OHIO ENVIRONMENTAL PROTECTION AGENCY
SUPPLEMENTAL ENVIRONMENTAL PROJECT GUIDANCE

December 2006

The purpose of this guidance is to establish procedures and criteria for Ohio EPA and the Ohio Attorney General's Office, Environmental Enforcement Section, regarding the potential use of supplemental environmental projects ("SEPs") in administrative and judicial consent orders to resolve environmental enforcement actions. This guidance does not create any rights, privileges or obligations in any party, including Ohio EPA. The acceptability of any particular proposed consent order and SEP is subject to the discretion and approval of the Director of Ohio EPA.

I. Applicability

This guidance[1] applies to administrative enforcement actions taken by Ohio EPA, and to civil judicial enforcement actions taken by the Attorney General's Office on behalf of Ohio EPA.

This guidance does not apply to any criminal enforcement actions prosecuted at the request of Ohio EPA. Further, this guidance is not intended for use by Ohio EPA staff or any other person at a hearing or at a trial or any forum outside of a settlement negotiation.

This guidance is not intended to address nor prevent the Director's ability to establish agency-wide SEP initives such as the Diesel School Bus SEP Initative.

II. Definitions

"Supplemental environmental project" or "SEP" means an environmentally beneficial activity which a respondent or defendant agrees to perform as part of a settlement of an enforcement action, but which the respondent or defendant is not otherwise legally obligated to perform.

An "environmentally beneficial activity" means an activity that reduces the emission or discharge of pollution into the environment or otherwise improves, protects, or reduces risks to public health or the environment.

"Not otherwise legally obligated to perform" means the activity is not currently required by any federal, state or local law or regulation, and is not likely to be required to be performed by the respondent or defendant:

[1] This guidance does not clarify or explain any statutes or rules, and therefore does not constitute a policy as defined in Ohio Revised Code section 3745.30.

- as injunctive relief in the instant enforcement action;
- as part of a settlement or order in another legal action; or
- in compliance or accordance with other legal requirements or obligations.

SEPs may include activities which the defendant/respondent will become legally obligated to undertake one or more years in the future, if the project will result in the facility coming into compliance earlier than the deadline. Such "accelerated compliance" projects are not allowable, however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the defendant/respondent for early compliance.

III. Criteria for Acceptability

Ohio EPA and the Attorney General have broad discretion to settle enforcement actions, including the discretion to include SEPs as an appropriate part of such settlements. The following four (4) criteria are intended to ensure that SEPs are consistent with Ohio EPA's mandate to protect public health, safety and the environment, and are within the respective authorities of, and statutory and constitutional requirements applicable to, Ohio EPA and the Attorney General. The determination of whether a proposed SEP is acceptable is within the sole discretion of the Director of Ohio EPA.

1. Enforceability

Performance of a SEP is enforceable in the same manner as any other term or condition of an administrative or judicial consent order. In order to ensure enforceability, the nature and scope (i.e., the "what, where and when") of the SEP must be defined in the settlement document (consent decree or DFFOs). The order must accurately and completely describe specific actions to be taken, the timing of such actions, and the result to be achieved; the order should also provide for a demonstration that the specified actions were performed and include a means for verifying completion of the SEP (including periodic reports, if appropriate) and the cost of the SEP, if appropriate.

2. Geographic Nexus

Ohio EPA will give strong preference to SEPs that have a reasonable geographic nexus to the violation(s) that prompted the enforcement action. A reasonable geographic nexus is established if the SEP benefits the general area[2] where the underlying violation(s) occurred. Ohio EPA may accept a SEP proposal that does not demonstrate a reasonable geographic nexus if the defendant/respondent has demonstrated to the satisfaction of Ohio EPA that there will be a significant benefit to the environment or public health through implementation of the SEP proposal. All SEPs must be performed in the State of Ohio and must benefit the State of Ohio.

[2] The "general area" includes the immediate geographic area, the same watershed basin, the same air quality control region, the same planning district or the same ecosystem where the violation(s) occurred; such area will generally not exceed 50 miles from the location where the violation(s) occurred.

3. Statutory Objective

Generally, the SEP should advance at least one of the objectives of the underlying statute(s) at issue in the enforcement action, and should be consistent with the provisions and objectives of such statute(s). A SEP advances the objectives of the underlying statute(s) if the SEP:

- reduces the emission or discharge into the environment of the type(s) of pollution the underlying statute(s) is intended to regulate;
- is designed to reduce the likelihood that similar violations will occur in the future; or
- reduces the adverse impact or overall risk to public health or the environment to which the violation at issue contributes.

Thus, there should be an appropriate correlation between the nature of the violation(s) and the environmental benefits to be derived from the SEP, or an overriding and significant public and environmental good to be served by implementation of the SEP. Such SEPs may have sufficient nexus even if the SEP addresses a different pollutant in a different medium. For example, an air enforcement case can include a SEP that would reduce water pollution discharges.[3]

4. SEP Administration and/or Oversight

Ohio EPA may not exercise or retain any authority to manage or administer a SEP. In particular:

- A project cannot be used to satisfy the statutory obligation of Ohio EPA or another government agency to perform a particular activity. Conversely, if a statute prohibits the expenditure of state resources on a particular activity, Ohio EPA cannot accept projects that would circumvent this prohibition.
- A project may not provide Ohio EPA or another government agency with additional resources to perform a particular activity for which the General Assembly has specifically appropriated funds. Further, a project cannot be used to satisfy the statutory obligation of Ohio EPA or another government agency to spend funds on a particular activity. However, a project may be related to a particular activity for which the General Assembly has specifically appropriated funds.

[3] If a SEP is proposed that addresses a different pollutant then is the subject of the enforcement case, the proposed SEP must be evaluated by the appropriate division that has jurisdiction over the pollutant at issue.

- A project may not provide additional resources to support activities performed by Ohio EPA employees or contractors. For example, if Ohio EPA has developed a brochure to help a segment of the regulated community comply with environmental requirements, a project may not, directly or indirectly, provide additional resources to revise, copy or distribute the brochure.

- A project may not provide a state grantee with additional funds to perform a specific task identified within an assistance agreement.

However, a SEP can provide for the establishment of a trust agreement and under the terms of the trust agreement Ohio EPA may be designated the authority to decide when and for what purpose(s) the funds may be released.[4]

From time to time, entities will propose projects that they have already completed or are being actively considered for business related purposes. Generally speaking, projects that are already completed should not be accepted as SEPs as the State is arguably not receiving any additional benefit to address the State for violations. For projects that are contemplated but not yet implemented, these could potentially be considered if some SEP credit would help ensure implementation and speed up the environmental benefits to be realized through its implementation.

IV. SEP Categories

There are seven (7) categories of projects that may qualify as acceptable SEPs. In order for a proposed project to be accepted as a SEP, it must satisfy the requirements of at least one of the following categories, in addition to the other requirements established in this Guidance.

1. Public Health

A public health project provides diagnostic, preventive and/or remedial components of human health care that is related to the actual or potential damage to human health caused by the violation(s). For example, 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 beneficiary of the project is the population that was harmed or put at risk by the violation(s).

[4] Payment into the account established by DSIWM pursuant to the authority under R.C. 3734.281 will not be considered a SEP for purposes of evaluation under this guidance document.

2. Pollution Prevention[5]

A pollution prevention project involves an activity that reduces the generation of pollution through "source reduction," i.e., any practice that 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.[6]

Source reduction may include equipment or technology modifications, process or procedure modifications,[7] 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 that increases efficiency in the use of energy, water or other materials. In all cases, for an activity to constitute 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.

3. Pollution Reduction

If a pollutant or waste stream has already been generated or released, a pollution reduction approach -- which employs recycling, treatment, containment or disposal techniques -- may be appropriate. A pollution reduction project involves an activity that 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, or improved containment, or safer disposal of an existing pollutant source.[8]

4. Environmental Restoration and Protection

An environmental restoration and protection project is one that goes beyond repairing the

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[5] For additional guidance on acceptable pollution prevention projects and how projects are evaluated see Ohio EPA's guidance titled "Guidance for Incorporating Pollution Prevention into Enforcement Settlements," issued July 1997.

[6] 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.

[7] "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 activity.

[8] Pollution reduction also includes "out-of-process recycling," wherein industrial waste collected from the manufacturing process and/or consumer waste materials are used as raw materials for production off-site, thereby reducing the need for treatment, disposal, or consumption of energy or natural resources.

damage caused by the violation(s), and enhances the condition of the ecosystem or immediate geographic area adversely affected. These projects may be used to restore or protect natural environments, such as ecosystems, and man-made environments, such as facilities and buildings.

This category also includes projects that protect the ecosystem from actual or potential damage resulting from the violation(s), or improve the overall condition of the ecosystem.[9] Examples include:

- remediation of abandoned waste sites or brownfield areas [10];
- restoration of a wetland in the same ecosystem or along the same avian flyway in which the subject facility is located;
- purchase and management of a watershed area to protect a drinking water supply where the (e.g., reporting) violation(s) did not directly damage the watershed but potentially could lead to damage due to unreported discharges.

This category also includes projects that 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 and within reasonable geographic nexus of the violation).[11] In some projects where the parties intend that the property be protected so that the ecological and pollution reduction purposes of the land are maintained in perpetuity, the defendant/ respondent may sell or transfer the land to another party, such as a federal, state or local park authority, with the established resources and expertise to perform this function.

5. Assessments and Audits

Assessments and audits, if they are not otherwise available as injunctive relief, are potential SEPs under this category. There are three types of projects in this category: a. pollution prevention assessments; b. environmental quality assessments; and c. compliance audits.

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[9] Simply preventing new discharges into the ecosystem, as opposed to taking affirmative action to preserve existing conditions at a property, would not constitute a restoration and protection project, but may fit into another category such as pollution prevention or pollution reduction.

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

[11] In some projects where a defendant/respondent has agreed to restore and then protect certain lands, the question arises as to whether the project may include the creation or maintenance of certain recreational improvements, such as hiking and bicycle trails. The costs associated with such recreational improvements may be included in the total SEP cost provided they do not impair the environmentally beneficial purposes of the project and they constitute only an incidental portion of the total resources spent on the project.

These assessments and audits are acceptable as SEPs only when the defendant/respondent agrees to provide Ohio EPA with a copy of the report. The results may be made available to the public, except to the extent they constitute trade secret information.

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. Pollution prevention assessments are acceptable as SEPs without an implementation commitment by the defendant/respondent because implementation recommendations may constitute activities that are in the defendant/ respondent's own economic interest.

b. Environmental quality assessments are investigations of: the condition of the environment at a site not owned or operated by the defendant/respondent; the environment impacted by a site or a facility regardless of whether the site or facility is owned or operated by the defendant/respondent; or threats to human health or the environment relating to a site or facility regardless of whether the site or facility is owned or operated by the defendant/ respondent. These include, but are not limited to: investigations of levels or sources of contamination in any environmental media at a site; or monitoring of the air, soil, or water quality surrounding a site or facility.[12] To be eligible as SEPs, such assessments must be conducted in accordance with available, recognized protocols applicable to the type of assessment to be undertaken.

   Environmental quality assessment SEPs may not be performed on the following types of sites: sites that are on the National Priority List under CERCLA section 105, 40 CFR Part 300, Appendix B; sites that would qualify for an EPA removal action pursuant to CERCLA section 104(a) and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR section 300.415; and sites for which the defendant/respondent or another party would likely be ordered to perform a remediation activity pursuant to CERCLA section 106, RCRA section 7003 or 3008(h), CWA section 311 or another federal or state law.

c. Environmental compliance audits are independent evaluations of a defendant/ respondent's compliance status with environmental requirements performed in accordance with R.C. Section 3745.70 through 3745.72. Credit

[12] Expanded sampling or monitoring of its own emissions or operations by a defendant/respondent does not qualify as a SEP to the extent that it is ordinarily available as injunctive relief.

may be given only 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 violations since compliance with environmental requirements is mandated by law. In general, compliance audits are acceptable as SEPs only when the defendant/respondent is a small business or small community.

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; or 2) go beyond compliance by reducing, beyond legal requirements, the generation, release or disposal of pollutants. For these projects, the defendant/respondent may lack the experience, knowledge or ability to implement the project itself; if so, it may be appropriate for the defendant/respondent 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 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 Ohio EPA has reason to believe that compliance in the sector would be significantly advanced by the proposed project.

7. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance -- such as computers and software, communications systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training -- to a responsible state or local emergency response or planning entity. Such assistance enables these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11001 et seq. (EPCRA)[13] to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to train emergency response personnel and to better respond to chemical spills. In order for these projects to qualify as acceptable SEPs, the need for the proposed assistance must be identified in the approved emergency response plan as an additional unfunded resource necessary to implement the emergency plan in accordance with section 303 of EPCRA.

[13] 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. This requirement 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.

8. Catchall

Other types of projects determined by Ohio EPA to have environmental merit which do not fit within at least one of the above categories, but are otherwise fully consistent with all other provisions of this guidance, may be accepted at the discretion of the Director of Ohio EPA.

Except for projects that meet the specific requirements of one of the categories described above, the following are examples of the types of projects that are not acceptable as SEPs:

1. General public educational or environmental awareness projects, e.g., sponsoring public seminars, conducting tours of environmental controls at a facility, promoting recycling in a community;[14]

2. Contributions to environmental research at a college or university without ensuring that the subject of the research will serve the reasonable geographic nexus area vis-a-vis the underlying violation(s);

3. Conducting a project which, though beneficial to a community, is unrelated to environmental protection, e.g., making a contribution to a non-profit, public interest, environmental, or other charitable organization, or donating playground equipment;

4. Studies or assessments undertaken without a requirement to address the specific environmental problems identified in the study (except as provided in section IV. 5. above);

5. Projects which the defendant/respondent will undertake, in whole or in part, with low-interest governmental loans, contracts, grants or other forms of governmental financial or non-financial assistance.

V. Calculation of the Final Monetary Penalty

A SEP serves to offset a certain amount of monies that would otherwise be paid to the State of Ohio as part of an administrative or civil enforcement settlement.[15] For example, if Ohio EPA agrees to settle an enforcement case for $50,000, with $20,000 of that amount to be offset for a SEP in lieu of payment to the State of Ohio, the overall civil penalty settlement amount remains $50,000. The $30,000 payment to the State of Ohio is the

[14] The Ohio Environmental Education Fund, established by House Bill 804 (eff. October 1, 1990), see R.C. 3745.22, and administered by Ohio EPA's Office of Environmental Education, is funded by civil penalties collected pursuant to R.C. sections 3704.06 and 6111.09 and provides for the award of monetary grants to qualified applicants in support of various environmental education projects throughout Ohio.

[15] Claims for stipulated penalties for violations of consent decrees or other settlement agreements should not be mitigated by the use of SEPs.

"monetary penalty" and the $20,000 offset is considered the "SEP amount."

The following process describes the steps involved in determing the appropriate cash v. SEP settlement:

1. Final Penalty Calculation

The applicable statutory provisions and penalty policies are used to calculate the gravity component of the penalty. The applicable penalty policies are used to calculate the economic benefit of noncompliance. The economic benefit and the gravity component are added to produce the "final penalty calculation," i.e., the amount necessary to settle the case without a SEP.

2. Minimum Monetary Penalty with a SEP

The minimum monetary penalty included in any settlement must equal or exceed either: a) the economic benefit of non-compliance plus 10 percent of the gravity component; or b) 25% of the gravity component only; which ever is greater.

For example:

In a case involving hazardous waste violations, the proposed penalty is $100,000. The penalty consists of $70,000 of gravity and $30,000 economic benefit. The minimum monetary penalty would be $37,000 (eco ben of $30,000 + 10% of gravity component ($7,000) = $37,000 which is greater than 25% of gravity component (.25 x 70,000 = $17,500)

In exceptional circumstances, in the sole discretion of the Ohio EPA, less than the minimum monetary amount specified above (up to 100% of the total final penalty calculation) may be accepted if an overriding public and environmental good will be served. Such decisions should be approved by the Deputy Director for Legal Affairs.

3. The SEP Cost

The net present after-tax cost of the SEP ("SEP Cost")[16] is the maximum amount that Ohio EPA may take into consideration in determining an appropriate penalty offset for performance of a SEP. If a project is expected to generate a positive monetary return to

[16] U.S. EPA has developed a computer model called PROJECT to facilitate the evaluation of the SEP Cost of a proposed project. See EPA's Supplemental Environmental Projects Policy, eff. 5/1/98, pages 13-15. If the PROJECT model reveals that a project would have a negative cost during the period of performance of the project, then the project would be expected to generate a profit for the defendant/respondent; such projects are not generally acceptable as SEPs.

the defendant/respondent, such a profitable project is generally not acceptable as a SEP.[17] If a project is expected to generate a profit, the defendant/respondent will probably implement the project based on its own economic interests. While Ohio EPA encourages environmentally beneficial projects that may also be profitable, regulated entities should not receive a bonus in the form of penalty mitigation to undertake such projects as part of an enforcement settlement.

Ohio EPA may use an alternative calculation that is not based on cost to determine the appropriate SEP offset amount. For example, Ohio EPA may value the SEP by assigning a monetary value to the amount of pollutants reduced as a result of implementation of the SEP. If Ohio EPA uses an alternative calculation the process discussed below in the SEP Offset amount may not be relevant for determining the assigned value of the SEP.

4. The SEP Offset Amount

The amount of the SEP Cost to be applied as an offset against the final penalty calculation is determined by evaluating the quality of the SEP using the following six factors:

- Benefits to the Public or Environment at Large. While all SEPs are expected to benefit public health or the environment, SEPs that are rated high on this factor will result in significant and quantifiable reduction in discharges of pollutants to the environment and comparable reduction in risk to the general public. Such SEPs may result in significant and, to the extent possible, measurable progress in protecting and restoring ecosystems.

- Innovativeness. SEPs that are rated high on this factor will further the development, implementation, or dissemination 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. Such SEPs may include "technology forcing" techniques which may establish new regulatory "benchmarks."

- Environmental Justice. SEPs that are rated high on this factor will mitigate damage or reduce risk to minority or low income communities that have been disproportionately impacted by pollution or may be subject to disproportionate environmental risk.

- Community Input. SEPs that are rated high on this factor will have been developed by taking into consideration input received from the affected community. No credit should be given for this factor if the defendant/respondent did not actively participate in soliciting and

[17] See Ohio EPA's "Guidance for Incorporating Pollution Prevention into Enforcement Settlements," July 1997, for the criteria on accepting SEPs with short "payback periods" (i.e., less than or equal to one and one-half years).

incorporating public input into the SEP.

- Multimedia Impacts. SEPs that are rated high on this factor will reduce the impacts of pollution on more than one environmental medium.

- Pollution Prevention. SEPs that are rated high 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 appropriate offset amount. Ohio EPA will take the information provided by the defendant/respondent and evaluate each SEP proposal under the criteria set forth above. As a general guide the appropriate offset amount will be determined in the following manner:

a. **Lower Quality SEPs**- offset will be $1 for every $2 in SEP cost;

b. **Medium Quality SEPs-** offset will be $1 for every $1.5 in SEP cost;

c. **High Quality SEPs**- offset will be $1 for every $1.2 in SEP cost; and

d. **Exceptional High Quality SEPs**[18]- offset will be $1 for every $1 in SEP cost.

VI. Liability for Performance

A defendant/respondent (or its successors in interest) is responsible and legally obligated to ensure that a SEP is completed satisfactorily. A defendant/respondent may not transfer this responsibility and liability to a third party. However, a defendant/respondent may use contractors or consultants acceptable to Ohio EPA to provide assistance in implementing a SEP.

VII. SEP Oversight and Enforceable Agreements

The settlement agreement should accurately and completely describe the SEP. See section III, Criteria for Acceptability. It should describe the specific actions to be performed by the defendant/respondent and provide for a reliable and objective means to verify the defendant/respondent's satisfactory completion of the project. This may require the submittal of periodic reports to Ohio EPA. A final report certified by a responsible official, acceptable to Ohio EPA, and evidencing completion of the SEP and documenting SEP

[18] To be considered an "exceptional high quality SEP", Ohio EPA must rate the SEP proposal very high in at least two of the categories above. However, if the defendant/respondent proposing the SEP is a small business, government agency, or a non-profit organization then the proposal must rate very high in only of the categories above.

expenditures, should be required.

To the extent feasible, defendants/respondents should be required to quantify the benefits associated with the project and provide Ohio 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 a SEP, it will state in a prominent manner that the project was undertaken as part of the settlement of an environmental enforcement action.

It shall be the responsibility of Ohio EPA Central Office enforcement staff to monitor SEP implementation as a part of the overall implementation of the Findings and Orders or Consent Decree.

VIII. 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 the appropriate SEP amount to Ohio EPA. In addition, stipulated penalties may be warranted or required, depending on the terms of the settlement document.

The determination of whether a SEP has been satisfactorily completed is within the sole discretion of Ohio EPA. A reasonableness standard shall govern such determinations.

IX. Community Input

In appropriate cases, Ohio EPA may make special efforts to seek input on project proposals from the local community that may have been adversely impacted by the violation(s). Soliciting community input into the SEP development process can: result in SEPs that better address the needs of the impacted community; promote environmental justice; produce better community understanding of Ohio EPA enforcement; and improve relations between the community and subject facility. Community involvement in SEPs may be most appropriate in cases where the range of possible SEPs is great and/or multiple SEPs may be negotiated.

When soliciting community input, the Ohio EPA negotiating team should follow the four guidelines set forth below.

1. Community input should be sought after Ohio EPA knows: that the defendant/respondent is interested in performing a SEP and is willing to seek community input; approximately how much money may be available for performing a SEP; and that settlement of the enforcement action is likely. If these conditions are not satisfied, Ohio EPA will have very little information to provide communities regarding the scope of possible SEPs.

2. The Ohio EPA negotiating team should use both informal and formal methods to contact the local community. Informal methods may involve telephone calls to local community organizations, local churches, local

elected leaders, local chambers of commerce, or other groups. Since Ohio EPA may not be able to identify all interested community groups, a public notice in a local newspaper may be appropriate.

3. To ensure that communities have a meaningful opportunity to participate, the Ohio EPA negotiating team should provide information to communities about SEPs generally, the opportunities and limits of such projects, the confidential nature of settlement negotiations, and the reasonable possibilities and limitations in the current enforcement action. This can be done by holding a public meeting, usually in the evening, at a local school or facility. The Ohio EPA negotiating team may wish to use community outreach experts at Ohio EPA in conducting this meeting. Sometimes the defendant/respondent may play an active role at this meeting and have its own experts assist in the process.

4. After the initial public meeting, the extent of community input and participation in the SEP development process will be determined. The amount of input and participation is likely to vary with each case. Except in extraordinary circumstances and with agreement of the parties, representatives of community groups will not participate directly in settlement negotiations. This restriction is necessary because of the confidential nature of settlement negotiations and because there is often no equitable process to determine which community group should directly participate in the negotiations.

X. Additional Criteria

Some additional criteria to consider in evaluating SEPs include the following:

1. Compliance history and resources of defendant/respondent. The defendant/respondent's history of compliance, and the resources of the defendant/respondent to conduct the proposed project, should be considered. It may not be appropriate to accept a SEP proposed by a defendant/respondent that has an extensive history of noncompliance, or is out of compliance with previous agency orders in any agency program.

2. Performance. The defendant/respondent must show that it and any intended recipient are ready, willing and able to perform the proposed SEP before any such agreement is presented to the Director. The defendant/respondent must also provide a written report to Ohio EPA to show that the SEP has been properly implemented, within a time frame to be stated in the order.

3. Oversight/Tracking. Additional staff resources may be required to monitor performance. Every effort should be made to ensure that the defendant/respondent provides sufficient and timely data to facilitate any required staff oversight/tracking efforts. If third-party oversight is necessary, these costs must be borne by the defendant/respondent.

XI. Deviation from this Guidance

Consistent with Ohio EPA's mandate to protect public health, safety and the environment, and the respective authorities of, and statutory and constitutional requirements applicable to Ohio EPA and the Attorney General, the Director may deviate from certain criteria of this guidance in extraordinary and limited circumstances where there is an unquestionable benefit to human health or the environment that outweighs the considerations underlying the applicable guidance criteria. These extremely limited situations will be evaluated on a case by case basis by the Director and will be considered only where the direct benefit of the project is exceptional and the project directly benefits the individuals, community or area potentially or actually affected by the violation(s).