accordance with, the provisions of the experimental use permit and temporary tolerances. These tolerances may be revoked if the experimental use permit is revoked or if any experience with or scientific data on this pesticide indicate that such revocation is necessary to protect the public health.

The Office of Management and Budget has exempted this notice from the requirements of section 3 of Executive Order 12866.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. 601–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

List of Subjects

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Authority: 21 U.S.C. 346a(j).

Dated: April 28, 1995.

Peter Caulkins,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 95–11147 Filed 5–9–95; 8:45 am]

BILLING CODE 6560–50–F

[Docket No. 95F–FRL–5205–5]

Interim Revised EPA Supplemental Environmental Projects Policy Issued

AGENCY: Office of Enforcement and Compliance Assurance, EPA.

ACTION: Notice.

SUMMARY: The Office of Enforcement and Compliance Assurance (EPA) is issuing the Interim Revised EPA Supplemental Environmental Projects Policy. This Policy supersedes the February 12, 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements. This Policy responds to numerous complaints that the 1991 Policy was too cumbersome, rigid and difficult to understand and apply. This Policy is being issued to provide greater flexibility to EPA in exercising its enforcement discretion to establish appropriate settlement penalties and to the regulated community in proposing supplemental environmental projects (SEPs) designed to secure significant environmental or public health protection and improvements. EPA intends to implement this Policy on an interim basis effective May 8, 1995.

DATES: Comments must be received on or before August 6, 1995.

ADDRESSES: Comments may be mailed to: SEP Policy, Multimedia Enforcement Division, Office of Regulatory Enforcement, Mail Code 2248–A, United States Environmental Protection Agency, 401 M Street, S.W., Washington D.C. 20460.

FOR FURTHER INFORMATION CONTACT: David A. Hindin, 202–564–6004, Gerard C. Kraus, 202–564–6047 or Peter W. Moore, 202–564–6014, Office of Regulatory Enforcement, Mail Code 2248–A, United States Environmental Protection Agency, 401 M Street, S.W., Washington D.C. 20460.

SUPPLEMENTARY INFORMATION: This interim final version of the EPA Supplemental Environmental Projects Policy expands and clarifies the 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements. The primary purpose of this Policy is to obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by this Policy. The revised Policy, issued today, establishes a framework for determining whether a proposed project can be considered in establishing an appropriate settlement penalty. In addition, this Policy sets out clear legal guidelines, well-defined categories of acceptable projects and simple easy to apply rules for calculating and applying the cost of a SEP in determining an appropriate settlement penalty.

Dated: May 1, 1995

Steven A. Herman,

Assistant Administrator, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency.

A. Introduction

1. Background

In settlements of environmental enforcement cases, the U.S. Environmental Protection Agency (EPA) will require the alleged violators to achieve and maintain compliance with Federal environmental laws and regulations and to pay a civil penalty. To further EPA's goals to protect and enhance public health and the environment, in certain instances environmentally beneficial projects, or Supplemental Environmental Projects (SEPs), may be included in the settlement. This Policy sets forth the types of projects that are permissible as SEPs, the penalty mitigation appropriate for a particular SEP, and the terms and conditions under which they may become part of a settlement. The primary purpose of this Policy is to encourage and obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by this Policy.

In settling enforcement actions, EPA requires alleged violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the violations. EPA also seeks substantial monetary penalties in order to deter noncompliance. Without penalties, companies would have an incentive to delay compliance until they are caught and ordered to comply. Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and deterring violations by other members of the regulated community. Penalties help ensure a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Penalties also encourage companies to adopt pollution prevention and recycling techniques, so that they minimize their pollutant discharges and reduce their potential liabilities.

Statutes administered by EPA generally contain penalty assessment criteria that a court or administrative law judge must consider in determining an appropriate penalty at trial or a hearing. In the settlement context, EPA generally follows these criteria in exercising its discretion to establish an appropriate settlement penalty. In establishing an appropriate penalty, EPA considers such factors as the economic benefit associated with the violations, the gravity or seriousness of the violations, and prior history of violations. Evidence of a violator's commitment and ability to perform a SEP is also a relevant factor for EPA to consider in establishing an appropriate settlement penalty. All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP compared to the violator who does not agree to perform a SEP.

The Agency encourages the use of SEPs. While penalties play an important role in environmental protection by deterring violations and creating a level playing field, SEPs can play an additional role in securing significant environmental or public health

protection and improvements.[1] SEPs may not be appropriate in settlement of all cases, but they are an important part of EPA's enforcement program. SEPs may be particularly appropriate to further the objectives in the statutes EPA administers and to achieve other policy goals, including promoting pollution prevention and environmental justice.

2. Pollution Prevention and Environmental Justice

The Pollution Prevention Act of 1990 (42 U.S.C. 13101 *et seq.*, November 5, 1990) identifies an environmental management hierarchy in which pollution ''should be prevented or reduced 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 * * *'' (42 U.S.C. 13103). In short, preventing pollution before it is created is preferable to trying to manage, treat or dispose of it after it is created.

Selection and evaluation of proposed SEPs should be conducted in accordance with this hierarchy of environmental management, i.e., SEPs involving pollution prevention techniques are preferred over other types of reduction or control strategies, and this can be reflected in the degree of consideration accorded to a defendant/respondent before calculation of the final monetary penalty.

Further, there is an acknowledged concern, expressed in Executive Order 12898 on environmental justice, that certain segments of the nation's population are disproportionately burdened by pollutant exposure. Emphasizing SEPs in communities where environmental justice issues are present helps ensure that persons who spend significant portions of their time in areas, or depend on food and water sources located near, where the violations occur would be protected. Because environmental justice is not a specific technique or process but an overarching goal, it is not listed as a category of SEP; but EPA encourages SEPs in communities where environmental justice may be an issue.

3. Using This Policy

In evaluating a proposed project to determine if it qualifies as a SEP and then determining how much penalty mitigation is appropriate, Agency enforcement and compliance personnel should use the following five-step process:

(1) Ensure that the project meets the basic definition of a SEP. (Section B)

(2) Ensure that all legal guidelines, including nexus, are satisfied. (Section C)

(3) Ensure that the project fits within one (or more) of the designated categories of SEPs. (Section D)

(4) Calculate the net-present after-tax cost of the project and then determine the appropriate amount of penalty mitigation. (Section E)

(5) Ensure that the project satisfies all of the implementation and other criteria. (Sections F, G, H and I)

4. Applicability

This Policy revises and hereby supersedes the February 12, 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements. This Policy applies to settlements of all civil judicial and administrative actions filed after the effective date of this Policy, and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the specific terms of a SEP.

This Policy applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations that EPA administers. It also may be used by EPA and the Department of Justice in reviewing proposed SEPs in settlement of citizen suits. This Policy also applies to federal agencies that are liable for the payment of civil penalties. This Policy does not apply to settlements of claims for stipulated penalties for violations of consent decrees or other settlement agreement requirements.[2]

This is a *settlement* Policy and thus is not intended for use by EPA, defendants, respondents, courts or administrative law judges at a hearing or in a trial. Further, whether the Agency decides to accept a proposed SEP as part of a settlement is purely within EPA's discretion. Even though a project appears to satisfy all of the provisions of this Policy, EPA may decide, for one or more reasons, that a SEP is not appropriate (e.g., the cost of reviewing a SEP proposal is excessive, the oversight costs of the SEP may be too high, or the defendant/respondent may not have the ability or reliability to complete the proposed SEP).

This Policy establishes a framework for EPA to use in exercising its enforcement discretion in determining appropriate settlements. In some cases, application of this Policy may not be appropriate, in whole or part. In such cases, the litigation team may, with the advance approval of Headquarters, use an alternative or modified approach.

B. Definition and Key Characteristics of a SEP

Supplemental environmental projects are defined as environmentally beneficial projects which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform. The three bolded key parts of this definition are elaborated below.

''Environmentally beneficial'' means a SEP must improve, protect, or reduce risks to public health, or the environment at large. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health or the environment.

''In settlement of an enforcement action'' means: (1) EPA has the opportunity to help shape the scope of the project before it is implemented; and (2) the project is not commenced until after the Agency has identified a violation (e.g., issued a notice of violation, administrative order, or complaint).[3]

''Not otherwise legally required to perform means'' the SEP is not required by any federal, state or local law or regulation. Further, SEPs cannot include actions which the defendant/respondent may be required to perform: as injunctive relief in the instant case; as part of a settlement or order in another legal action; or by state or local requirements. SEPs may include activities which the defendant/respondent will become legally obligated to undertake two or more years in the future. Such ''accelerated compliance'' projects are not allowable, however, if the regulation or statute provides a benefit (e.g., a higher

[1] Depending on circumstances and cost, SEPs also may have a deterrent impact.

[2] The Agency is evaluating whether SEPs should be used, and if so, how, in evaluating claims for stipulated penalties.

[3] Since the primary purpose of this Policy is to obtain environmental or public health benefits that may not have occurred ''but for'' the settlement, projects which have been started before the Agency has identified a violation are not eligible as SEPs. Projects which have been committed to or started before the identification of a violation may mitigate the penalty in other ways. Depending on the specifics, if a company had initiated environmentally beneficial projects before the enforcement process commenced, the initial penalty calculation could be lower due to the absence of recalcitrance, no history of other violations, good faith efforts, less severity of the violations, or a shorter duration of the violations.

emission limit) to the defendant/respondent for early compliance.

Also, the performance of a SEP reduces neither the stringency nor timeliness requirements of Federal environmental statutes and regulations. Of course, performance of a SEP does not alter the defendant/respondent's obligation to remedy a violation expeditiously and return to compliance.

C. Legal Guidelines

EPA has broad discretion to settle cases, including the discretion to include SEPs as an appropriate part of the settlement. The legal evaluation of whether a proposed SEP is within EPA's authority and consistent with all statutory and Constitutional requirements may be a complex task. Accordingly, this Policy uses five legal guidelines to ensure that our SEPs are within the Agency's and a federal court's authority, and do not run afoul of any Constitutional or statutory requirements.[4]

1. All projects must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future. SEPs are likely to have an adequate nexus if the primary impact of the project is at the site where the alleged violation occurred or at a different site in the same ecosystem or within the immediate geographic[5] area. Such SEPs may have sufficient nexus even if the SEP addresses a different pollutant in a different medium. In limited cases, nexus may exist even though a project will involve activities outside of the United States.[6]

2. A project must advance at least one of the declared objectives of the environmental statutes that are the basis of the enforcement action. Further, a project cannot be inconsistent with any provision of the underlying statutes.

3. EPA or any other federal agency may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP. Nor may EPA retain authority to manage or administer the SEP. EPA may, of course, provide oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.

4. The type and scope of each project are determined in the signed settlement agreement. This means the ''what, where and when'' of a project are determined by the settlement agreement. Settlements in which the defendant/respondent agrees to spend a certain sum of money on a project(s) to be determined later (after EPA or the Department of Justice signs the settlement agreement) are generally not allowed.

5. A project may not be something that EPA itself is required by its statutes to do. And a project may not provide EPA with additional resources to perform an activity for which Congress has specifically appropriated funds. In addition, a SEP should not appear to be an expansion of an existing EPA program. For example, if EPA has developed a brochure to help a segment of the regulated community comply with environmental requirements, a SEP may not directly, or indirectly, provide additional resources to revise, copy or distribute the brochure.

D. Categories of Supplemental Environmental Projects

EPA has identified seven categories of projects which may qualify as SEPs. In order for a proposed project to be accepted as a SEP, it must satisfy the requirements of at least one category plus all the other requirements established in this Policy.

1. Public Health

A public health project provides diagnostic, preventative and/or remedial components of human health care which is related to the actual or potential damage to human health caused by the violation. This may include epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/ tissue samples, medical treatment and rehabilitation therapy.

Public health SEPs are acceptable only where the primary benefit of the project is the population that was harmed or put at risk by the violations.

2. Pollution Prevention

A pollution prevention project is one which reduces the generation of pollution through ''source reduction,'' i.e., any practice which reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment, prior to recycling, treatment or disposal. (After the pollutant or waste stream has been generated, pollution prevention is no longer possible and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods.)

Source reduction may include equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project which protects natural resources through conservation or increased efficiency in the use of energy, water or other materials. ''In-process recycling,'' wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on site, is considered a pollution prevention project.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution released to the environment, not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency (conservation) in the use of energy, water or other materials. This is consistent with the Pollution Prevention Act of 1990 and the Administrator's ''Pollution Prevention Policy Statement: New Directions for Environmental Protection,'' dated June 15, 1993.

3. Pollution Reduction

If the pollutant or waste stream already has been generated or released, a pollution reduction approach—which employs recycling, treatment, containment or disposal techniques—may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as ''pollution prevention.'' This may include the installation of more effective end-of-process control or treatment technology. This also includes ''out-of-process recycling,'' wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for production off-site, reducing the need for treatment,

[4] These legal guidelines are based on federal law as it applies to EPA; States may have more or less flexibility in the use of SEPs depending on their laws.

[5] The immediate geographic area will generally be the area within a 50 mile radius of the site on which the violations occurred.

[6] All projects which would include activities outside the U.S. must be approved in advance by Headquarters and/or the Department of Justice. See section I.

disposal, or consumption of energy or natural resources.

4. Environmental Restoration and Protection

An environmental restoration and protection project is one which goes beyond repairing the damage caused by the violation to enhance the condition of the ecosystem or immediate geographic area adversely affected.[7] These projects may be used to restore or protect natural environments (such as ecosystems) and man-made environments, such as facilities and buildings. Also included is any project which protects the ecosystem from actual or potential damage resulting from the violation or improves the overall condition of the ecosystem. Examples of such projects include: Reductions in discharges of pollutants which are not the subject of the violation to an affected air basin or watershed; restoration of a wetland along the same avian flyway in which the facility is located; or purchase and management of a watershed area by the defendant/respondent to protect a drinking water supply where the violation, e.g., a reporting violation, did not directly damage the watershed but potentially could lead to damage due to unreported discharges. This category also includes projects which provide for the protection of endangered species (e.g., developing conservation programs or protecting habitat critical to the well-being of a species endangered by the violation).

With regards to man-made environments, such projects may involve the remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos and leaded paint, which are a continuing source of releases and/or threat to individuals.

5. Assessments and Audits

Assessments and audits, if they are not otherwise available as injunctive relief, are potential SEPs under this category. There are four types of projects in this category:

a. Pollution prevention assessments; b. site assessments; c. environmental management system audits; and d. compliance audits.

a. *Pollution prevention assessments* are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production, and generation of toxic and hazardous materials and other wastes. To be eligible for SEPs, such assessments must be conducted using a recognized pollution prevention assessment or waste minimization procedure to reduce the likelihood of future violations.

b. *Site assessments* are investigations of the condition of the environment at a site or of the environment impacted by a site, and/or investigations of threats to human health or the environment relating to a site. These include but are not limited to: Investigations of levels and/or sources of contamination in any environmental media at a site; investigations of discharges or emissions of pollutants at a site, whether from active operations or through passive transport mechanisms; ecological surveys relating to a site; natural resource damage assessments; and risk assessments. To be eligible for SEPs, such assessments must be conducted in accordance with recognized protocols, if available, applicable to the type of assessment to be undertaken.

c. An *environmental management system audit* is an independent evaluation of a party's environmental policies, practices and controls. Such evaluation may encompass the need for: (1) A formal corporate environmental compliance policy, and procedures for implementation of that policy; (2) educational and training programs for employees; (3) equipment purchase, operation and maintenance programs; (4) environmental compliance officer programs; (5) budgeting and planning systems for environmental compliance; (6) monitoring, record keeping and reporting systems; (7) in-plant and community emergency plans; (8) internal communications and control systems; and (9) hazard identification, risk assessment.

d. *An environmental compliance audit* is an independent evaluation of a defendant/respondent's compliance status with environmental requirements. Credit is only given for the costs associated with conducting the audit. While the SEP should require all violations discovered by the audit to be promptly corrected, no credit is given for remedying the violation since persons are required to achieve and maintain compliance with environmental requirements. In general, compliance audits are acceptable as SEPs only when the defendant/respondent is a small business.[8,9]

These two types of assessments and environmental management system audits are allowable as SEPs without an implementation commitment by the defendant/respondent. Implementation is not required because drafting implementation requirements before the results of the study are known is difficult. Further, for pollution prevention assessments and environmental management systems audits, many of the implementation recommendations from these studies may constitute activities that are in the defendant/respondent's own economic interest.

These assessments and audits are acceptable where the primary impact of the project is at the same facility, at another facility owned by the violator, or at a different facility in the same ecosystem or within the immediate geographic area (e.g., a publicly owned wastewater treatment works and its users). These assessments and audits are only acceptable as SEPs when the defendant/respondent agrees to provide EPA with a copy.

6. Environmental Compliance Promotion

An environmental compliance promotion project provides training or technical support to other members of the regulated community to: (1) Identify, achieve and maintain compliance with applicable statutory and regulatory requirements; (2) avoid committing a violation with respect to such statutory and regulatory requirements; or (3) go beyond compliance by reducing the generation, release or disposal of pollutants beyond legal requirements. For these types of projects, the defendant/respondent may lack the experience, knowledge or ability to implement the project itself, and, if so, the defendant/respondent should be required to contract with an appropriate expert to develop and implement the compliance promotion project. Acceptable projects may include, for example, producing or sponsoring a seminar directly related to correcting widespread or prevalent violations

[7] If EPA lacks authority to require repair, then repair itself may constitute a SEP.

[8] For purposes of this Policy, a small business is owned by a person or another entity that employs 100 or fewer individuals. Small businesses could be individuals, privately held corporations, farmers, landowners, partnerships and others.

[9] Since most large companies routinely conduct compliance audits, to mitigate penalties for such audits would reward violators for performing an activity that most companies already do. In contrast, these audits are not commonly done by small businesses, perhaps because such audits may be too expensive.

within the defendant/ respondent's economic sector.

Environmental compliance promotion SEPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements which were violated and where EPA has reason to believe that compliance in the sector would be significantly advanced by the proposed project. For example, if the alleged violations involved Clean Water Act pretreatment violations, the compliance promotion SEP must be directed at ensuring compliance with pretreatment requirements.

7. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance—such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training—to a responsible state or local emergency response or planning entity. This is to enable these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel and to better respond to chemical spills.

EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs) and Local Fire Departments (LFDs). This enables states and local communities to plan for and respond effectively to chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment or ecosystems which could be damaged by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

Emergency planning and preparedness SEPs are acceptable where the primary impact of the project is within the same emergency planning district or state affected by the violations. Further, this type of SEP is allowable only when the SEP involves non-cash assistance and there are violations of EPCRA or reporting violations under CERCLA Section 103 alleged in the complaint.

8. Projects Which Are Not Acceptable as SEPs

Except for projects which meet the specific requirements of one of the categories enumerated in § D. above, the following are examples of the types of projects that are not allowable as SEPs:

a. General educational or public environmental awareness projects, e.g., sponsoring public seminars, conducting tours of environmental controls at a facility, promoting recycling in a community;

b. Contribution to environmental research at a college or university;

c. Conducting a project, which, though beneficial to a community, is unrelated to environmental protection, e.g., making a contribution to charity, or donating playground equipment;

d. Studies or assessments without a commitment to implement the results (except as provided for in Section D.5 above);

e. Projects which are being funded by low-interest federal loans, federal contracts, or federal grants.

E. Calculation of the Final Penalty

As a general rule, the costs to be incurred by a violator in performing a SEP may be considered in determining an appropriate settlement amount. Calculating the final penalty in a settlement which includes a SEP is a three-step process. First, the Agency's penalty policies are used as applicable to calculate all of the other parts of the settlement penalty (including economic benefit and gravity components). Second, calculate the net-present after-tax cost of the SEP. Third, evaluate the benefits of the SEP, based on specific factors, to determine what percentage of the net-present after-tax cost will be considered in determining an appropriate final settlement penalty.

1. Penalty

Penalties are an important part of any settlement. A substantial penalty is generally necessary for legal and policy reasons. Without penalties there would be no deterrence as regulated entities would have little incentive to comply. Penalties are necessary as a matter of fairness to those companies that make the necessary expenditures to comply on time: violators should not be allowed to obtain an economic advantage over their competitors who complied. Except in extraordinary circumstances, if a settlement includes a SEP, the penalty should recover, at a minimum, the economic benefit of noncompliance plus 10 percent of the gravity component, or 25 percent of the gravity component only, whichever is greater.

In cases involving government agencies or entities, such as municipalities, or non-profit organizations, where the circumstances warrant, EPA may determine, based on the nature of the SEPs being proposed, that an appropriate settlement could contain a cash penalty less than the economic benefit of non-compliance. The precise amount of the cash penalty will be determined by the applicable penalty policy.

2. Calculation of the Cost of the SEP

To ensure that a proposed SEP is consistent with this Policy, the net present after-tax cost of the SEP, hereinafter called the ''SEP Cost,'' is calculated. In order to facilitate evaluation of the SEP Cost of a proposed SEP, the Agency has developed a computer model called PROJECT. To use PROJECT, the Agency needs reliable estimates of the costs and savings associated with a defendant/ respondent's performance of a SEP. Often the costs will not be estimates but known amounts based on a defendant/ respondent's agreement to expend a fixed or otherwise known dollar amount on a project.

There are three types of costs that may be associated with performance of a SEP (which are entered into the PROJECT model): capital costs (e.g., equipment, buildings); one-time nondepreciable costs (e.g., removing contaminated materials, purchasing land, developing a compliance promotion seminar); and annual operation costs or savings (e.g., labor, chemicals, water, power, raw materials).[10]

In order to run the PROJECT model properly (i.e., to produce a reasonable estimate of the net present after-tax cost of the project), the number of years that annual operation costs or savings will be expended in performing the SEP must be specified. At a minimum, the defendant/respondent must be required to implement the project for the same number of years used in the PROJECT model calculation. If certain costs or savings appear speculative, they should not be entered into the PROJECT model. The PROJECT model is the primary method to determine the SEP cost for purposes of negotiating settlements.[11]

[10] PROJECT does not evaluate the potential for market benefits which may accrue with the performance of a SEP (e.g., increased sales of a product, improved corporate public image, or improved employee morale). Nor does it consider costs imposed on the government, such as the cost to the Agency for oversight of the SEP, or the burden of a lengthy negotiation with a defendant/ respondent who does not propose a SEP until late in the settlement process.

[11] See PROJECT User's Manual, January 1995. If the PROJECT model appears inappropriate to a

EPA does not offer tax advice on whether a company may deduct SEP expenditures from its income taxes. If a defendant/respondent states that it will not deduct the cost of a SEP from its taxes and it is willing to commit to this in the settlement document, and provide the Agency with certification upon completion of the SEP that it has not deducted the SEP expenditures, the PROJECT model calculation should be adjusted to calculate the SEP Cost without reductions for taxes. This is a simple adjustment to the PROJECT model: just enter a zero for variable 7, the marginal tax rate. If a business is not willing to make this commitment, the marginal tax rate in variable 7 should not be set to zero; rather the default settings (or a more precise estimate of the business' marginal tax rates) should be used in variable 7.

If the PROJECT model reveals that a project has a negative cost, this means that it represents a positive cash flow to the defendant/respondent and as a profitable project thus, generally, is not acceptable as a SEP. If a project generates a profit, a defendant/respondent should, and probably will, based on its own economic interests implement the project. While EPA encourages companies to undertake environmentally beneficial projects that are economically profitable, EPA does not believe violators should receive a bonus in the form of penalty mitigation to undertake such projects as part of an enforcement action. EPA does not offer subsidies to complying companies to undertake profitable environmentally beneficial projects and it would thus be inequitable and perverse to provide such subsidies only to violators. In addition, the primary goal of SEPs is to secure a favorable environmental or public health outcome which would not have occurred but for the enforcement case settlement. To allow SEP penalty mitigation for profitable projects would thwart this goal.[12]

3. Penalty Mitigation

After the SEP Cost has been calculated, EPA should determine what percentage of that cost may be applied as mitigation against the preliminary total calculated gravity component before calculation of the final penalty. The SEP should be examined as to whether and how effectively it achieves each of the following five factors listed below.

- *Benefits to the Public or Environment at Large.* While all SEPs benefit public health or the environment, SEPs which perform well on this factor will result in significant and quantifiable reduction in discharges of pollutants to the environment and the reduction in risk to the general public. SEPs also will perform well on this factor to the extent they result in significant and, to the extent possible, measurable progress in protecting and restoring ecosystems (including wetlands and endangered species habitats).
- *Innovativeness.* SEPs which perform well on this factor will further the development and implementation of innovative processes, technologies, or methods which more effectively: reduce the generation, release or disposal of pollutants; conserve natural resources; restore and protect ecosystems; protect endangered species; or promote compliance. This includes ''technology forcing'' techniques which may establish new regulatory ''benchmarks.''
- *Environmental Justice.* SEPs which perform well on this factor will mitigate damage or reduce risk to minority or low income populations which may have been disproportionately exposed to pollution or are at environmental risk.
- *Multimedia Impacts.* SEPs which perform well on this factor will reduce emissions to more than one medium.
- *Pollution Prevention.* SEPs which perform well on this factor will develop and implement pollution prevention techniques and practices.

The better the performance of the SEP under each of these factors, the higher the mitigation percentage may be set. As a general guideline, the final mitigation percentage should not exceed 80 percent of the SEP Cost. For small businesses, government agencies or entities, and non-profit organizations, this percentage may be set as high as 100 percent. For any defendant/respondent, if one of the five factors is pollution prevention, the percentage may be set as high as 100 percent. A lower mitigation percentage may be appropriate if the government must allocate significant resources to monitoring and reviewing the implementation of a project.

In administrative enforcement actions in which there is a statutory limit on administrative penalties, the cash penalty obtained plus the amount of penalty mitigation credit due to the SEPs shall not exceed the statutory administrative penalty limit.

F. Performance by a Third Party

SEPs are generally performed either by the defendant/respondent itself (using its own employees) and/or by contractors or consultants.[13] In the past in a few cases, a SEP has been performed by someone else, commonly called a third party. Because of legal concerns and the difficulty of ensuring that a third party implements the project as required (since by definition a third party has no legal or contractual obligation to implement the project as specified in the settlement document), performance of a SEP by a third party is not allowed.

G. Oversight and Drafting Enforceable SEPS

The settlement agreement should accurately and completely describe the SEP. (See related legal guideline 4 in Section C above.) It should describe the specific actions to be performed by the defendant/respondent and provide for a reliable and objective means to verify that the defendant/respondent has timely completed the project. This may require the defendant/respondent to submit periodic reports to EPA. If an outside auditor is necessary to conduct this oversight, the defendant/respondent should be made responsible for the cost of any such activities. The defendant/respondent remains responsible for the quality and timeliness of any actions performed or any reports prepared or submitted by the auditor. A final report certified by an appropriate corporate official, acceptable to EPA and evidencing completion of the SEP, should be required.

To the extent feasible, defendant/respondents should be required to quantify the benefits associated with the project and provide EPA with a report setting forth how the benefits were measured or estimated. The defendant/respondent should agree that whenever it publicizes a SEP or the results of the SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.

The drafting of a SEP will vary depending on whether the SEP is being performed as part of an administrative or judicial enforcement action. SEPs with long implementation schedules (e.g., 18 months or longer), SEPs which require EPA review and comment on

particular fact situation, EPA Headquarters should be consulted to identify an alternative approach. For example, the December 1993 version of PROJECT does not readily calculate the cost of an accelerated compliance SEP. The cost of such a SEP is the additional cost associated with doing the project early (ahead of the regulatory requirement) and it needs to be calculated in a slightly different manner.

[12] The penalty mitigation guidelines in subsection E.3 provide that the amount of mitigation should not exceed the net cost of the project. To provide penalty mitigation for profitable projects would be providing a credit in excess of net costs.

[13] Of course, non-profit organizations, such as universities and public interest groups, may function as contractors or consultants.

interim milestone activities, and other complex SEPs may not be appropriate in those administrative enforcement actions where EPA lacks injunctive relief authority or is subject to a penalty ceiling. Specific guidance on the proper drafting of SEPs will be provided in a separate guidance document.

H. Failure of a SEP and Stipulated Penalties

If a SEP is not completed satisfactorily, the defendant/respondent should be required, pursuant to the terms of the settlement document, to pay stipulated penalties for its failure. Stipulated penalty liability should be established for each of the scenarios set forth below as appropriate to the individual case.

1. Except as provided in paragraph 2 immediately below, if the SEP is not completed satisfactorily, a substantial stipulated penalty should be required. Generally, a substantial stipulated penalty is between 50 and 100 percent of the amount by which the settlement penalty was mitigated on account of the SEP.

2. If the SEP is not completed satisfactorily, but the defendant/respondent: (a) made good faith and timely efforts to complete the project; and (b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, no stipulated penalty is necessary.

3. If the SEP is satisfactorily completed, but the defendant/respondent spent less than 90 percent of the amount of money required to be spent for the project, a small stipulated penalty should be required. Generally, a small stipulated penalty is between 10 and 25 percent of the amount by which the settlement penalty was mitigated on account of the SEP.

4. If the SEP is satisfactorily completed, and the defendant/respondent spent at least 90 percent of the amount of money required to be spent for the project, no stipulated penalty is necessary.

The determinations of whether the SEP has been satisfactorily completed (i.e., pursuant to the terms of the agreement) and whether the defendant/respondent has made a good faith, timely effort to implement the SEP is in the sole discretion of EPA.

I. EPA Procedures

1. Approvals

The authority of a government official to approve a SEP is included in the official's authority to settle an enforcement case and thus, subject to the exceptions set forth here, no special approvals are required. The special approvals apply to both administrative and judicial enforcement actions as follows: [14]

a. Regions in which a SEP is proposed for implementation shall be given the opportunity to review and comment on the proposed SEP.

b. In all cases in which a SEP may not fully comply with the provisions of this Policy, the SEP must be approved by the EPA Assistant Administrator for Enforcement and Compliance Assurance.

c. In all cases in which a SEP would involve activities outside the United States, the SEP must be approved in advance by the Assistant Administrator and, for judicial cases only, the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice.

d. In all cases in which a SEP includes an environmental compliance promotion project, the SEP must be approved by the Office of Regulatory Enforcement in OECA. With time, this approval requirement may be delegated to Regional officials.

2. Documentation and Confidentiality

In each case in which a SEP is included as part of a settlement, an explanation of the SEP with supporting materials (including the PROJECT model printout, where applicable) must be included as part of the case file. The explanation of the SEP should demonstrate that the five criteria set forth in Section A.3 above are met by the project and include a description of the expected benefits associated with the SEP. The explanation must include a description by the enforcement attorney of how nexus and the other legal guidelines are satisfied.

Documentation and explanations of a particular SEP may constitute confidential settlement information that is exempt from disclosure under the Freedom of Information Act, is outside the scope of discovery, and is protected by various privileges, including the attorney-client privilege and the attorney work-product privilege. While individual Agency evaluations of proposed SEPs are confidential documents, this Policy is a public document and may be released to anyone upon request.

This Policy is primarily for the use of U.S. EPA enforcement personnel in settling cases. EPA reserves the right to change this Policy at any time, without prior notice, or to act at variance to this Policy. This Policy does not create any rights, duties, or obligations, implied or otherwise, in any third parties.

[14] In judicial cases, the Department of Justice must approve the SEP.

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BILLING CODE 6560–50–P

[OPPT–59344; FRL–4951–5]

Certain Chemicals; Approval of a Test Marketing Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of an application for test marketing exemption (TME) under section 5(h)(1) of the Toxic Substances Control Act (TSCA) and 40 CFR 720.38. EPA has designated this application as TME–95–3. The test marketing conditions are described below.

DATES: This notice becomes effective April 24, 1995. Written comments will be received until May 25, 1995.

ADDRESSES: Written comments, identified by the docket number [OPPT–59344] and the specific TME number should be sent to: TSCA noncofidential center (NCIC), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. NEB–607 (7407), 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD (202) 554–0551.

Comments and data may also be submitted electronically by sending electronic mail (e-mail) to: ncic@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect in 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by [OPPT–59344]. No CBI should be submitted through e-mail. Electronic comments on this notice may be filed online at many Federal Depository Libraries. Additional information on electronic submissions can be found under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Vera Stubbs, New Chemicals Branch, Chemical Control Division (7405), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–447, 401 M St., SW., Washington, DC 20460, (202) 260–5671.

SUPPLEMENTARY INFORMATION: Section 5(h)(1) of TSCA authorizes EPA to exempt persons from premanufacture notification (PMN) requirements and permit them to manufacture or import new chemical substances for test