be more toxic than the agreed-upon chemical.
3. Documentation of costs must be submitted to EPA.
4. Certifications:
  - a. The company must certify that the project is not being implemented in response to any other enforcement action and is not required by any other law, agreement or contract. The respondent may not be receiving a credit or grant from EPA or any other entity in connection with the project.
  - b. All submissions made in connection with the SEP and completion of the project must be certified by a corporate officer of the respondent.
5. EPA's approval of the project does not represent an endorsement of the equipment or technology chosen. EPA will in its sole discretion determine if the goal of the project has been achieved.
6. EPA may inspect the facility at any time to determine compliance with the terms of the Consent Agreement.

7. The company should agree to implement or use the SEP for a minimum length of time (e.g., one year), during which time the facility is not to reinstitute use of the eliminated chemical.

8. The case team should consider the appropriateness of assessing stipulated penalties, or recovering some portion or all of the original credit granted for the SEP, for the failure to implement or complete the SEP in a timely manner as required by the terms of the settlement document, or if expenditures do not reach required levels.

9. The case team should consider the appropriateness of assessing stipulated penalties, or recovering some portion or all of the original credit granted for the SEP, for the failure of the SEP to accomplish projected pollution prevention or pollution reduction objectives.

10. Public statements made by the company about the SEP must disclose that the project was undertaken in connection with the settlement of an enforcement action brought for violation of environmental law.

11. If a 1 to 1 reduction has been given to offset equipment donation expenditures, a statement should be included stating that the expenditures are not deductible for federal tax purposes.

12. A force majeure provision with respect to delays affecting implementation of the project should be included only if the defendant insists on it, not as a matter of course.

**Note:** A credit project should not be described as a "penalty" or the settlement may be in violation of the Miscellaneous Receipts Act, 31 U.S.C. 3302 (MRA).<sup>4</sup>

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<sup>4</sup>The MRA requires that anyone "receiving money for the government from any source deposit the money in the Treasury as soon as practicable," and a broad interpretation of the Act results in an application of its provisions to money both constructively and actually received. If the SEP is termed a "penalty," it could be argued that anything in the nature of a penalty is a sum due the United States and therefore subject to the MRA. However, EPA believes that the agency has sufficient discretionary authority in assessing and mitigating penalties under our statutes to permit the reduction of penalties to reflect expenditures made by defendants for certain environmentally beneficial purposes--provided there is an appropriate nexus to the violation and provided a "significant" cash penalty is paid.

## VI. TRACKING AND MONITORING

### A. Tracking

Case attorneys are responsible for entering data about the SEP into the Region's Multi-media Enforcement Tickler System (METS). Attached to this guidance as Attachment IV is the METS SEP Form, which must be filled out for each completed enforcement action and included in the concurrence package. The completed SEP Form should also be sent via LAN to the ORC Pollution Prevention Contact at the time the settlement is filed. A description of the SEP Data Fields is also included in Attachment IV, explicating the fields included in the SEP Form. In order to maintain consistency in reporting the data, an ORC contractor will be responsible for transferring the information from the SEP Form to METS.

### B. Monitoring

The case team should allocate the responsibility for assuring that all conditions of the consent agreement or consent decree have been satisfied in a timely manner, including all conditions of the SEP. Verification of the SEP should be incorporated into programmatic tracking mechanisms and may be accomplished through the respondent's submission of appropriate documents or certification of completion. However, it is recommended that some percentage of SEPs, particularly those that are long-term, involve significant capital costs, or are unusually complex or unique, be verified through on-site inspection. Such inspections may be undertaken by the initiating program or by other media programs after reviewing data in METS, as outlined below. Verification of the SEP for such cases should occur as soon as feasible following completion of the SEP, but in no case longer than 12 months after completion.

### C. Follow-up Inspections

The planning for inspections from all media should include review of the SEP module of METS to ascertain if there is an SEP in place at the facility. If there is, sufficient information should be obtained from the SEP case team in order for the inspecting team to determine, if possible, (a) the status of the SEP and (b) whether the projected SEP benefit was in fact achieved. The results of any such inspection, including anecdotal evidence on the success of the project, should be reported back to the original SEP case team and to the ORC Pollution Prevention Coordinator.

Supplemental Environmental Projects (SEP)  
Guidelines for Proposals

A supplemental environmental project (SEP) is a project that produces environmental or public health and safety benefits beyond those required by law, for which a credit may be granted by EPA to offset partially the penalty imposed in the settlement of an enforcement action. You should include in your SEP proposal the following information:

1. Description of the Project

A detailed description of the project, including identification of the affected process, media, waste stream or discharge, as well as a technical description of the work to be performed. Include detailed information describing how, by whom, and when the project will be completed.

2. Conception of Project

Information pertaining to when the project was first conceived by the company, as well as why the SEP was proposed. If research was conducted or a pilot project undertaken prior to EPA's enforcement action, provide a description of such research or pilot project and state when the work was performed and why the currently proposed SEP was not then implemented.

3. Itemized Costs

-- A projected budget for the project, including a detailed breakdown of equipment and other capital costs, as well as labor costs. (A proposal from a supplier or consultant will eventually be required in order to confirm the estimated cost of the project.) Identify consultants who will perform the work, if any, and include any allocation of labor costs between consultant and company employees, if applicable.

4. Projected Savings to Company

An estimate and itemization of the savings to the company that will result from the project, if any. Include a calculation of the payback period (i.e., the time that it will take for the company to recoup the cost of the project through the savings that it achieves as a result of the project).

5. Quantification of Environmental Benefit

An estimation of projected percentage and quantity of reduction of pollutant, expressed in pounds/year, resulting from the project or a description of the benefit to the general public or

the environment (e.g., expanded capacity for local bodies to do hazardous materials emergency response by contributing to a Local Emergency Planning Commission (LEPC); eliminating 2,500 pounds of 1,1,1-trichloroethane for off-site disposal; or eliminating 1,500 pounds of emissions by replacing a solvent). State specifically what procedures will be used to verify the amount of pollutants reduced (e.g., stack test, sampling, monitoring data, etc.)

After EPA approves the proposal, EPA may require a more detailed workplan to be submitted, including a scope of work and a schedule of implementation. If the project will take more than 6 months to complete, the workplan should include milestone events and interim reporting deadlines. This workplan will be subject to EPA approval.

You may, if you so desire, assert a business confidentiality claim covering part or all of the information submitted, in the manner described by 40 C.F.R. § 2.203(b). You should read the above-cited regulations carefully before asserting a business confidentiality claim, since certain categories of information are not properly the subject of such a claim. Information covered by such a claim will be disclosed by EPA only to the extent, and by the means of the procedures, set forth by 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is received by EPA, it may be made available to the public by EPA without further notice to you.

ATTACHMENT III

EXAMPLES OF SETTLEMENT DOCUMENT PROVISIONS<sup>1</sup> FOR SEPS

[Description of the Project]

(1) Respondent shall undertake a supplemental environmental project (the "Project"), which the parties agree is intended to protect the environment and public health and which is beyond the requirements of existing law. Within thirty (30) days of receiving a copy of this Consent Agreement signed by the Regional Administrator, Respondent shall make all the necessary arrangements to install three alkaline-based aqueous agitation wash systems at the facility in order to replace two freon cleaning units and one methylene chloride cleaning unit at the facility (the "Project"). The Project shall, by April 1, 1993, eliminate the use of freon 113 and methylene chloride at the facility, resulting in an annual reduction of 14,415 pounds of freon 113 and 9,739 pounds of methylene chloride. The Project is more specifically described in the scope of work (hereinafter, the "Scope of Work"), attached hereto as Exhibit A and incorporated herein by reference.

[Solution not more toxic]

(2) Respondent anticipates that the facility will use the cleaning solution known as "Formula 815 GD", supplied by \_\_\_\_\_ Corporation, in the cleaning systems constituting the Project. In no event, however, shall any substitute cleaner be used in connection with the Project which is more toxic or hazardous than Formula 815 GD, as such characteristics are described on the material safety data sheet (MSDS) for Formula 815 GD attached hereto as Exhibit B.

[Cost of Project]

(3) The total expenditure for the Project shall be not less than \$000,000, in accordance with the specifications set forth in the Scope of Work. Respondent agrees to provide Complainant with documentation of the expenditures made in connection with the Project by \_\_\_\_\_, 1993.

To the extent that the actual expenditures for the Project do not total \_\_\_\_\_ thousand dollars (\$000,000), Respondent shall pay to EPA, within 30 days of submission of the certification of completion required by paragraph \_\_\_\_\_, one dollar (\$1) for every \_\_\_\_\_ dollars (\$000) [the ratio of reduction in penalty] below \_\_\_\_\_ thousand dollars (\$000,000) [the projected cost of the Project] that Respondent actually expends for the Project, plus interest at the rate of the United States Treasury tax and loan

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<sup>1</sup>The provisions set forth in this attachment are examples only. It should be noted that neither the language nor the dates and timeframes used represent Agency or Regional policy.

rate, in accordance with 4 C.F.R. § 102.13(c).

**[Certification that Project is not otherwise required]**

(4) Respondent hereby certifies that, as of the date of this Consent Agreement, Respondent is not otherwise required, by virtue of any local, state or federal statute, regulation, order, consent decree, permit or other law or agreement, to develop or implement the Project. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, a credit for the Project in any other enforcement action or any grant from EPA or other entity to undertake the Project.

**[EPA to judge achievement of goals]**

(5) Whether Respondent has complied with the terms of this Consent Agreement and Order through achievement of the elimination of the use of \_\_\_\_\_ as herein required shall be the sole determination of EPA.

**[Milestone requirements]**

(6) Respondent shall submit a Project Report describing the Project to EPA by \_\_\_\_\_, 1993. The Project Report shall contain the following information:

- (i) A detailed description of the installed systems.
- (ii) A description of system operation and performance, including monitoring data and documentation of the elimination of \_\_\_\_\_.
- (iii) A description of any operating problems encountered and the solutions thereto.
- (iv) Itemized system costs, documented by copies of purchase orders and receipts or cancelled checks.

**[EPA right to inspect; Respondent must use Project]**

(7) Respondent agrees that EPA may inspect the facility at any time in order to confirm that the Project is operating properly and in conformity with the representations made herein. Respondent agrees that it shall continuously use the alkaline agitation wash systems installed as the Project for not less than one year subsequent to installation, and Respondent shall not reinstate the use of \_\_\_\_\_ at any time.

**[Document retention and certification]**

(8) Respondent shall maintain legible copies of documentation of the underlying research and data for any and all documents or reports submitted to EPA pursuant to this Consent Agreement, and Respondent shall provide the documentation of any such underlying research and data to EPA within seven days of a request for such information. In all documents or reports, including, without limitation, the Project Report, submitted to EPA pursuant to this

Consent Agreement, Respondent shall, by its officers, sign and certify under penalty of law that the information contained in such document or report is true, accurate, and not misleading by signing the following statement:

I certify that the information contained in or accompanying this document is true, accurate, and complete.

As to those identified portions of this document for which I cannot personally verify their truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification, that this information is true, accurate, and complete.

[EPA acceptance of Final Report]

(9) (a) Following receipt of the Project Report described in paragraph \_\_\_ above, EPA will either (i) accept the Project Report or (ii) reject the Project Report and notify the Respondent, in writing, of deficiencies in the Project Report and any additional actions and/or information required to be taken or supplied by Respondent.

(b) If Respondent objects to any EPA notification of deficiency or disapproval given pursuant to this paragraph, Respondent shall notify the EPA in writing of its objection within ten (10) days of receipt of such notification. EPA and Respondent shall have an additional thirty (30) days from the receipt by the EPA of the notification of objection to reach agreement. If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall provide a written statement of its decision to Respondent, which decision shall be final and binding upon Respondent. Respondent agrees to comply with any requirements imposed by EPA as a result of any such deficiency or failure to comply with the terms of this Consent Agreement and Order. In the event the Project is not installed and operating as contemplated hereby, as determined by EPA, the penalty proposed in the complaint shall be due and payable by Respondent to EPA in accordance with paragraph \_\_\_ hereof, minus any amounts previously paid pursuant to paragraph \_\_\_ hereof.

[Failure to Complete Project]

(10) In the event that (i) Respondent fails to comply with any of the terms or provisions of this Agreement relating to the Project or, (ii) notwithstanding anything herein to the contrary, Respondent cannot achieve compliance with the requirements of this Consent Agreement and Order, for any reason whatsoever, by \_\_\_\_\_, then Respondent shall become liable for the full amount of the penalty proposed in the complaint, minus any amounts previously paid pursuant to paragraph \_\_\_ hereof. In such event, Respondent shall immediately submit a cashier's or

certified check to the EPA, in the manner specified in said paragraph \_\_\_.

[Alternatively, CAO may require additional penalty to be paid pro rata according to the decrease in the actual cost of Project. See item (3) above.]

[Public statements must acknowledge enforcement action]

(11) Respondent hereby agrees that any public or private statement, oral or written, making reference to the Project shall include the following language, "This Project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of the reporting requirements of Section 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11023."

[No relief from compliance; no endorsement by EPA]

(12) This Consent Agreement and Order shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit, nor shall it be construed to constitute EPA approval of the equipment or technology installed by Respondent in connection with the Project under the terms of this Agreement.

[No tax deduction for 1 to 1 credit]

(13) Respondent hereby agrees that, in consideration of EPA's granting Respondent a credit against the assessed penalty for the full amount of the foregoing expenditures, said expenditures shall not be deductible for purposes of Federal taxes.

[Force Majeure--if insisted on by respondent]

(14) (a) If any event occurs which causes or may cause delays in the achievement of compliance at Respondent's facility as required under this Agreement, Respondent shall notify Complainant in writing within 10 days of the delay or Respondent's knowledge of the anticipated delay, whichever is earlier. The notice shall describe in detail the anticipated length of the delay, the precise cause or causes of the delay, the measures taken and to be taken by Respondent to prevent or minimize the delay, and the timetable by which those measures will be implemented. The Respondent shall adopt all reasonable measures to avoid or minimize any such delay. Failure by Respondent to comply with the notice requirements of this paragraph shall render this paragraph void and of no effect as to the particular incident involved and constitute a waiver of the Respondent's right to request an extension of its obligation under this Agreement based on such incident.

(b) If the parties agree that the delay or anticipated delay in compliance with this Agreement has been or will be

caused by circumstances entirely beyond the control of Respondent, the time for performance hereunder may be extended for a period no longer than the delay resulting from such circumstances. In such event, the parties shall stipulate to such extension of time. In the event that the EPA and the Respondent cannot agree that a delay in achieving compliance with the requirements of this Consent Agreement and Order has been or will be caused by circumstances beyond the control of the Respondent, the dispute shall be resolved in accordance with the provisions of paragraph \_\_\_ of this Agreement.

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

## SEP DATA FORM

**\*\*\*NOTE:** Press insert key before entering data.  
The highlighted data elements are mandatory.

## I. FACILITY INFORMATION

FACILITY NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_  
(INCLUDE CITY, STATE, AND ZIP)

ENGINEER: \_\_\_\_\_ ATTORNEY: \_\_\_\_\_

DOCKET NO.: \_\_\_\_\_ FINDS NO. \_\_\_\_\_

INDUSTRIAL DESCRIPTION: \_\_\_\_\_

SIC CODE: \_\_\_\_\_

TYPE OF VIOLATION: \_\_\_\_\_ (STATUTE AND SECTION, PLUS BRIEF DESCRIPTION OF VIOLATION)

## II. SEP INFORMATION

SEP TYPE: \_\_\_\_ Enter number, select from the categories below.

1. Pollution Prevention
2. Pollution Reduction
3. Environmental Restoration
4. Environmental Auditing
5. Public Awareness Programs
6. Donation to LEPC/SERC

SEP DESCRIPTION: \_\_\_\_\_

ASSOCIATED MEDIA: \_\_\_\_\_ (AIR, WATER, LAND)

ASSOCIATED STATUTE(S): \_\_\_\_\_ (TO WHICH PROGRAMS DOES THE SEP APPLY - CAA, FIFRA, TSCA, SPCC, etc.)

MULTIMEDIA SEP (Y/N): \_\_\_\_

## III. PENALTY INFORMATION

DATE OF CONSENT AGREEMENT/CONSENT DECREE: \_\_\_\_/\_\_\_\_/\_\_\_\_

PROPOSED PENALTY AMOUNT: \$ \_\_\_\_\_

ADJUSTED PENALTY AMOUNT: \$ \_\_\_\_\_

FINAL PENALTY AMOUNT: \$ \_\_\_\_\_

PENALTY DUE DATE: \_\_\_\_/\_\_\_\_/\_\_\_\_

ATTACHMENT IV

IV. SEP COST/CREDIT INFORMATION

INITIAL SEP COST: \$ \_\_\_\_\_ ANNUAL O&M COST: \$ \_\_\_\_\_  
SEP CREDIT: \$ \_\_\_\_\_ PERCENT REDUCTION: \_\_\_\_\_  
ESTIMATED PAYBACK PERIOD: \_\_\_\_\_ (YEARS)

V. ENVIRONMENTAL BENEFIT

POLLUTANT: \_\_\_\_\_  
QUANTITY: \_\_\_\_\_ UNIT: \_\_\_\_\_ (TONS OR POUNDS/YEAR)  
PERCENT REDUCTION: \_\_\_\_\_  
MEDIUM: \_\_\_\_\_ (AIR, WATER, LAND)

POLLUTANT: \_\_\_\_\_  
QUANTITY: \_\_\_\_\_ UNIT: \_\_\_\_\_ (TONS OR POUNDS/YEAR)  
PERCENT REDUCTION: \_\_\_\_\_  
MEDIUM: \_\_\_\_\_ (AIR, WATER, LAND)

POLLUTANT: \_\_\_\_\_  
QUANTITY: \_\_\_\_\_ UNIT: \_\_\_\_\_ (TONS OR POUNDS/YEAR)  
PERCENT REDUCTION: \_\_\_\_\_  
MEDIUM: \_\_\_\_\_ (AIR, WATER, LAND)

COMMENTS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

VI. SEP MILESTONES

13. MILESTONE DESCRIPTION: Completion of Project/Final Report Due  
TARGET DATE: \_\_\_/\_\_\_/\_\_\_  
REVISED TARGET DATE: \_\_\_/\_\_\_/\_\_\_  
DATE MILESTONE ACHIEVED: \_\_\_/\_\_\_/\_\_\_

14. MILESTONE DESCRIPTION: \_\_\_\_\_  
\_\_\_\_\_

TARGET DATE: \_\_\_/\_\_\_/\_\_\_  
REVISED TARGET DATE: \_\_\_/\_\_\_/\_\_\_  
DATE MILESTONE ACHIEVED: \_\_\_/\_\_\_/\_\_\_

15. MILESTONE DESCRIPTION: \_\_\_\_\_  
\_\_\_\_\_

TARGET DATE: \_\_\_/\_\_\_/\_\_\_  
REVISED TARGET DATE: \_\_\_/\_\_\_/\_\_\_  
DATE MILESTONE ACHIEVED: \_\_\_/\_\_\_/\_\_\_

## ATTACHMENT IV

### SEP DATA FIELDS

#### Added METS Data Fields for SEPs

##### I. FACILITY INFORMATION

- **Industrial Description (IND\_DESC)** - Description of the industrial source category (e.g. metal plating, paper coating)
- **Standard Industrial Classification code (SICC)** - Give SIC Code for the facility, not a range of codes.
- **Type of Violation** - Include statute and section, as well as brief description of violation.

##### II. SEP INFORMATION

- **Type of pollution prevention project (SEP\_TYPE)** - Based on the national SEP policy, each pollution prevention project must fall into one of the following categories:

1. pollution prevention
2. pollution reduction
3. environmental restoration
4. environmental auditing
5. public awareness programs
6. donation to LEPC/SERC

- **SEP project description (SEP\_DESC)** - Briefly describe the facility's SEP project (i.e., changing industrial processes, or substituting different fuels or materials).

- **Associated media (ASS\_MED)** - Media affected by SEP (Air, Water, Land).

- **Associated statute(s) (ASS\_STAT)** - Media program (FIFRA, CAA, TSCA, SPCC, etc.) to which SEP applies.

- **Multi-media SEP (Y/N)** - Answer "yes" if SEP (a) affects one or more media or (b) affects a media that is different from that which was the basis of the violation.

##### III. PENALTY INFORMATION

- **Proposed Penalty Amount** - Original penalty proposed in an administrative complaint.

- **Adjusted Penalty Amount** - The penalty resulting after all adjustments, e.g., for non-viable claims, good faith compliance

## ATTACHMENT IV

and litigation risk, have been made.

- **Final Penalty Amount**- Cash portion of settlement penalty amount.

- **Penalty Due Date** - Date on which final penalty payment must be made.

### IV. SEP COST/CREDIT INFORMATION

- **Initial SEP cost (INIT\_COST)** - Quantify the initial capital cost to facility in implementing the SEP project.

- **Annual O&M cost (OM\_COST)** - On-going annual Operation & Maintenance cost for SEP.

- **SEP credit (CREDIT)** - Amount by which the gravity-based portion of the penalty was reduced in consideration of the SEP.

- **Percent reduction** - Percentage by which the adjusted penalty was reduced as result of credit granted for the SEP.

- **Estimated pay-back period (PROJ\_PB)** - Estimated amount of time it will take facility to recoup the cost of SEP through savings, tax benefits, etc., in years.

### V. ENVIRONMENTAL BENEFIT

- **Media (MEDIA)** - Is the environmental benefit of SEP to the air, water, or land?

- **Pollutant (PPLT)**

- **Quantity (QTY)** - Quantity of reduction in emissions of pollutant or in usage of toxic chemical.

- **Unit (UNIT)** - Tons or pounds

- **Percent reduction (PCNT\_RED)** of pollutant(s) - Percentage by which prior usage or emission of pollutant is reduced.

- **Comments (COMMENT)** - Brief description of the environmental benefit. Include substitute chemical, if any.

### VI. SEP MILESTONES

- **Milestone description (DESCRIPT)** - At least one milestone should be the completion of the project. Also note any interim reports that must be submitted.

- **Target date (TARGET)** - milestone target date

- **Revised target date (REV\_TARGET)**

- **Date milestone achieved (DTAC)**

ATTACHMENT V

CHECKLIST FOR OE CONCURRENCE ON SEPS  
WITH A HORIZONTAL NEXUS TO THE VIOLATION

1. Into which of the six following eligible categories does the project fall?<sup>1</sup>
  - A. Pollution prevention
  - B. Pollution reduction
  - C. Projects remediating adverse public health or environmental consequences
  - D. Environmental auditing projects
  - E. Enforcement-related environmental public awareness projects
  - F. Contingency planning/safety/emergency response donations
2. Does this project give the Respondent additional time to correct a violation or to come into compliance with existing requirements?
3. How is the nexus requirement met?
4. If any inter-Regional concurrence is necessary, has it been obtained? (Applies only to projects offering relief at different facilities.)
5. Was the project first proposed to EPA after the issuance of the complaint?
6. Will a substantial monetary penalty be collected?
7. Is the credit ratio you are offering more favorable to the Respondent than 2 to 1 for the proposed project (i.e., 1 to 1)?
8. Do Respondent's compliance history and resources indicate that it will successfully complete the SEP?

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<sup>1</sup>See pp. 2-4 of the Feb. 12, 1991 memo, "Policy on the Use of Supplemental Enforcement Projects in EPA Settlements", for descriptions of these categories.

**APPENDIX: GUIDANCE AND OTHER DOCUMENTS RE: SEPs**

- 5/28/92 EPA Definition of "Pollution Prevention" (F. Henry Habicht II, Deputy Administrator) (Attachment I)
- 2/25/91 Interim EPA Policy on the Inclusion of Pollution Prevention Provisions in Enforcement Settlements (James M. Strock, Assistant Administrator, Office of Enforcement)
- 2/12/91 Policy on the Use of Supplemental Environmental Projects in EPA Settlements (James M. Strock, AA, OE)
- 12/26/90 Adherence to CWA Penalty Policy and Special Documentation Requirements for Mitigation Projects (James Elder, Dir. Water Enforcement & Permits & Fred Stiehl, AE Counsel for Water)
- 11/3/89 Draft Guidelines for Evaluating Administrative Penalty Mitigation Projects (Edward Reich AAA, OE)
- 7/25/88 Guidance on Certification of Compliance with Enforcement Agreements (Thomas L. Adams, AA, OE)
- 10/28/86 GM-51: Guidance on Calculating After Tax Net Present Value of Alternative Payments (Thomas L. Adams, AA, OE)
- 2/16/84 GM-22: Agencywide Framework for Civil Penalties