

# ENVIRONMENTAL REMEDIATION THROUGH SUPPLEMENTAL ENVIRONMENTAL PROJECTS AND CREATIVE NEGOTIATION: RENEWED COMMUNITY INVOLVEMENT IN FEDERAL ENFORCEMENT

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Traditionally, federal environmental enforcement actions have had two goals—mandatory compliance with statutory standards, and punitive monetary penalties to deter future violations. Protracted litigation has generally been the tool used to achieve these goals, requiring substantial time and money. However, such “end-of-the-pipe” regulations have failed to address issues of pollution prevention and remediation in the areas harmed by environmental violations. This comment argues that a more effective means of federal enforcement can be achieved through the use of creative settlement techniques that employ supplemental environmental projects to address pollution prevention and community remediation. These projects allow enforcement agencies to go beyond the limitations of traditional enforcement methods by keeping penalty dollars local to benefit the communities harmed by environmental violations, while still holding accountable the violating parties.

## INTRODUCTION

On April 1, 1993, Region I of the Environmental Protection Agency (EPA)<sup>1</sup> received an anonymous tip concerning suspicious-looking barrels outside the garage of a Massachusetts Highway Department (MHD) facility on Route 24 in Bridgewater, Massachusetts.<sup>2</sup> An initial

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<sup>1</sup> The Region I office is located in Boston, Massachusetts at the John F. Kennedy Federal Building.

<sup>2</sup> See Scott Allen, *State, EPA Agree on \$20m Waste Cleanup*, BOSTON GLOBE, Sept. 11, 1994, Metro/Region at 1.

EPA investigation yielded discovery of roughly seventy-five barrels of waste, some uncovered, some over a year old.<sup>3</sup> Subsequent investigations of several other of the 148 MHD facilities would reveal over one hundred more illegally stored barrels of hazardous waste.<sup>4</sup> While these discoveries set the stage for years of protracted litigation between EPA and MHD under the rubric of either a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Resource Conservation and Recovery Act (RCRA) federal enforcement action, remarkably a settlement was reached in just over a year.<sup>5</sup> Most notable, though, were the terms of the settlement, which resulted in over \$20 million in cleanup costs to remediate the state facilities.<sup>6</sup> Additionally, \$5 million would be spent on supplemental environmental projects (SEPs) focusing on environmental justice programs to benefit the communities that were harmed by MHD.<sup>7</sup> All of this money was to be spent within Massachusetts, principally in low-income areas that were most affected by environmental pollution.<sup>8</sup> Only a small penalty of \$100,000 was to be paid directly to the federal government by the state.<sup>9</sup>

While the settlement was the largest ever against a state agency under RCRA, the Commonwealth of Massachusetts was able to turn a potentially devastating, high-profile enforcement action into a win-win situation for both the state and EPA, with only the federal treasury losing out.<sup>10</sup> Millions of potential penalty dollars were internalized by the state to directly benefit it from the enforcement action, with much of the remediation work beginning within a year of the initial investigation.<sup>11</sup>

Such a success story historically would have been rare in environmental enforcement, but environmental attorneys have learned from

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<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See generally *In the Matter of: The Commonwealth of Massachusetts, Massachusetts Highway Department, EPA Docket No. RCRA-I-94-1071, Consent Agreement and Order*, Oct. 3, 1994, p.6 [hereinafter MHD Consent Agreement]; Resource Conservation and Recovery Act (RCRA) 42 U.S.C. §§ 6901-6992(k) (1994); The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), §§ 101-405, 42 U.S.C. §§ 9601-9675 (1994).

<sup>6</sup> See Allen, *supra* note 2.

<sup>7</sup> See *id.*; EPA, DEP, and Mass Highway Reach Unprecedented Environmental Enforcement Agreement, EPA ENVTL. NEWS, Sept. 12, 1994, at 1 [hereinafter EPA ENVTL. NEWS].

<sup>8</sup> See Allen, *supra* note 2.

<sup>9</sup> See MHD Consent Agreement, *supra* note 5, at 42.

<sup>10</sup> See EPA ENVTL. NEWS, *supra* note 7, at 1; see also Allen, *supra* note 2.

<sup>11</sup> See Allen, *supra* note 2.

the first generation of federal enforcement that developed primarily in the 1970s and 1980s.<sup>12</sup> Protracted litigation results in millions of lost dollars, with years going by before polluted sites are eventually cleaned.<sup>13</sup> Frequently, detrimental impacts on communities adjacent to such sites are not even addressed, particularly in low-income communities.<sup>14</sup>

This Comment will attempt to explore the new generation of federal enforcement that has developed through the use of SEPs and creative lawyering to more effectively address the needs of communities affected by environmental pollution, using the MHD settlement as the prototype. Section I explores RCRA, the federal statute that set the framework for EPA enforcement action and allowed the settlement and on-site remediation to take place. Section II lays out the background and procedural aspects of the EPA investigation under RCRA, detailing the nature of the investigation and subsequent negotiations as they played out. Section III analyzes both the history and significance of SEPs, which were the key to the community remediation. Section IV details both the unique SEPs that were employed by the EPA in this case and the continuing development of the SEP program. The concluding section argues that the procedural methodology and substantive results from the MHD settlement should represent the prototype for the new generation of environmental enforcement, using dispute resolution, creative settlement techniques, and community input to quickly and effectively remediate and restore communities affected by environmental pollution beyond the scope of what a traditionally adjudicated statutory enforcement action could achieve.

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<sup>12</sup> See generally J. William Futrell, *Hazardous Wastes and Toxic Substances: Lessons from Superfund, RCRA, and Other Environmental Laws*, 24 HOUS. L. REV. 125 (1987).

<sup>13</sup> See Terry J. Satterlee & Jerry L. Anderson, *RCRA Corrective Action: The Next Wave of Hazardous Substance Cleanup*, 59 UMKC L. REV. 181, 181-82 (1991); Peter J. Howe, *New Bedford Still Seeks Way to Deal With PCBs*, BOSTON GLOBE, Nov. 3, 1997, at B1 (New Bedford Harbor named a Superfund site over 14 years ago, but as of Nov. 1997, only approximately three percent of hazardous PCB waste had been cleaned).

<sup>14</sup> See Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S2.

## I. RCRA—THE HISTORY OF A FEDERAL REGULATORY PROGRAM

### A. *The Development of RCRA*

RCRA is the major federal statute that regulates solid and hazardous waste.<sup>15</sup> RCRA was actually an amendment to the Solid Waste Disposal Act of 1965 (SWDA), which was first amended in 1970 under the Resource Recovery Act (RRA).<sup>16</sup> RCRA so transformed SWDA that it is now referred to merely as RCRA.<sup>17</sup>

SWDA grew out of an amendment to the Clean Air Act aimed at addressing the growing contamination and pollution of the environment from industrialization and urbanization.<sup>18</sup> The purpose of SWDA was both to initiate a national research and development program for the proper and economical disposal of solid waste, and to provide technical and financial assistance to state and local governments to plan, develop, and conduct solid waste disposal programs.<sup>19</sup> However, by 1970, Congress became alarmed by the amount of solid waste being generated by the country, and amended SWDA under the Resource Recovery Act of 1970.<sup>20</sup> RRA shifted focus from disposal to management and recovery of reusable materials and energy.<sup>21</sup> Like SWDA, RRA mainly provided grants and funding for developing projects and facilities without requiring a formal regulatory program addressing solid waste disposal.<sup>22</sup> By the time Congress returned to the issue of solid waste six years later, a new crisis had developed with non-residential waste, or hazardous waste.<sup>23</sup>

President Ford signed RCRA into law in 1976 to confront hazardous waste, one of the nation's highest-priority environmental problems.<sup>24</sup> RCRA, the first significant federal effort to address hazardous

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<sup>15</sup> See 42 U.S.C. §§ 6901-6991(k) (1994).

<sup>16</sup> See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 251 (1992); SWDA Pub. L. 89-272, 79 Stat. 992 [hereinafter SWDA]; RRA Pub. L. 91-512, 84 Stat. 1227 [hereinafter CCA].

<sup>17</sup> See PLATER ET AL., *supra* note 16, at 251.

<sup>18</sup> See John C. Chambers & Mary S. McCullough, *From the Cradle to the Grave: an historical perspective of RCRA*, NAT. RESOURCES & ENV'T, Fall 1995, at 21; Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671 (1994).

<sup>19</sup> See *id.* (quoting SWDA § 202(b)).

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See Chambers & McCullough, *supra* note 18, at 21.

<sup>24</sup> See *id.* at 22.

waste,<sup>25</sup> regulated the treatment, storage, and management disposal of hazardous wastes by monitoring wastes from their creation until after their permanent disposal.<sup>26</sup> Hence, RCRA is often referred to as a "cradle-to-grave" regulation because it regulates the entire waste cycle with "an exceptional degree of rigor and detail."<sup>27</sup>

A key provision of RCRA is the definition of solid waste itself, which allows for the potential regulation of almost any discarded substance, regardless of physical form or property.<sup>28</sup> Thus, the 1976 RCRA amendments were able to achieve, at least on paper, what the preceding efforts of SWDA and RRA had not: a national solid waste policy and regulatory program mandating that hazardous wastes be treated, stored, and disposed of in a manner that would minimize the present and future threat to human health and the environment.<sup>29</sup>

RCRA completely overhauled the previous SWDA by comprehensively regulating the handling of solid and hazardous wastes at currently-operating or future waste disposal facilities.<sup>30</sup> Waste shipments were subject to a tracking system, the so-called "cradle-to-grave" manifest system, and three separate groups—hazardous waste generators; transporters; and treatment, storage and disposal (TSD) facilities—had to comply with standards to ensure environmentally sound disposal of waste materials.<sup>31</sup> This regulatory program has been viewed as the most comprehensive regulatory program ever developed by EPA.<sup>32</sup> However, implementation of the regulatory scheme took nearly four years, and by then an unforeseen problem had already arisen regarding inactive waste sites.<sup>33</sup>

RCRA's regulatory scheme essentially takes a two-prong approach to hazardous waste by setting strict standards for the storage, trans-

<sup>25</sup> See Satterlee & Anderson, *supra* note 13, at 183.

<sup>26</sup> See *Midatlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 505-06 (1986) (citing 42 U.S.C. § 6973 (1982)).

<sup>27</sup> See PLATER ET AL., *supra* note 16, at 251-52; see also Chambers & McCullough, *supra* note 18, at 22.

<sup>28</sup> See Chambers & McCullough, *supra* note 18, at 22. Section 1004(27) of RCRA defines solid waste as any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operation . . . *Id.*; 42 U.S.C. § 6903(27) (1982).

<sup>29</sup> See Chambers & McCullough, *supra* note 18, at 22.

<sup>30</sup> See Futrell, *supra* note 12, at 125 n.3.

<sup>31</sup> See *id.* A major goal of RCRA was to protect and preserve the quality of groundwater, a resource increasingly relied on as drinking water in the U.S. See *id.*

<sup>32</sup> See Chambers & McCullough, *supra* note 18, at 22.

<sup>33</sup> See *id.*

portation, and disposal or treatment of hazardous waste, and then by employing the comprehensive manifest system to effectively track waste through all of its phases.<sup>34</sup> However, such an approach essentially focused on the prevention of future hazardous waste, and enforcement under the 1976 Act soon ran into problems attempting to address past or inactive waste storage and disposal sites.<sup>35</sup> One such problem was EPA's attempt to use section 7003 of RCRA to require cleanup of hazardous waste releases.<sup>36</sup> Section 7003 gave EPA the authority to restrain practices presenting an "imminent and substantial endangerment to health or the environment."<sup>37</sup> However, courts generally did not construe the language of section 7003 to provide for remedial action from past disposal practices, and RCRA contained no other corrective action provisions.<sup>38</sup>

In 1980, both CERCLA and the first series of amendments to RCRA were passed.<sup>39</sup> The enactment of CERCLA addressed the problem of cleaning up hazardous waste releases and responded to the gaps left by RCRA section 7003 by providing for the cleanup of inactive sites.<sup>40</sup> In fact, CERCLA was primarily directed toward abandoned or inactive sites.<sup>41</sup> However, the release of hazardous substances at operating facilities was still inadequately addressed under RCRA.<sup>42</sup> Part of the problem was EPA's inability to meet its statutory deadlines for promulgating regulations under RCRA, which led to a lack of enforcement.<sup>43</sup> In fact, the early 1980s have been referred to as the most abrasive chapter in the history of relations between EPA and Congress, as the hazardous waste issue essentially became a captive of politics.<sup>44</sup>

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<sup>34</sup> See Satterlee & Anderson, *supra* note 13, at 183.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*; 42 U.S.C. § 6973.

<sup>37</sup> See 42 U.S.C. § 6973; Satterlee & Anderson, *supra* note 13, at 183.

<sup>38</sup> See *id.* See generally *United States v. Wade*, 546 F. Supp. 785, 788-92 (E.D. Pa. 1982).

<sup>39</sup> See 42 U.S.C. §§ 9601-9675; Chambers & McCullough, *supra* note 18, at 23.

<sup>40</sup> See Satterlee & Anderson, *supra* note 13, at 184.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See Chambers & McCullough, *supra* note 18, at 22-23; PLATER ET AL., *supra* note 16, at 929.

<sup>44</sup> See Futrell, *supra* note 12, at 134.

### B. *The Hazardous and Solid Waste Amendments*

In response to the EPA's inability to effectively promulgate regulations to enforce RCRA, Congress passed the Hazardous and Solid Waste Amendments of 1984 (HSWA).<sup>45</sup> These amendments, lengthy and unparalleled in detail, intruding into EPA's management practices, and prescribing new regulatory practices, have been touted as a classic example of intergovernmental distrust.<sup>46</sup> The amendments also increased the overall complexity of the RCRA regime to earn it the characterization by one judge as a statute of "mind-numbing" complexity.<sup>47</sup>

HSWA contained an unprecedented number of statutory deadlines for mandatory duties to be performed by the EPA.<sup>48</sup> Congress ensured EPA compliance by inserting a number of "hammer" provisions subjecting EPA to harsh legislative standards set by Congress if EPA failed to act.<sup>49</sup> Additionally, citizens would be able to sue EPA to force compliance in the event EPA missed an implementation deadline.<sup>50</sup>

Substantively, HSWA filled the gap between RCRA and CERCLA by requiring corrective action at any facility permitted under RCRA.<sup>51</sup> Although the corrective action provisions mandated by Congress took several years to implement, the end result allowed EPA to require the owner or operator of a solid waste management facility to respond to releases of hazardous constituents.<sup>52</sup>

Hence, as CERCLA cases became more and more bogged down in protracted studies and intractable litigation, commentators predicted that EPA would place increasing emphasis on the corrective action mechanisms provided by RCRA (and HSWA).<sup>53</sup> Although it limited

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<sup>45</sup> See *id.*; PLATER ET AL., *supra* note 16, at 929; Chambers & McCullough, *supra* note 18, at 23.

<sup>46</sup> See Futrell, *supra* note 12, at 134. Futrell continues that in the "ensuing bureaucratic collapse with its resignations and dismissals, the EPA lost its chance to develop a hazardous waste program in which it could use its discretion to assess and manage risks." *Id.*; see also Chambers & McCullough, *supra* note 18, at 23 (The 1984 amendments not only significantly expanded the regulatory program under RCRA, but also limited the discretion previously given to EPA to administer the program.).

<sup>47</sup> See *American Mining Congress v. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987); see also Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, 21 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10255, 10256 (May 1991).

<sup>48</sup> See Futrell, *supra* note 12, at 134.

<sup>49</sup> See PLATER ET AL., *supra* note 16, at 929 n.11.

<sup>50</sup> See Futrell, *supra* note 12, at 134.

<sup>51</sup> See Satterlee & Anderson, *supra* note 13, at 184.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* at 181.

EPA's discretion in promulgating the program, the corrective action approach was to be more streamlined than CERCLA in order to give the agency more flexibility in dealing with different hazardous waste clean-up situations.<sup>54</sup>

Thus, while section 7003 of RCRA is still one of the most significant provisions for triggering the statute, the corrective action provisions provide for broader cleanup authority than what EPA relied upon prior to 1984.<sup>55</sup>

### C. RCRA's Corrective Action Program

Although HSWA mandated development of the corrective action program, the overwhelming complexities involved prevented EPA from issuing the proposed regulations for almost six years.<sup>56</sup> The new corrective action measures focused on cleanup of RCRA-regulated sites even for conditions that were created in the past.<sup>57</sup> EPA was directed to promulgate regulations requiring "corrective action for all releases of hazardous waste or constituents from any solid waste management unit . . . regardless of the time at which waste was placed in such unit."<sup>58</sup> Thus, RCRA TSD facilities subject to the above provision are in effect subject to the same degree of examination and potential clean-up activities as a CERCLA site.<sup>59</sup>

According to section 6925 of RCRA, any owner or operator of a facility that engages in treatment, storage, or disposal of hazardous waste is required to obtain a RCRA Subtitle C permit.<sup>60</sup> Accordingly, this provision automatically subjects the facility to the corrective action provisions implemented under HSWA, even if the facility will only store hazardous waste.<sup>61</sup> Thus, the threshold issues in a RCRA action are often whether a substance is in fact a hazardous waste, and

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<sup>54</sup> See *id.*

<sup>55</sup> See *id.* at 183 (unlike CERCLA and the corrective action provisions, § 7003 does not provide broad cleanup authority).

<sup>56</sup> See Richard G. Stoll, *The New RCRA Cleanup Regime: Comparisons and Contrasts with CERCLA*, 44 Sw. L.J. 1299, 1304 (1991).

<sup>57</sup> See *id.* at 1300.

<sup>58</sup> 42 U.S.C. § 6924(u).

<sup>59</sup> See Stoll, *supra* note 56, at 1305. Facilities that merely generate waste and stay within a ninety day accumulation exemption (transferring waste off site within that period) will not trigger T/S/D interim status and are exempt from the corrective action program. See *id.* at 1306; 40 C.F.R. § 262.34 (1990).

<sup>60</sup> See 42 U.S.C. § 6925.

<sup>61</sup> See *id.*; Satterlee & Anderson, *supra* note 13, at 184; Stoll, *supra* note 56, at 1305.



moreover, whether an activity qualifies as treatment, storage, or disposal.<sup>62</sup>

Section 3004 of RCRA contains many of the HSWA provisions incorporating corrective action, as well as minimum technology, ground water monitoring, labeling, and record-keeping requirements (the baseline requirements).<sup>63</sup> Section 3004(u) of RCRA requires any permitted facility or facility seeking a permit to take corrective action for all releases of hazardous waste, and section 3004(v) requires that corrective action be taken beyond the facility boundaries where necessary to protect human health and the environment.<sup>64</sup>

Failure to comply with these provisions or to take corrective actions from EPA compliance orders can result in fines of up to \$25,000 per day, per violation.<sup>65</sup> Thus, EPA may order corrective actions at any permitted facilities where there has been a release of hazardous waste or constituents of solid waste, with failure of compliance resulting in fairly stiff penalties.<sup>66</sup>

Although "release" is not defined under RCRA, it is generally interpreted along the lines of the CERCLA definition, which includes not only leaking and spilling, but even the dumping of closed barrels in some instances.<sup>67</sup>

Thus, the RCRA corrective action program has been deemed "CERCLA-like" in scope and effect.<sup>68</sup> A look at the corrective action procedures will show a process that is very similar to a CERCLA investigation, while also highlighting some of the distinctions between the programs.<sup>69</sup>

<sup>62</sup> See Satterlee & Anderson, *supra* note 13, at 184; Stoll, *supra* note 56, at 1305; see also PLATER ET AL., *supra* note 16, at 929. Under the mature corrective action program, a facility must address hazardous constituent releases if they come from units containing any solid waste, regardless of whether the waste is legally classified as hazardous.

<sup>63</sup> See 42 U.S.C. § 6924(o), (p), (r), (s); Interview with Deborah Brown, Head of RCRA Enforcement Group, EPA Region I, Feb. 8, 1998 [hereinafter Brown Interview 2/8/98]. The baseline program actually becomes the most significant set of provisions in the Mass. Highways dispute. See *infra* notes 126–33 and accompanying text.

<sup>64</sup> See 42 U.S.C. § 6924(u), (v).

<sup>65</sup> See 42 U.S.C. § 6928(a), (c).

<sup>66</sup> See 42 U.S.C. § 6928; Satterlee & Anderson, *supra* note 13, at 187.

<sup>67</sup> See Satterlee & Anderson, *supra* note 13, at 187. This would in fact be the case in MHD, as storing closed barrels can violate the baseline program in several different capacities without technically even having a release. See *In the Matter of: The Commonwealth of Massachusetts, Massachusetts Highway Department*, EPA Docket No. RCRA-I-94-1071 at 10–12 [hereinafter MHD Complaint].

<sup>68</sup> See Stoll, *supra* note 56, at 1299.

<sup>69</sup> See generally Stoll, *supra* note 56.

### D. A CERCLA/RCRA Comparison

EPA essentially followed the procedural structure of a CERCLA cleanup for the RCRA corrective action procedures, while attempting to include more flexibility and efficiency.<sup>70</sup> A CERCLA cleanup involves a preliminary investigation, a remedial investigation and feasibility study, the issuance of a record of decision, and the remedial action.<sup>71</sup> The length of time between the preliminary investigation and the record of decision can be as long as eight years.<sup>72</sup> By the time EPA issues the record of decision, the cleanup has frequently only consisted of preliminary short-term removal measures to mitigate damages—full remediation can take as long as three or more years.<sup>73</sup>

EPA thus attempted to streamline the RCRA corrective action program.<sup>74</sup> The agency first performs a RCRA Facility Assessment (RFA), which includes a paperwork review and site visit.<sup>75</sup> If further action is necessary, a RCRA Facility Investigation (RFI) is performed, and, if required, a Corrective Measures Study (CMS) is undertaken to assess remedial alternatives and costs.<sup>76</sup> The CMS will then serve as the basis for corrective action measures.<sup>77</sup>

Although EPA structured the procedural format of a RCRA corrective action similar to CERCLA, EPA also attempted to make RCRA cleanups more flexible and less cumbersome than CERCLA through less complex studies and less costly remedies.<sup>78</sup> One key difference between CERCLA and RCRA is that RCRA typically involves only one site owner or operator, and less time and transaction costs need to be consumed impleading potentially responsible parties.<sup>79</sup> Additionally, choices of remedies under RCRA are generally more flexible than CERCLA because there is no National Contingency Plan to follow.<sup>80</sup> Thus, when implementing the corrective action

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<sup>70</sup> See Satterlee & Anderson, *supra* note 13, at 187.

<sup>71</sup> See *id.*

<sup>72</sup> See PLATER ET AL., *supra* note 16, at 885.

<sup>73</sup> See *id.* In 1989 the average time period for a CERCLA cleanup was roughly 12 years. See *id.* It is against such a backdrop that dispute resolution and fast action remediation take on paramount importance.

<sup>74</sup> See Satterlee & Anderson, *supra* note 13, at 181.

<sup>75</sup> See Stoll, *supra* note 56, at 1309.

<sup>76</sup> See *id.*; Satterlee & Anderson, *supra* note 13, at 187.

<sup>77</sup> See Stoll, *supra* note 56, at 1310; Satterlee & Anderson, *supra* note 13, at 193.

<sup>78</sup> See Stoll, *supra* note 56, at 1311; Satterlee & Anderson, *supra* note 13, at 195.

<sup>79</sup> See Satterlee & Anderson, *supra* note 13, at 195.

<sup>80</sup> See *id.*; 42 U.S.C. § 9607(a)(4)(A) (1995). The National Contingency Plan specifies proce-

measures, EPA expresses a general preference for deferring to RCRA where a viable owner or operator is on site, although no statutory provision prevents the use of CERCLA.<sup>81</sup> In fact, the EPA's position grants it wide discretion in picking and choosing between the two statutes.<sup>82</sup> Such a position creates a lot of bargaining leverage for EPA, and this statutory dynamic should be kept in mind to understand the development and negotiation process of the Mass Highway Department case.

## II. REGULATION IN ACTION: THE MHD CASE

### A. *Investigation*

Region I of the EPA has jurisdiction throughout New England, which includes Connecticut, Maine, New Hampshire, Rhode Island, Vermont, and Massachusetts. On April 1, 1993, an anonymous caller informed the EPA that there was a large cluster of drums that appeared to contain hazardous waste located at a maintenance facility owned by the MHD in Bridgewater, Massachusetts.<sup>83</sup> The initial investigation by an EPA inspector immediately raised concerns when unlabeled barrels, corroded drums, and stained soil were found at the site.<sup>84</sup> The inspector contacted the MHD site facilitator, who seemed ignorant of the federal waste handling laws, but assured the EPA inspector that they had performed an environmental audit and were handling the situation.<sup>85</sup> However, the facilitator would only turn over bits and pieces of the audit to the inspector.<sup>86</sup> This further raised the suspicions of the inspector, as the audit encompassed not only the Bridgewater site, but all 148 MHD facilities.<sup>87</sup> Through the enforce-

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dures, techniques, materials, equipment, and methods to be employed in identifying, removing, and remediating releases of hazardous substances. See 42 U.S.C. § 9605(a). This difference between CERCLA and RCRA would become very significant in negotiating the MHD settlement because it allowed EPA the flexibility to tailor the settlement to maximize the speed and scope of remediation efforts without having to go through as many time consuming procedural hoops as otherwise might be required. See Brown Interview 2/8/98, *supra* note 63.

<sup>81</sup> See Stoll, *supra* note 56, at 1312.

<sup>82</sup> See *id.*

<sup>83</sup> See MHD Consent Agreement, *supra* note 5, at 6.

<sup>84</sup> See Interview with Deborah Brown, Dec. 3, 1997 [hereinafter Brown Interview 12/3/97]; see also MHD Consent Agreement, *supra* note 5, at 6.

<sup>85</sup> See Allen, *supra* note 2; see also Brown Interview 12/3/97, *supra* note 84.

<sup>86</sup> See Brown Interview 12/3/97, *supra* note 84.

<sup>87</sup> See *id.*

ment of RCRA, EPA was eventually able to compel disclosure of the audit.<sup>88</sup>

Section 3007 of RCRA is an efficient information-gathering enforcement tool, allowing EPA to enter sites for inspection and sampling, gain access to records and copy them, and make formal written demands for information regarding an entity's hazardous waste activity.<sup>89</sup>

Thus, further investigation of the audit received at Bridgewater led EPA to other MHD sites, and inspections continued to take place for the better part of the next year.<sup>90</sup>

The series of inspections took a full year before EPA was able to take significant legal action.<sup>91</sup> During that time, EPA tried to ascertain whether there was either a systemic problem within MHD, or whether there were just a few isolated incidents of possible contamination.<sup>92</sup> The South Boston facility was one of the last facilities investigated, and with thirty to forty violations at that facility alone, it was clear that these were not isolated incidents.<sup>93</sup>

### B. *Negotiation*

After investigations of several other sites revealed dozens of violations, Deborah Brown, the head of Region I's RCRA Division, went to MHD's General Counsel and said, "You guys have got a real problem."<sup>94</sup>

This, in and of itself, is not the typical procedure for EPA.<sup>95</sup> EPA seldom notifies a party of a pending enforcement action (until the party receives the administrative complaint in the mail) unless there is an imminent and substantial threat to human health and the envi-

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<sup>88</sup> See *id.*; see also STEPHEN FERRY, ENVIRONMENTAL LAW 278 (1997).

<sup>89</sup> See 42 U.S.C. § 6927.

<sup>90</sup> See MHD Consent Agreement, *supra* note 5, at 6-8; EPA ENVTL. NEWS, *supra* note 7, at 4 (MHD audits revealed storage and disposal problems at numerous sites). The audit would eventually be fully disclosed. It was conducted by an environmental consulting group and basically listed in spreadsheet format all of the MHD facilities with potential problems and findings for each facility. See Brown Interview 12/3/97, *supra* note 84.

<sup>91</sup> See MHD Consent Agreement, *supra* note 5, at 6-8; Brown Interview 2/8/98, *supra* note 63.

<sup>92</sup> See MHD Consent Agreement, *supra* note 5, at 6-8; Brown Interview 2/8/98, *supra* note 63.

<sup>93</sup> See MHD Consent Agreement, *supra* note 5, at 7; see also Allen, *supra* note 2; MHD Complaint, *supra* note 84, at 11-12.

<sup>94</sup> See Brown Interview 12/3/97, *supra* note 84; Allen, *supra* note 2.

<sup>95</sup> See Brown Interview 12/3/97, *supra* note 84.

ronment.<sup>96</sup> However, that decision, and the decision by the MHD General Counsel to deal immediately with the problem, allowed for negotiations to take place and a settlement to be reached prior to the issuance of a complaint or enforcement action.<sup>97</sup> This was also highly unusual, since the complaint itself is frequently the leverage piece for EPA in negotiations.<sup>98</sup>

However, in this case, EPA had already documented dozens of violations at at least three sites.<sup>99</sup> The RCRA penalty provisions provide for fines of up to \$25,000 per violation per day.<sup>100</sup> Most of the violations from the initial inspections were merely baseline violations, such as failure to label and failure to keep records.<sup>101</sup> Some of the facilities were not even permitted.<sup>102</sup> The baseline penalties alone were already into the millions of dollars, and EPA had yet even to address the more complicated issues of corrective action provisions and whether some sites had gone beyond generator status to qualify as default interim TSD facilities.<sup>103</sup>

These more complex issues would have been costly to litigate, not only to MHD, but also to EPA and federal enforcement agencies. For example, the Department of Justice (DOJ) would have to be involved to litigate the issues beyond mere compliance with the baseline program.<sup>104</sup> Such involvement substantially increases the length of time of the litigation, potentially by years, which in turn significantly increases costs.<sup>105</sup> In turn, this would have delayed much of the cleanup and remediation efforts by years as well, because such efforts would have had to come within strict compliance with an approved corrective action program as delineated by DOJ and EPA.<sup>106</sup> Initiation of the corrective action program requires formally completing all of the

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<sup>96</sup> See *id.*; 42 U.S.C. § 6973.

<sup>97</sup> See generally MHD Consent Agreement, *supra* note 5; MHD Complaint, *supra* note 84; see also EPA ENVTL. NEWS, *supra* note 7, at 1-3.

<sup>98</sup> See Brown Interview 12/3/97, *supra* note 84.

<sup>99</sup> See *id.*; see also EPA ENVTL. NEWS, *supra* note 7, at 4 (although the complaint focused on just three of the department's 148 facilities, MHD audits revealed storage and disposal problems at numerous sights).

<sup>100</sup> See 42 U.S.C. § 6928(a), (c).

<sup>101</sup> See MHD Consent Agreement, *supra* note 5, at 6-8. See generally MHD Complaint, *supra* note 84.

<sup>102</sup> See Brown Interview 2/8/98, *supra* note 63.

<sup>103</sup> See MHD Complaint, *supra* note 84, at 18-19.

<sup>104</sup> See Brown Interview 2/8/98, *supra* note 63.

<sup>105</sup> See *id.*

<sup>106</sup> See *supra* notes 68-73 and accompanying text.

procedures outlined in Section I of this comment, including full RFIs by the DOJ to follow up EPA's initial RFAs, a corrective measures study, and then the issuance of corrective action measures for each site.<sup>107</sup> While RCRA's corrective action program was designed to be more streamlined than CERCLA's, industry analysts now recognize that the cumbersome and expensive administrative and procedural requirements of the program can actually be an impediment to efficient clean-up and remediation efforts, resulting in EPA's actual avoidance of its use.<sup>108</sup>

Thus, the cost of litigation throughout this entire process appears to have been in and of itself a substantial impetus to negotiate a settlement for both sides. MHD knew it was going to be spending millions of dollars one way or another merely to come into compliance.<sup>109</sup> Any significant delay would mean more money, not only in litigation costs, but in remediation and penalty costs.<sup>110</sup> MHD would also feel significant public and political pressure to act swiftly once the nature of the violations became public.<sup>111</sup>

Additionally, looming behind the baseline compliance issues was section 7003 of RCRA.<sup>112</sup> At MHD sites with more egregious violations, such as Bridgewater and South Boston, EPA could likely have compelled immediate action under its authority to restrain practices presenting an imminent and substantial endangerment to health or the environment, although they never would have been able to compel what was agreed to under the SEP provisions.<sup>113</sup> However, the complexity of litigation would have again dramatically increased even under section 7003, as the legal theories involved moved from the almost strict liability standards of failure to comply under the baseline program, to proving whether the threatened damage from ongoing activity at MHD sites constituted imminent and substantial danger.<sup>114</sup>

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<sup>107</sup> See *supra* notes 75-77 and accompanying text.

<sup>108</sup> See *generally* 28 Env't Rep. (BNA) S-15 (Jan. 16, 1998) (RCRA reform sought to streamline and improve efficiency of corrective action program . . . that is used reluctantly by industry because of what parties from all sides see as cumbersome administrative requirements); 28 Env't Rep. (BNA) 1343 (Nov. 7, 1997) (costly and timely RCRA requirements under corrective action encourage some owners to abandon sites rather than face RCRA requirements); 26 Env't Rep. (BNA) 1898 (Feb. 2, 1996) (RCRA reform sought to increase efficiency and flexibility).

<sup>109</sup> See MHD Complaint, *supra* note 84, at 18-19.

<sup>110</sup> See *supra* note 100 (\$25,000 per day per violation).

<sup>111</sup> See EPA ENVTL. NEWS, *supra* note 7, at 1-2 (both the EPA and the Commonwealth held a common belief that public agencies had an equal if not greater obligation than businesses to comply with environmental laws).

<sup>112</sup> See *supra* note 37 and accompanying text.

<sup>113</sup> See *id.*

<sup>114</sup> See FERRY, *supra* note 88, at 285.

Faced with the prospects of being targeted by DOJ, EPA, and eventually the state attorney general's office and state Department of Environmental Protection (DEP), MHD decided to take immediate action to work with EPA toward negotiating a settlement and achieving compliance.<sup>115</sup> Immediate action would mitigate the cost of future clean-up expenses by preventing hazardous constituents from working themselves further into the environment, thus avoiding even greater remediation efforts.

The negotiated settlement allowed MHD and the Commonwealth to save face because they cooperated in implementing and directing the clean-up efforts with the federal EPA through the state DEP.<sup>116</sup> Most importantly, a settlement allowed EPA to effectuate the purposes of the statute by comprehensively addressing the releases of hazardous constituents that had taken place years ahead of a litigation schedule.<sup>117</sup>

### C. *The Settlement*

The settlement that was reached was touted as "unprecedented in the nation's history."<sup>118</sup> EPA worked with the Massachusetts DEP so that DEP would be involved in much of the oversight of the MHD agreement.<sup>119</sup> The joint state-federal agreement was unparalleled in both size and scope, and represented the largest commitment of public resources ever to address violations at a state facility under RCRA anywhere in the country.<sup>120</sup> In the end, MHD requested expenditure authorization of between twenty and forty million dollars to further investigate and remediate environmental problems at its facilities.<sup>121</sup> There were provisions for each facility to come into compliance within specified time periods, as well as provisions for auditing each facility.<sup>122</sup> MHD also agreed to spend \$5 million in SEPs, mainly for environmental justice programs.<sup>123</sup> Finally, MHD paid a \$100,000 penalty to the federal government for violating hazardous waste laws.<sup>124</sup>

<sup>115</sup> See EPA ENVTL. NEWS, *supra* note 7, at 1-2.

<sup>116</sup> See *id.* at 2, 5; see also Allen, *supra* note 2 (the agreement to let the state DEP oversee most of the follow-up inspections . . . reflected the EPA's faith in the state's commitment to the cleanup).

<sup>117</sup> See generally MHD Consent Agreement, *supra* note 5.

<sup>118</sup> EPA ENVTL. NEWS, *supra* note 7, at 1.

<sup>119</sup> See *supra* note 116 and accompanying text.

<sup>120</sup> See EPA ENVTL. NEWS, *supra* note 7, at 1.

<sup>121</sup> See *id.*

<sup>122</sup> See generally MHD Consent Agreement, *supra* note 5.

<sup>123</sup> See EPA ENVTL. NEWS, *supra* note 7, at 1.

<sup>124</sup> See *id.*

In order to better prepare itself if negotiations stalled, EPA worked on both the settlement agreement and a complaint simultaneously.<sup>125</sup> The complaint was filed pursuant to section 3008(a) of RCRA, for noncompliance and violation of section 3002(c) of RCRA.<sup>126</sup> EPA targeted three specific sites: Bridgewater, Wellesley, and South Boston.<sup>127</sup> In doing so, EPA chose to treat MHD as a large-quantity generator of hazardous waste under section 6903(5) of RCRA, rather than as an interim TSD.<sup>128</sup> The allegations in the complaint ranged from failure to ensure that all personnel who handled or managed waste received training, to failure to conduct annual reviews or maintain contingency plans, to storage of waste in excess of ninety days and leaking containers.<sup>129</sup> EPA assessed a total penalty of \$3,989,660 (payable to the Treasurer, United States of America).<sup>130</sup>

Along with the complaint, EPA served and executed the Consent Agreement and Order (CAO).<sup>131</sup> The flexibility provided by the consent agreement allowed EPA to go well beyond the scope of what was alleged in the complaint.<sup>132</sup> Among other things, EPA was able to negotiate corrective action measures without having to go through the procedural hoops to bring those actual charges.<sup>133</sup>

The stated objective of the CAO required MHD to perform the following: (1) achieve a state of compliance with the notification and reporting requirements that formed the basis of the complaint; (2) implement EPA-approved SEPs as generally set out in the CAO; (3) pay a civil penalty in the amount of \$100,000; (4) correct any operating procedures or conditions at its facilities that violate or may violate RCRA and applicable regulations; and (5) correct procedures and/or conditions at its facilities that may pose a threat to human health and the environment.<sup>134</sup>

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<sup>125</sup> See Brown Interview 12/3/97, *supra* note 84; see generally MHD Complaint, *supra* note 84; MHD Consent Agreement, *supra* note 5 (particularly filing dates).

<sup>126</sup> See MHD Complaint, *supra* note 84, at 1.

<sup>127</sup> See *id.* at 4.

<sup>128</sup> See *id.* at 5.

<sup>129</sup> See *id.* at 6–9.

<sup>130</sup> *Id.* at 19.

<sup>131</sup> See MHD Consent Agreement, *supra* note 5.

<sup>132</sup> Compare MHD Complaint, *supra* note 84 with MHD Consent Agreement, *supra* note 5 (only baseline violations alleged, but corrective action measures agreed to in Consent Agreement, among other remedial provisions such as SEPs).

<sup>133</sup> See *id.*

<sup>134</sup> See MHD Consent Agreement, *supra* note 5, at 3–4.



Furthermore, EPA gave the Commonwealth of Massachusetts, through the Executive Office of Environmental Affairs and DEP, large measures of responsibility to administer portions of the settlement, including a unique role in ensuring and reviewing the performance of multi-media audits at each MHD facility.<sup>135</sup> DEP received responsibility to take timely and appropriate enforcement actions to address any violations uncovered by the audits.<sup>136</sup> While EPA would defer to DEP's lead role in taking appropriate measures, EPA and DEP would have dual enforcement authority.<sup>137</sup>

DEP was charged with directing and monitoring an agency-wide audit of all MHD facilities that generated, stored, disposed of, or transported waste; thoroughly evaluating the nature and extent of any releases or threatened releases of hazardous wastes or hazardous constituents at or from the facilities; implementing stabilization/interim measures to control or abate imminent threats to human health or the environment from releases and threatened releases of hazardous waste or hazardous constituents at or from the facilities; preventing or minimizing the further spread of contamination while pursuing long-term corrective action remedies at the facilities; and implementing waste minimization strategies.<sup>138</sup>

DEP's role was included pursuant to the Clean State Initiative enacted by then Governor William Weld (Executive Order 350) on March 19, 1994, which required Massachusetts state agencies to identify, report, and correct all environmental problems in a comprehensive manner.<sup>139</sup> Agencies would achieve these goals by identifying, investigating, and facilitating the resolution of existing compliance matters.<sup>140</sup> In so doing, the Commonwealth would address future environmental problems by investigating, planning, and proposing the implementation of preventative environmental measures for each of the executive offices and their agencies.<sup>141</sup>

Incorporating the DEP and the Clean State Initiative into the CAO formally charged the state with responsibility for enforcing the agreement, but also allowed the Commonwealth to save face within the

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<sup>135</sup> See Letter from Harley Laing, EPA Regional Counsel to Edward J. Corcoran II, MHD Chief Counsel (Sept. 30, 1994).

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> MHD Consent Agreement, *supra* note 5, at 4.

<sup>139</sup> See *id.* at 2.

<sup>140</sup> See *id.* at 4.

<sup>141</sup> See *id.*

community by allowing it to appear to be taking the initiative in environmental protection.<sup>142</sup> Additionally, this entire process was expedited by assigning both the enforcement and implementation costs to a third party, because EPA would not otherwise have had the resources to implement and enforce the CAO on its own.<sup>143</sup>

### III. THE DEVELOPMENT OF SEPS

While MHD's twenty million dollar commitment to perform remediation at its sites was the largest commitment ever made by a state to address RCRA violations at state facilities, the five million dollar commitment to supplemental environmental projects was an even more significant record-setting achievement.<sup>144</sup> The SEP provisions were significant because they provided the agency with the discretion to go beyond the traditional boundaries of statutory enforcement to truly effectuate the purposes of the statute: prevention and remediation of environmental pollution.<sup>145</sup> In order to fully explore the significance of these SEPs, some background of their use and development is necessary.

EPA has employed SEPs in various forms and under various names since the late 1970s and early 1980s.<sup>146</sup> SEPs developed as "alternative payments" in the form of projects or activities within the substantive settlement conditions of consent orders and decrees.<sup>147</sup> They were to be distinguished from other projects that were part of injunctive relief requirements to merely correct violations or obtain compliance at a site.<sup>148</sup> Defendants agreed to perform SEPs in exchange for a reduction in the amount of an assessed civil penalty.<sup>149</sup> EPA had preliminary guidance on such programs as early as 1984, but did not have

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<sup>142</sup> See Allen, *supra* note 2; EPA ENVTL. NEWS, at 1-2, 4.

<sup>143</sup> See Brown Interview 2/8/98, *supra* note 63.

<sup>144</sup> See EPA ENVTL. NEWS, *supra* note 7, at 1.

<sup>145</sup> See discussion *infra* notes 151-55 and accompanying text.

<sup>146</sup> See 23 Env't Rep. (BNA) 2692 (Feb. 12, 1993); see also 26 Env't. L. Rep. (Env't. L. Inst.) 10174 (Apr. 1996).

<sup>147</sup> See EPA Memorandum Letter, Policy on the Use of Supplemental Enforcement Projects in EPA Settlements, Feb. 12, 1991 [hereinafter EPA 1991 SEP Policy Letter] (the letter precedes the actual Policy Statement). SEPs were also referred to as "mitigation projects" or "environmentally beneficial expenditures." See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

a more formal policy on SEPs as such until 1991.<sup>150</sup> Hence, SEPs were used sparingly until the 1990s.<sup>151</sup>

### A. *The 1991 EPA SEP Policy Guideline*

The 1991 SEP Policy guideline (1991 Policy) stated the agency's belief that the use of supplemental projects, if carefully crafted and executed, could provide useful environmental benefits "*beyond what can be secured solely through injunctive relief*," and could be particularly useful in promoting pollution *prevention*.<sup>152</sup>

The 1991 Policy's introduction explained that SEPs aimed to achieve more than mere compliance from a defendant after a violation.<sup>153</sup> EPA has always insisted that a defendant come into compliance with federal environmental laws and regulations as part of a settlement because it could otherwise achieve this result as part of adjudicated injunctive relief.<sup>154</sup> In this case, the agency desired to employ additional relief beyond what was normally available in the form of projects that would both mitigate and remediate the adverse public health or environmental consequence from the violation in question.<sup>155</sup>

EPA will only approve a SEP if the project furthers the agency's statutory mandate to clean up the environment and deter violations of law.<sup>156</sup> Hence, EPA established three criteria that defendants must meet before it will even consider a SEP proposal: (1) violations must be corrected through actions to ensure future compliance; (2) deterrence objectives are served by payment of a substantial monetary penalty;<sup>157</sup> and (3) there is an appropriate "nexus" or relationship between the nature of the violation and the environmental benefits to

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<sup>150</sup> See *id.* (citing GM-22, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties, Alternative Payments section, at 24-27, issued 2/16/84); EPA 1991 SEP Policy Letter. The 1991 Policy replaced and superseded the Alternative Payments section of the 1984 document. See *id.*

<sup>151</sup> See 26 Env'tl. L. Rep. (Env'tl. L. Inst.) 10174 (Apr. 1996).

<sup>152</sup> See EPA 1991 SEP Policy Letter, *supra* note 147, at 2 (emphasis added).

<sup>153</sup> See EPA Memorandum, Policy on the Use of Supplemental Enforcement Projects in EPA Settlements, Feb. 12, 1991, at 1 [hereinafter EPA 1991 SEP Policy].

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See *id.* at 1-2.

<sup>157</sup> See *id.* at 1. The SEP Policy states that EPA penalty policies still require the assessment of a substantial monetary penalty . . . generally at a level that captures the defendant's economic benefit of noncompliance plus some appreciable portion of the gravity component of the penalty. See EPA 1991 SEP Policy, at 1.

be derived from the supplemental project.<sup>158</sup> Furthermore, all projects must improve the injured environment or reduce the total risk burden posed to public health or the environment by the identified violations.<sup>159</sup>

Because the 1984 Alternative Payments policy offered little guidance on the nature of projects that would be acceptable to EPA, the agency had problems administering the program.<sup>160</sup> The 1991 Policy Guidelines attempted to address these prior concerns by establishing five categories that would be permissible for supplemental activities; proposals that did not fall within one of these categories would not be approved.<sup>161</sup> The five categories of permissible SEPs established under the 1991 Policy were pollution prevention, pollution reduction, environmental restoration, environmental auditing projects, and public awareness projects that are directly related to addressing compliance within the industry in which the violation took place.<sup>162</sup>

Projects that EPA specifically mentioned as impermissible included general educational or environmental awareness-raising projects;<sup>163</sup> contributions to research at colleges or universities concerning the environmental area of noncompliance or concerning any other area of environmental study; and projects unrelated to the enforcement action, but otherwise beneficial<sup>164</sup> to the community.<sup>165</sup>

While the five categories of permissible SEPs created a great deal of flexibility for creative proposals and agency discretion, proposed SEPs still needed to meet a nexus requirement.<sup>166</sup> To satisfy the nexus requirement, EPA required that an appropriate relationship exist between the nature of the violation and the environmental benefits to be derived from the type of supplemental environmental project.<sup>167</sup> For pollution prevention, pollution reduction, restoration, and audit

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<sup>158</sup> See EPA 1991 SEP Policy, *supra* note 153, at 1.

<sup>159</sup> See *id.* at 2.

<sup>160</sup> See EPA 1991 SEP Policy Letter, *supra* note 147.

<sup>161</sup> See EPA 1991 SEP Policy, *supra* note 153, at 2-4.

<sup>162</sup> *Id.*

<sup>163</sup> See *id.* at 4-5. Specific examples include sponsoring public seminars about, or inviting schools to tour the environmental controls at a facility, or promoting recycling in a community. See *id.* at 5.

<sup>164</sup> Such as contributing to charities. See *id.* at 5.

<sup>165</sup> See EPA 1991 SEP Policy, *supra* note 153, at 5.

<sup>166</sup> See *id.*

<sup>167</sup> See *id.* For example, the nexus between a violation and an environmental restoration project would exist when the project remediated injuries caused by the same pollutant at the same facility giving rise to the violation. See *id.*

projects, EPA further broke down the nexus requirement to either a "vertical" or "horizontal" nexus.<sup>168</sup>

EPA considered a "vertical" nexus to exist when the supplemental project operated to reduce pollutant loadings in a given environmental medium to offset earlier excess loadings of the same pollutant in the same medium created by the violation in question.<sup>169</sup> Such projects might trace a violation back into the manufacturing process to address the root cause of the pollution, and reductions would be obtained from the source responsible for the violation or, in some cases, from another source that was upstream from the immediately responsible source.<sup>170</sup>

A "horizontal" nexus, on the other hand, would exist when the supplemental project involved either relief for different media at a given facility, or relief for the same media at different facilities.<sup>171</sup> Because the relationship between the project and the violation in question could be more attenuated under a "horizontal" nexus, such proposals were subject to careful scrutiny.<sup>172</sup> A nexus would be met only if the supplemental project reduced the overall public health or environmental risk posed by the facility responsible for the violation, or enhanced the prospects for reducing or eliminating the likelihood of future violations substantially similar to those that were the basis for the enforcement action.<sup>173</sup>

An example of an acceptable "horizontal" nexus within the 1991 SEP Policy involving RCRA would be a supplemental project to reduce toxic air emissions from a facility that had been found in violation of the federal regulation for contaminating drinking water in a neighborhood.<sup>174</sup> The reduction of emissions of a different medium, in addition to correcting the violation in question, would be necessary

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<sup>168</sup> See *id.* at 6.

<sup>169</sup> See EPA 1991 SEP Policy, *supra* note 153, at 6.

<sup>170</sup> See *id.* The example given within the policy statement for a "vertical" nexus involves the Clean Water Act. If pollutants were discharged from a facility at a certain point along a river, an acceptable pollution reduction project would be to reduce discharges of that same pollutant at an upstream facility on the same river. Another example would be to alter a production process at a facility which handles a portion of the manufacturing process antecedent to that which caused the violation of the regulatory requirement in a way that yields reductions or total elimination of the residual pollutant discharges to the environmental media affected by the violation. See *id.*

<sup>171</sup> See *id.* at 7.

<sup>172</sup> See *id.*

<sup>173</sup> See EPA 1991 SEP Policy, *supra* note 153, at 7.

<sup>174</sup> See *id.*

to compensate for the increased health risk that neighborhood residents were subjected to because of the original RCRA violation.<sup>175</sup> Another example of a "horizontal" nexus would be the reduction of discharges at another facility of the defendant within the same watershed or air quality basin as the facility where the violation in question had occurred.<sup>176</sup> This would reduce the overall health or environmental risk posed by related operations to the environment or to the health of the residents in the same geographic vicinity by reducing the overall pollutant discharges within that community and thus compensate for past excess discharges and increased risks.<sup>177</sup>

Once a proposed SEP met both the category requirement and the nexus requirement, it would still need to meet further criteria before approval by EPA.<sup>178</sup> Because a defendant could propose to undertake a SEP at any time prior to resolution of the enforcement action, EPA had to consider the status of the litigation or administrative action and the amount of resources that had been committed to that action before accepting a proposal.<sup>179</sup> Furthermore, EPA would evaluate the defendant's enforcement history and technical and financial resources in order to determine the likelihood of the defendant completing the project.<sup>180</sup> EPA gave greater deference to first-time violators than repeat offenders.<sup>181</sup>

EPA also carefully scrutinized who was the main beneficiary of the project.<sup>182</sup> The 1991 Policy Guidelines made clear that the sole interest of the federal government in considering SEPs was to ameliorate the adverse public health and/or environmental impacts of violations.<sup>183</sup> Therefore, projects were not intended to reward defendants for undertaking projects that are clearly in the defendant's economic self-interest, such as modernizing facilities to become more competitive.<sup>184</sup>

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<sup>175</sup> See *id.*

<sup>176</sup> See *id.*

<sup>177</sup> See *id.*

<sup>178</sup> See EPA 1991 SEP Policy, *supra* note 153, at 8.

<sup>179</sup> See *id.* at 8-9.

<sup>180</sup> See *id.* at 9.

<sup>181</sup> See *id.*

<sup>182</sup> See *id.*

<sup>183</sup> See EPA 1991 SEP Policy, *supra* note 153, at 9.

<sup>184</sup> See *id.* However, for an in depth discussion of how environmental technology can be employed as an incentive for businesses to increase environmental compliance, decrease pollutant discharges, and increase efficiency and competitiveness, see generally, CURTIS MOORE & ALAN MILLER, GREEN GOLD: JAPAN, GERMANY, THE UNITED STATES AND THE RACE FOR ENVIRONMENTAL TECHNOLOGY (1994).

Thus, EPA developed a general rule against approving projects representing "sound business practices," such as capital expenditures or management improvements where the defendant receives the substantial share of benefits rather than the public.<sup>185</sup> The only exception to this rule would be where a project is both a sound business practice and a pollution prevention project because of the potential long-term health and environmental benefits to the public.<sup>186</sup> However, under such an analysis, the public benefits must be substantial in serving the public interest.<sup>187</sup>

Finally, although SEPs fulfill EPA's goal of protecting and restoring the environment, the agency desired that penalties, as an important countervailing enforcement goal, have the strongest possible deterrent effect upon the regulated community.<sup>188</sup> Thus, the agency would not lower a penalty amount by more than the after-tax amount the violator had spent on the project.<sup>189</sup> EPA's penalty policy criteria attempt to assess a civil penalty based on the defendant's economic benefit from noncompliance, plus a component based on the gravity of the violation.<sup>190</sup> If a SEP is approved, EPA would calculate the net present after-tax value of the supplemental project, and the gravity component of the penalty would be mitigated by the after-tax cost of the project, depending on the level of environmental benefits to the public.<sup>191</sup>

### B. *Acceptance of SEPs*

The use of SEPs greatly increased and policy implementation continued to develop after the issuance of the 1991 Policy Guidelines.<sup>192</sup> By 1993, between five and ten percent of all EPA settlements employed SEPs.<sup>193</sup> EPA expected and encouraged continued development and expansion of the SEP program.<sup>194</sup> The SEP program was

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<sup>185</sup> See EPA 1991 SEP Policy, *supra* note 153, at 9.

<sup>186</sup> See *id.*

<sup>187</sup> See *id.*

<sup>188</sup> See *id.* at 9-10.

<sup>189</sup> See *id.* at 10.

<sup>190</sup> See EPA 1991 SEP Policy, *supra* note 153, at 10.

<sup>191</sup> See *id.*

<sup>192</sup> See, e.g., 25 Env't Rep. (BNA) 282 (June 10, 1994); 23 Env't Rep. (BNA) 2692 (Feb. 12, 1993).

<sup>193</sup> See 23 Env't Rep. (BNA) 2692 (Feb. 12, 1993). Approximately one in ten cases employed the use of an SEP. See *id.*

<sup>194</sup> See *id.*

encouraging to EPA because it spurred settlements, rather than litigation. The result was a conservation of EPA resources, with a pollution prevention focus, rather than merely addressing compliance issues.<sup>195</sup> EPA approved approximately 400 SEPs in 1992, with the great majority of them focusing on pollution prevention from violations of the Toxic Substances Control Act (TSCA) and the Emergency Planning and Community Right-To-Know Act (EPCRA).<sup>196</sup> EPA also approved SEPs under other federal statutes such as the Clean Air Act, Clean Water Act, and RCRA.<sup>197</sup>

One result from the expansion of the SEP program after the 1991 Policy was the unusual alliance that formed in support of the program.<sup>198</sup> EPA strongly supported the SEP program not only because of the improvements in pollution prevention, but also because of the expediency of its responses to violations. Industry and corporate defendants were relieved to see fines reduced, and local community groups were able to put teeth into citizen suits, as their communities directly benefited from pollution prevention and remediation projects.<sup>199</sup> EPA essentially gained support from groups that otherwise might not have backed proposals to reduce penalties.<sup>200</sup>

However, not everyone supported the newly energized SEP program.<sup>201</sup> Representative John Dingell (D-Mich.), then chairman of the House Energy and Commerce Committee, challenged EPA's authority to enter into SEPs.<sup>202</sup> In December of 1991, he called for the General Accounting Office (GAO) to study whether EPA had legal authority to enter into SEPs when settling mobile source emissions violations under the Clean Air Act.<sup>203</sup> In July of 1992, GAO concluded in its report that EPA did not have that authority.<sup>204</sup> In so concluding,

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<sup>195</sup> *See id.*

<sup>196</sup> *See id.*; 23 Env't Rep. (BNA) 3201 (Apr. 23, 1993); Toxic Substance Control Act (TSCA), 15 U.S.C. §§ 2601-2671 (1994); Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. §§ 11001-11050 (1994). Initial figures for the first half of 1992 showed 164 SEPs were negotiated worth approximately \$23 million. *See id.*

<sup>197</sup> *See* 23 Env't Rep. (BNA) 2692 (Feb. 12, 1993).

<sup>198</sup> *See id.*

<sup>199</sup> *See id.*

<sup>200</sup> *See id.*

<sup>201</sup> *See, e.g.*, 23 Env't Rep. (BNA) 3201 (Apr. 23, 1993); 26 Env'tl. L. Rep. (Env'tl. L. Inst.) 10174 (Apr. 1996).

<sup>202</sup> *See, e.g.*, 23 Env't Rep. (BNA) 3201 (Apr. 23, 1993); 26 Env'tl. L. Rep. (Env'tl. L. Inst.) 10174 (Apr. 1996).

<sup>203</sup> *See* 23 Env't Rep. (BNA) 2692 (Feb. 12, 1993); 26 Env'tl. L. Rep. (Env'tl. L. Inst.) 10174 (Apr. 1996).

<sup>204</sup> *See* 23 Env't Rep. (BNA) 2692 (Feb. 12, 1993); 26 Env'tl. L. Rep. (Env'tl. L. Inst.) 10174 (Apr. 1996).



GAO took exception to EPA's approval of SEPs for mobile emissions violations that allowed defendants to fund public awareness campaigns.<sup>205</sup> GAO further found that the receiver of the penalty payment frequently had no relationship to the violation and had suffered no injury justifying payment.<sup>206</sup>

While EPA interpreted this study as only applying to mobile source emissions under the Clean Air Act, the report did raise concerns that the SEP program might be in jeopardy.<sup>207</sup> The GAO study further concluded that EPA's SEP program violated the Miscellaneous Receipts Act (MRA).<sup>208</sup> The MRA requires that money received by government officials and agencies on behalf of the government be deposited into the U.S. Treasury.<sup>209</sup> Finally, GAO claimed that EPA was circumventing the congressional appropriations process, because it could carry out agency goals beyond addressing the particular violation in question.<sup>210</sup>

EPA responded to Representative Dingell and GAO in December, 1992 with a letter that reiterated its belief that it had legal authority to continue the SEP program, although it had revised the mobile emissions programs to address some of GAO's concerns.<sup>211</sup> Representative Dingell requested a follow-up decision from GAO in which he challenged EPA's authority to enter into SEPs under any statute.<sup>212</sup> GAO responded in March, 1993 with a letter that reaffirmed its July, 1992 opinion, but EPA did not issue a formal response to this letter.<sup>213</sup> Representative Dingell also wrote to newly-appointed EPA Administrator Carol Browner in March, 1993, urging her to reverse former Administrator William Reilly's policy on SEPs.<sup>214</sup>

However, Browner's previous emphasis on nontraditional enforcement measures that encouraged pollution prevention, environmental restoration, and public education indicated she would continue to support and develop the SEP program.<sup>215</sup> In later face-to-face meet-

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<sup>205</sup> See 23 Env't Rep. (BNA) 3201 (Apr. 23, 1993). Violators funded public relations firms to mount campaigns regarding automobile pollution control equipment. See *id.*

<sup>206</sup> See *id.*

<sup>207</sup> See *id.*

<sup>208</sup> See 31 U.S.C. § 3302; 26 Env'tl. L. Rep. (Env'tl. L. Inst.) 10174 (Apr. 1996).

<sup>209</sup> See 31 U.S.C. § 3302(b).

<sup>210</sup> See 23 Env't Rep. (BNA) 3201 (Apr. 23, 1993); 26 Env'tl. L. Rep. (Env'tl. L. Inst.) 10174 (Apr. 1996).

<sup>211</sup> See 23 Env't Rep. (BNA) 2692 (Feb. 12, 1993).

<sup>212</sup> See 26 Env'tl. L. Rep. (Env'tl. L. Inst.) 10174 (Apr. 1996).

<sup>213</sup> See *id.*

<sup>214</sup> See 23 Env't Rep. (BNA) 3201 (Apr. 23, 1993).

<sup>215</sup> See 23 Env't Rep. (BNA) 2692 (Feb. 12, 1993).

ings with Representative Dingell's staff, GAO, and EPA, the three groups agreed that GAO opinions did not apply to all SEPs, although the public awareness issue remained more uncertain.<sup>216</sup>

While Browner continued to place greater emphasis on the SEP program and multi-media enforcement over the next year, the nexus issue raised by Representative Dingell and GAO would continue to be a focus of those concerned by the expansion of SEPs.<sup>217</sup> Further concerns were raised by the tax implications to corporations and businesses that performed SEPs.<sup>218</sup> Unlike penalties, some critics feared SEP expenditures could theoretically be deducted as business expenses.<sup>219</sup>

#### IV. PROGRESS & APPLICATION—THE SEP PROGRAM GROWS

##### A. *The MHD SEPs*

Against this political backdrop of both growing support and concerns being raised about SEPs under EPA's 1991 Policy, Region I forged ahead with the largest dollar commitment to SEPs ever under a RCRA enforcement.<sup>220</sup> Not only was the dollar amount significant, as it was the largest public appropriation of resources for SEPs ever, but the projects themselves were significant because they greatly expanded the scope of SEPs by targeting environmental justice<sup>221</sup> and community-based emergency planning and preparation.<sup>222</sup> This would later be reflected in both the Interim Revised EPA SEP Policy released in May, 1995 and the 1998 Final Policy Guideline.<sup>223</sup>

EPA approved six individual SEPs proposed by MHD.<sup>224</sup> Under the first project, generally entitled "government training," MHD developed an environmental education program for the highway and public

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<sup>216</sup> See 26 Env'tl. L. Rep. (Env'tl. L. Inst.) 10174 (Apr. 1996).

<sup>217</sup> See 17 Env't Rep. (BNA) 2062 (Mar. 4, 1994).

<sup>218</sup> See *id.*

<sup>219</sup> See *id.*; but see EPA 1991 SEP Policy, *supra* note 153 (addressing penalty mitigation by SEPs with after tax figures).

<sup>220</sup> See EPA ENVTL. NEWS, *supra* note 7, at 1.

<sup>221</sup> Environmental Justice addresses the disproportionately high and adverse human health or environmental impacts on minority and low-income populations. See Exec. Order No. 12898, 30 WEEKLY COMP. PRES. DOC. 276 (Feb. 11, 1994).

<sup>222</sup> See EPA ENVTL. NEWS, *supra* note 7, at 1; compare EPA 1991 SEP Policy *supra* note 153, with MHD Proposed SEPs as outlined *infra* this section.

<sup>223</sup> See generally Interim Revised EPA SEP Policy, May 8, 1995 [hereinafter EPA 1995 SEP Policy]; EPA Supplemental Environmental Projects Policy, 63 Fed. Reg. 24796, 24796 (1998) [hereinafter EPA 1998 SEP Policy].

<sup>224</sup> See *infra* notes 225–54 and accompanying text.

works departments of the state's 351 cities and towns.<sup>225</sup> The program was designed to inform such departments of environmental regulatory requirements governing state and municipal maintenance facilities.<sup>226</sup> Programs included workshops on subjects such as underground storage of petroleum projects, hazardous waste regulations, right-to-know laws, and releases of oil and other hazardous materials.<sup>227</sup> The stated objective was to increase environmentally sound practices within the state and reduce incidents of noncompliance with environmental laws and regulations.<sup>228</sup> The program was also designed to directly benefit all of the state's EPA-designated Environmental Justice Areas.<sup>229</sup>

A more significant community-based project was the donation of CAMEO software and training, and in some cases computers, to over eighty designated Massachusetts Priority Planning Areas.<sup>230</sup> CAMEO, or Computer-Aided Management of Emergency Operations, is a program designed to aid communities in response strategies and risk management procedures for hazardous substance releases.<sup>231</sup> This software allows communities to compile database lists of hazardous waste generators in their respective areas, track what types of hazardous substances are generated or stored at the sites, and create emergency planning to respond to releases or exposures in order to mitigate damages.<sup>232</sup> CAMEO software uses mapping features that can incorporate census data to predict how releases could affect areas.<sup>233</sup>

A third project involved an expenditure of \$750,000 to assess and remediate two sites in Holyoke.<sup>234</sup> This project was in conjunction with

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<sup>225</sup> See *In the Matter of: The Commonwealth of Massachusetts, MHD*, Docket No: RCRA-I-94-1071, Proposed Supplemental Environmental Projects, January 3, 1995 [hereinafter MHD SEP 1/3/95].

<sup>226</sup> See *id.*

<sup>227</sup> See *id.*

<sup>228</sup> See *id.*

<sup>229</sup> See *id.*

<sup>230</sup> See MHD SEP 1/3/95, *supra* note 225.

<sup>231</sup> See 18 Chem. Reg. Rep. (BNA) 1791 (Mar. 17, 1995). CAMEO was developed by the National Oceanic and Atmospheric Administration (NOAA), EPA, and the National Safety Council to aid response organizations in responding to hazardous substance releases. See 20 Chem. Reg. Rep. (BNA), 227 (May 10, 1996).

<sup>232</sup> See MHD SEP 1/3/95, *supra* note 225.

<sup>233</sup> See *id.* CAMEO systems are frequently located at community fire departments where the emergency response teams are located. See 13 Chem. Reg. Rep. (BNA) 1428 (Feb. 9, 1990).

<sup>234</sup> See *In the Matter of: The Commonwealth of Massachusetts, MHD*, Docket No: RCRA-I-94-1071, Proposed Supplemental Environmental Projects, May 1, 1995 [hereinafter MHD SEP 5/1/95].

a multi-site cooperative agreement between EPA and DEP—the Holyoke Initiative.<sup>235</sup> The Holyoke Initiative was one of four site-assessment environmental justice projects scheduled nationwide by EPA's Hazardous Site Evaluation Division.<sup>236</sup> The City of Holyoke has both a high proportion of minority and low-income residents, and over forty sites with oil and/or hazardous material contamination.<sup>237</sup>

MHD specifically targeted two sites as part of the Holyoke SEP.<sup>238</sup> One of the sites involved petroleum contaminated soil, while the other involved a release of fuel and waste oil in both a surface contamination and sub-surface plume.<sup>239</sup> Additionally, MHD owned several facilities in the area that were also being remediated as part of MHD's compliance efforts.<sup>240</sup> These projects would reduce the risk to public health and the environment by remediating contaminated properties for redevelopment and creation of a greenspace for residential use.<sup>241</sup> The remediation effort would remove petroleum and other hazardous contaminants from the soil and groundwater, thereby abating the existing hazardous condition and preventing further migration of existing contaminants.<sup>242</sup>

A similar innovative project involved site assessment and remediation of multiple parcels along the Neponset River watershed, which runs through several environmental justice neighborhoods including Dorchester, Hyde Park, and Mattapan.<sup>243</sup> This project was created pursuant to an agreement with the Trust for Public Land (TPL),<sup>244</sup> whereby MHD would aid TPL in acquiring the contaminated parcels along the river, remediating, and ultimately conveying the properties

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<sup>235</sup> *See id.*

<sup>236</sup> *See id.*

<sup>237</sup> *See id.* Fifty-four percent of the residents in the area targeted by the Holyoke Initiative and MHD SEP earned incomes below the poverty level. *See id.*

<sup>238</sup> *See* MHD SEP 5/1/95, *supra* note 234, at 1.

<sup>239</sup> *See id.*

<sup>240</sup> *See id.*

<sup>241</sup> *See id.*

<sup>242</sup> *See id.*

<sup>243</sup> *See In the Matter of: The Commonwealth of Massachusetts, MHD*, Docket No: RCRA-I-94-1071, Proposal for the Expenditure of Funds to Assess and Remediate Contaminated Land Along the Neponset River Acquired by the Trust for Public Land and Transferred to the Metropolitan District Commission as Part of the Neponset River Greenway Initiative (Dec. 17, 1996) [hereinafter MHD Neponset River Proposal].

<sup>244</sup> TPL is an over 20 year old national nonprofit land conservation organization, based in San Francisco, with regional offices throughout the country. They work with local governments, state and federal agencies, and other nonprofit groups to facilitate the transfer of significant private lands into public ownership. *See id.* at 1.

to the Metropolitan District Commission to provide for public open space.<sup>245</sup> This project was part of a larger initiative, the Neponset River Greenway Initiative, which involved several local citizens groups, state funds and commissions, and national nonprofit groups to build public awareness about, and access to, the Neponset River.<sup>246</sup> The SEP would improve water quality, plant and wildlife habitat, and provide recreational opportunities and river access to the environmental justice communities.<sup>247</sup>

A similar open space recreational development project was approved in another inner-city suburb of Boston.<sup>248</sup> In coalition with the Dudley Street Neighborhood Initiative (DSNI)<sup>249</sup>, a nonprofit community public interest group, MHD would remediate land and build a four season greenhouse in the Dudley Street area of Roxbury.<sup>250</sup> This type of SEP was particularly innovative because the community was involved in developing the SEP through the MHD's coalition with the local community organizations.<sup>251</sup> Unlike previous SEPs that may have had after-the-fact benefits for a community once the defendant made improvements to its own site, in these cases the community was the primary basis of the remedial effort, with benefits flowing directly to the community affected by the defendant.<sup>252</sup>

EPA approved another similar community-based remediation project in the city of Lawrence, where MHD would work in coalition with the City, EPA, and DEP to assess, cap, and convert a former incinerator site and adjacent incinerator residue landfill into a multi-use

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<sup>245</sup> See *id.* Several of the proposed parcels were inactive commercial and industrial properties. See *id.* at 2.

<sup>246</sup> See *id.* at 1.

<sup>247</sup> See MHD Neponset River Proposal, *supra* note 243, at 1.

<sup>248</sup> See *In the Matter of: The Commonwealth of Massachusetts, MHD*, Docket No: RCRA-I-94-1071, Proposal for the Expenditure of Funds to Assess and Remediate Contaminated Land in the Dudley Street Neighborhood and to Design and Construct a Four Season Community Greenhouse in Coordination with the Dudley Street Neighborhood Initiative (May 20, 1997), at 1 [hereinafter MHD Dudley Street Proposal].

<sup>249</sup> DSNI, a collaborative group of over 2,000 residents, social service agencies, businesses, and religious institutions, was the first grassroots community organization in the country to gain eminent domain authority in order to transform vacant lots into either green spaces or parcels capable of redevelopment. See *id.*

<sup>250</sup> See *id.* The Dudley Street neighborhood is one of the poorest in Massachusetts, with a per capita income of less than \$9,000. It contains 54 state-listed hazardous waste sites, which equals nine percent of Boston's waste sites in an area that houses just four percent of the population. See *id.*

<sup>251</sup> See *id.* at 2.

<sup>252</sup> See MHD Dudley Street Proposal, *supra* note 248, at 2.

recreational area along the Merrimack River.<sup>253</sup> This SEP would accomplish multiple environmental goals such as preventing further pollution of the Merrimack by remediating the former landfill, reducing risks to human health, and creating natural open-space recreational opportunities to an economically disadvantaged, diverse, urban population.<sup>254</sup>

These SEPs pushed the boundaries of the nexus requirements as defined by the 1991 EPA SEP Policy.<sup>255</sup> Given the controversy surrounding SEPs and particularly the nexus requirement, such EPA efforts could have threatened the viability of settlement negotiations.<sup>256</sup> However, at the same time, the MHD SEPs were comporting with a shift in the federal government that recognized the need for emphasis on environmental justice and creative solutions to environmental problems.<sup>257</sup>

In February, 1994, President Clinton issued Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.<sup>258</sup> This order greatly bolstered EPA's latitude in formulating SEPs because it specifically directed federal agencies to integrate environmental justice issues into agency policy.<sup>259</sup> By incorporating environmental justice and community-based remediation projects, the MHD SEPs were able to achieve these goals prior to EPA's formal incorporation of E.O. 12898 into its Revised SEP Policy.<sup>260</sup> The innovative aspects of the MHD SEPs can thus be highlighted through the changes that were incorporated into the Interim Revised EPA Supplemental Environmental Projects Policy that was released in the spring of 1995 following the MHD settlement.<sup>261</sup>

### B. *The 1995 Revised SEP Policy*

Although the 1995 Revised Policy became effective May 8, 1995, after some of the MHD SEPs had already been approved, several of

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<sup>253</sup> See MHD SEP 1/3/95, *supra* note 225.

<sup>254</sup> See *id.*

<sup>255</sup> Compare MHD SEP Proposals *supra* notes 225–54 with EPA 1991 SEP Policy, *supra* note 153.

<sup>256</sup> See *supra* note 217 and accompanying text.

<sup>257</sup> See Exec. Order No. 12898, 30 WEEKLY COMP. PRES. DOC. 276 (Feb. 11, 1994).

<sup>258</sup> See *id.*

<sup>259</sup> See *id.*

<sup>260</sup> See generally EPA 1995 SEP Policy, *supra* note 223.

<sup>261</sup> See *id.* at 2, 7–8.

MHD's proposals were not approved until after that time and were thus considered under the new policy.<sup>262</sup> The new key language of the Revised Policy follows right after the background section and is titled "Pollution Prevention and Environmental Justice."<sup>263</sup> The Policy acknowledges "the concerns, as expressed in Executive Order 12898 on environmental justice, that certain segments of the nation's population are disproportionately burdened by pollutant exposure."<sup>264</sup> It further states that "because environmental justice is not a specific technique or process but an overarching goal, it is not listed as a category of SEP; but EPA encourages SEPs in communities where environmental justice may be an issue."<sup>265</sup> Another notable addition was a new category entitled "Emergency Planning and Preparedness" that emphasizes projects similar to the MHD CAMEO project.<sup>266</sup>

### C. *The 1998 Final SEP Policy*

On May 1, 1998, EPA released the Final EPA SEP Policy which supersedes the 1995 Interim Revised Policy.<sup>267</sup> As the introductory memorandum indicates, the new policy is "a product of almost three years of experience implementing and fine-tuning the 1995 Interim Revised SEP Policy."<sup>268</sup> The Final Policy basically maintains the same structure and operation of the Interim Policy while attempting to clarify some of the language and principles.<sup>269</sup> EPA has attempted to refine and clarify the policy in order to "better assist it in exercising its enforcement discretion to establish appropriate settlement penalties and supplemental environmental projects that secure significant environmental and public health improvements."<sup>270</sup> Thus, the stated primary purpose of the policy is still to obtain environmental and public health protection and improvements that may not otherwise occur without the settlement incentives provided by the policy.<sup>271</sup>

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<sup>262</sup> See *id.* at 1.

<sup>263</sup> See *id.* at 2.

<sup>264</sup> *Id.*

<sup>265</sup> See EPA 1995 SEP Policy, *supra* note 223, at 2.

<sup>266</sup> See *id.* at 9.

<sup>267</sup> See EPA 1998 SEP Policy, 63 Fed. Reg. at 24796.

<sup>268</sup> See 29 Env't Rep. (BNA) 77 (May 1, 1998) (citing EPA Memorandum Letter, Issuance of Final Supplemental Environmental Projects Policy, April 10, 1998).

<sup>269</sup> See *id.*; EPA 1998 SEP Policy, 63 Fed. Reg. at 24796.

<sup>270</sup> EPA 1998 SEP Policy, 63 Fed. Reg. at 24796.

<sup>271</sup> See *id.*

Some of the significant changes include the creation of an "other" category to include otherwise-beneficial projects that do not fit neatly into any of the previously allowable categories,<sup>272</sup> a more defined penalty calculation methodology,<sup>273</sup> and a more clearly defined and revised nexus guideline that makes projects easier to implement by making the nexus easier to apply.<sup>274</sup>

However, one of the most significant additions, in light of the projects implemented under the MHD settlement, is the addition of a new guideline that both encourages and rewards the use of community input to develop projects.<sup>275</sup> The new policy states that seeking input on project proposals from the local community that may have been adversely impacted by the violation may better address the needs of the impacted community, promote environmental justice, produce better community understanding of EPA enforcement, and improve relations between the community and the violating facility.<sup>276</sup> While representatives from community groups will not be able to participate directly in the settlement negotiations, the potential for implementation of community input is at least another step forward in attempts to more efficiently and effectively redress adversely impacted communities.<sup>277</sup>

## CONCLUSION

Many factors have contributed to the eventual shift that has taken place within federal agencies and enforcement groups regarding the incorporation of means to achieve environmental justice and the use of SEPs to carry out this mission: the success of SEPs in the formative years between the 1991 and 1995 Policies,<sup>278</sup> The President's Executive Order 12898,<sup>279</sup> a new EPA Administrator who continued to see the value in creative solutions to achieve pollution prevention,<sup>280</sup> the unusual coalition of supporters for the SEP program,<sup>281</sup> the continuing disparity of hazardous exposures between low and high income com-

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<sup>272</sup> See *id.* at 24800-01.

<sup>273</sup> See *id.* at 24801-02.

<sup>274</sup> See *id.* at 24798.

<sup>275</sup> See EPA 1998 SEP Policy, 63 Fed. Reg. at 24803.

<sup>276</sup> See *id.*

<sup>277</sup> See *id.*

<sup>278</sup> See *supra* notes 192-97 and accompanying text.

<sup>279</sup> See *supra* notes 258-60 and accompanying text.

<sup>280</sup> See *supra* notes 215-16 and accompanying text.

<sup>281</sup> See *supra* notes 197-200 and accompanying text.



munities,<sup>282</sup> the most recent 1998 SEP Policy Guidelines,<sup>283</sup> and perhaps most notably the failure of traditional litigation-based federal enforcement measures to either effectively prevent exposures to pollution and hazardous substances or adequately remediate communities affected by such exposures.<sup>284</sup>

Given the flurry of dynamics that began in the 1970s with the enactment of RCRA and CERCLA and has come full circle in the latter half of the 1990s as we once again rethink the efficacy of these statutes, it is easy to lose sight of some of the small but bold steps that have been taken to fight environmental degradation.<sup>285</sup> The MHD settlement and community-based SEPs that the EPA employed may not appear so novel since the enactments of the Revised Policy and the most recent Final Policy, which specifically endorse such goals as environmental justice and community remediation.<sup>286</sup> However, they were most controversial at the time of their enactment in 1994.<sup>287</sup> Keeping the Department of Justice out of the settlement talks (and the majority of the MHD money in Massachusetts and out of the U.S. Treasury), as well as the Washington EPA office and the Massachusetts Attorney General's office, and then seeking approval for millions of dollars of fairly radical SEPs that strained the traditional nexus requirements was not all achieved with immediate support as a resounding blow against environmental pollution.<sup>288</sup> The Department of Justice still has less incentive to support an SEP program because it means less money will be going into the U.S. Treasury from enforcement actions.<sup>289</sup>

However, as Region I EPA Administrator John DeVillars noted, "this approach should serve as a model for obtaining environmental

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<sup>282</sup> See generally discussion of MHD SEPs, *supra* Section IV (discussing environmental justice).

<sup>283</sup> See EPA 1998 SEP Policy, 63 Fed. Reg. at 24796.

<sup>284</sup> See *supra* Section I; notes 104-08 and accompanying text.

<sup>285</sup> See generally 28 Env't Rep. (BNA) S-15 (Jan. 16, 1998) (RCRA reform sought to streamline and improve efficiency of corrective action program . . . [that] is used reluctantly by industry because of what parties from all sides see as cumbersome administrative requirements); 28 Env't Rep. (BNA) 1343 (Nov. 7, 1997) (costly and timely RCRA requirements under corrective action encourage some owners to abandon sites or leave waste in place rather than face RCRA requirements); 26 Env't Rep. (BNA) 1898 (Feb. 2, 1996) (RCRA reform sought to increase efficiency and flexibility).

<sup>286</sup> See *supra* notes 261-65, 275-77 and accompanying text.

<sup>287</sup> See *supra* notes 255-56 and accompanying text.

<sup>288</sup> See Brown Interview 2/8/98, *supra* note 63.

<sup>289</sup> See *infra* notes 8-10, 209 and accompanying text.

compliance . . . all across the country."<sup>290</sup> Statutes such as CERCLA are too time-consuming and costly to adequately protect the public from both short and long-term effects of hazardous exposures.<sup>291</sup> RCRA's corrective action program was a step in the right direction in that EPA can at least force hazardous waste generators to timely respond to releases of hazardous constituents.<sup>292</sup> But even this federal remedy takes time and money, and may not adequately remediate the more diffuse off-site results of hazardous releases.<sup>293</sup>

Dispute resolution, as evidenced by the MHD settlement, can cut down critical periods of time that might otherwise be lost to litigation, thus mitigating increased harms from hazardous releases.<sup>294</sup> Furthermore, dispute resolution can frequently go beyond the remedies available through traditional adjudicated enforcement actions.<sup>295</sup> The use of SEPs can frequently be the best possible means of redressing harms to citizens of an affected community.<sup>296</sup> SEPs can go beyond on-site remediation of a defendant's property and directly provide for community remediation and restoration, and furthermore increase the safety and health of the community as a whole through preventive measures.<sup>297</sup>

However, SEPs place a heavy burden on EPA and all parties involved to ensure their appropriate design and use.<sup>298</sup> The development of statutes such as RCRA evidence a cyclical shift in the appropriateness and amount of discretion that has been afforded to EPA.<sup>299</sup> Periods of inability to appropriately adopt and enforce regulations resulted in Congressional mandates that limited EPA discretion.<sup>300</sup> Then, as rigid enforcement mechanisms under CERCLA began to break down the effectiveness of enforcement actions, greater discre-

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<sup>290</sup> See Allen, *supra* note 2.

<sup>291</sup> See *supra* notes 71-73, 78 and accompanying text.

<sup>292</sup> See *supra* Section I.C and accompanying notes.

<sup>293</sup> See *supra* notes 103-08 and accompanying text.

<sup>294</sup> See generally Exec. Order No. 12988, Civil Justice Reform, Feb. 5, 1996 (urging resolution of federal claims, where feasible, through informal discussions, negotiations, and settlements rather than formal court proceedings in order to facilitate just and efficient resolution of civil claims).

<sup>295</sup> See *supra* notes 152, 271 and accompanying text.

<sup>296</sup> See *supra* notes 152, 271, Section III and accompanying text.

<sup>297</sup> See *supra* Sections III-IV.

<sup>298</sup> See *supra* notes 217-19 and accompanying text.

<sup>299</sup> See *supra* notes 44-46, 54, 70, 82, 106-08 and accompanying text.

<sup>300</sup> See *supra* notes 43-50 and accompanying text.

tion was given to EPA to tailor remedies under RCRA corrective action measures.<sup>301</sup>

Such a dynamic has been developing through EPA's employment of SEPs as well. While oversight is critical to ensure the SEP program continues to attain breakthrough achievements in creative and effective settlement agreements, the unique ability of SEPs to respond to the individual circumstances of environmental problems must be maintained. Thus, while litigation remains an effective tool to apply pressure and force action in some cases, dispute resolution and creative settlements should become the goal in the new generation of environmental enforcement.<sup>302</sup> The use of SEPs is only one advantage to dispute resolution, as SEP provisions could be written into federal statutes and become an everyday part of adjudicated relief. Dispute resolution also saves time and money.<sup>303</sup> All of these qualities, as evidenced by the MHD settlement, are the most effective means of responding to environmental crises. Apart from outright prevention, dispute negotiation and community remediation through creative settlements and SEPs continue to be one of the most effective means of preserving and protecting human health and the environment.

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<sup>301</sup> See *supra* notes 53-54, 70, 80-82 and accompanying text.

<sup>302</sup> See *supra* notes 97-98, 110, 125, 290 and accompanying text.

<sup>303</sup> See *supra* notes 104-09, 294.