

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 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 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

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>.

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

² The 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.