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NOTES AND COMMENTS

Supplemental Environmental Projects: A Bargain for the Environment

LAURIE DROUGHTON*

Supplemental Environmental Projects (SEPs) have been used increasingly by the United States Environmental Protection Agency (EPA) in settlement decrees. SEPs, in general, consist of installing pollution prevention equipment or implementing pollution prevention programs, thereby achieving environmental benefit in excess of that which could be realized through injunctive relief. In return for performing the SEP, the EPA correspondingly decreases the penalty the violator must pay. This article examines the history and use of SEPs and advocates that inclusion of SEPs in settlement decrees is well within the EPA's statutory authority under the various statutes for whose enforcement the EPA is responsible.

I. Introduction

A growing awareness of the inadequacy of end-of-the-pipe regulation for achieving environmental goals has re-

* This article is dedicated in loving memory of Mary E. Droughton and Janet T. Walsh, both of whom will always be an inspiration to me.

sulted in a shift in the legislative, regulatory and enforcement focus of Congress and the United States Environmental Protection Agency (EPA) to pollution prevention.¹ In the 1984 reauthorization of the Solid Waste Disposal Act, also known as the Resource Conservation and Recovery Act (RCRA),² Congress mandated that industry employ waste minimization and toxicity reduction approaches and decrease its reliance upon potentially environmentally dangerous methods of waste handling, particularly via land treatment.³ Congress passed the Pollution Prevention Act of 1990 (PPA) which further emphasizes these goals.⁴ The PPA implements the national objective of pollution prevention by mandating a "program of information collection, technology transfer, and financial assistance to the States to implement this policy and to promote the use of source reduction techniques."⁵ These and other legislative developments have prompted the EPA to focus greater efforts on pollution prevention programs through its regulations, policies, and enforcement.⁶

Pollution prevention is simply what the words connote: the reduction of pollution generation. Pollution prevention methods can include source reduction or waste minimization techniques. Source reduction addresses waste generation within the production process,⁷ generally through "good operating practices, technology changes, [input] material

1. In addition to a recognition of the limits of command and control regulation, the recent increased attention to non-point source pollution provides additional impetus to pursue pollution prevention opportunities. Joseph J. Breen & Michael J. Dellarco, *Pollution Prevention: The New Environmental Ethic*, in POLLUTION PREVENTION IN INDUSTRIAL PROCESSES: THE ROLE OF PROCESS ANALYTICAL CHEMISTRY 2, 3 (Joseph J. Breen & Michael J. Dellarco eds., 1992).

2. RCRA §§ 1002-11,012, 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993).

3. RCRA § 3002(b), 42 U.S.C. § 6922(b) (1988 & Supp. V 1993).

4. PPA §§ 6602-6610, 42 U.S.C. §§ 13,101-13,109 (Supp. V 1993).

5. S. REP. NO. 526, 101st Cong., 2d Sess. 1 (1990).

6. Pollution Prevention Strategy, 56 Fed. Reg. 7849, 7850 (1991). See also *Speakers Say Prospects for RCRA Reauthorization Seen as Dim*, PESTICIDE & TOXIC CHEM. NEWS, Apr. 28, 1993, available in LEXIS, Envirn, Allwns.

7. WASTE MANAGEMENT, INC. AND PIPER & MARBURY, WASTE REDUCTION: POLICY & PRACTICE 23-24 (1990) [hereinafter WASTE MANAGEMENT, INC. AND PIPER & MARBURY, WASTE REDUCTION].

changes, and product changes.”⁸ The PPA specifically designates source reduction as the preferable method of pollution prevention,⁹ since if wastes are never generated, no opportunity for mishandling or exposure exists.¹⁰

In contrast, waste minimization encompasses practices that prevent pollution by removing waste from the regulated waste stream through reuse, recycling, or destruction or separation of toxic constituents.¹¹ Destruction and separation are accomplished using traditional waste management technologies, such as incineration or extraction processes. The advantage of this approach, as demonstrated by recent history, is the relative ease in regulation.¹² Additionally, these processes do reduce the amount of hazardous waste generated. The obvious disadvantages are continued waste generation and the toxic and/or hazardous constituents are often

8. *Id.* at 24.

9. S. REP. NO. 526, 101st Cong., 2d Sess. 1 (1990).

10. Breen & Dellarco, *supra* note 1, at 3. Additionally, source reduction may be necessary to address the nation's hazardous waste problems, since “many of the benefits of controlling pollution have already been achieved and . . . further environmental gains can come only from eliminating pollutants at the point of generation.” WASTE MANAGEMENT, INC. AND PIPER & MARBURY, WASTE REDUCTION, *supra* note 7, at 24.

11. See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., SPECIAL REP. NO. OTA-TTE-347, FROM POLLUTION TO PREVENTION: A PROGRESS REPORT ON WASTE REDUCTION, 20-25 (1987) [hereinafter OTA, PROGRESS REPORT].

12. For example, under the National Pollutants Discharge Elimination System (NPDES) permit system of the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), CWA §§ 101-607, 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993), the permittee is required to submit Discharge Monitoring Reports (DMRs) which provide information regarding permit parameter concentrations in the discharge. 40 C.F.R. § 122.41(l)(4)(i) (1994). Exceedances reported on DMRs function as admissions of guilt and are, therefore, sufficient evidence of violation to support a motion for summary judgment on the existence of violations. See, e.g., Connecticut Fund for the Env't v. Raymark Indus., Inc., 631 F. Supp. 1283, 1285-86 (D. Conn. 1986). The ease with regulation of traditional command and control techniques results because dischargers are required to treat their effluent to a certain standard or violate the act. The CWA is a classic example of how easy it is to regulate such a system with its self-reporting DMR requirement. There would not be such a direct way to enforce or regulate pollution prevention/waste minimization efforts.

only transferred between environmental media rather than destroyed.¹³

Reuse of the waste (either on-site or exchanged with other industries) or recycling offers a middle-of-the-road alternative. Waste is still generated, but it is either reused as a raw material in an industrial process or recycled into a usable material.¹⁴ The biggest drawback to either reuse or recycling is regulatory constraints. Once generated, wastes may become subject to the requirements of the regulatory system.¹⁵ This system may actually result in greater incentive to dispose of the material rather than to "jump through hoops" to allow it to be deregulated and reused or recycled.¹⁶ These considerations and the requirements of the PPA have resulted in source reduction, rather than waste minimization, to be the focus of regulatory and enforcement efforts.¹⁷

The EPA and the Office of Technology Assessment (OTA), in reports submitted to Congress in 1986, concluded that traditional command and control regulatory approaches for pollution prevention programs were neither practicable nor feasible.¹⁸ Instead they recommended encouraging vol-

13. Pollution Prevention Strategy, 56 Fed. Reg. 7853. For example, vapor extraction results in volatile constituents being released from solid media, reducing the hazardous property of the solid, but consequently creating air emissions from those same volatile organics. *See also* Breen & Dellarco, *supra* note 1, at 3 and Bert Black & David H. Hollander, *Forced Volunteerism: The New Regulatory Push to Prevent Pollution*, 16 Chem. Reg. Rep. (BNA) 1996 (Jan. 22, 1993).

14. WASTE MANAGEMENT, INC. AND PIPER & MARBURY, WASTE REDUCTION, *supra* note 7, at 29-30. Potentially, a waste may be reused as generated or may be enhanced by treatment prior to reuse. Treatment options may include, for example, ion exchange, distillation or dewatering. *Id.* at 29. Locating an off-site industry who could use the generated wastes may be aided by using a waste exchange.

15. *Id.* at 63-67. However, RCRA attempts to regulate legitimate recycling activities either not at all or lightly. *Id.*

16. Black & Hollander, *supra* note 13, at 1996.

17. Pollution Prevention Strategy, 56 Fed. Reg. 7855. *See also* Breen & Dellarco, *supra* note 1, at 6.

18. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., SPECIAL REP. NO. OTA-TTE-317, SERIOUS REDUCTION OF HAZARDOUS WASTE: FOR POLLUTION PREVENTION AND INDUSTRIAL EFFICIENCY 3-4 (1986) [hereinafter OTA, SERIOUS REDUCTION]. Both reports support the use of nonregulatory technical assistance to help industry reduce waste generation.

untary efforts through increased dissemination of information to promote awareness and to provide technological information.¹⁹ This approach was incorporated into the PPA and the resultant regulatory actions. The EPA has tried to further "volunteer" efforts in pollution prevention by incorporating Supplemental Environmental Projects (SEPs) into settlements for alleged violations of various federal statutes, including the Toxic Substances Control Act (TSCA),²⁰ the Emergency Planning and Community Right-to-Know Act (EPCRA),²¹ the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),²² RCRA,²³ CWA²⁴ and the Air Pollution Prevention and Control Act, also known as the Clean Air Act (CAA).²⁵ ²⁶ The EPA uses the SEP program in enforcement settlements through which a company may receive a decreased fine in return for performing specified pollution prevention activities.²⁷ SEPs offer the advantage of imposing a

Neither supports a regulatory approach prescribing industry action. The EPA recommended technical and informational assistance to industry. The heart of the suggested program was information gathering, developing of a waste minimization program, and looking at long-term options after gathering the short-term information. The OTA focused on in-plant technical assistance as the preferred method of assistance and recommended grant programs to the states and the creation of an office to deal with these issues within the EPA. *Id.* See also OTA, PROGRESS REPORT, *supra* note 11, at 3-5.

19. OTA, SERIOUS REDUCTION, *supra* note 18, at 4.

20. TSCA §§ 2-412, 15 U.S.C. §§ 2601-2692 (1988 & Supp. V 1993).

21. EPCRA §§ 301-330, 42 U.S.C. §§ 11,001-11,050 (1988 & Supp. V 1993).

22. FIFRA §§ 2-31, 7 U.S.C. §§ 136-136y (1988 & Supp. V 1993).

23. RCRA §§ 1002-11,012, 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993).

24. CWA §§ 101-607, 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

25. CAA §§ 102-618, 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993).

26. ENVIRONMENTAL PROTECTION AGENCY, ENFORCEMENT ACCOMPLISHMENTS REPORT FY 1993, REP. NO. EPA 300-R-94-003, 2-6 (1994) [hereinafter EPA, ENFORCEMENT ACCOMPLISHMENTS]. Forty-eight states offer assistance in identifying appropriate Supplemental Environmental Projects (SEPs). *Assistance Available from States to Help Companies Offset Penalties*, 17 Chem. Reg. Rep. (BNA) 1708 (Jan. 7, 1994).

27. Memorandum from James M. Strock, Assistant Administrator, to Regional Administrators, Deputy Regional Administrators, Regional Counsels, Regional Program Division Directors, Assistant Administrators, General Counsel, Program Compliance Directors, Associate Enforcement Counsels 1 (Feb. 12, 1991) (on file with author) [hereinafter SEP Guidance Memorandum]. The SEP policy will likely be revised during 1995. The revisions will affect the categories of acceptable projects, redefine the nexus requirement, and provide guidelines for calculating penalty offset. Telephone Interview with David Hindin, Team

penalty that will have a long term environmental benefit in addition to the punitive effect of extracting monetary penalties.

This article will discuss the development of pollution prevention as the preferred environmental management alternative and how SEPs may be used effectively to further this objective. Particular focus is on whether such actions exceed the EPA's statutory authority. Part II will examine federal legislation and regulatory efforts to incorporate pollution prevention into the EPA's programs. Part III will discuss the SEP program, experiences to date, and the legal basis for inclusion of SEPs in enforcement settlements. Part IV will provide a conclusion.

II. Development of Federal Pollution Prevention Programs

A. Resource Conservation and Recovery Act

The EPA derives its power to regulate hazardous waste from Subtitle III, also known as Subtitle C, of RCRA.²⁸ As

Leader Attorney, United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance (Oct. 25, 1994). For a discussion of the nexus requirement, see § III(A), *infra*. See generally *Environmental Protection Agency Civil Penalty Policy*, [Federal Laws] Env't Rep. (BNA) 21:0761 (Feb. 16, 1984) [hereinafter *Civil Penalty Policy*].

28. RCRA §§ 3001-3023, 42 U.S.C. §§ 6921-6939e (1988 & Supp. V 1993). RCRA Subtitle C, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), regulates hazardous waste from "cradle to grave." RCRA requires the EPA to establish minimum standards for all aspects of hazardous waste generation, transportation and treatment, storage or disposal. RCRA is intended to focus on prospective behavior to avoid future harm to public health and the environment; however it also incorporates corrective action requirements for past releases. Regulated hazardous wastes are either "listed" or "characteristic." Listed wastes are set forth in 40 C.F.R. pt. 261, subpt. D. A listed waste appears on one of four lists: hazardous wastes from non-specific sources (40 C.F.R. § 261.31 (1994)); hazardous wastes from specific sources (40 C.F.R. § 261.32 (1994)); discarded commercial chemical products, off-specification species, container residues and spill residues thereof identified as acute hazardous wastes (40 C.F.R. § 261.33(e) (1994)); or discarded commercial chemical products, off-specification species, container residues and spill residues thereof identified as toxic wastes (40 C.F.R. § 261.33(f) (1994)). Characteristic wastes are described in 40 C.F.R. pt. 261, subpt. C. A characteristic hazardous waste exhibits one or more of the following characteristics: ignitability (40

part of the objectives and national policies behind RCRA, Congress declared that the generation and land disposal of hazardous waste should be reduced through "process substitution, materials recovery, properly conducted recycling and reuse, and treatment."²⁹ To help achieve this objective, Congress included several certification requirements to promote pollution prevention among hazardous waste generators. On each manifest accompanying a waste shipment, RCRA requires generators to certify that the generator "has a program in place to reduce the volume or quantity and toxicity of" their waste, and that "the proposed method of treatment, storage or disposal" be one that "minimizes present and future threat to human health and the environment."³⁰ Further, RCRA requires that before issuance of a permit to a treatment, storage or disposal facility (TSDF) for handling wastes generated on-site, the facility must certify the existence of a waste-minimization program and the sufficiency of the treatment, storage or disposal method to protect present and future human health and the environment.³¹

Although the appropriate manifest forms and permits include these certification requirements, in reality, they have little "bite." They do not provide sufficient impetus for promoting effective pollution prevention programs since adequate enforcement and appropriate standards are not available.³² The EPA has promulgated non-binding guidance for developing waste minimization programs; but since it is non-binding, the waste generator may choose to ignore the

C.F.R. § 261.21 (1994)), corrosivity (40 C.F.R. § 261.22 (1994)), reactivity (40 C.F.R. § 261.23 (1994)) or toxicity (40 C.F.R. § 261.24 (1994)).

29. RCRA § 1003(a)(6), 42 U.S.C. § 6902(a)(6) (1988 & Supp. V 1993). However, RCRA regulates only waste generation and management, not manufacturing processes. WASTE MANAGEMENT, INC. AND PIPER & MARBURY, WASTE REDUCTION, *supra* note 7, at 63.

30. RCRA § 3002(b), 42 U.S.C. § 6922(b) (1988 & Supp. V 1993). The manifest referred to is the standard manifest used to ship hazardous waste off-site for treatment, storage or disposal. *See also* 40 C.F.R. § 262.20(a) (1994).

31. RCRA § 3005(h), 42 U.S.C. § 6925(h) (1988 & Supp. V 1993).

32. ENVIRONMENTAL PROTECTION AGENCY, THE NATION'S HAZARDOUS WASTE MANAGEMENT PROGRAM AT A CROSSROADS: THE RCRA IMPLEMENTATION STUDY, REP. NO. EPA-530-SW-90-069, 54 (1990) [hereinafter EPA, CROSSROADS].

guidance and the EPA cannot pursue an enforcement action against the generator.³³ Furthermore, the certification does not require any affirmative, specific commitment regarding degree of waste reduction.³⁴ The generator-determined degree of waste reduction is not reviewable by the EPA.³⁵

Of greater potential merit are the technology-forcing provisions of the RCRA "land-ban" sections. Land-ban requirements prohibit designated wastes from land disposal unless specified pretreatment requirements are deemed adequate to reduce the mobility and toxicity of the waste such that the treated residual can be safely land disposed.³⁶ These provisions result in increased disposal costs to the generator by requiring either alternate treatment or disposal or pretreatment prior to land disposal.³⁷ This regulatory scheme pro-

33. *Id.* See Guidance to Hazardous Waste Generators on the Elements of a Waste Minimization Program, 58 Fed. Reg. 31,114 (1993). The guidance suggests the following elements should be incorporated into a waste minimization program: "(1) [t]op management support; (2) characterization of waste generation and waste management costs; (3) periodic waste minimization assessments; (4) appropriate cost allocation; (5) encouragement of technology transfer; and (6) program implementation and evaluation." *Id.*

34. The generator need only certify the waste minimization efforts be to "the degree determined by the generator to be economically practicable." RCRA §§ 3002(b)(1), 3005(h)(1), 42 U.S.C. §§ 6922(b)(1), 6925(h)(1) (1988 & Supp. V 1993).

35. S. REP. NO. 284, 98th Cong., 1st Sess. 66 (1983).

36. See RCRA § 3004, 42 U.S.C. § 6924 (1988 & Supp. V 1993). The federal land disposal restrictions (LDRs), or land ban regulations, apply to RCRA hazardous wastes which are land disposed or placed. 40 C.F.R. § 268.1 (1994). The EPA may set one of three types of treatment standards, which are all based on the best demonstrated available technology (BDAT) identified for the waste. The standard may be: (1) a concentration level to be achieved prior to disposal, 40 C.F.R. §§ 268.41, 268.43 (1994); (2) a specified technology to be used, 40 C.F.R. § 268.42 (1994); or (3) a "no land disposal" designation, issued when the waste is no longer generated, is totally recycled, is not currently being land disposed or no hazardous residuals are produced from treatment. The applicable standard must be met prior to land disposal of the waste. See 40 C.F.R. pt. 268 (1994).

37. Pollution Prevention Strategy, 56 Fed. Reg. 7852. Hazardous wastes banned from land disposal may only be stored for the purpose of accumulation of quantities necessary for proper recovery, treatment or disposal. RCRA § 3004(j), 42 U.S.C. § 6924(j) (1988 & Supp. V 1993). In general, a generator may accumulate hazardous waste on-site without a permit for up to 90 days. 40 C.F.R. § 262.34(a) (1994). Therefore, storage is not a feasible long-term alternative once a waste is prohibited from land disposal.

vides an economic incentive to reduce pollution generated.³⁸ However, although promising as a market-incentive, since all manufacturers will be subject to the same requirements and no additional incentives are provided to encourage pollution prevention, the waste generator may simply pass the additional cost to the consumer. Thus, the potential incentive to the generator to reduce its waste would be lessened.

B. Emergency Planning and Community Right-to-Know Act

In response to the relative lack of pollution prevention progress achieved through RCRA, Congress passed the Emergency Planning and Community Right-to-Know Act (EPCRA) in 1986.³⁹ Congress wanted EPCRA to stimulate the industrial community to comply with environmental laws and to further reduce pollution generation.⁴⁰ These goals were to be achieved by providing information directly to the public, with the hope that change would come through political pressure.⁴¹ EPCRA has four major sections: emergency planning,⁴² emergency notification,⁴³ community right-to-know reporting requirements,⁴⁴ and the Toxics Chemical Release

38. EPA, CROSSROADS, *supra* note 32, at 39-40.

39. EPCRA §§ 301-330, 42 U.S.C. §§ 11,001-11,050 (1988 & Supp. V 1993).

40. Steven D. Newburg-Rinn, *Right-To-Know and Pollution Prevention Legislation, in POLLUTION PREVENTION IN INDUSTRIAL PROCESSES: THE ROLE OF PROCESS ANALYTICAL CHEMISTRY*, *supra* note 1, at 21.

41. *Id.*

42. EPCRA §§ 301-303, 42 U.S.C. §§ 11,001-11,003 (1988 & Supp. V 1993). The emergency planning sections designate substances and facilities covered by the requirements, provide notification requirements for covered facilities and furnish guidelines for developing comprehensive emergency response plans at covered facilities. *Id.*

43. EPCRA § 304, 42 U.S.C. § 11,004 (1988 & Supp. V 1993). EPCRA requires reporting of certain releases of extremely hazardous substances exceeding reportable quantities. *Id.* § 11,004(a). This requirement applies to the owner or operator of any facility at which a "hazardous chemical is produced, used, or stored." *Id.* Federally permitted releases and releases that result in exposure to persons solely within the site or sites on which the facility is located are exempt from the notification requirement. *Id.* § 11,004(a)(4). The list of regulated substances and associated reportable quantities is provided in 40 C.F.R. pt. 355, Appendices A and B.

44. EPCRA §§ 311-312, 42 U.S.C. §§ 11,021-11,022 (1988 & Supp. V 1993). These sections require submission of Material Safety Data Sheets (MSDS) and

Inventory (TRI).⁴⁵ The TRI is the predominant pollution prevention component of the statute. The TRI requires annual reporting of direct releases to all environmental media for Standard Industrial Classification (SIC) Codes 20-39 with ten or more full-time employees that manufacture or process more than 25,000 pounds or use more than 10,000 pounds of any one of approximately 330 chemicals or chemical categories.⁴⁶ The annual release forms are "intended to provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities."⁴⁷

The TRI requirements have been a "powerful incentive" for manufacturing facilities to reduce their emissions⁴⁸ because, in essence, the manufacturer must "justify . . . releases to the environment."⁴⁹ Since EPCRA's enactment, and its subsequent success in encouraging industry to take a hard look at pollution emission levels, the EPA Administrator has called for voluntary participation in the "industrial toxics project," also called the "33/50" program.⁵⁰ The program's goals are to cut nationwide emissions of seventeen key chemicals by thirty-three percent by the end of 1992 and by fifty percent by the end of 1995.⁵¹ Mandatory participation in reporting TRI releases and voluntary participation in the 33/50 program could potentially have a significant impact in providing incentive to industry regarding pollution prevention.

an annual emergency and hazardous chemical inventory form from regulated facilities.

45. EPCRA § 313, 42 U.S.C. § 11,023 (1988 & Supp. V 1993).

46. EPCRA § 313(a)-(c), (f), 42 U.S.C. § 11,023(a)-(c), (f) (1988 & Supp. V 1993).

47. 42 U.S.C. § 11,023(h) (1988 & Supp. V 1993).

48. Tom Anderson, *Making Progress: 4 Corporations Report Headway as They Strive to Cut Pollution*, REP. DISPATCH, Dec. 5, 1993, at 14A.

49. *Id.* The manufacturers have to confront pollution as an aspect of doing business. Since the manufacturer's emissions inventory is made public, each manufacturer's good will is at stake at the time of publication. *Id.*

50. Pollution Prevention Strategy, 56 Fed. Reg. 7851.

51. *Id.* In 1991, nationwide TRI emissions were reduced 33.2%, while in 1992, 40.1% reductions were reported. ENVIRONMENTAL PROTECTION AGENCY, 1992 TOXICS RELEASE INVENTORY PUBLIC DATA RELEASE, REP. NO. EPA 745-R-94-001, 263 (1994).

C. Pollution Prevention Act of 1990

In the PPA, Congress declared the national pollution prevention policy to be:

that pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.⁵²

Congress relied on two methods to implement this policy and promote the use of source reduction techniques: (1) information collection and dissemination and (2) technical and financial assistance to the states.⁵³ In addition, in the PPA, Congress mandated increased reporting requirements of the TRI under EPCRA.⁵⁴ Congress designed the PPA to be a "first step toward accomplishing pollution prevention objectives," relying on voluntary reduction of pollutants through the implementation of the PPA requirements.⁵⁵

D. EPA Implementation

During the summer of 1988, the EPA established its Office of Pollution Prevention.⁵⁶ The Office has been actively promoting pollution prevention through technology transfer.⁵⁷ Shortly after passage of the PPA the Office further fo-

52. PPA § 6602(b), 42 U.S.C. § 13,101(b) (1988 & Supp. V 1993).

53. S. REP. NO. 526, 101st Cong., 2d Sess. 1 (1990). Specifically, under the PPA, the EPA is required to develop and implement a strategy to promote source reduction, make matching grants to States, establish a national clearinghouse on source reduction techniques, coordinate and improve information collection under RCRA and TRI, report to Congress on progress, and establish an Office of Pollution Prevention. *Id.* at 2.

54. PPA § 6607, 42 U.S.C. § 13,106 (1988 & Supp. V 1993).

55. S. REP. NO. 526, 101st Cong., 2d Sess. 1 (1990).

56. Pollution Prevention Strategy, 56 Fed. Reg. 7855.

57. *Id.* The Pollution Prevention Office's accomplishments include holding agency-wide innovative pollution prevention projects competitions; setting up

cused its mission with the publication of the EPA's Pollution Prevention Strategy.⁵⁸ The strategy provides guidance for the incorporation of pollution prevention into existing regulatory programs and sets forth a program for achieving pollution prevention goals.⁵⁹ The latter objective refers to programs, such as the industrial toxics project, where pollution prevention is to be promoted throughout various industries, agriculture and at federal facilities through voluntary efforts and partnering with the EPA.⁶⁰ The former objective strives to incorporate pollution prevention into the EPA's operations in programs and regional offices.⁶¹

Beyond promoting voluntary reduction efforts, the EPA plans to integrate pollution prevention into its programs using the following approaches:

Identify and overcome regulatory and nonregulatory barriers;⁶²

Expand public participation and choice;⁶³

Access the states' grant program to promote pollution prevention technologies and applications;⁶⁴

the Pollution Prevention Information Clearinghouse; coordinating the rulemaking for the pulp and paper industry which is designed to eliminate dioxin formation during the bleaching process; developing the states' grants program; and creating an audit guide. *Id.*

58. Pollution Prevention Strategy, 56 Fed. Reg. 7849.

59. *Id.* at 7852.

60. *Id.* The industrial toxics project is discussed *infra* at Section II(B).

61. *Id.*

62. *Id.* at 7856-57. To overcome these barriers, the EPA will investigate current obstacles, provide technical assistance to states and industry, improve identification of releases to specific media, assess legislative and regulatory impacts of alternative methods of reducing pollution, identify incentives to implement alternatives, and continue operation of the Pollution Prevention Information Clearinghouse. *Id.*

63. Pollution Prevention Strategy, 56 Fed. Reg. 7857. The EPA will increase information sharing to individuals, businesses and communities. *Id.* In addition, it will assess environmental and health consequences of various consumer products and try to "harness consumer power" to influence business to develop "environmentally friendly" products. *Id.* Further, the EPA will work with other federal agencies to develop appropriate labelling guidelines. *Id.* at 7857-58.

64. *Id.* at 7858. Recognizing the role states have played in fostering pollution prevention, the EPA will continue to provide grant money for states to use on qualifying projects. *Id.*

Provide outreach and training to government, industry, academia, and the public;⁶⁵

Investigate methods to encourage pollution prevention within the permitting programs;⁶⁶

Improve cross-media evaluation for certain chemicals and their sources;⁶⁷

Use TSCA to create pollution prevention incentives;⁶⁸

Increase research;⁶⁹

Identify emerging products and technologies that use and foster pollution prevention approaches;⁷⁰ and

Incorporate pollution prevention conditions in enforcement settlements.⁷¹

As outlined above, the Pollution Prevention Strategy generally attempts to achieve pollution prevention goals through voluntary efforts. One notable exception is the en-

65. *Id.* Outreach and training programs will include continuing use of the Pollution Prevention Information Clearinghouse, developing technical and non-technical resources, establishing training programs for government employees and industry, and developing elementary school through university pollution prevention curriculum materials. *Id.*

66. *Id.* at 7859. The EPA will enter into enforceable commitments to achieve emissions reductions of ninety to ninety-five percent from a baseline year. *Id.* In permitting, the EPA will encourage alternatives to conventional treatment processes. *Id.* The EPA will work with industries to develop practical alternatives and will consider new permitting processes to allow testing and operation. *Id.*

67. *Id.* This will be accomplished by categorizing rules by pollution sources, which have been referred to as regulatory clusters. *Id.* Evaluating alternatives in terms of the clusters will result in accurate evaluation of cumulative impacts to affected sources. *Id.*

68. Pollution Prevention Strategy, 56 Fed. Reg. 7859. Under TSCA, the EPA may control the use of specific chemical substances in commerce and manufacturing. *Id.* When a particular substance presents an unreasonable risk to human health, limitations on its use may provide pollution prevention incentives. *Id.*

69. *Id.* The EPA research provides information on available pollution prevention opportunities for various business sectors. *Id.* The EPA's immediate priority focuses on the contaminants and sources targeted in the industrial toxics project. *Id.*

70. Pollution Prevention Strategy, 56 Fed. Reg. 7860. These goals will be achieved through several of the programs discussed above. *Id.*

71. *Id.* at 7859. Pollution prevention conditions are incorporated into settlement agreements as SEPs. *Id.*

forcement strategy, discussed in Part III. The EPA's enforcement policy incorporates pollution prevention goals by allowing and encouraging the inclusion of SEPs in negotiated settlements.⁷² The EPA will continue to use SEPs during EPA Administrator Carol Browner's tenure.⁷³ Once incorporated into a consent decree, the pollution prevention project becomes mandatory and enforceable.⁷⁴

III. Supplemental Environmental Projects

A. The SEP Program

The SEP program allows industry to avoid paying a portion of penalty fines by installing pollution control equipment or implementing pollution prevention programs.⁷⁵ There are five acceptable categories of SEPs: pollution prevention, pollution reduction, environmental restoration, environmental auditing, and public awareness projects.⁷⁶ To gain approval,

72. *Id.* The EPA estimates that ninety-five percent of enforcement actions result in settlement. *Criminal Cases, Fine Collections Rise in 1993, EPA Says in Report on Enforcement*, 24 [Current Developments] Env't Rep. (BNA) 1516, 1517 (Dec. 17, 1993) [hereinafter *Criminal Cases, Fine Collections Rise*].

73. *New Directions Predicted for EPA Enforcement Policy*, PESTICIDE & TOXIC CHEM. NEWS, Jan. 27, 1993, available in LEXIS, Envirn, Pubs. Furthermore, SEPs are being used in response to Executive Order 12,898, in which President Clinton called on federal agencies to incorporate environmental justice principles into their operations. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994). The EPA will be encouraging the use of SEPs in target communities to achieve the agency goals of "(1) ensuring that no segment of the population 'bears disproportionately high and adverse effects of environmental pollution;' and (2) educating and empowering everyone . . . to 'ensure early participation in the environmental decision-making process, form partnerships and achieve environmental justice to help promote sustainable communities.'" *Special Report: EPA Eyes Enforcement Plan Emphasizing Civil Rights*, HAZARDOUS WASTE NEWS, (May 9, 1994) available in LEXIS, Envirn, Allnws.

74. EPA, ENFORCEMENT ACCOMPLISHMENTS, *supra* note 26, at 2-2. See also SEP Guidance Memorandum, *supra* note 27, at 12-13.

75. During the publication process of this comment, the EPA instituted an Interim Revised Supplemental Environmental Projects Policy that became effective on May 8, 1995. This new policy broadens SEP categories, amends legal deficiencies associated with the prior policy, and "makes the concept more 'user friendly.'" Lynn L. Bergeson, *EPA Revises Supplemental Environmental Projects Policy*, POLLUTION ENGINEERING, July 1995, at 37.

76. SEP Guidance Memorandum, *supra* note 27, at 2-4. Pollution prevention projects generally address source reduction. *Id.* at 2. Pollution reduction projects reduce emissions to levels well below required regulatory or permitted

the SEP must benefit the general public and not be a statutory requirement with which the company would have had to comply unless compliance is significantly ahead of schedule.⁷⁷ In general, the EPA will be receptive to a project if it "further the Agency's statutory mandates to clean up the environment and deter violations of the law."⁷⁸ Projects deemed to be "sound business practices" are not acceptable SEPs.⁷⁹ Implementation of sound business practices, although perhaps beneficially affecting the environment, are within the violator's economic self-interest and, therefore, are not considered an acceptable offset for the payment of a penalty.⁸⁰

A "vertical or horizontal nexus" to the violation is required for a SEP to be acceptable.⁸¹ A vertical nexus exists where the SEP results in reducing future emissions to offset past excess emissions of the same pollutant to the same medium.⁸² A horizontal nexus exists where the project addresses different media at the same facility or the same media at a different facility.⁸³ A project with a horizontal nexus to the violation is less likely to be approved than one

levels or incorporate an accelerated compliance schedule. *Id.* at 2-3. Environmental restoration projects repair the damage resulting from the violation and, in addition, enhance the environment in the vicinity of the violating facility. *Id.* at 3. Environmental auditing projects must go beyond "sound business practices" to seek out facility practices contributing to environmental problems. *Id.* at 3-4. Public awareness projects educate the public or disseminate technical information to the community. *Id.* at 4. Projects not acceptable include funding research at educational institutions, general public awareness projects, or projects unrelated to the violation. *Id.* at 5.

77. *Id.* at 2-3.

78. *Id.* at 1.

79. *Id.* at 9.

80. *Id.* However, where a project will result in significant, long-term environmental benefits, implementation of a sound business practice may be deemed an acceptable project. *Id.*

81. SEP Guidance Memorandum, *supra* note 27, at 6.

82. *Id.* at 6. For example, if a facility's discharges violate the CWA, a permissible SEP would be to undertake a reduction of similar pollutant discharges of another facility along the same waters. *Id.*

83. *Id.* at 7. An acceptable SEP demonstrating a horizontal nexus would be a facility's reduction of emissions to compensate for health risks to a community, due to the same facility's violations. *Id.*

with a vertical nexus because of the relation to the violation.⁸⁴

SEPs are designed to complement but not replace monetary penalties. The EPA's SEP policy requires that the economic benefit of violation be recovered in monetary penalties, despite the cost of the new equipment or the cost of developing and implementing the SEP.⁸⁵ First, the EPA establishes the gravity of the penalty by considering the circumstances and extent of the violation.⁸⁶ Second, the EPA reduces the penalty amount in consideration of the proposed project.⁸⁷ Factors such as the extent of voluntary disclosure, history of prior violations, delisted chemicals, cooperation of the firm, the ability of the violator to pay and other factors as the courts may require are considered when setting penalty amounts.⁸⁸

Although a dollar-for-dollar credit against the penalty is possible, in general the project cost exceeds the penalty reduction.⁸⁹ Joy Technologies, in response to a proposed penalty of \$90,000, agreed to a penalty of \$20,000 and performance of a SEP estimated at a gross cost of \$350,000.⁹⁰ Dow Corning agreed to pay a minimum of \$500,000 to install

84. *Id.*

85. *Id.* at 10. In addition, the general and statute-specific penalty policies require recoupment of the economic benefit of the violation. See *infra* text accompanying notes 148-151. Furthermore, the SEP policy prohibits lowering the penalty by more than the amount spent on the project after taxes. SEP Guidance Memorandum, *supra* note 27, at 10.

86. *New EPA Enforcement Policy to Expand Search for Incomplete, Inaccurate TRI Data*, 23 [Current Developments] *Env't Rep. (BNA)* 1276, 1277 (Aug. 28, 1992).

87. *Id.*

88. *Id.*

89. Jennifer E. King, *CEO Wants Cost Analysis, Says Seminar Co-Chair*, *CORP. LEGAL TIMES*, July 1993, at 30. The EPA states a company must typically spend \$2.50 on a SEP for each one dollar reduction in fines. *Correction*, 25 [Current Developments] *Env't Rep. (BNA)* 325 (June 17, 1994); *Use of Supplemental Environmental Projects by EPA, States Increasing as Familiarity Grows*, 25 [Current Developments] *Env't Rep. (BNA)* 282 (June 10, 1994). But see *infra* text accompanying notes 90-92.

90. *EPCRA Enforcement Continues to Feature Other Cleanups*, *PESTICIDE & TOXIC CHEM. NEWS*, Apr. 29, 1992, available in *LEXIS*, *Envirn*, *Pubs*. The project involved substitution of water-based paint for a solvent-based paint to eliminate xylene use. *Id.*

a chemical spill control device at one of their facilities in exchange for a \$126,500 penalty reduction.⁹¹ Similarly, All American Pipeline Company completed a SEP in which existing pump engines were replaced with new engines which will burn more efficiently, at an estimated cost of at least \$1,000,000 for a corresponding \$186,000 penalty reduction.⁹² But some examples of less drastic cost differences do exist. A dollar-for-dollar agreement was reached in *In re Harbor Universal, Inc.*⁹³ The consent decree addressed alleged violations of RCRA and required the metal furniture manufacturer to incorporate changes in its operations that would reduce the amount of waste generated.⁹⁴ This settlement is considered "novel" and only resulted because the EPA was "extremely impressed" with the proposed environmental project.⁹⁵

The EPA's Assistant Administrator for Enforcement and, under certain circumstances, the media Assistant Administrator must approve an administrative settlement incorporating a SEP.⁹⁶ Judicial settlements also require the approval of the Assistant Administrator for Enforcement and, further, require the approval by the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice (DOJ).⁹⁷ The DOJ publishes notice of all pro-

91. Dow Corning Corp., No. TSCA-91-H-17, 1993 TSCA LEXIS 244 at *5, *8 (E.P.A. July 13, 1993). Dow Corning had voluntarily disclosed TSCA violations. *Id.* at *3. Fifteen percent of the eighty percent reduction was attributed to Dow Corning's efforts to mitigate the penalty and perform the SEP. *Id.* at *5. See also *EPA Agrees to Reduce \$230,000 Fine 80 Percent for 20 Imports of Uncertified New TSCA Chemical*, 17 Chem. Reg. Rep. (BNA) 954 (Aug. 13, 1993).

92. All American Pipeline Co., 59 Fed. Reg. 37,991 (Dep't Justice 1994). All American Pipeline Company had allegedly violated the prevention of significant deterioration of air quality (PSD) and new source performance standards (NSPS) of the CAA. *Id.*

93. *Company Begins Work on Pollution Prevention Project Under Dollar-for-Dollar Settlement with EPA*, 23 [Current Developments] Env't Rep. (BNA) 1413 (Sept. 18, 1992) [hereinafter *Company Begins Work*].

94. *Id.*

95. *Id.* The SEP also resulted in reduced generation of certain chemicals targeted under the 33/50 program. *Id.*

96. SEP Guidance Memorandum, *supra* note 27, at 1.

97. *Id.*

posed consent decrees in the Federal Register and provides an opportunity for public review and comment.⁹⁸

B. Experience in the SEP Program

The EPA has reportedly used SEPs since the early 1980s, although with much greater frequency recently.⁹⁹ SEPs have been used most frequently in enforcement of TSCA, and EPCRA; however, SEPs have also been used in enforcement of RCRA, FIFRA, CWA, and CAA.¹⁰⁰ TSCA was the first law with a SEP-related provision, which specifically allows "settlements with conditions."¹⁰¹ This provision has been part of TSCA since the 1970s. The CAA also has SEP-related provisions.¹⁰² The EPA's general Civil Penalty Policy and its statute-specific policies also recognize the use of SEPs for penalty settlement.¹⁰³ The EPA uses SEPs in up to one in ten enforcement settlements, including actions settled both judi-

98. 28 C.F.R. § 50.7 (1992).

99. *Growth Expected in Program to Cut Fines in Swap for Participation in Projects*, 16 Chem. Reg. Rep. (BNA) 2278 (Feb. 19, 1993) [hereinafter *Growth Expected*].

100. *Id.* In 1992, the EPA used SEPs in 187 mobile air source cases and in 82 cases under EPCRA and TSCA. *FY 1992 Enforcement Garner Record \$78.7 Million, EPA Says*, PESTICIDE & TOXIC CHEM. NEWS, June 23, 1993, available in LEXIS, Envirn, Pubs. Fifty-two percent of all 1992 SEPs were pollution reduction projects, 28% were pollution prevention projects, public awareness projects represented 5%, environmental audits and contributions to local emergency planning committees each constituted 4%, and environmental restoration accounted for 2%. *Use of Supplemental Environmental Projects by EPA, States Increasing as Familiarity Grows*, 25 [Current Developments] Env't Rep. (BNA) 282 (June 10, 1994). In 1993, 48% of SEPs were pollution reduction projects, while 18% were pollution prevention projects. EPA, ENFORCEMENT ACCOMPLISHMENTS, *supra* note 26, at 2-6.

101. TSCA § 16(a)(2)(C), 15 U.S.C. § 2615(a)(2)(C) (1988 & Supp. V 1993). The provision specifically allows the EPA to "compromise, modify or remit, with or without conditions, any civil penalty which may be imposed under this subsection." *Id.*

102. CAA §§ 113(d)(2)(B), 304(g)(2), 42 U.S.C. §§ 7413(d)(2)(B), 7604(g)(2) (1988 & Supp. V 1993). Section 7413 gives the EPA Administrator the authority to "compromise, modify, or remit, with or without conditions," any administrative penalties. Section 7604 provides that in a citizen suit, the court has the discretion to order that the penalty be used in "beneficial mitigation projects which are consistent with this Chapter and enhance the public health or the environment."

103. See *infra* text accompanying notes 134-156.

cially and administratively.¹⁰⁴ The EPA estimates that in 1992, more than 400 SEPs were negotiated, totalling an estimated \$50.1 million.¹⁰⁵ In 1993, 229 SEPs were negotiated, with an estimated value of \$73.8 million.¹⁰⁶

Typical settlements incorporating SEPs require payment of a civil penalty and, often, injunctive relief. For example, the consent decree in *United States v. Florida Tile Indus., Inc.* required the payment of a civil penalty, the performance of remedial measures to eliminate further stormwater discharges to a lake, and completion of two SEPs.¹⁰⁷ This decree adequately addressed the violation and, in addition, provided for collateral environmental benefit.

SEPs negotiated to date demonstrate a wide variety of acceptable projects with extensive environmentally beneficial effects. In *United States v. North Am. Philips Corp.*, the consent decree, lodged to settle alleged violations of the CWA, required installation of closed loop and evaporation systems resulting in a significant decrease in the volume of wastewater discharges. These improvements were completed in addition to payment of a civil penalty and complete elimination of the discharge that formed the basis of the complaint.¹⁰⁸ Similarly, in a consent decree addressing violations of the CAA, Bethlehem Steel Corporation was required to either install new doors on its coke ovens to reduce emissions from leaking doors or pay an additional \$1.2 million in civil penalties.¹⁰⁹ These projects demonstrate how SEPs can be used to address potential future violations of environmental laws by incorporating projects eliminating sources of pollu-

104. *Growth Expected*, *supra* note 98, at 2278.

105. *EPA 1992 Data Show Criminal Fines Jump; Most Civil Cases Filed Under TSCA*, 17 Chem. Reg. Rep. (BNA) 545, 546 (June 4, 1993).

106. EPA, ENFORCEMENT ACCOMPLISHMENTS, *supra* note 26, at 2-6. SEPs and injunctive relief combined were expected to reach at least \$800 million for 1993. *Criminal Cases, Fine Collections Rise*, *supra* note 72, at 1517.

107. *Florida Tile Indus., Inc.*, 58 Fed. Reg. 42,747 (Dep't Justice 1993).

108. *North Am. Philips Corp.*, 57 Fed. Reg. 31,531 (Dep't Justice 1992). The complaint alleged continual violations of the national categorical pretreatment standards for the applicable manufacturing categories. *Id.*

109. *Bethlehem Steel Corp.*, 57 Fed. Reg. 10,041 (Dep't Justice 1992). Bethlehem Steel had allegedly violated provisions of the CAA in operating its blast furnace, coke oven batteries, and a high pressure boiler. *Id.*

tion from the industrial process. However, SEP requirements need not stop at the plant gate. For example, in addition to paying a civil penalty for CWA violations, the Magna Copper Company was required to pay \$50,000 to the United States Forestry Service to improve fish habitats in area streams and to remediate contamination at an off-site abandoned mine.¹¹⁰ Also, in *Conservation Law Found. of New England, Inc. v. City of Fall River*, in response to water quality violations resulting in part from combined sewer overflow, the SEP mandated installation of water-saving devices in the homes of Fall River residents.¹¹¹ Furthermore, SEPs have required research into a specific industrial process to prevent future pollution. In an administrative action against Southern Foundry Supply, Inc. for alleged violations of EPCRA, the SEP required a project "to assess the feasibility of a process to recover pure nickel" from the foundry waste residues.¹¹²

SEPs have also been used to address potential future violations through implementation of auditing and training programs beyond that normally required by existing environmental statutes. CSX Transportation, Inc. (CSXT) agreed to undertake several SEPs in addition to paying civil penalties in response to allegations of violations of its National Pollutants Discharge Elimination Systems (NPDES) permit.¹¹³ The SEPs involve compliance audits at twenty-two CSXT facilities in the Southeast, environmental audits of sixty-one of its inactive rail yards, environmental awareness programs for managers, and development of a manual containing standard operating procedures for handling stormwater runoff at CSXT yards.¹¹⁴

110. Magna Copper Co., 59 Fed. Reg. 49,712 (Dep't Justice 1994).

111. No. 87-3067-Z, 1992 U.S. Dist. LEXIS 3165, at *1, *21-22 (D. Mass. Mar. 11, 1992).

112. *EPA Settles with Southern Foundry Supply, Inc., Chattanooga, Tenn., for EPCRA Violations*, PR NEWSWIRE, June 18, 1993, available in LEXIS, Envirn, Allnws. The SEP would only be deemed acceptable by the EPA if the company committed to construction and operation of the new process upon completion of research. *Id.*

113. CSX Transportation, Inc., 58 Fed. Reg. 54,375 (Dep't Justice 1993).

114. *Id.* See also *CSX Transportation Agrees to Pay \$3 Million to Settle Alleged Clean Water Act Violations in Florida and North Carolina*, PR NEWSWIRE, Sept. 29, 1993, available in LEXIS, Envirn, Allnws.

SEPs may also be designed to address environmental restoration from past operations that is beyond that which may be obtained through an enforcement action. For example, in *United States v. Inland Steel Corp.*, the SEP required Inland Steel to rectify prior degradations of the environment in addition to coming into complete compliance with the statutory requirements at issue.¹¹⁵

Industry generally has been supportive of SEPs.¹¹⁶ A firm realizes a tax benefit by incorporating a SEP in a settlement agreement since companies can write off the associated expenditures, either as a business or capital expense.¹¹⁷ In addition, the investment might be a prudent business decision when a company anticipates future regulations that would demand the project expense at a later date.¹¹⁸ The company may also receive good press and enhance its rela-

115. *Inland Steel Corp.*, 58 Fed. Reg. 15,360 (Dep't Justice 1993). The complaint alleged violations of the CWA, the Public Health Service Act, also known as the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j (1988 & Supp. V 1993), RCRA, and CAA, including emission of airborne pollutants in excess of permitted quantities, discharge of water borne pollutants in violation of the company's NPDES permit, and release of hazardous wastes and hazardous constituents from Inland Steel's operations at Indiana Harbor Works. *Id.* The consent decree included an agreement to spend \$26 million on SEPs, most notably \$19 million in sediment remediation of the Grand Calumet River. *Id.*

116. *Growth Expected*, *supra* note 98, at 2278.

117. *Id.* Penalties are not deductible in any manner. *Id.* The determination of whether a particular environmental cleanup or assessment activity is classified as a currently deductible business expense or capital expense subject to depreciation is a question of fact. Rev. Rul. 94-38, 1994-25 I.R.B. 4, 1994 IRB LEXIS 313, at *5-6 (June 20, 1994). The Internal Revenue Service has ruled that the costs of environmental cleanups are deductible as business expenses if they do not produce permanent improvements or provide significant future benefits. *Id.* at *6-7. Significant future benefits will be determined based on a comparison of an asset's status after the remediation to its original unpolluted condition. *Id.* Therefore, when cleanup costs are simply spent to restore the land to its previous condition, they may be currently deductible as ordinary and necessary business expenses. *Id.* at *8. However, costs incurred which constitute a general plan of rehabilitation or which have long useful lives must be capitalized. Tech. Adv. Mem. 93-15-004 (Apr. 16, 1993). Costs of conducting audits are also subject to a factual analysis regarding whether they produce long-term benefits. *Id.* However, it is likely that they will be currently deductible as evaluation costs. *Costs of Environmental Cleanup of Land is Currently Deductible*, 23 Fed. Tax Weekly (CCH) 265, 266 (June 9, 1994).

118. Black & Hollander, *supra* note 13, at 1999.

tionship with the EPA.¹¹⁹ These factors, together with expected savings associated with the economically beneficial result of carrying out pollution prevention programs,¹²⁰ make the use of SEPs an attractive alternative to settling alleged violations solely with cash payments.

One disadvantage to the EPA in using SEPs is the reduction in penalty dollars collected, which Congress may perceive as failure to enforce environmental laws vigorously.¹²¹ Another potential disadvantage to the EPA in negotiating SEPs is the resources required to enforce the settlements themselves.¹²² Beyond these potential disadvantages, the EPA has encountered some resistance in using SEPs. First, the DOJ is sometimes reluctant to promote SEPs.¹²³ The DOJ takes the position that without statutory authority, like that found in TSCA, the projects contravene the Anti-Deficiency Act (ADA)¹²⁴ by impermissibly redirecting penalties from the U.S. Treasury.¹²⁵ The EPA has continued to incorporate SEPs in settlements; however, administrative SEPs are more easily negotiated since they require no concurrence from the DOJ or the courts.

Additional resistance of potentially great consequence to the program has come from Representative John Dingell (D-Mich.), then chairman of the House Energy and Commerce Committee. Rep. Dingell called for a study by the General Accounting Office (GAO) in December 1991 to investigate

119. *Id.*

120. Breen & Dellarco, *supra* note 1, at 3. Economic savings may be realized from reduced raw material requirements; decreased waste management, handling, and disposal costs; and lessened potential future cost liabilities for site cleanups or employee exposure claims resulting from material and waste handling. *Id.*

121. *Enforcement Settlements Push Pollution Prevention*, PESTICIDE & TOXIC CHEM. NEWS, Dec. 11, 1991, available in LEXIS, Envirn, Allnws.

122. *Id.* For example, if a violator only paid a penalty, that would end the EPA's involvement in that case. However, if a consent decree includes an agreement for the violator to conduct a SEP, additional oversight by the agency is required to ensure that the violator completes the project.

123. Stephen C. Jones, *Creativity Helps Companies Cut Penalties*, NAT'L L.J., Aug. 17, 1992, at 18.

124. 31 U.S.C. § 1341 (1988 & Supp. V 1993). See discussion at section III(C), *infra*.

125. Jones, *supra* note 122, at 18.

whether the EPA had the authority to reduce a mobile source penalty under the CAA where the violator agreed to fund a public awareness program regarding automobile pollution.¹²⁶ The GAO concluded that the EPA had acted beyond its statutory authority.¹²⁷ The GAO opinion stated that the project was not acceptable on two bases: (1) the beneficiary of the penalty payment had no relationship to the violation and had suffered no injury from the violation; and (2) the Miscellaneous Receipts Act (MRA)¹²⁸ requires payments of penalties to the U.S. Treasury.¹²⁹ Of particular concern is that the EPA could use SEPs to realize agency goals which go beyond addressing the violation, thus circumventing the appropriations process in contravention of the ADA.¹³⁰ SEPs may violate these statutes if viewed as "bleeding off" the funds for the EPA's own benefit.¹³¹ The EPA has interpreted this opinion to apply only narrowly to mobile source issues.¹³²

126. Comp. Gen., B-247155 at 1 (July 7, 1992). The GAO opinion pertained to a SEP negotiated under CAA § 205, which addresses mobile source violations such as excess automobile emissions. *Id.* Most of the mobile source violations involved tampering with fuel systems, mislabelling fuel, or improperly fueling a vehicle. *GAO Backs Dingell Opposition to Program in Which New Projects Lead to Reduced Fines*, 23 [Current Developments] *Env't Rep. (BNA)* 3201 (Apr. 23, 1993). The proposed public awareness programs were intended to discourage tampering with automobile pollution control equipment, etc. *Id.* Often the violators simply paid a public relations firm to develop and implement the campaign. *Id.*

127. Comp. Gen., B-247155, *supra* note 125, at 1.

128. 31 U.S.C. § 3302 (1988 & Supp. V 1993). See discussion at section III(C), *infra*.

129. Comp. Gen., B-247155, *supra* note 125, at 3. GAO cited two previous decisions regarding alternative payment policies implemented by the Nuclear Regulatory Commission (NRC) and the Commodity Futures Trading Commission (CFTC). *Id.* at 3. The NRC had proposed that a licensee fund nuclear safety research in full or partial payment of its assessed penalty. *Id.* The CFTC proposed a donation to an educational institution for full or partial payment of the assessed penalty. *Id.* at 4. The GAO rejected these proposals on the same bases as it rejected the proposed mobile source SEP. *Id.* at 1. Note that the SEP policy specifically precludes consideration of the types of projects suggested by the NRC and CFTC. SEP Guidance Memorandum, *supra* note 27, at 5.

130. *Legality of SEPs Questioned by GAO; Negotiations Continue in TSCA, FIFRA, EPCRA Cases*, 17 *Chem. Reg. Rep. (BNA)* 99 (Apr. 23, 1993).

131. *Id.* at 100.

132. *Growth Expected*, *supra* note 98, at 2280.

C. Legal Basis for SEPs

In the PPA, Congress declared the national policy to be that pollution should be prevented or reduced at the source whenever feasible and directed the EPA to incorporate pollution prevention into its programs.¹³³ In response to this directive, the EPA has included the use of SEPs for enforcement in its Pollution Prevention Strategy.¹³⁴ Use of SEPs is acceptable since they are provided for within the substantive statutes, outside the requirements of the MRA and the ADA, legal as an out-of-court agreement incorporated into a consent decree, simply a consideration in the application of the EPA Civil Penalty Policy, and accepted by Congress through its acquiescence and support.

1. Statutory Basis

The EPA asserts that the various federal environmental laws provide a statutory basis for use of SEPs in negotiated agreements designed to address violations.¹³⁵ As discussed earlier, some statutes incorporate specific provisions suggesting the acceptance of SEPs. For example, TSCA allows settlement "with or without conditions."¹³⁶ The CAA gives the EPA Administrator the authority to "compromise, modify, or remit, with or without conditions, any administrative penalty" imposed.¹³⁷ The EPA relies on the more general lan-

133. PPA § 6602, 42 U.S.C. § 13101 (1988 & Supp. V 1993).

134. Pollution Prevention Strategy, 56 Fed. Reg. 7849-50.

135. *Reilly Defends Use of Supplemental Environmental Projects*, PESTICIDE & TOXIC CHEM. NEWS, Jan. 20, 1993, available in LEXIS, Envirn, Allnws [hereinafter *Reilly Defends Use*].

136. TSCA § 16(a)(2)(C), 15 U.S.C. § 2615(a)(2)(C) (1988 & Supp. V 1993).

137. CAA § 113(d)(2)(B), 42 U.S.C. § 7413(d)(2)(B) (1988 & Supp. V 1993). The CAA also provides for "beneficial mitigation projects" in citizen suit enforcement. CAA § 304(g)(2), 42 U.S.C. § 7604(g)(2) (1988 & Supp. V 1993). The inclusion of these provisions which allow such projects to be incorporated into the settlement of citizen suits evidences the congressional recognition of the benefit of such projects. ("These payments will help to ameliorate air quality problems rather than merely assess responsibility for their occurrence." SENATE COMM. ON ENV'T AND PUBLIC WORKS, CLEAN AIR ACT AMENDMENTS OF 1990, 136 CONG. REC. H2858 (1990) reprinted in LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 at 2667, 2767 (1993)). However, a critical difference may exist between projects included as

guage in EPCRA allowing the Administrator to take into account "such other matters as justice may require" in determining appropriate administrative penalties.¹³⁸ Analogous language appears in the penalty provisions of the CWA¹³⁹ and the CAA.¹⁴⁰ Similarly, FIFRA provides that the Administrator "shall consider the appropriateness of such penalty given the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation."¹⁴¹ The EPA points to these general mitigation provisions as bases for inclusion of SEPs in enforcement settlements.¹⁴² Specifically, the flexibility given to the EPA in determining the appropriate penalty amount is reinforced by the statutory wording, allowing the inclusion of SEPs in settlements. The SEPs, in turn, are seen as a mitigating factor that "justice requires" be considered when deciding an appropriate penalty amount.¹⁴³

part of a negotiated settlement between two private parties and one between a private party and the federal government regarding the necessity of depositing penalties into the government coffers. The private payments may not vest in the federal government and would, therefore, be exempt from the Miscellaneous Receipts Act requirements. However, since a citizen suit plaintiff stands in the shoes of the government, any assessed penalty must be deposited in the United States Treasury. Relying on this reasoning, the DOJ has objected to citizen suit consent decrees containing such projects. District courts are split over whether to approve the consent decrees with projects or to accept the DOJ's advice and reject them. *See, e.g.,* Pennsylvania Env'tl. Defense Found. v. Bellefonte Borough, 718 F. Supp. 431 (M.D. Pa. 1989); *contra* Natural Resources Defense Council v. Interstate Paper Corp., Civ. No. 487-169 (S.D. Ga. 1988), *reprinted in* 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,901 (1989). For a thorough discussion of these issues see DAVID S. MANN, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act*, 21 ENVTL. L. 175 (1991).

138. EPCRA § 325(b)(1)(C), 42 U.S.C. § 11045(b)(1)(C) (1988 & Supp. V 1993).

139. CWA § 309(d), (g)(3), 33 U.S.C. §§ 1319(d), (g)(3) (1988 & Supp. V 1993). Both the civil and administrative penalty sections list "such other matters as justice may require" as a factor to be considered in determining the appropriate penalty amount. *Id.*

140. CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1) (1988 & Supp. V 1993).

141. FIFRA § 14(a)(4), 7 U.S.C. § 1361(a)(4) (1988 & Supp. V 1993).

142. Telephone Interview with Michael Walker, Senior Enforcement Counsel, United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance (Feb. 7, 1994).

143. *Id.*

Although the EPA asserts that it is authorized to include SEPs in negotiated settlements for those statutes under its enforcement purview, it does recognize that the policy has limits.¹⁴⁴ These limits are detailed in the SEP policy, which provides guidelines regarding what constitutes acceptable SEPs and outlines the nexus requirements.¹⁴⁵ In its opinion discussed above, the GAO based its finding that the use of SEPs exceeded the EPA's authority in part, on a lack of relationship between the project and the violation.¹⁴⁶ If the EPA strictly follows its nexus requirement, this objection should be effectively silenced.

2. Application of EPA Civil Penalty Policy

The EPA carries out its statutory enforcement duties through use of its penalty policies. The reduction in civil penalties attendant to performance of a SEP is simply the result of applying these policies. The following discussion will use the provisions set forth in the EPA's Civil Penalty Policy (Penalty Policy).¹⁴⁷ However, several of the individual statutes have their own penalty policies.¹⁴⁸ In general, these policies track the basic requirements and goals of the general Penalty Policy. Furthermore, each policy, including the Civil Penalty Policy, is developed to effect the EPA's statutory duties.

The EPA develops its penalty policies to carry out its statutory duty to collect penalties from violators. These policies promote two main goals: deterrence and fair and equitable treatment of the regulated community.¹⁴⁹ The deterrence component of a penalty, at a minimum, should remove any

144. *Reilly Defends Use*, *supra* note 134.

145. *Id.*

146. Comp. Gen., B-247155, *supra* note 125, at 1.

147. *Civil Penalty Policy*, *supra*, note 27, at 21:0761.

148. See, e.g., *EPA Clean Air Act Stationary Source Civil Penalty Policy*, [Federal Laws] Env't Rep. (BNA) 21:0761 (Oct. 25, 1991); *EPA RCRA Civil Penalty Policy*, [Federal Laws] Env't Rep. (BNA) 21:5091 (Oct. 29, 1990); *EPA Civil Penalty Policy on the Clean Water Act*, [Federal Laws] Env't Rep. (BNA) 21:0911 (Feb. 11, 1986).

149. *Civil Penalty Policy*, *supra* note 27, at 21:0762-63.

economic benefit accrued from the violation of the law.¹⁵⁰ The SEP policy specifically accounts for this consideration in making the economic benefit the lower limit for the penalty reduction.¹⁵¹ Beyond this, the Penalty Policy recommends that an additional amount be included in the penalty to reflect the seriousness of the violation and to put the violator in an economically worse position than would have resulted had it complied with the law.¹⁵²

Under the second main goal, to provide for fair and equitable treatment of the regulated community, the EPA will increase or mitigate the civil penalty amount consisting of the benefit and gravity components based on the following factors: degree of willfulness and/or negligence associated with the violation; the violator's history of noncompliance; its ability to pay; its degree of cooperation/noncooperation; and "other unique factors specific to the violator or the case."¹⁵³ By negotiating a SEP, the violator displays behavior warranting penalty adjustment. First, negotiating a SEP takes time and resources. Violator cooperation and commitment are required. Second, the willingness to undertake a SEP and help benefit the environment is a "unique factor" suggesting mitigation would be appropriate. Finally, the EPA has indicated that SEPs are to be considered when ability to pay is an issue.¹⁵⁴

Additionally, the Penalty Policy includes a third goal of swift resolution of environmental problems.¹⁵⁵ Recognizing the agency mission of protecting the environment, the EPA seeks swift resolution of alleged violations to correct identified environmental problems.¹⁵⁶ Certainly a negotiated settlement embodying a pollution prevention project achieves

150. *Id.* at 21:0762.

151. SEP Guidance Memorandum, *supra* note 27, at 1.

152. *Civil Penalty Policy*, *supra* note 27, at 21:0762.

153. *Id.* at 21:0763.

154. *Id.* at 21:0772. The Penalty Policy refers to these projects in the Alternative Payments section. *Id.* The SEP policy specifically replaces and supersedes this section. SEP Guidance Memorandum, *supra* note 27, at cover memorandum.

155. *Civil Penalty Policy*, *supra* note 27, at 21:0763.

156. *Id.*

this goal. The Penalty Policy provides for a reduction in the gravity component of an assessed penalty to encourage such swift resolutions.¹⁵⁷

In negotiating an agreement containing a SEP, the EPA is simply applying its Civil Penalty Policy. The EPA still requires recoupment of the economic benefit associated with failure to comply, and usually a gravity component, but is merely mitigating the penalty based on good faith efforts to cooperate and attempts for swift resolution. The SEP is not a substitute for the penalty or part of the penalty, but instead is a mitigating factor.

3. Miscellaneous Receipts Act and Anti-Deficiency Act

The GAO's second, and primary, objection to the use of SEPs lies in the requirements under the Miscellaneous Receipts Act and Anti-Deficiency Act.¹⁵⁸ The MRA requires officials or agents of the federal government to deposit all collected monies in the United States Treasury.¹⁵⁹ The ADA prohibits government officials from making an expenditure exceeding congressionally appropriated amounts or without appropriation unless authorized by law.¹⁶⁰

a. Miscellaneous Receipts Act

The basic requirement of the MRA is simply that, absent specific statutory authority, all funds received for use by and for the United States must be deposited in the general fund of the Treasury as miscellaneous receipts.¹⁶¹ In contrast, where

157. *Id.*

158. Comp. Gen., B-247155, *supra* note 125, at 3.

159. 31 U.S.C. § 3302(b) (1988 & Supp. V 1993).

160. 31 U.S.C. § 1341(a) (1988 & Supp. V 1993).

161. 62 Comp. Gen. 70, 71 (1982). For example, the Veterans Administration was required to deposit parking fees collected from employees and visitors of their hospitals. 45 Comp. Gen. 27 (1965). The use of the fees to defray costs associated with the parking facilities was not provided for in the statute which authorized the construction and maintenance of garages at the hospitals and such use was therefore impermissible. *Id.* Similarly, monies recovered from a private party or insurer to compensate for damage to a government motor vehicle could not be credited to the agency funds, but had to be deposited into the general fund. 64 Comp. Gen. 431 (1985).

a governmental body holds money in trusteeship for a class of persons affected by the statutory or regulatory violations, it need not deposit such money into the Treasury.¹⁶² Further, no such requirement attaches where Congress has specifically provided for a different method of handling or disposing of received monies.¹⁶³

Thus, where specific statutory authority exists to retain collected funds or to handle such funds differently, the MRA is inapplicable. This is the case with SEPs. The funds at issue are the resultant reduced penalty increment from the inclusion of a SEP in the settlement agreement. As discussed above, Congress has given the EPA broad discretion in determining penalty amounts. Beyond the "catch-all" factor generally included in the statute, Congress authorized consideration of factors such as "nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, [and] economic benefit or savings (if any) resulting from the violation."¹⁶⁴ This broad discretion provides the specific statutory authority to handle collected funds differently. Any funds not "collected" from the maximum statutory penalty, due to the consideration of one

162. 60 Comp. Gen. 15 (1980). Therefore, the Department of Energy (DOE) would be required to deposit monies received from oil companies pursuant to a consent order unless the monies were returned to victims suffering from the oil companies' violations. *Id.* The consent decree addressed alleged violations of the petroleum price and allocation regulations. *Id.* Where the Department returned the monies to the victims of the overcharges, it was acting simply as a trustee; but, where the DOE distributed monies to a class of individuals not likely to have suffered from overcharges, the distribution would be a violation of the Act. *Id.*

163. *United States v. Brendel*, 136 F. 737 (2d Cir. 1905). In *Brendel*, congressionally authorized Treasury regulations required that monies collected as custom duties be transported in accordance with a particular contract. *Id.* at 739. Thus, the defendant could not be held liable for loss of the funds after depositing them with the transportation contractor, as required by regulation. *Id.* at 740. The case applied to the predecessor of the MRA.

164. CWA § 309(g)(3), U.S.C. § 1319(g)(3) (1988 & Supp. V 1993). *See also* EPCRA § 325(b)(1)(C), 42 U.S.C. § 11,045(b)(1)(C) (1988 & Supp. V 1993); FIFRA § 14(a)(4), 7 U.S.C. § 1361(a)(4) (1988 & Supp. V 1993); CAA § 113(e)(1), 42 U.S.C. § 7413(e)(1) (1988 & Supp. V 1993); and TSCA § 16(a)(1)(B), 15 U.S.C. § 2615(a)(1)(B) (1988 & Supp. V 1993).

of the listed factors in the applicable statute, are directly authorized by law.¹⁶⁵ Consideration of SEPs in deciding the penalty amount is simply consideration of the statutorily authorized penalty-determination factor of "as justice requires."

Another argument can be made that the EPA, in allowing SEPs in settlement agreements, is holding the reduced penalty increment in trusteeship for the public. The environment and the public are the victims of a violation of a statute's directives. In requiring the violator to undertake projects designed to better the surrounding environment, the SEPs, in effect, compensate the public for its loss. The nexus requirements help ensure that the class of individuals receiving the benefit is appropriate based on the violation.

b. Anti-Deficiency Act

The intent of the ADA is to "prevent the Departments from incurring financial obligations over and above those authorized in advance by Congress."¹⁶⁶ The obligations refer not only to financial contractual obligations, but include acceptance of voluntary service and employment of personal service in excess of that authorized by law.¹⁶⁷ The ADA reflects the requirements of the Appropriations Clause of the Constitution,¹⁶⁸ in that it helps ensure that public funds are spent "according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents or the individual pleas of litigants."¹⁶⁹ But a contract or other obligation will not be in contravention of the Act if it is not enforceable for future payment of money¹⁷⁰ or if the duty is

165. In fact, the maximum statutory penalty is rarely, if ever, assessed.

166. 30 Op. Att'y Gen. 51, 53 (1913).

167. *Id.*

168. U.S. CONST. art. I, § 9, cl. 7.

169. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 427 (1990). Therefore, for example, the Secretary of the Navy was prohibited from continuing work on an uncompleted dry dock after appropriation was exhausted, even if immediate action was essential. 21 Op. Att'y Gen. 288 (1896).

170. 42 Comp. Gen. 81 (1962).

not contingent upon congressional appropriations.¹⁷¹ Thus, where a federal statute requires absolute action, the government will be held liable although appropriations were inadequate.¹⁷²

The perceived problem of SEPs regarding the ADA is that the EPA could use SEPs to carry out agency goals that are beyond remedying the particular violation, thus circumventing the congressional appropriation process. However, this is not accurate. Congress does appropriate enforcement monies to be spent according to the dictates of the various federal environmental statutes. As discussed above, in reference to the MRA, the EPA is working well within the statutory limits.

Furthermore, the requirements of the ADA will not apply if a statute requires absolute action or establishes an obligation that is not enforceable for future payment of unappropriated funds by the government. The environmental statutes do require absolute action. The EPA is given the duty, depending on the statute, to protect the nation's environment. The EPA fulfills this duty, in part, by enforcement against violators of a particular statute. None of the statutes suggest that the duty to enforce is dependent on appropriations for particular enforcement activities. The enforcement is left to the discretion of the agency. Thus, where the EPA performs its enforcement duty in accordance with the applicable statute, no ADA violation can result, despite lack of congressional appropriation for a specific activity.

171. *San Carlos Irrigation and Drainage Dist. v. United States*, 23 Cl. Ct. 276, 283 (1991) (duty of the United States to operate and maintain a dam was not contingent upon congressional appropriations, so the contract between the government and the irrigation district was given effect).

172. *Shipman v. United States*, 18 Ct. Cl. 138 (1883). The court indicated that where authorization to enter a contract depends wholly on appropriations, no officer has power to create liability for the United States in excess of that amount. *Id.* However, where a statute authorizes something to be done absolutely, the officer is "clothed with authority" to perform that duty without limitation as to cost. *Id.* The decision is based on the distinction between 31 U.S.C. § 1341(a)(1)(A), which prohibits spending in excess of appropriation, and 31 U.S.C. § 1341(a)(1)(B), which prohibits obligation prior to appropriation *unless* authorized by law.

The other potential issue regarding the ADA and SEPs is the perceived deficiency in the Treasury resulting from the "uncollected" penalty. Arguments against this problem mirror those discussed above regarding the MRA.

4. Legality of Consent Decrees

Furthermore, the EPA will violate neither the MRA nor the ADA if a proposed SEP is not considered a civil penalty. If the SEP is labeled a civil penalty, then payment should be made to the United States Treasury.¹⁷³ However, if the SEP is not labeled a civil penalty or no liability is admitted, the settlement is simply an out-of-court agreement that the parties are free to make.¹⁷⁴ If the parties desire to incorporate their settlement into a judicially approved consent decree, the court must review the agreement for fairness, reasonableness, and adequacy.¹⁷⁵ Specifically the court "must be certain that the decree 1) 'spring[s] from and serve[s] to resolve a dispute within the court's subject-matter jurisdiction,' 2) 'come[s] within the general scope of the case made by the pleadings,' and 3) 'further[s] the objectives of the law upon which the complaint was based.'"¹⁷⁶ Regarding suits affecting the public interest, which an environmental enforcement action invariably is, the court must be certain the settlement upholds the objective of the applicable statute.¹⁷⁷ This may

173. *Sierra Club v. Electronic Controls Design*, 909 F.2d 1350, 1354 (9th Cir. 1990); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 82 (3d Cir. 1990).

174. *Sierra Club*, 909 F.2d at 1354.

175. *United States v. Metropolitan St. Louis Sewer Dist.*, 952 F.2d 1040, 1044 (8th Cir. 1992); *United States v. Telluride Co.*, 849 F. Supp. 1400, 1402 (D. Colo. 1994).

176. *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989) (quoting *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986)).

177. *Telluride*, 849 F. Supp., *supra* note 174, at 1402. In *Telluride*, the United States had commenced suit alleging violation of the CWA against the Telluride Company, Mountain Village Company, Inc., and the Telluride Ski Area, Inc. *Id.* at 1401. The complaint asserted that the defendants had filled in approximately 44.5 acres of wetlands without acquiring a permit, in violation of the Act. *Id.* On the day the suit was filed, the government lodged a consent decree with the court which proposed a full settlement. The court rejected the decree on the grounds that it was not "fair, reasonable and adequate or in the

be ascertained, in part, through an analysis of "(1) whether the decree is technically adequate to accomplish the goal of cleaning the environment, (2) whether it will sufficiently compensate the public for the costs of remedial measures, and (3) whether it reflects the relative strength or weakness of the government's case against the environmental offender."¹⁷⁸

Furthermore, entering a consent decree is not a judgment on the merits of the action. Therefore, the decree need not strictly adhere to the statutory civil penalty provision.¹⁷⁹ As such, within the exercise of the court's equitable discretion, remedies and restitution in forms other than civil penalties may be incorporated in settlement agreements.¹⁸⁰ "[A] . . . court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."¹⁸¹

In consideration of all these requirements, a SEP is an appropriate remedy to be incorporated into a consent decree. Although the potential civil penalty is reduced, the consent decree can still meet the requirement of being fair, reasonable, and adequate. First, a consent decree resulting from violation of a federal environmental statute will undoubtedly come under the subject matter jurisdiction of the federal courts. Second, provided the United States' complaint was sufficient, the requirement of coming within the scope of the pleadings can generally be met. Third, incorporating a SEP in a consent decree helps to ensure appropriate redress of the

public interest." *Id.* at 1401-02. In rejecting the decree, the court stated its role was "more searching" when public interests are at stake and rejected the decree since it did not adequately fulfill the objectives of the CWA, specifically citing the procedural irregularities and the government's improper reliance on the defendant's own environmental expert. *Id.* at 1402-04.

178. *Id.* at 1402.

179. *Metropolitan St. Louis Sewer Dist.*, 952 F.2d, *supra* note 174, at 1044. The Eighth Circuit stated, "the District Court was not required to apply the standards of section 1319(d) [of the CWA], which spells out the factors to be used in determining the appropriate civil penalty to be levied against a party found to be in violation of the Clean Water Act." *Id.*

180. *United States v. Roll Coater, Inc.*, 21 ELR 21,073, 21,077 (S.C. Ind. 1991). This is so because of the decree's contractual nature. *Id.*

181. *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986).

violation while furthering the various statutes' goals. While the civil penalty is also assessed in the decree and remains a deterrence,¹⁸² the SEP is an additional remedy, serving restitution purposes, not unlike injunctive relief. The SEP itself is not a civil penalty, but a mitigating factor in determining an appropriate penalty amount.¹⁸³ Since it is not a civil penalty, payment need not be made to the Treasury. Therefore, under traditional principles followed by courts in assessing a consent decree, the presence of a SEP is not a sufficient basis to disapprove the decree. Rather, the presence of the SEP in the decree may *help* to make the decree fair, reasonable, and adequate in consideration of the need to address the public interest.

5. Congressional Acquiescence

In addition to these legal bases for SEPs, Congress is aware of the use of SEPs by the EPA, and has, through legislative history and proposed bills, stamped this approach with their approval. In amending the CWA, Congress specifically encouraged such creative settlements of fines and penalties that further the goals of the Act.¹⁸⁴ More recently, Congress has provided for SEPs in proposed bills. One such bill would amend the CWA relating to civil penalties.¹⁸⁵ The bill would specifically authorize the Administrator of the EPA to order that the violator spend a portion of an administrative or civil

182. SEP Guidance Memorandum, *supra* note 27, at 1.

183. See *supra* text accompanying notes 84-97.

184. H.R. CONF. REP. NO. 1004, 99th Cong., 2d Sess. 139 (1986).

In certain instances settlements of fines and penalties levied due to NPDES permit and other violations have been used to fund research, development and other related projects which further the goals of the Act. In these cases, the funds collected in connection with these violations were used to investigate pollution problems other than those leading to the violation. Settlements of this type preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of environmental protection. Although this practice has been used on a selective basis, the conferees encourage this procedure where appropriate.

Id.

185. H.R. 1907, 103d Cong., 1st Sess. (1993). The bill is currently pending.

penalty in carrying out SEPs.¹⁸⁶ Another bill proposes the creation of the Clean Water Trust Fund.¹⁸⁷ Monies from enforcement actions under the CWA would be deposited into the fund for use by the Administrator to restore waters from damages resulting from violations of the Act.¹⁸⁸ Representative Peter Visclosky, the bill's sponsor, specifically indicated that the bill would not preclude the EPA from seeking SEPs as part of settlements.¹⁸⁹ These examples display Congressional acquiescence to the EPA's use of SEPs and provide support for the assertion that use of SEPs does not violate the appropriations process.

IV. Conclusion

Federal environmental enforcement has shifted its focus from end-of-the-pipe regulation to pollution prevention. This shift is apparent in recent legislative developments including the certification and land-ban requirements in RCRA, the TRI of EPCRA, and the recent enactment of the PPA. The EPA has incorporated this approach in its regulatory programs through its Pollution Prevention Strategy, which, in part, calls for inclusion of SEPs in enforcement settlement agreements. SEPs are pollution prevention projects that an alleged violator performs in exchange for a reduction in civil penalties. The EPA's encouragement of the use of SEPs is a natural outgrowth of the shift in focus from end-of-the-pipe control strategies to pollution prevention. SEPs allow multiple benefits: to the EPA in the resultant benefit to the environment and decreased potential for future violation; to the

186. *Id.*

187. H.R. 1801, 103d Cong., 1st Sess. (1993). The bill is currently pending.

188. *Id.* Rep. Visclosky indicates, "[i]t does not make sense for scarce resources to go into the bottomless pit of the Treasury's general fund, especially if we fail to solve our serious water quality problems due to lack of funds." *Members of Congress Offer Legislation to Improve Water Quality in Great Lakes*, 24 [Current Developments] *Env't Rep. (BNA)* 424, 425 (July 9, 1993) [hereinafter *Members of Congress Offer Legislation*].

189. *Members of Congress Offer Legislation*, *supra* note 188, at 425. Furthermore, Rep. Visclosky "strongly support[s] the use of SEP's [*sic*] to facilitate the cleanup of serious environmental problems." 139 CONG. REC. E998 (daily ed. Apr. 21, 1993).

environment by addressing waste generation issues not subject to injunctive relief; and even to the violator by conferring a tax benefit, good press, and increased revenues due to the attendant decrease in waste generation. As such, this program has great promise in that it positively affects the future conduct of a current violator and its waste generation and handling procedures.

Unfortunately, this approach has met with some resistance due to a perception that, in using SEPs, the EPA has exceeded its statutory authority. The arguments supporting such a stance are outlined in the GAO opinion denying the EPA's ability to include SEPs in settlements negotiated under CAA section 205. The GAO based its conclusion on the lack of nexus between the SEP and the violation, and the application of the MRA and ADA.

Since the adoption of the EPA's SEP policy, the first of these objections is no longer valid since the policy requires a nexus. Secondly, the MRA and the ADA are not applicable to SEPs since the substantive statutes provide a statutory basis for inclusion. In granting the EPA broad discretion in determining penalty amounts, the "uncollected" reduction in penalty is outside the requirement of the MRA that all collected monies be deposited in the U.S. Treasury. Additionally, the reduction may be considered as held in trust for the public, and, therefore, also beyond the statute's reach. Equally persuasive arguments show the ADA is inapplicable to SEPs. First, the substantive statutes require absolute action, i.e., enforcement of the statutory provisions and, thus, no appropriation is required for action. Moreover, the EPA is working within its appropriated budget for enforcement and has not incurred any deficiency.

Further support for the legality of SEPs is found in the application of the EPA's Penalty Policy; in assessment of consent decrees using general court review standards and in Congressional acquiescence. Application of the EPA's Penalty Policy shows that performance of a SEP should and, under the Penalty Policy, would be cause to reduce the penalty based on good faith and desire for swift resolution. Also, since the EPA SEP policy requires that the economic benefit

of the violation be recovered in penalty dollars, the Penalty Policy is not violated. When reviewed in a consent decree, a SEP takes on the status of an equitable remedy allowable in the agreement because of its contractual nature. Finally, Congress has been aware of the use of SEPs and has, on several occasions, specifically approved of these programs.

These considerations support the acceptability of SEPs in enforcement settlement agreements. The use of SEPs allows an enforcement action to take on a character that has great potential to benefit the environment. Moreover, SEPs advance the national policy as announced in both RCRA and PPA. The nation must move toward pollution prevention in order to overcome its pollution problems effectively and efficiently. The use of SEPs is a step in this direction.