

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Another commenter stated that the draft guidance places too much emphasis on the limitations on community participation and not enough emphasis on empowering communities.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 “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

deposited into the Treasury as soon as practicable unless the Federal agency receiving the money has statutory authority to use the funds differently.

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

¹ The MRA, 31 U.S.C. 3302(b), requires that money received for the use of the United States be