

ENVIRONMENTAL ENFORCEMENT SOLUTIONS

HOW COLLABORATIVE SEPS
ENHANCE COMMUNITY BENEFITS

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The **National Policy Consensus Center** assists public leaders and state dispute resolution programs in establishing and strengthening the use of collaborative practices to address difficult public policy issues.

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Cover photograph: Post-construction view of the abandoned rail corridor acquired during a community-based collaborative SEP negotiated by the US EPA Region 1 and the State of Massachusetts Department of Environmental Protection. Community participation and resource leveraging resulted in the acquisition and remediation of three Boston brownfields.
http://www.bostonnatural.org/east_boston.php.

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- A. Participant Biographical and Contact Information
- B. Six Strategies with Recommended Next Steps
- C. Thirteen Immediate Next Steps
- D. Selection Criteria for SEP Demonstration Pilots
- E. PowerPoint Presentation: *State Supplemental Environmental Project (SEP) Programs: A Review of Publicly Accessible State SEP Databases*

EXECUTIVE SUMMARY

In March 2006, the National Policy Consensus Center (NPCC) and the United States Environmental Protection Agency (US EPA) co-hosted a multi-stakeholder Colloquium to consider whether collaborative approaches would allow Supplemental Environmental Projects (SEPs) to leverage environmental, public health, economic, and social benefits for communities affected by environmental law violations. A SEP is an environmentally beneficial project that a violator voluntarily agrees to perform, in addition to actions required to correct the violation(s), as part of an enforcement settlement.

Colloquium participants explored the **benefits of expanding the SEP process** to incorporate multi-sector, community-based collaborations in the selection, design, and/or implementation of a SEP. They examined how a **community-based collaborative SEP can leverage** community investments and opportunities to achieve the affected community's economic and environmental justice objectives **with minimal additional government resources**. They discussed how to **encourage regulatory agencies and responsible parties** (violators) to adopt collaborative approaches as a better way of undertaking SEPs.

Five Key Conclusions and Recommendations emerged from the Colloquium and subsequent work:

- SEPs are underutilized generally; US EPA and states should examine how to expand opportunities for SEPs, especially where there may be enhanced benefits for the affected community.
- Collaborative governance processes can lead to greater community benefits by leveraging SEPs with other investments, actions, and commitments.
- US EPA and states should consider (1) undertaking pilot collaborative SEPs to determine violator and community interest and (2) developing appropriate “best practices” for each state based on a collaborative governance process such as the Public Solutions model developed by NPCC.
- Agencies should consider developing publicly accessible SEP libraries, idea banks, and fund banks to expand the opportunities for SEPs and make the process more efficient, transparent, and accessible.
- Agencies could benefit by examining SEP policies and practices, enhancing opportunities for collaborative SEPs and incorporating “best practices” for them.

The need for **publicly accessible SEP information** was an overarching theme of the Colloquium. Information is the key to a transparent and inclusive SEP process, particularly a collaborative SEP with the potential for community involvement and investment. Increased public accessibility to SEP information--including project identification--is a prerequisite for a community-based collaborative SEP.

CHAPTER 1: BACKGROUND AND PURPOSE

COLLOQUIUM PURPOSE AND OBJECTIVES

A Supplemental Environmental Project (SEP) is an environmentally beneficial project that a violator voluntarily agrees to perform, in addition to actions required to correct the environmental law violation(s), as part of an enforcement settlement.¹

The Colloquium's Purposes

- *To explore how collaborative approaches involving affected communities create economic, environmental, and social benefits through leveraging SEPs with other investments and resources, and*
- *To examine whether and how to encourage regulatory agencies and responsible parties to adopt community-based collaborative approaches as a better way of undertaking SEPs.*

The Post-Colloquium Objectives

- *To implement and evaluate 1-2 SEP pilots, based upon the Colloquium's collaborative model for leveraging SEP resources, and*
- *To publish Colloquium Proceedings, including Recommendations for "best practices" for both collaborative as well as community-based collaborative SEPs.*

The National Policy Consensus Center (NPCC) and US EPA Region 10 co-sponsored the March 28-29, 2006 Colloquium to explore: (1) how collaborative approaches can create environmental, public health, social, and economic benefits of enforcement through

leveraging SEPs with other investments and resources and (2) how to encourage others to incorporate collaborative approaches into the SEP process.

COLLOQUIUM PARTICIPANTS

The twenty-five participants, identified in Attachment A to this Report, represented government (US EPA Regions 1, 8, 9, 10 and the States of Oregon and Washington), academia, grassroots community-based groups, and two national nonprofits with SEP experience. Participants were invited because of their expertise and leadership in collaborative problem-solving, federal and state environmental enforcement, SEPs, environmental and economic justice, land revitalization and conservation, pollution prevention/ toxics reduction, and/or the evaluation of environmental, public health, social, and economic effects of collaboration.

Participants Represented 6 Stakeholder Groups:

- *Academia*
- *Community-based Organizations*
- *State Government*
- *Federal Government*
- *Non-profits*
- *Private Sector (measurement and evaluation)*

Potential participants were interviewed about their knowledge of and interest in the topic of SEPs and their willingness to participate in a facilitated dialogue (Colloquium) about the SEP process.

COLLOQUIUM PLANNING AND PROCESS

Prior to the Colloquium, participants were provided with an Issue Paper that identified select SEP issues and analyzed five years of SEP data from US EPA's publicly accessible Environmental and Compliance History Online database (ECHO),² case studies,

selected State and Federal SEP policies, an article about NPCC’s Public Solutions approach to collaborative public policy decision-making, and the Executive Summary of American Bar Association Report *Supplemental Environmental Projects: A Fifty State Survey with Model Practices* (S. Bonorris, ed.). The Survey is available at: www.uchastings.edu/site_files/plri/ABAHastingsSEPreport.pdf.

Presentations and topics of discussion at the Colloquium included:

- Collaborative governance as related to SEPs;
- The promise and pitfalls of SEPs;
- Case studies illustrating how collaborative SEPs and Community Benefits Agreements (CBAs) actively engaged communities and succeeded in leveraging resources, actions, and commitments beyond what was otherwise possible;
- Overviews of SEP policies, practices, and sample SEPs from the states of Oregon and Washington;
- Nonprofit third party resources with experience “matching” and/or “managing” SEPs by either leveraging the acquisition and rehabilitation of urban property for recreational purposes or implementing clean energy, energy efficiency, and pollution prevention projects; and
- Measurement of the environmental, public health, social, and economic benefits of collaboration.

The Colloquium discussion has resulted in three documents to date.

First, *Six Strategies with Recommended Next Steps* is provided as Attachment B to this Report. The recommended Next Steps for implementing the Six Strategies are pragmatic and *practice*-focused. Several promote public accessibility. The recommendations would enhance a SEP program’s community benefits without requiring statutory or policy modifications.

Second, *Thirteen Immediate Next Steps* (see Attachment C) emphasizes multi-stakeholder outreach on topics such as collaborative governance, resource leveraging, and community-based collaborative SEPs. Colloquium participants and

NPCC staff have begun implementation of all thirteen, aided in their coordination by the Collaborative SEPs Listserv.

Finally, *Selection Criteria for SEP Demonstration Pilots* (see Attachment D) emphasizes the availability of collaborative and leveraging opportunities among the criteria for SEP pilot designation.

Colloquium documents are posted at www.policyconsensus.org/publications.

COLLOQUIUM FINDINGS AND RECOMMENDATIONS

The Colloquium discussion supported the following findings:

Collaborative SEPs

- A collaborative SEP benefits the affected communities by creating environmental, public health, social, and economic benefits through multi-stakeholder resource leveraging.
- A collaborative SEP has the potential to leverage non-enforcement generated funds (see pp. 5 to 9) for a discussion of collaborative governance).
- A collaborative SEP that is community-based builds social capital that ultimately benefits all stakeholders.
- A collaborative SEP process is consensus-based, transparent, accessible, inclusive, efficient, effective, accountable, and administered as a neutral process.
- Collaborative SEP processes require public accessibility and community involvement. Accessibility (e.g. information on pre-developed or pre-approved projects) reduces transaction costs by minimizing delay and reducing additional negotiation costs. Reduced costs encourage a violator to undertake a SEP and enhance the community benefit of environmental enforcement. Public involvement in a collaborative SEP ensures that projects actually aid local communities.
- A collaborative SEP is the enforcement tool with the greatest potential to achieve benefits for a potential environmental justice community.³

Best Practices for SEPs

- Existing practices such as publicly accessible SEP Idea Banks, SEP Libraries, and SEP Fund Banks (allowing for aggregation of separate SEP funds) are all proven “best practices” for leveraging funds and attaining “beyond compliance” benefits for affected communities.
- Many of the legal limitations of federal law shaped by the federal constitution and federal procurement law cannot apply to the states.⁴
- Multi-jurisdictional and integrated enforcement planning can produce SEPs with benefits for the affected community (and others) far exceeding those attainable by either jurisdiction independently.

Training and Evaluation

- Training of agency enforcement staff and attorneys to use collaboration tools in SEP negotiation would both serve the specific interest of regulatory enforcement and the broader public interest in comprehensive environmental protection.
- Measurement techniques are available to evaluate the environmental, public health, social, and economic effects of collaborative environmental decision-making.

To test these findings, participants agreed to work with US EPA and interested states to identify one or more SEP demonstration pilots and evaluate the “best practices” discussed during the Colloquium.

CHAPTER 2: SEPS AND COLLABORATIVE PROCESSES

WHAT IS A COLLABORATIVE SEP?

The agency enforcement staff and the violator normally negotiate SEPs, without involving other parts of the agency, outside organizations, or the affected community. They are often short-term projects with limited or no relationship to potentially related programs, projects, or investments in the community where the violation took place.

In a collaborative SEP, outside interests are brought in--either during the negotiations or after the project has been agreed on--to integrate the SEP with other environmental or community actions. This integration expands the benefits of the SEP by using it to leverage other investments or resources from other organizations or governments.

Collaborative SEPs can take several forms. In the simplest one, the agency staff and the violator seek input from outside sources to fine-tune the SEP to meet needs identified in public comments. These sources of input include other programs in the enforcing agency, another agency, organizations, local governments, or community representatives.

Alternatively, the agency can invite those participants to help develop or implement the SEP. In this form of collaborative SEP, participants work to integrate or leverage the SEP with other projects, activities or programs.

The most complex form of collaborative SEP is when the agency and the violator agree to use a portion of the SEP to pay for a collaborative process. This process involves more participants who might be able to contribute to a solution and follows the principles and practices of collaborative governance.

WHAT IS COLLABORATIVE GOVERNANCE?

“Collaborative governance takes as its starting point the idea that working together creates more lasting, effective solutions,” says Colloquium participant Greg Wolf, the Director of the National Policy Consensus Center (NPCC). He defined “governance” as the “process by which public ends and means are identified, agreed upon, and pursued. Governance is different from ‘government,’ which relates to the specific jurisdiction in which authority is exercised.”

“‘Governance’ is the process by which public ends and means are identified, agreed upon, and pursued. Collaborative governance takes as its starting point the idea that working together creates more lasting, effective solutions.”
- NPCC

Governance includes both formal and informal systems of relationships and networks for decision-making and problem-solving. Figure 1 shows a side-by-side comparison of the contrasting elements of collaborative governance and traditional governance.⁵

Public Solutions System

As an example of collaborative governance, Wolf outlined the elements of the Public Solutions System, which NPCC has employed in a number of projects--most notably under the banner of the Oregon Solutions program (www.oregonsolutions.org).⁶ The Public Solutions System relies on these elements:

Sponsor: An agency, foundation, civic organization, public-private coalition, etc. to initiate support for a project.

Convener/leader: A governor, legislator, local official, respected civic leader, etc. with power to bring diverse people together to work on common problems. The sponsor selects the convener/leader after consulting with the principal participants.

Neutral Forum: An impartial organization or venue to provide and ensure skilled process management, including performing an assessment to determine the likelihood of success and educating the participants on the process and the project.

Participants: All sectors (public, private, civic, etc.) are involved to ensure representation of all interests and points of view. These should include not only organizations with a direct interest in the project or outcome, but those that can contribute to a robust solution, like a community organization or local business.

Written agreement: A mechanism to establish accountability for implementation of the participants' commitments.

According to NPCC, collaborative governance processes must be both effective and efficient. "Effective" means productive and "efficient" means with a minimum expenditure (of resources).⁷ Wolf reported that in a typical Oregon Solutions project, **additional resources are leveraged from other participants in amounts three to four times more than the value of the original project**, more than justifying the added cost of the collaborative governance process.

A Public Solutions-based SEP Model:

- *leverages SEPs with other investments and resources,*
- *engages relevant members of the community in decision-making, and*
- *creates economic, environmental, and social benefits for the community.*

Colloquium participants agreed that the best public solutions come from people working together on issues. They agreed that applying principles and elements such as those upon which Public Solutions is based to a collaborative SEP process would increase the community benefit of environmental enforcement.


	Collaborative Governance	Traditional Governance
Place	 Neutral forum	 Hearing Room
Leader	 Convener	 Decision Maker
Rules of Engagement	 Public Solutions System	 Roberts Rules/ Masons Guide
Sponsor	 Public / Private / Not-for-profit	 Government
Solution	 Integrated, Public, Private, Investments and Agreements to Take Action	 Decisions By Government Bodies

Figure 1: Collaborative Governance

EXAMPLES OF COLLABORATIVE GOVERNANCE THAT WORK

A successful collaborative process ensures that the impacted community meaningfully participates in identifying achievable local benefits.

Selecting the right convener, having a neutral forum, and identifying and coordinating local strategic stakeholders can achieve meaningful community participation, as demonstrated both by the National Policy Consensus Center's (NPCC) Oregon Solutions program and by the Community Benefits Agreements program (CBA)⁸ pioneered by the Los Angeles Alliance for a New Economy (LAANE).

Both CBAs and collaborative SEPs have a governance approach that includes multi-stakeholder collaborations. These collaborations can move beyond regulatory mandates, policies, or practices and achieve sustainable community revitalization objectives. They often result in agreements that include commitments by governments to undertake projects or provide services in support of the agreement.

National Policy Consensus Center Public Solutions Program

Over 30 Oregon Solutions projects have used the Public Solutions System. Several of the projects were similar to many SEPs. Participants agreed on a project and then initiated a process to see if additional community investments or activities could be integrated with the project to expand its benefits.

The commitments made by the private and public parties in an Oregon Solutions project would produce suitable SEPs. For example, in the North Portland project described below, the City of Portland committed to retrofit existing diesel equipment with diesel particulate filters and to use ultra-low sulfur diesel fuel in all diesel engines. If there had been a relevant violation involving another entity, a SEP involving the upgrade of the violator's fleet could have provided an incentive and leadership in leveraging other actions, including fleet upgrades.⁹

North Portland Diesel Emissions Reduction Project

North Portland is the hub of distribution of goods for the entire state of Oregon and therefore has the highest levels of diesel emissions in the state (estimated at ~20 times the health standard).

Community groups, non-profit organizations, agencies, and private and public fleets (operating in or from N. Portland) are collaborating to reduce fleet emissions through fuel and equipment upgrade projects.

Using the Public Solutions System model (*see p. 5*), a written agreement was reached by all the parties that embodied a blend of public and private cost sharing that will support action on each party's voluntary commitments.



Freightliner signing Declaration of Cooperation

Private entities such as fuel providers, trucking companies, and garbage and recycling haulers, public entities such as the Oregon Departments of Environmental Quality and Transportation, City of Portland, Multnomah County Health Department, and non-profit organizations such as Environmental Justice Action Group (EJAG), Coalition for a Livable Future (CLF), and Oregon Environmental Council (OEC) all took part in an effort to promote voluntary actions to reduce diesel emissions.

A Collaborative Governance System is:

- Transparent and accountable*
- Equitable and inclusive*
- Effective and efficient*
- Responsive*
- Neutral*
- Consensus-based*

Los Angeles Alliance for a New Economy's (LAANE) Community Benefits Agreements (CBA) Program

The Community Benefits Agreement is an emerging public and private partnership tool that addresses unintended environmental, public health, social, and economic consequences of urban development.

CBAs have been negotiated to avoid litigation and to build community support for a large project. CBAs and SEPs both seek to achieve a community benefit. Unlike SEPs, CBAs are settlements of cases prosecuted by a private party, not by the government. CBAs always involve significant public participation, including multi-stakeholder collaborations.

CBAs are "legal documents in which the developer of a project commits to a series of benefits including quality jobs, local hiring, affordable housing, environmental mitigations, and community services. Residents of the project neighborhood and other stakeholders organize in cross-issue and multi-racial coalitions. Often, city government becomes involved through provision of subsidies or application of land use requirements."

http://www.laane.org/projects/lax_cba/index.html

For ten years, the City of Los Angeles attempted unsuccessfully to expand Los Angeles International Airport to accommodate growing passenger and freight demand. However, community and political opposition had defeated plans for massive expansion.

Development of LAX presented the potential for a classic case of pitting "jobs" against "the environment." LAX generates close to 400,000 jobs in the regional economy, and provides employment in service industries to thousands of residents of the neighboring communities. Although many of the jobs held by local residents are low-quality ones, in communities plagued by unemployment and poverty, these are important to family survival and the local economies.

These same communities, however, suffer negative environmental and public health impacts from LAX as it exists: Poor air quality and excessive noise

levels due to the automobile and airplane traffic. Without mitigation, modernization could exacerbate these problems.

The LAX Coalition for Environmental, Economic and Educational Justice was determined to redefine the debate and to advocate for improvements to the environment and creation of quality jobs targeted to local residents. The Coalition organized collectively to design a [Community Benefits Agreement](#) that includes important environmental mitigations and community benefits for nearby communities, as well as guaranteeing that the new jobs will be good ones.



LAX Coalition for Economic, Environmental and Educational Justice

The City Council and the Airport Commission approved the CBA. It calls for spending one-half billion dollars over ten years for state of the art measures to abate noise and air pollution generated by the airport and design and implement public health programs to address the consequences of that pollution. In addition, the funds will be used to provide job training for 500 neighborhood residents per year and to give preference to local residents in filling jobs at the airport.

Many of the commitments made by the airport and the City could have been the subject of SEPs, if a violation had been involved. The collaboration between the City, the Airport Commission, and LAANE could have been expanded to include the violator or the enforcing agency or a third party charged with expending the SEP funds.

EXAMPLES OF COLLABORATIVE SEPs

While no SEP case has been identified that fully utilized a collaborative governance process such as Public Solutions, two noteworthy SEPs, each the result of successful concurrent state and federal enforcement actions and coordination, were discussed during the Colloquium.¹⁰

The Neponset River/East Boston Greenway SEP and the Rocky Mountain Steel Mills SEP both illustrate how community-based collaborations effectively leveraged significantly more value from enforcement than had the jurisdiction's enforcement action concluded in either a penalty or in a traditional (non-collaborative) SEP.

In the **Neponset River/East Boston Greenways SEP** negotiated by US EPA Region 1 and the State of Massachusetts Department of Environmental Protection (MassDEP), a remarkable public-private-nonprofit-community partnership produced a \$2 million SEP.¹¹ An additional \$1.2 million of leveraged funds allowed a third party (Trust for Public Land, or TPL, *see* p. 23) to acquire greenway sites, which, following remediation, were conveyed to the Metropolitan District Commission. SEP funds bridged the remediation-funding gap that allowed TPL to acquire greenway sites, which were conveyed to the state urban parks agency. Leveraged funds also allowed the seeding of an endowment managed by the Boston Natural Areas Fund on behalf of the East Boston Greenway to be used for enhanced maintenance and park programming.

As important as enhanced monetary investment is enhanced community action. The \$432,678 **Rocky Mountain Steel Mills SEP**, the result of concurrent federal and state enforcement actions by US EPA Region 8 and the State of Colorado Department of Public Health and Environment (CDPHE), succeeded in mobilizing a community of low income, predominately Hispanic new immigrants and third-generation families. This insular, private culture was distrustful of outsiders and local public

health agencies. Together, the community and the agencies collaboratively selected nine public health projects, to be completed over a two-year period.¹²

The Neponset River/ East Boston Greenways SEP and the Rocky Mountain Steel SEP are considered by many to be among the most successful SEPs to date. The collaboration between US EPA, the states of Massachusetts and Colorado, and various nonprofit organizations, businesses, local government and community groups allowed for a more varied, flexible, and innovative SEP than either the federal or the state agencies could have accomplished independently, given their respective regulatory authorities and SEP policies.

Can more deliberately applied collaborative *governance* approaches, if applied to the SEP process, produce a collaborative SEP that achieves “beyond compliance” benefits in an efficient, effective, and appropriate way? To answer this question, the Colloquium **recommended selection of one or more SEP pilots that would use the collaborative “best practices” identified during the Colloquium.** Evaluation would compare the outcomes of the collaborative governance, collaborative, non-collaborative, and non-SEP cases.

Participants adopted the following case criteria for selection of collaborative SEPs pilots (*see* Attachment D):

- Likelihood to reach an agreement on the proposed project within 6-12 months. This plan would include a reasonable timetable for implementation, including goals and deadline(s). Implementation--in terms of the regulatory agency's role--would be minimal after the agreement is reached;
- Opportunities for resource leveraging;
- Opportunities for a collaborative governance approach that involves different sectors (local, federal, state governments, businesses, nonprofits, community groups, private citizens, academia) in decision-making and/or implementation;
- Appropriate candidate(s) for conveners;¹³
- Existence of a neutral forum; and
- Source of funding for process (meetings, fact-finding, facilitation, assistance to convenor).

CHAPTER 3: GOVERNMENTAL PRACTICES SUPPORTING A COLLABORATIVE SEP PROCESS

HIGHLIGHTS OF FEDERAL SEP POLICIES AND PRACTICES

US EPA SEP Policies

US EPA's SEP policies have shaped state practices, but are more restrictive than state policies generally.

No federal statute expressly authorizes US EPA to accept SEPs in mitigation of civil enforcement actions.¹⁴ US EPA's broad authority and discretion to bring enforcement actions, and to settle them, is widely accepted.¹⁵ There is no record that a court has ever invalidated a US EPA-approved settlement that included a SEP.¹⁶

US EPA has issued several SEP policies¹⁷ since the *1988 Final SEP Policy*¹⁸ that incorporate articulated congressional and judicial guidelines in establishing requirements for a federal SEP. To ensure that the Agency's enforcement discretion is used appropriately and in compliance with federal law, a SEP must:¹⁹

- Be related to – or have a “nexus” to – the underlying violation;
- Provide significant environmental and public health benefits;
- Benefit the community affected by the violation; and
- Secure public health and/or environmental improvements beyond what can be achieved under applicable environmental law.

There are several types of commonly proposed projects or practices that are not acceptable as federal SEPs (but may be under state programs), including:

- Donations to third parties;
- US EPA management of funds obtained through a SEP;
- Augmentation of appropriations without express legislative authorization; and
- Projects for which a violator is already receiving federal financial assistance, i.e., a federal loan, contract, or grant.

In contrast to some state programs discussed below, US EPA's SEP policy allows aggregation of separate SEP funds *only* where (1) separate violators pool resources to hire a contractor to manage and/or implement a consolidated SEP²⁰ or where (2) separate violators perform discrete and segregable projects within a larger SEP.²¹ Under either scenario, violators remain liable in the same manner as they would under a typical settlement, including the implementation and completion of the SEP.²² Unlike many states, US EPA *cannot* aggregate funds from separate SEPs into a SEP Fund Bank to be used later.²³

Likewise, US EPA policy regarding third party involvement is more restrictive than many states. Under US EPA's policy, a third party may implement a SEP and manage SEP funds only if the violator (1) is likely to complete the SEP satisfactorily, (2) is expected to fully expend the funds agreed to, and (3) does not merely make a cash payment to a third party.²⁴ US EPA policy prohibits the transfer of legal liability for implementation of the SEP from a violator to a third party.²⁵

Adherence to these policies would be required for any collaborative SEP using US EPA's enforcement authorities.

Public Accessibility to US EPA SEP Information

It is axiomatic that publicly accessible information increases the likelihood that an enforcement action will conclude with a SEP. For this reason, US EPA (and most states) provides a link to its SEP policies.²⁶

US EPA's Office of Enforcement and Compliance Assurance (OECA) routinely updates its directory of significant cases with SEP settlements from 1998 through the present. OECA also collects project ideas from interested parties to include in the *Potential Supplemental Environmental Projects* Guidance.²⁷

“Best Practices”

In addition to the OECA website’s publicly accessible features, several Regional webpages provide Region-specific SEP information or practices. For example, uncertainty about whether a particular proposed project would be acceptable or successfully completed in a timely manner by a violator makes potential stakeholders unwilling to invest resources in creating and submitting ideas. One US EPA Region has adopted a “Best Practice” to address this concern. The Region’s SEP Coordinator screens proposals, and in consultation with the proponent, develops the proposal to include realistic cost estimates.²⁸

HIGHLIGHTS OF STATE SEP POLICIES AND PROGRAMS

State SEP Policies

According to the *Supplemental Environmental Projects: A Fifty State Survey*, thirty-two states have formal, published SEP policies and sixteen states (and the District of Columbia) have informal practices or internal, unpublished policies.²⁹ Only two states—North Carolina and South Carolina—have rejected SEPs as a matter of policy.

Although federal SEP policies are followed by many states, several have promulgated policies significantly different from US EPA. State SEP policies vary with respect to (1) legal requirements (e.g., agency authority to manage funds, contributions to third parties, willfully guilty or repeat violators’ access to SEPs), nexus requirements, penalty calculations (i.e., percentage of penalty that can be mitigated) and (2) types of projects allowed.

An August 2006 review of state enforcement websites indicates that SEP model practices are also widely varied. States differ with respect to (1) public accessibility of SEP-related information and (2) degree

of community involvement facilitated, both of which provide benefits that increase the likelihood of successful SEPs. On the whole, state SEP policies are more flexible than US EPA’s, making it easier to undertake and implement collaborative SEPs.

State Supplemental Environmental Project (SEP) Programs: A Review of Publicly Accessible State SEP Databases (see Attachment E) is an outreach tool, available in a .ppt format, illustrating state approaches.

Public Accessibility to State SEP Information

Publicly accessible information increases the likelihood that an enforcement action will conclude with a SEP. Twenty-four states have little or no publicly accessible SEP information. When searched, some agency websites yielded results containing some SEP terminology (i.e., the term “supplemental environmental project”), but lacked clear SEP policy guidance and/or SEP enforcement data. One state that lacks publicly accessible SEP information reported that less than 1% of its total enforcement actions resulted in SEPs over the five year period from FY 2000 through FY 2004.

Thirteen states provide a link to their SEP policies. Of the eleven states that go beyond publicly accessible SEP policy information, one reported 13 SEPs from 204 enforcement actions (6.4%) in FY 2004, another state 11.8%, and a third 28.8%. These thirteen states, in addition to an explanation of their SEP policies, provide one or more of the following:

- A link to the US EPA’s ECHO database, which allows for a SEP search;
- Guidelines and access to a SEP Idea Bank, allowing the public to post and/or view suggested project ideas for SEPs; and
- The ability for penalties to be placed into a community fund (SEP Fund Bank) for an environmentally beneficial project.

TABLE 1: PUBLICLY ACCESSIBLE ENFORCEMENT DATA (FY 2004)		
State SEP Practice	Percent of Total Enforcement Actions Including a SEP	Percent of Total Penalty Dollars Spent on SEPs
<i>State 1: Little or no mention of SEPs on website</i>	0.0%	0.0%
<i>State 2: Little or no mention of SEPs on website</i>	2.3%	2.5%
<i>State 3: Link to SEP Policy</i>	0.3%	Not available
<i>State 4: Link to SEP Policy</i>	6.5%	Not available
<i>State 5: SEP Library</i>	2.5%	9.1%
<i>State 6: SEP Guidance, including proposal submission guidance and “bank” of pre-approved SEPs by location</i>	11.8%	42.5%
<i>State 7: SEP Idea Bank</i>	6.4%	63.4%
<i>State 8: SEP Fund</i>	28.8%	\$14,077.16 from the Fund was used for environmentally beneficial projects from January 1, 2004 to December 31, 2004 ¹

“Best Practices”

SEP practices vary widely across states and provide a range of results. The following practices promote public accessibility to SEP information and are the “best practices” recommended by the Colloquium.

- “Best Practices” include:*
- *Publicly Accessible SEP Idea Banks*
 - *Publicly Accessible SEP Libraries*
 - *Publicly Accessible SEP Fund Banks*

A “**SEP Idea Bank**” is a pre-approved list of proposed SEPs contributed by various sources. It allows violators to choose a project that has already been vetted by the agency and is of interest to the nonagency proponent. Some states provide public access to submitted proposals while others only provide publicly accessible instructions and/or mechanisms (i.e., a web-based form) for submission.

Project ideas in a publicly accessible SEP Bank can be catalogued by location, cost, or category. Upon the request of a violator, the agency enforcement case team may consult the Idea Bank for relevant SEP ideas, or refer violators to do so. Providing guidance—and technical assistance—during the initial stages of project submission mitigates misunderstandings relating to cost expectations, increases long-term efficiency, and makes it more likely that beneficial community projects will be undertaken as SEPs.

An Idea Bank facilitates an important step in the collaborative SEP process: connecting a potential violator with an affected community and its needs. Without this connection, the penalty investment may not be optimally leveraged to directly benefit the community.

Supplemental Environmental Project Idea Bank

Project Listing by Region, sorted by Date Submitted

Statewide

Project Name Project Type	Submitted Implemented	Location Est. Cost
View Storm Water and Erosion Control Training Center Technical Assistance and Outreach	Jun 30, 2006	\$75,000 +
View Greening Schools Green Schools	Aug 25, 2004	Statewide \$15,001 - \$25,000
View High School Environmental Education Environmental Education	Jan 26, 2004	Illinois \$5,001 - \$15,000

Figure 2: IEPA's SEP Idea Bank Main Page, <http://www.epa.state.il.us/cgi-bin/en/sep/sep.pl> (accessed February 13, 2007).

The Illinois Environmental Protection Agency (IEPA) provides an example of a publicly accessible SEP Idea Bank (see Figure 2). To assist the public in submitting proposals, the SEP information page contains instructions and a list that explains each SEP category (i.e., Public Health, Pollution Prevention, Pollution

Reduction, etc.). Submitted projects remain posted for two years and, currently, there are over eighty-five projects on the list. The IEPA website also contains a searchable database, which yields PDF copies of enforcement orders and consent orders that contain negotiated settlements that detail SEPs.

PRE-APPROVED SEPs

RECIPIENT OF SEP FUNDS	PROJECT TITLE	PROJECT DESCRIPTION	ELIGIBLE COUNTIES*	MINIMUM AMOUNT
CLEANUP PROJECTS				
The Audubon Society	Bolivar Flats Shorebird Sanctuary- Trash Cleanup	Household trash and appliances have been dumped in sanctuary wetlands. Trash will be removed mechanically and disposed of at a licensed landfill.	Galveston	\$1,000
Coastal Conservation Association	Coastal Conservation Association Big Bay Debris Clean-Up	Remove abandoned vessels, pilings, markers, dredge pipe, and other hazards from the waters and beaches.	Nueces, San Patricio, Kleberg, Kenedy, and Aransas	Any contribution amount accepted
Gregg County	Illegal Dump Site Cleanup	Clean up illegal dump sites and tire sites located throughout the county.	Gregg	\$1,000
Gulf Coast Waste Disposal Authority	River, Lakes, Bays 'N Bayous Trash Bash	Clean up trash and pollutants from Galveston Bay and waterways in the San Jacinto watershed.	Galveston and Harris	Any contribution amount accepted
Keep Odessa Beautiful, Inc.	Earth Day / Texas Recycles Day Household Hazardous Waste Collection	Properly disposing of household hazardous waste and tires collected at these events.	Ector	\$7,000

Figure 3: TCEQ's List of Pre-approved SEPs, http://www.tceq.state.tx.us/assets/public/legal/sep/pre-approved_seps.pdf (accessed February 13, 2007).

The Texas Commission on Environmental Quality (TCEQ) provides two publicly accessible PDF documents containing (1) guidance about SEPs and how to create SEP proposals and (2) a list of pre-approved SEPs (*see* Figure 3).

An “**SEP Library**” is a database of approved or successful SEPs that provides a frame of reference for those developing SEPs. Thus, new SEP proposals benefit from past lessons learned, increasing the overall efficiency of the SEP process and reducing transactional costs.

The largest barrier to adoption of SEP libraries is the concern that inclusion in the library will be perceived as an assurance that the project will be accepted by the agency. This assumption can be corrected by clearly articulated caveats, allowing SEP libraries to serve as facilitators to the SEP process. Alternatively, access to the library can be restricted until parties understand the library’s limits. However, to facilitate transparency and open access, this latter approach would require

access to an agency SEP consultant or coordinator.

The Massachusetts Department of Environmental Protection (MassDEP) provides a publicly accessible SEP library. The MassDEP website provides a downloadable document containing the following information about 78 SEPs: case names, numbers and dates, the amount agreed to be spent on SEPs or credited in penalties, short descriptions of the SEP activities, and the violations that prompted enforcement action (*see* Figure 4). The SEPs are arranged alphabetically and by category.

The Washington Department of Ecology’s (Ecology) Water Quality Program posted an internal “library” in June 2006 (*see* Figure 5). Currently, the list of “Innovative Settlements” contains the requirements for an innovative settlement and examples of past projects. Along with date, description, and project title, the site provides a link to each project’s complete settlement agreement so that enforcement attorneys can access approved past projects as one resource in creating

**LIST OF APPROVED MA DEP
SUPPLEMENTAL ENVIRONMENTAL PROJECTS
In Alphabetical Order**

The SEPs below have been characterized as belonging to the following categories:

- Environmental Conservation, Protection and Restoration**
- Public Health**
- Pollution Prevention**
- Pollution Reduction**
- Emergency Planning and Preparedness**
- Environmental Compliance Promotion**

The cited value of projects is the amount credited, or required to be spent, by the consent order, whichever is larger.

ENVIRONMENTAL CONSERVATION, PROTECTION AND RESTORATION

Pond dredging, donation of developable land for conservation, runoff control as needed to protect State Park waters.

A.A. Will Materials Corp., April 6, 2000. ACOP-SE-00-R003-2467A-SEP.

Value: \$43,875.

Donation of land (developable at least in part), with significant environmental value, to a qualified land trust, conservation organization or public agency; dredging and removal of certain sediments and organic materials from the shore of Big Bear Hole Pond in Taunton, donation of materials to be used for stormwater management and control of runoff to

Figure 4: MassDEP’s List of Approved SEPs, <http://www.mass.gov/dep/images/sepalph.pdf> (accessed February 13, 2007).

Ecology Intranet Home : WQ Intranet Home : WQ Internet Home

Enforcements - Innovative Settlements

Ecology's settlement objective is to achieve compliance with state environmental laws and regulations, mitigate or restore damage done to the environment, where possible, and encourage use of pollution prevention strategies to reduce future wastes generated. Innovative penalty settlements may divert assessed penalty amounts to a Supplement Environmental Project (SEP). Innovative settlement proposals must include the following three general elements:

- The proposal must result in environmental benefits beyond correcting existing violations and providing assurances regarding future compliance.
- The penalty paid plus the net cost of the innovative proposal must reflect the gravity of the violation and the economic benefit of noncompliance (if quantifiable).
- There should be a relationship between the nature of the violation and the environmental benefit sought through the proposal.

The following are examples of innovative settlements.

Date	Title	Description
2006	I.P. Callison & Sons (complete settlement agreement)	A portion (\$22,557.00) of the penalty issued to I.P. Callison was settled through a payment to the Chehalis Basin Fisheries Task Force for use on fish habitat restoration projects.
2005	Middle Creek Restoration Weyerhaeuser Co. (complete settlement agreement)	The Weyerhaeuser Raymond Saw Mill did not correctly monitor and sample its wastewater discharges to the City of Raymond sanitary sewer. Weyerhaeuser settled a penalty of \$19,000, which was forwarded to the Willapa Bay Fisheries Enhancement Group and used for the Middle Creek salmon restoration project.
2005	Portac Planner Mill/Hoh River Conservation Trust (complete settlement agreement)	Portac Planner Mill paid a portion of the assessed amount to the Hoh River Conservation Trust. The conservation trust is used to purchase and preserve sections of land along both banks of the Hoh River. The goal of the Hoh River Conservation Trust is to acquire available parcels from the Olympic National Park to the outlet at the Pacific Ocean.
2005	Shakertown (complete settlement agreement)	Shakertown was issued a Notice of Penalty for State Waste Discharge permit noncompliance. A portion of the penalty was settled to help fund the Winlock Wastewater Treatment upgrade.
2004	Sound Refining Corporation (complete settlement agreement)	A penalty issued to Sound Refining Corporation was settled by hiring a consultant to conduct a 3rd party audit of the facilities with a focus on water quality compliance. The audit will include review of operations and maintenance procedures and recommendations for improvement.

Figure 5: Washington Ecology's Intranet Site, <http://www.ecology/programs/wq/documents/enforcements.html> (accessed August 2006).

future projects. Other Ecology Programs are interested in contributing as well, and the goal is to have the site publicly accessible within the next two years.

An “**SEP Fund Bank**” is a way to aggregate smaller amounts of SEP funds to be used on larger projects. These funds can be set aside into accounts or escrow funds and be managed or implemented as SEPs by state enforcement agencies or private entities.

Fund Banks can allow for projects with a greater environmental or public health benefit in a variety of ways. For example, if a number of penalties are assessed for small amounts, aggregation can allow for projects with greater environmental benefit. Another example is when several violators have participated in the same violation or similar violations in the same geographic area and at approximately the same time.

SEP Fund Banks not only divert agency (penalty) funds from the general fund, but also arguably augment agency budgets. (Federal law³⁰ prevents US EPA from creating a SEP Fund Bank, but it does not apply to states.) Fund Banks raise two policy concerns for many states, namely, that (1) a SEP Fund Bank conflicts with the goal that violators benefit the environment through a project that goes beyond merely writing a check to a third party and (2) funds set aside

for future SEPs lack an assurance that the violator's contribution successfully benefited the environment. Both issues are mitigated by an agreement that either (1) establishes minimal participation requirements for the violator or (2) ensures oversight and provides further actions in the case of unsuccessful projects. Unfortunately, such agreements may limit a violator's willingness to propose a SEP. Both Delaware and New York have versions of a SEP Fund Bank.

Delaware's Department of Natural Resources and Environmental Control (DNREC) manages the state's Community Environmental Protection Fund (CEPF). According to the CEPF statute, the Fund will consist of 25% of the civil and administrative penalties collected by DNREC, pursuant to its general enforcement authority, as well as specific statutory authority relating to sediment and erosion control, wetlands protection, coastal zone protection, chronic violators, and hazardous substance clean up.³¹

While the Fund does not receive funds from SEPs, it has many of the same qualities. For example, money within the Fund must only be applied to Community Environmental Projects located in the community where the violation occurred. The DNREC website provides a publicly accessible application with

guidelines and examples of suggested projects (see Figure 6). Also, the DNREC website provides PDF downloads of CEPF account statements that provide fund balances for public review. As of March 2006, the CEPF contained \$1,676,540.33.³²

The New York Department of Environmental Conservation (DEC) has an Environmental Benefit Projects (EBP) Policy, which authorizes escrow accounts for SEP funds. An EBP is a project that a respondent agrees to undertake in partial settlement of an enforcement action.³³ The EBP must improve, restore, protect, and/or reduce risks to public health and/or the environment beyond that achieved by

respondents' compliance with applicable laws and regulations.³⁴ For unspecified future SEPs, violators may place the penalty funds into an escrow account held by the violator or an approved independent escrow agent. The interest and remaining account balance is given over to the state at the conclusion of the SEP. Although the escrow policy is publicly accessible, the New York DEC does little to connect violators with community members.

OFFICE OF THE SECRETARY							
Through March 31, 2006							
Community Environmental Account (8100)							
DATE	LOCATION	TYPE of VIOLATION	INFORMATION	REVENUE	TRANSFER OUT	TRANSFER IN	BALANCE
02/18/04			AA402004036				\$0.00
02/27/04			Formosa Plastics Corp	\$5,775.00		\$5,775.00	\$5,775.00
03/01/04	Delaware City Complex	Air Violation	Motiva Enterprises LLC	\$450.00		\$450.00	\$6,225.00
03/11/04	Delaware City Complex	Air Violation	Motiva	\$50,000.00		\$50,000.00	\$56,225.00
03/12/04	Newark	Air Violation	Power Systems Composites, LLC	\$2,500.00		\$2,500.00	\$58,725.00
03/18/04	Seaford	Air Violation	Ticon DE Inc.	\$2,125.00		\$2,125.00	\$60,850.00
03/25/04	Cheswold	Air Violation	Dow Reichhold Specialty Latex	\$1,250.00		\$1,250.00	\$62,100.00
04/30/04	Milford	Air Violation	Coastal Coating	\$1,250.00		\$1,250.00	\$63,350.00
05/04/04	Claymont	Air Violation	Sunoco	\$125.00		\$125.00	\$63,475.00
05/06/04	Delaware City Complex	Air Violation	Motiva	\$10,000.00		\$10,000.00	\$73,475.00
05/27/04	Delaware City Complex	Air Violation	Motiva	\$25,000.00		\$25,000.00	\$98,475.00
06/04/04	Delaware City Complex	Air Violation	Motiva	\$25,000.00		\$25,000.00	\$123,475.00
06/04/04	Delaware City Complex	Air Violation	Motiva	\$3,437.50		\$3,437.50	\$126,912.50
07/02/04	Delaware City Complex	Air Violation	Motiva	\$85.12		\$85.12	\$126,997.62
08/18/04	New Castle	Air Violation	American Minerals Inc	\$2,500.00		\$2,500.00	\$129,497.62
08/18/04	Delaware City Complex	Air Violation	Motiva	\$6,000.00		\$6,000.00	\$135,497.62
08/18/04	Delaware City Complex	Air Violation		\$3,750.00		\$3,750.00	\$139,247.62
09/09/04	New Castle	Air Violation	Contractor Materials (1 of 11)	\$255.21		\$255.21	\$139,502.83
09/23/04	New Castle	Air Violation	Contractor Materials (2 of 11)	\$255.20		\$255.20	\$139,758.03
10/04/04	Delaware City Complex	Judgement multi-media court case	Metachem Bankruptcy	\$122,946.31		\$122,946.31	\$262,704.34
10/04/04			DE City Dragon Run Park Project		\$11,475.91	-\$11,475.91	\$251,228.43
10/04/04			1st State Community Action Agency - Neighborhood Cleanup		\$1,250.00	-\$1,250.00	\$249,978.43
11/04/04	New Castle	Air Violation	Laidlaw Corp	\$7,875.00		\$7,875.00	\$257,853.43
10/27/04	New Castle	Air Violation	Contractor Materials (3 of 11)	\$255.20		\$255.20	\$258,108.63
11/29/04			Additional funds to 1st State Community Action Agency		\$2,600.00	-\$2,600.00	\$255,508.63
11/30/04	New Castle	Air Violation	Contractors Materials (4 pf 11)	\$255.21		\$255.21	\$255,763.84
12/03/04	Delaware City Complex	Air Violation	Motiva Enterprises LLC	\$131.25		\$131.25	\$255,895.09
12/14/04	Delaware City Complex	Air Violation	Premcor Refining Group	\$73.12		\$73.12	\$256,068.21
12/29/04	New Castle	Air Violation	Contractor Materials LLC(5 of 11)	\$255.20		\$255.20	\$256,223.41
01/11/05	Wilmington	Water Pollution Discharge NPDES	Veolia Water (formerly known as U. S. Filter)	\$4,500.00		\$4,500.00	\$260,723.41

Figure 6: Delaware Department of Natural Resources and Environmental Control website, <http://www.dnrec.state.de.us/ciac/documents/CEPFasofMarch312006.pdf> (accessed February 15, 2007).

CHAPTER 4: COMMON ISSUES FOR SEPS

WHAT ARE THE POTENTIAL LEGAL AND POLICY ISSUES?

No court has provided judicial guidance on government's proper use of SEPs to enhance the environmental and public health of communities. The *Fifty State Survey*³⁵ proposed the following legal and policy considerations for agencies formulating or implementing a SEP policy:

- Although no specific law may authorize SEPs, agencies have general enforcement discretion to bring environmental suits and settle them;
- The power to enforce laws includes the power not to prosecute violations;
- Voluntary settlements may include provisions that could not have been imposed by the agency or a court;
- Community input can cure potential challenges to SEPs and advance procedural justice;
- SEP Libraries providing pre-approved SEPs reduce transaction costs for all stakeholders;
- A state SEP fund segregating environmental penalties for beneficial uses is an option uniquely available to the states;
- Third party contributions allow small violators to enhance environmental benefits without having to undertake a SEP; and
- Oversight and enforceability are essential to building assurances of successful SEP management and accountability.

The *Survey* also addressed the issue of liability for nonperformance of a SEP.³⁶ Under US EPA policy, a violator is responsible and liable for ensuring that a SEP is completed satisfactorily.³⁷ A violator may not transfer liability to a third party, including a contractor or consultant retained to implement a SEP.³⁸

US EPA imposes stipulated penalties for failure to perform ranging between 75-150% of the mitigation value awarded to the SEP, although the penalty may be avoided if good faith and timely efforts were made and at least 90% of the funds budgeted for the SEP were spent.³⁹

Most state policies have similar provisions. In addition, Maine may require a "letter of credit, escrow agreement, or third-party oversight" when evaluating a violator's capacity to successfully complete a SEP.⁴⁰ Outsourcing oversight to a branch of state government--for instance, the University of Maine--is thought to increase the likelihood of successful outcomes through a third party's project management expertise and neutrality.⁴¹

Many state policies emphasize upstream decision-making by requiring implementation schedules, quantifiable deliverables, and enforceable interim deadlines. A collateral benefit of discrete performance indicators, the *Survey* posits, promotes transparency and is useful in building support for the use of SEPs within the regulated and affected communities and the state legislature.⁴²

WHAT ARE THE COMMUNITY BENEFITS OF A SEP?

Benefits to communities may include public health improvements and environmental restoration through pollution prevention and reduction, as well as improvements in social and economic conditions. SEPs have financed the purchase and preservation of wetlands and greenspace, underwritten the cost of fence-line monitoring and mobile asthma clinics, and supported the conversion of bus fleets to natural gas.

US EPA's brownfields redevelopment initiatives also provide SEP opportunities. Although SEPs may not be used for activities funded under the Brownfields Program, such as site assessment or remediation, they can be used to complement brownfield program activities. For instance, SEPs may be used to construct green buildings, construct urban forests, restore streams, and/or complete construction related to those on-site activities.⁴³

HOW COMMON ARE SEPs?

From their analysis of the US EPA’s ECHO enforcement database during the five year time period from 2001 to 2005, NPCC staff made the following observations:⁴⁴

First, the review revealed that that on average, roughly five percent (between 4%-6%) of all enforcement, including both judicial and administrative, concluded with a SEP. Second, of all SEPs negotiated during this five year timeframe, administrative SEPs outnumbered judicial SEPs by a factor of 10 to 1 (see Figure 7).⁴⁵ (US EPA controls the prosecution, negotiation, and settlement of all administrative cases.)⁴⁶ Third, SEPs have a significant strategic value in achieving “beyond compliance” benefits for affected communities.

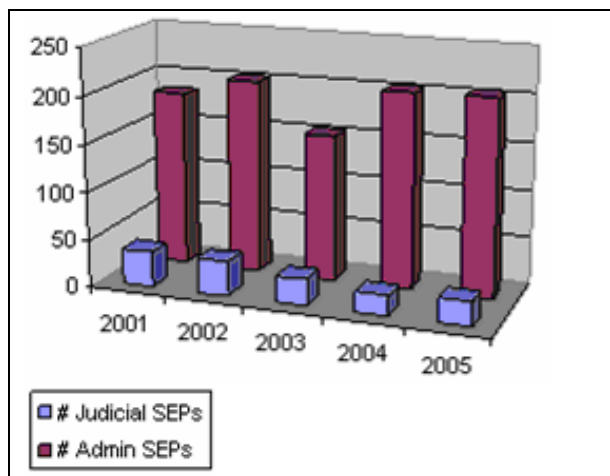


Figure 7: The Frequency of Administrative and Judicial SEPs, 2001-2005

To understand how SEPs augment the benefits of enforcement, consider Figure 8. During the five year time frame (2001-2005) studied, \$814,500,000 in penalties was collected in non-SEP enforcement actions. During that same five year period of time, enforcement actions concluding with a SEP generated \$558,600,000 of value (penalty plus SEP). Given that an average of only 5% of all enforcement concludes with a SEP, the value of an average SEP enforcement case is *13 times greater* than the average non-SEP action.

Of course, there may be plausible explanations for the disproportionately high value of SEP-based enforcement relative to penalty-only enforcement. For instance, enforcement cases settling with a SEP may have been generally stronger cases, leaving defendants more willing to settle on terms more favorable to the government, namely, a large penalty *and* a large SEP. Or, a few exceptionally “high

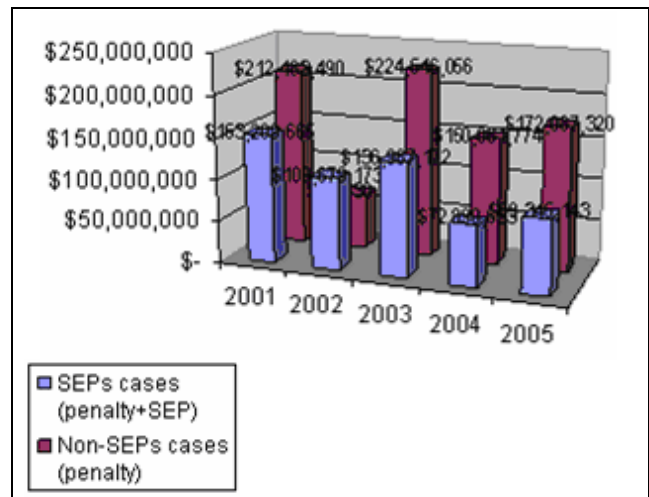


Figure 8: The Monetary Value of Enforcement Cases, 2001-2005

value” SEPs may have skewed averaged data. Finally, SEPs may have been consistently over valued by Agency staff eager to achieve “on the ground” remedies in lieu of monetary penalties for affected communities burdened by the impacts of the violator’s noncompliance.

Regardless of the explanation for the disproportionality, it is certain that an incremental increase in the number of SEPs will have a noticeable impact on the affected community because a SEP produces public health and/or environmental improvements beyond those otherwise achievable by law.

WHICH ENVIRONMENTAL MEDIA AND CATEGORIES ARE MOST COMMONLY ASSOCIATED WITH SEPs?

NPCC staff also analyzed the 2001-2005 ECHO data with respect to the type of SEP, based on the environmental law violated and the category of SEP implemented. Five trends emerged.

First, the most common SEP involves settlements of *regulatory*⁴⁷ enforcement actions under the Emergency Planning and Community Right to Know Act (EPCRA) (20%), the Clean Water Act (CWA) (20%), and the Clean Air Act (19%) (*see* Figure 9).

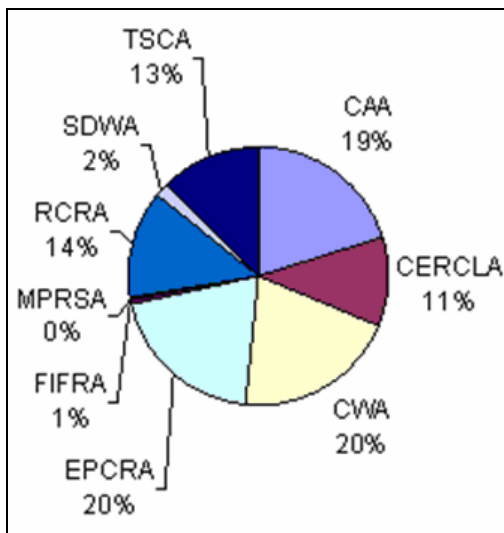


Figure 9: The Frequency of SEPs by Media, 2001-2005.

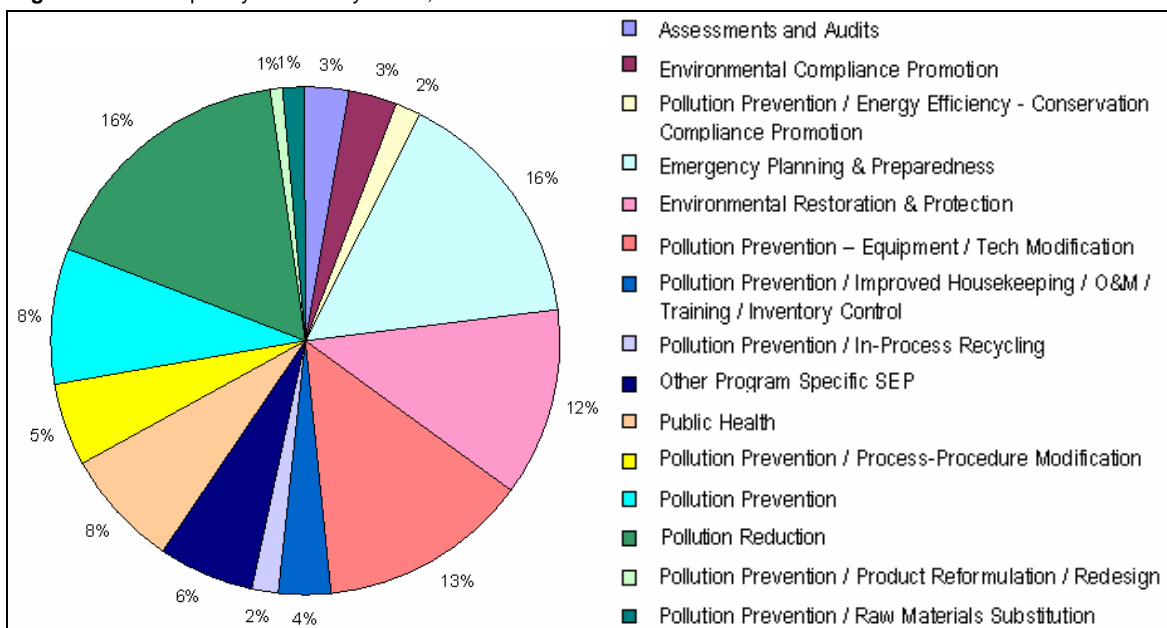


Figure 11: The Frequency of SEPs by Category, 2001-2005.

Second, violations of the CAA and the CWA result in the highest valued SEPs, 44% and 23%, respectively (*see* Figure 10).

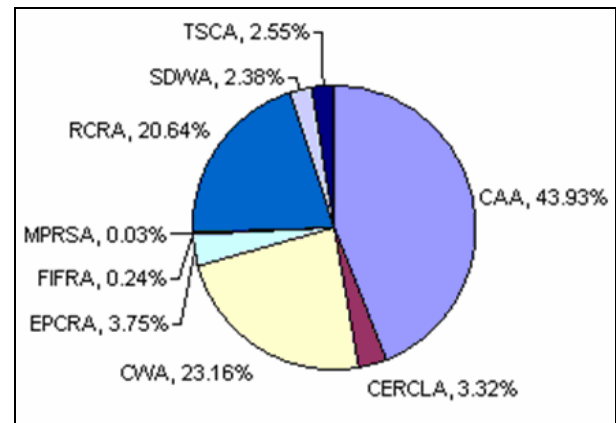


Figure 10: The Monetary Value of SEPs by Media, 2001-2005

Third, some categories of SEPs are more common than others. The four most frequent categories, constituting 57% of all SEPs performed, are:

- Pollution Reduction (16%),
- Emergency Planning and Preparedness (16%),
- Pollution Prevention Equipment/Technology Modification (13%), and
- Environmental Restoration (12%) (*see* Figure 11).⁴⁸

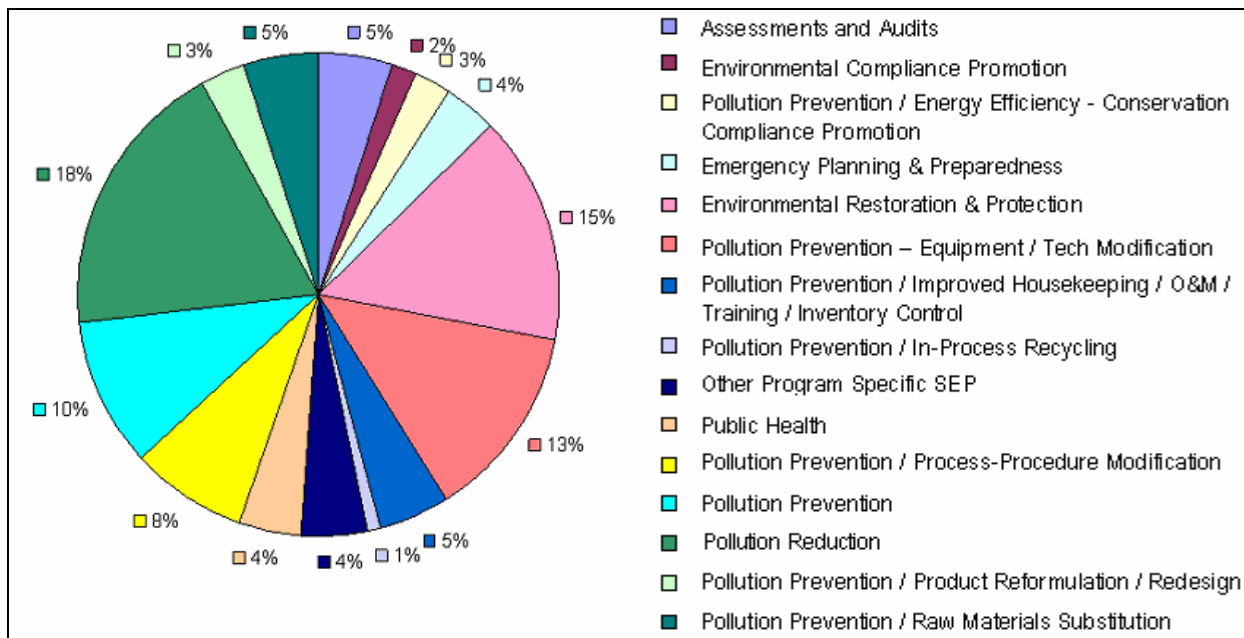


Figure 12: The Monetary Value of SEPs by Category, 2001-2005.

Fourth, the monetary value of SEPs varies by media. The Clean Water Act and Clean Air Act SEP enforcement data show a rough equivalence between their frequency and their respective monetary value (see Figure 12). Although EPCRA settlements comprise 20% of the number of SEPs negotiated, they represent only 4% of the aggregate value of all SEPs.

Finally, US EPA Regional offices develop specializations or preferences as to categories of SEPs they tend to negotiate. For instance, of the three Regions participating in the Colloquium, "Pollution Reduction" is the most frequent category in Region 1, while Region 8 specializes in "Public Health" and Region 10 in "Emergency Planning and Preparedness" SEPs (see Figure 13).

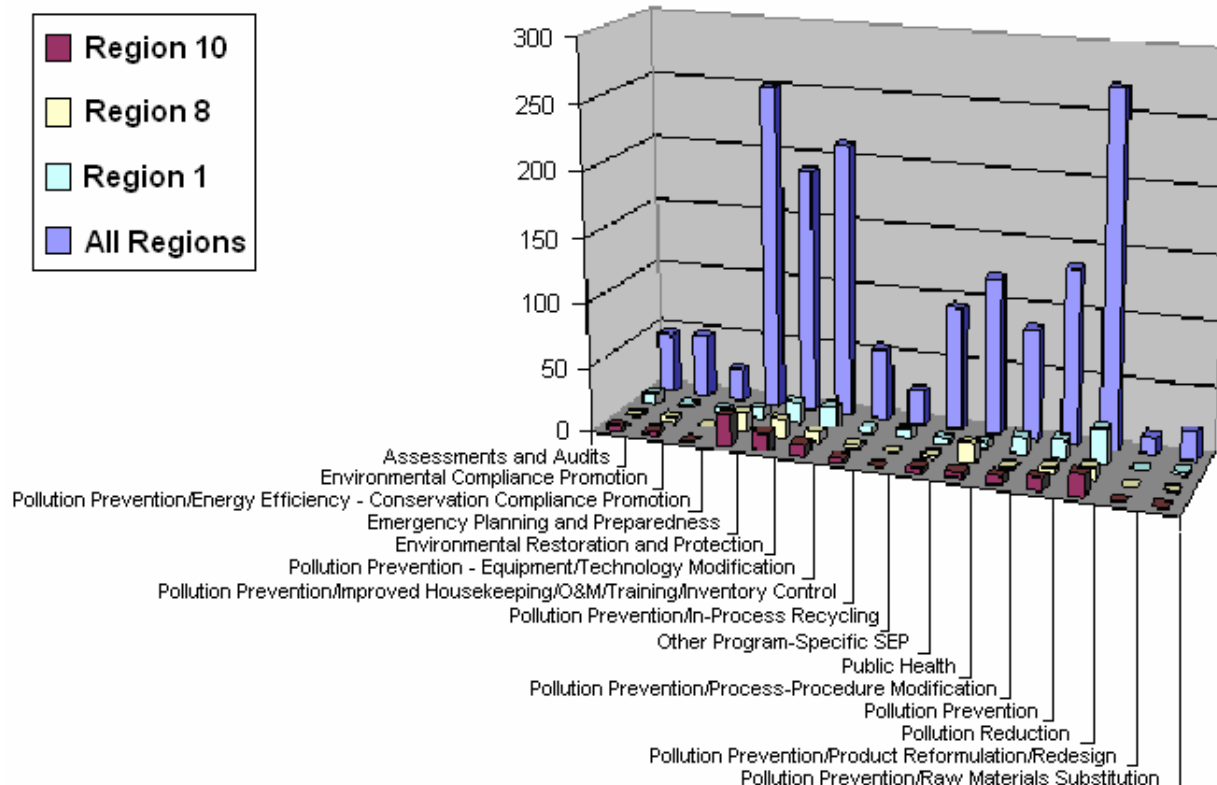


Figure 13: The Frequency of SEPs by Category in Regions 1, 8, and 10.

The ECHO database does not indicate whether a SEP is either collaborative or leveraged, although anecdotal evidence would indicate that few, if any, are either. Were these data available, a conclusion could be drawn comparing the respective frequencies and values of collaborative governance SEPs, collaborative SEPs, and noncollaborative SEPs.

Nor does ECHO disclose whether the enforcement action impacts a potential environmental justice community. The upcoming implementation of US EPA's Environmental Justice Smart Enforcement Assessment Tool (EJSEAT) will remedy this. EJSEAT will apply a nationally consistent methodology that identifies community demographics in the area of a facility. EJSEAT will also disclose publicly available information about

A Public Solutions-based SEP Model:

- *leverages SEPs with other investments and resources,*
- *engages relevant members of the community in decision-making, and*
- *creates economic, environmental, and social benefits for the community.*

environmental and public health burdens of the potentially impacted community.⁴⁹

Will Collaborative SEPs Produce Good Outcomes?

The determination of whether collaborative SEPs, or SEPs generally, enhance the effectiveness of environmental regulation requires performance measures and evaluation. It was the strongly held view of the Colloquium that while monetary benefits are important, solely focusing on the monetary value of a traditional (noncollaborative) SEP overlooks the nonmonetary value of enhancing a community's capacity to self-govern, using the skills learned during the collaborative SEP process.

For several years, US EPA and other stakeholders have been working to evaluate the use of collaborative processes, although there have been few

comparative studies. The US EPA Systematic Evaluation of Environmental Economic Results (SEEER) tool was designed to quantify the impacts of using a collaborative process by comparing the results of a collaborative process with the results of alternative approaches.⁵⁰

SEEER has been used to evaluate six cases in Oregon and four cases at US EPA, with ongoing additional work on two cases at US EPA and DOI.⁵¹ Key findings to date include:

- Evaluating environmental effects is feasible,
- Social capital is a very important gain from the collaborative processes,
- Collective decisions by parties are closer to science judgments compared to decisions made when only some of the interests are represented or information is insufficient, and
- Collaboratives were uniformly positive experiences.

The decisionmaking in the collaborative cases was judged more effective compared to their likely alternatives. Decisions were reached more quickly, with significant timesavings. Moreover, the environmental gains were judged to be about 25% greater in part because the agreements were better, more durable, and easier to implement. There were also reported gains in organizational effectiveness as improved environmental gains offset modest post-agreement costs to state and federal agencies.

The SEEER approach to evaluation requires clear and observable goals and outcomes, systematic information gathering, engagement of key stakeholders, political capital, and resources for design, implementation, and use. A proposed outcome-based logic model was presented at the Colloquium for discussion by Colloquium participants (Figure 14).⁵²

Collaborative SEP pilots managed under a Public Solutions approach could be evaluated using the SEEER methodology.

SEP Logic Model

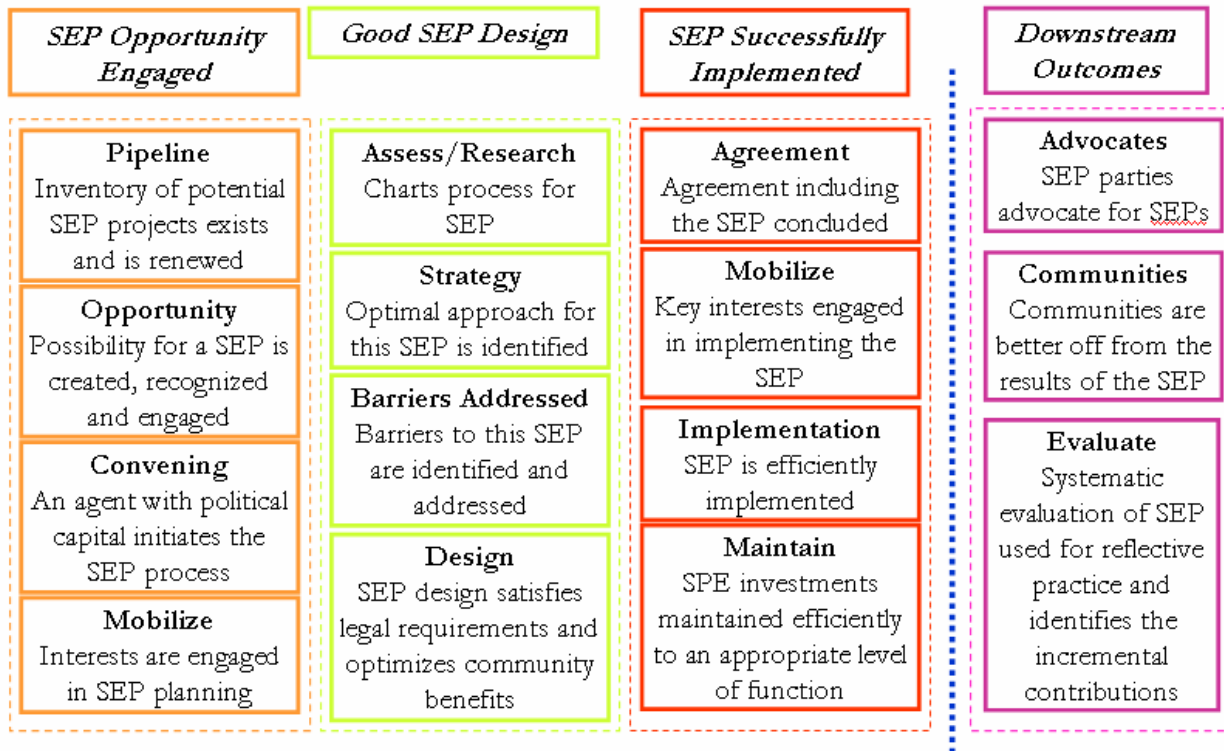


Figure 14: The SEP Logic Model.

WHAT NONPROFIT RESOURCES ARE AVAILABLE TO MANAGE A COLLABORATIVE SEP?

Two national nonprofits with experience in SEPs participated in the Colloquium. Local or regional nonprofits can fill a similar role.

The **Strategic Environmental Pipeline Project (StEPP) Foundation**⁵³ and the **Trust for Public Land (TPL)**⁵⁴ shared their experience with multi-stakeholder, multi-media SEPs. Their presentations demonstrated how third party nonprofits can both match (identify partners with projects) and/or manage (leverage) resources in the SEP process.

StEPP was established in 2001 to identify and match viable clean energy, energy efficiency, and pollution prevention projects with funding, with an emphasis on leveraging multi-stakeholder collaborations. When a SEP is one of the sources of funding for a project, StEPP manages the SEP process from start to finish, working with the State environmental agency.

StEPP has amassed a database of over 2500 projects in all 50 states. The database allows searches by location, target audience, environmental media, and environmental attributes.

StEPP can assist a violator in selecting a SEP that meets the objective sought and satisfies any nexus requirement. If there is no appropriate project in the database, StEPP will develop one through an RFP process that takes into account measurable

environmental impacts, financial “leverage” through matching dollars and in-kind donations, and public awareness or education opportunities.

StEPP has worked with the Colorado Department of Public Health and Environment to administer more than \$3,000,000 in SEP projects, and it is interested in providing SEP services in other states.

TPL, created in 1972, is a national non profit that conserves land for people to enjoy as parks, community gardens, historic sites, rural lands, and other natural places. A key focus for TPL is its Parks for People Initiative through which TPL assists underserved communities to improve and increase the amount of park and open spaces by identifying opportunities, providing technical assistance to municipalities and community based organizations, including, acquiring land, and in some cases, planning and building parks.

The acquisition or transformation of urban property for recreational purposes is often complicated by the presence of environmental contamination.

Over time TPL has developed expertise in working through contamination issues. For instance, TPL played a pivotal role in the land acquisition and the rehabilitation success of the Neponset River and East Boston Greenways SEP project discussed during the Colloquium and featured on p. 9 of this Report.

CHAPTER 5: NEXT STEPS

The most important Next Step is to initiate and evaluate 1 to 2 collaborative SEP pilots using the Public Solutions model. Potential pilots will be assessed, in part, on the basis of the Colloquium's Selection Criteria (*see* Attachment D). At this time NPCC is open to proposals.

The most important Next Step is to initiate 1-2 collaborative SEP pilots using the Public Solutions model.

NPCC staff created the Collaborative SEPs Listserv with almost 80 subscribers representing government, academic, community-based groups, neighborhood associations, industry, and nonprofits. NPCC, in consultation with Colloquium participants (and others), as coordinated through the Collaborative SEPs Listserv, has moved forward and taken actions towards implementing all of the *Thirteen Immediate Next Steps* (*see* Attachment C).

External outreach, in collaboration with Colloquium participants, is ongoing with selected state agencies, community-based groups, neighborhood associations, industry, and nonprofits. Collaborative efforts are underway to provide training in SEPs collaborative problem-solving to the legal community through the ABA and state bar associations.

CONCLUSION

WHAT CAN US EPA AND THE STATES DO NOW TO ENHANCE SEP PRACTICES?

One US EPA Region's enforcement policy views SEPs as the "default" resolution of enforcement matters involving a willing violator. This policy is the exception rather than the rule. All participants acknowledged the reality of legal and/or policy barriers to full integration of collaborative SEPs. As a result, the Colloquium crafted *Six Strategies with Next Steps* (see Attachment C), most of which--if not all--can be implemented immediately, with no change in existing SEP statutes or policies.

US EPA has been active in both designing and implementing SEP policy, but the States are at the forefront of designing and implementing "Best Practices" because the legal limitations of federal law shaped by the federal constitution and federal procurement law do not apply to the states. At a minimum, federal and state legal authorities allow at least one-- if not all--of the "best practices" discussed during the Colloquium, including SEP Idea Banks, SEP Libraries, and SEP Fund Banks.

The Colloquium concluded that a **collaborative governance model involving affected communities**, such as Public Solutions, **has the potential to create environmental, public health, economic, and social benefits by leveraging SEPs with other investments and resources**. The Colloquium further concluded that that evaluation of a collaborative SEP approach is not only key to adoption, but also feasible and will yield systematic knowledge about the process and results.

Five Key Conclusions and Recommendations

- SEPs are underutilized generally; states should examine how to expand opportunities for SEPs, especially where there may be enhanced benefits for the affected community.
- Collaborative governance processes can lead to significantly enhanced community benefits by

leveraging SEPs with other investments, actions and commitments.

- Agencies should consider (1) undertaking pilot collaborative SEPs to determine violator and community interest and (2) developing appropriate "best practices" for each state and US EPA based on a collaborative governance process such as Public Solutions.
- Agencies should consider developing publicly available SEPs libraries, idea banks and fund banks to expand the opportunities for SEPs and make the process more efficient, transparent, and accessible.
- Environmental enforcement agencies could benefit by examining SEP policies and practices, enhancing opportunities for collaborative SEPs, and incorporating "best practices" for them.

Collaborative approaches to environmental enforcement, in the appropriate case, deserve more attention and encouragement. The involvement of more people in the process gives them ownership, investment, and a stake in the solution and also result in enhanced community benefits. In particular, a collaborative governance approach can leverage community investments several fold and add non-monetary commitments of time, activity, and talent as well.

Fundamentally, a successful SEP program--especially for collaborative SEPs--is all about relationships. Collaboration supports relationships. Successful collaboration not only leverages monetary resources; it leverages trust.

ENDNOTES

¹ More information about SEPs can be found at: <http://www.epa.gov/compliance/civil/seps>. “Beyond Compliance” is the goal.

² See <http://www.epa.gov/compliance/data/systems/multimedia/echo.html>

³ The Refinery Reform Campaign’s recent report underscored the value of a collaborative SEP process in ensuring that the impacted community enjoys the benefit of enforcement: “Part of the injustice is the exclusion of community participation in the decision-making process. This participation must exceed the advisory capacity; to be meaningful the impacted community must have an authoritative seat at the table.” *SEPS: The Most Affected Communities are Not Receiving Satisfactory Benefits*, http://www.refineryreform.org/downloads/SEPs_report_061906.pdf at p 22.

⁴ For instance, US EPA’s SEP policies prohibit use of a private third party to complete a SEP because of the appearance that US EPA is using the organization to indirectly manage or direct SEP funds, in violation of the Miscellaneous Receipts Act, 21 U.S.C. §3301(b) (2000) (directing that all assessed penalties be deposited in the U.S. Treasury), and the Anti-Deficiency Act, 31 U.S.C. §1341(a) (prohibiting agency expenditures in excess of congressional appropriations). Federal SEP guidelines are designed to preserve the Congressional prerogative to appropriate funds as provided in the U.S. Constitution, a function that cannot be waived. Absent a similar statutory limitation in state law, this limitation is inapplicable to the states.

⁵ See <http://www.policyconsensus.org>

⁶ See G. Wolf, *Oregon Experience Launches Community Solutions Partnerships*, Nat Civic Rev (Winter 2004).

⁷ See <http://www.policyconsensus.org/publicsolutions/index.html>. For information on Oregon (Public) Solutions projects, see <http://www.orsolutions.org>

⁸ See http://www.laane.org/projects/lax_cba/index.html

⁹ See <http://www.orsolutions.org/metrohood/dieselem.htm>

¹⁰ A good example of leveraging resources involving a SEP, not discussed during the Colloquium is the Detroit River SEP. The broad-based group of individuals, organizations, corporations, and agencies has created the nation’s only International Wildlife Refuge in the Detroit River watershed. Millions of dollars of investment by companies, agencies, municipalities, foundations, and individuals have been contributed. Demonstrating how a SEP can be integrated with other projects in support of a community objective, U.S. Steel rehabilitated approximately 2,000 feet of shoreline downstream of Belanger Park in River Rouge using soft engineering techniques, improving fishing opportunities for children and families in River Rouge’s only waterfront park.

¹¹ Trust for Public Land, “Brownfields to Parks Examples, East Boston Greenway, Boston, MA,” available at http://www.tpl.org/tier3_cdl.cfm?content_item_id=908&folder_id=729

¹² See <http://www.epa.gov/Region8/ej/rockyseps.pdf>

¹³ See www.policyconsensus.org for a discussion of the role of a convener, and the recommended skill set.

¹⁴ Two federal environmental statutes implicitly support US EPA’s use of SEPs in settlement agreements. For instance, The Toxic Substances Control Act (TSCA) specifically allows US EPA to pursue “settlements with conditions.” 15 U.S.C. §2615(a)(2)(c) specifically allows US EPA to “compromise, modify or remit, with or without conditions, any civil penalty which may be imposed under this subsection.” The Clean Air Act (CAA) also grants US EPA the authority to “compromise, modify, or remit, with or without conditions,” any administrative penalties under the Act. 42 U.S.C. §7413(d)(2)(B) (2000). See Quan Ngheim, “Comment: Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act,” 24 BC Env’t. Aff. L. Rev. 561 (1997).

¹⁵ *Heckler v. Chaney*, 470 U.S. 821, 831-832 (1985) (an agency’s discretion not to prosecute or enforce is generally committed to the agency’s absolute discretion); see also *Sierra Club v. Whitman*, 268 F.3d. 898, 902-03 (9th Cir. 2001) (finding that Congress imposed no mandatory enforcement duty with the provisions or legislative history of the CWA, even when US EPA finds a violation).

¹⁶ In *US v. Atofina Chemicals, Inc*, 2002 US Dist LEXIS 15137 (ED PA 2002), a federal court observed that briefing materials did not provide evidence of the “clear Congressional authorization” for the SEP in a particular consent decree, but made no further comment on the scope of US EPA authority.

¹⁷ US EPA’s SEP policies enumerate categories of acceptable SEPs. They address several legal and policy issues, including the procedure for calculation of the final penalty, liability for nonperformance, oversight and drafting of enforceable SEPs, stipulated penalties, community input, approval procedures, profitable SEPs, aggregation of funds and the use of third parties to manage or implement SEPs. See <http://cfpub.epa.gov/compliance/resources/policies/civil/seps>

¹⁸ *US EPA, Final Supplemental Environmental Projects Policy*, available at <http://www.epa.gov/compliance/resources/policies/civil/seps/fnl-sup-hermn-mem.pdf>

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- ¹⁹ US EPA, *Expanding the Use of Supplemental Environmental Projects* (June 11, 2003), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-expandinguse.pdf> at p 2.
- ²⁰ US EPA, *Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds* (December 15, 2003), available at <http://www.epa.gov/compliance/resources/policies/civil/seps/seps-thirdparties.pdf>
- ²¹ *Id.*
- ²² *Id.*
- ²³ *Id.* at 3.
- ²⁴ *Id.* at 4.
- ²⁵ *Id.*
- ²⁶ See <http://www.epa.gov/compliance/civil/seps/index.html>
- ²⁷ See <http://www.epa.gov/compliance/resources/policies/civil/seps/projectsideas42004.pdf>
- ²⁸ See <http://www.epa.gov/region01/enforcement/sep>
- ²⁹ *Supplemental Environmental Projects: A Fifty State Survey with Model Practices* (S. Bonorris, ed.). The Survey was written in association with the American Bar Association's (ABA) Sections on Individual Rights and Responsibilities and the Environment and Natural Resources. www.uchastings.edu/site_files/plri/ABAHastingsSEPreport.pdf
- ³⁰ Miscellaneous Receipts Act, 21 U.S.C. §3301(b) (2000) (directing that all assessed penalties be deposited in the US Treasury) and the Anti-Deficiency Act, 31 U.S.C. § 1341(a) (prohibiting agency expenditures in excess of Congressional appropriations).
- ³¹ Del. Code Ann., Title 7, §§ 6005, 6041 (2004).
- ³² Delaware Department of Natural Resources and Environmental Control website, available at <http://www.dnrec.state.de.us/ciac/documents/CEPFasofMarch312006.pdf>
- ³³ New York Department of Environmental Conservation, "CP-37 Environmental Benefit Projects Policy" (August 1995), available at <http://www.dec.state.ny.us/website/ogc/egm/ebp.html>
- ³⁴ *Id.*
- ³⁵ Bonorris, *supra* note 29, at 23.
- ³⁶ *Id.* at 26-27.
- ³⁷ *Final SEP Policy*, *supra* note 17, at 17.
- ³⁸ *Id.* at 17.
- ³⁹ *Id.* at 18.
- ⁴⁰ Maine Department of Environmental Protection, *Supplemental Environmental Projects Policy*, at 3, 6 (September 17, 2004), available at http://www.maine.gov/dep/pubs/sep_pol.pdf
- ⁴¹ *Id.* at 3.
- ⁴² Bonorris, *supra* note 29, at 26-27.
- ⁴³ See <http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/brownfield-seps.pdf>
- ⁴⁴ The ECHO database includes only SEPs resulting from the enforcement of US EPA's *regulatory* programs, such as the Clean Air Act or the Clean Water Act actions. Data regarding the frequency and value of SEPs arising from US EPA's remedial programs, such as brownfields, are not included. US EPA's *remedial* enforcement authority is under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).
- ⁴⁵ Administrative cases are prosecuted and settled by the Agency, while judicial cases are managed by the US Department of Justice, with the assistance of the Agency.
- ⁴⁶ In its FY2005-2007 Program Managers Guidance for US EPA Regional Administrators and the State Enforcement Commissioners, (OECA) identified SEPs as a national enforcement priority. The FY2007 Update further encourages, with examples, use of SEPs, particularly where a SEP would benefit a potential environmental justice community of concern. OECA, *FY 2007 Update to FY 2005-2007 National Program Managers Guidance* (June 12, 2006) at pp 18, 44, 67, 72-74, and 82. <http://epa.gov/compliance/resources/policies/data/planning/npmguidance2007.pdf> If the Regions and States heed US EPA's Guidance, the public can reasonably expect the frequency of SEPs, particularly administrative SEPs over which EPA exercises exclusive control, to increase.
- ⁴⁷ *Supra* note 45.
- ⁴⁸ US EPA's SEP policy recognizes eight SEP categories, including Pollution Prevention. ECHO reports 14 SEP categories, including several subsets of Pollution Prevention.
- ⁴⁹ EJSEAT is a cornerstone of OECA's Strategic Plan for environmental justice, and features prominently in the Agency's Response to the Office of the Inspector General Report, *EPA Needs to Conduct Environmental Justice Reviews of Its Programs, Policies, and Activities*, Report No. 2006-P-00034. <http://www.epa.gov/compliance/resources/policies/ej/oig-report-ej-response-12-18-06.pdf>

and www.epa.gov/oig/reports/2006/20060918-2006-P-00034.pdf EJSEAT is available to the States.

⁵⁰ SEER is a joint project of US EPA Conflict Prevention and Resolution Center (CPRC) and the US Department of Interior (DOI) Office of Collaborative Action and Dispute Resolution (CADR).

⁵¹ The four EPA cases included a Superfund case, a permitting case, an enforcement case without a SEP, and an enforcement case with a SEP.

⁵² Colloquium participant Andy Rowe, GHK International, presented the Model.

⁵³ See <http://www.steppfoundation.org>

⁵⁴ See <http://www.tpl.org>