

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 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 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.

John Peter Suarez,

Assistant Administrator, Office of Enforcement and Compliance Assurance.

This document is interim guidance intended for use of the EPA personnel and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States,

enforcement action, also includes the Department of Justice.

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

⁷ See 40 CFR part 2, subpart B.