

ENVIRONMENTAL PROTECTION AGENCY

[FRL –]

Interim Guidance for Community Involvement in Supplemental Environmental Projects

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice

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 EPA received five (5) comments on the draft guidance.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

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

FOR FURTHER INFORMATION CONTACT: For further information contact Melissa

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the defendant, and the affected community.

The commenter also noted that the revised Consolidated Rules of Practice ("CROP"), 64 FR 40138 (July 23, 1999)², did not include modifications to the "settlement process."

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

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

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

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

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

INTERIM GUIDANCE ON COMMUNITY INVOLVEMENT IN SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

innovative SEPs that might not otherwise have been considered.

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

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

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

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

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

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

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

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

Signed:_____

John Peter Suarez, Assistant Administrator
Office of Enforcement and Compliance

Assurance

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

⁷ See 40 CFR Part 2, subpart B.

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

APPENDIX A

RESOURCES FOR IDENTIFYING COMMUNITIES

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

Suggested Internal Sources

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

problems.

Suggested External Sources

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

APPENDIX B

COMMUNITY OUTREACH TECHNIQUES

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

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

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

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

audience.

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