DOCKET NO. CV-08-4035242-S

GINA MCCARTHY, COMMISSIONER OF ENVIRONMENTAL PROTECTION,	:	SUPERIOR COURT
V.	:	JUDICIAL DISTRICT OF HARTFORD
KOHLER MIX SPECIALTIES, LLC	:	JANUARY 11, 2012

JOINT MOTION FOR ORDER IN ACCORDANCE WITH STIPULATION

The parties to the above-captioned action, plaintiff Daniel C. Esty, Commissioner of Energy and Environmental Protection (formerly Commissioner of Environmental Protection)[1] and defendant Kohler Mix Specialties, LLC, hereby respectfully move that this Court grant this motion and enter Judgment in the above-captioned matter in accordance with the attached stipulation of the parties.

[1] Public Act 11-80, effective July 1, 2011, established the Department of Energy and Environmental Protection as the successor agency to the Department of Environmental Protection.

ORAL ARGUMENT NOT REQUESTED
TESTIMONY NOT REQUIRED

PLAINTIFF

DANIEL C. ESTY
COMMISSIONER OF ENERGY AND ENVIRONMENTAL PROTECTION

GEORGE JEPSEN
ATTORNEY GENERAL

BY: Sharon Seligman

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DEFENDANT

KOHLER MIX SPECIALTIES, LLC

BY: _____

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ORDER

The foregoing Motion for Order in Accordance with Stipulation having been duly heard, it is hereby: ~~GRANTED~~/DENIED

1/11/12
Date

Judge of the Superior Court
(M. Hon. J.)

CERTIFICATION

I hereby certify that, on this date, a copy of the foregoing Joint Motion for Order in Accordance with Stipulation, and the attached Stipulated Judgment, were sent via first class mail, postage pre-paid and electronic mail to the following:

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Halloran & Sage LLP
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Hartford, CT 06103

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Sharon Seligman

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V.	:	JUDICIAL DISTRICT OF HARTFORD
KOHLER MIX SPECIALTIES, LLC	:	JANUARY 11, 2012

STIPULATED JUDGMENT

Daniel C. Esty, Commissioner of Energy and Environmental Protection, formerly the Commissioner of Environmental Protection,[1] Plaintiff and Kohler Mix Specialties, LLC, Defendant, the parties to the above-captioned action, hereby stipulate and agree that judgment may enter as follows:

WHEREAS, the Plaintiff is the Commissioner of Energy and Environmental Protection (the "Commissioner") for the State of Connecticut and, as such, is charged with supervision and enforcement of the statutes of the State of Connecticut respecting the environment, including Conn. Gen. Stat. Ch. 446k governing water pollution, and is generally empowered by virtue of Conn. Gen. Stat. Section 22a-6(a)(3) to institute all legal proceedings necessary to enforce statutes, regulations, permits or orders administered, adopted or issued by the Commissioner; and

WHEREAS, the defendant, Kohler Mix Specialties, LLC (hereinafter "Kohler" or the "defendant"), a limited liability company organized under the laws of the State of Delaware, and

[1] Effective July 1, 2011, Public Act No. 11-80 established the Department of Energy and Environmental Protection as the successor agency to the Department of Environmental Protection.

registered to do business in Connecticut as a foreign limited liability company, conducts business as a specialty dairy manufacturer at a facility located at 100 Milk Lane in Newington, Connecticut (the "Kohler Facility"); and

WHEREAS, on or about May 8, 1998, the Commissioner issued State Permit No. SP0002278 (the "Permit") to H.P. Hood Inc. for the discharge of treated dairy manufacturing wastewater into the Metropolitan District Commission sanitary sewer system, subject to the requirements of the Permit and the applicable water pollution control laws and regulations, which Permit was subsequently modified on June 22, 1998; and

WHEREAS, on or about July 16, 1999, the Commissioner approved the transfer of the Permit to Kohler Mix Specialties of Connecticut, Inc.; and

WHEREAS, on or about July 1, 2004, the Commissioner approved the transfer of the Permit to M-Foods Dairy TXCT, LLC and subsequently to the defendant Kohler Mix Specialties, LLC (hereinafter the "Permit" or "Kohler's Permit"), which Permit was subsequently modified on January 11, 2005 and again on May 7, 2008;

WHEREAS, on January 18, 2008, the Commissioner brought suit against Kohler in the above-captioned matter, alleging, with respect to the Kohler Facility, (1) Kohler's creation or maintenance of a facility or condition that reasonably can be expected to create a source of pollution to the waters of the state, (2) Kohler's violations of the water pollution statutes and regulations of the state of Connecticut, and (3) Kohler's violations of the terms of Kohler's Permit for the discharge of treated dairy manufacturing wastewater into the Metropolitan District Commission sanitary sewer system;

NOW THEREFORE, the parties, without making admission of law or fact, stipulate and agree that judgment may and shall enter in accordance with the following terms:

WHEREUPON, it is ordered, adjudged and decreed as follows:

I. INTRODUCTORY PROVISION

A. This Judgment applies to and binds Kohler Mix Specialties, LLC, together with its officers, successors, assigns and agents.

II. INJUNCTIVE PROVISIONS

A. A permanent injunction is issued against Kohler, prohibiting it from violating any applicable provisions of the statutes and regulations of the State of Connecticut governing water pollution control, including, but not limited to, any of the statutory (including Conn. Gen. Stat. Chapter 446k), regulatory (including Regulations of Conn. State Agencies § 22a-430-1, *et seq.*) and/or permit provisions (including the Permit) governing water pollution control.

B. Within sixty (60) days from entry of Judgment in accordance with this Stipulation, Kohler shall submit, for the Commissioner's review and written approval, a detailed and comprehensive report identifying all facility and operational improvements (including but not limited to physical plant, engineering, management, organizational, and consultant oversight modifications) implemented by Kohler at the Kohler Facility with regard to its wastewater collection and treatment system and compliance with the terms of the Permit and applicable statutes and regulations governing water pollution control from January 2008 to present.

C. A permanent injunction is issued requiring Kohler to maintain such consultant oversight modifications, implemented at the Kohler facility since January 2008 and as approved by the Commissioner per Section II.B. above, for a minimum of three (3) years from the date of

entry of Judgment in accordance with this Stipulation.

III. CIVIL PENALTY PROVISION

A. A civil penalty is assessed against the defendant, Kohler Mix Specialties, LLC, in the amount of Two Hundred Ninety-Nine Thousand, Nine Hundred Ninety-Nine Dollars and Zero Cents ($299,999.00). The civil penalty shall be made payable as follows:

1. Payment in the amount of One Hundred Ninety-Nine Thousand, Nine Hundred Ninety-Nine Dollars and Zero Cents ($199,999.00) shall be made by certified or bank check made payable to the "Treasurer, State of Connecticut" and forwarded to the undersigned counsel for the Plaintiff at the Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, Connecticut 06141-0120, or as otherwise directed in writing by counsel for the Plaintiff, upon entry of Judgment in this matter by the Superior Court pursuant to this Stipulated Judgment.
2. Pursuant to § 22a-16a of the Connecticut General Statutes, the remaining One Hundred Thousand Dollars and Zero Cents ($100,000.00) shall be payable by the defendant to fund a supplemental environmental project (SEP) or projects, approved in writing by the Commissioner, which project or projects are to be proposed and performed by the Town of Newington for the enhancement of environmental protection or conservation of natural resources (the "SEP Payment"). Any approved project(s) shall be consistent with the Department of Energy and Environmental Protection's Policy on Supplemental

Environmental Projects dated March 25, 1993 and revised February 15, 1996, a copy of which is attached hereto as **Attachment A.**

a. Upon written approval by the Commissioner of any such project(s), the defendant shall make that portion of the SEP Payment applicable to such project to the Town of Newington within fifteen (15) days of receipt from the Commissioner of written notice to do so, in accordance with the terms of such notice.

b. On or before December 15, 2013, unless otherwise specified by the Commissioner in writing, the defendant shall remit the remaining balance of the SEP Payment, if any, upon the Commissioner's written request, by delivering to the undersigned counsel for the Plaintiff at the Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, Connecticut 06141-0120 the unpaid portion in the form of a certified or bank check payable to the "Commissioner of Energy and Environmental Protection." The check shall state on its face, "Kohler Mix Specialties, LLC – Statewide SEP Account."

c. The defendant shall not claim or represent that any SEP payment made pursuant to this Stipulated Judgment constitutes an ordinary business expense or charitable contribution or any other type of tax deductible expense, and the defendant shall not seek or obtain any other tax benefit such as a tax credit as a result of the payment under this Section III.A.2.

d. If and when the defendant disseminates any publicity, including but not limited to any press release regarding funding an SEP, the defendant shall include a statement that such funding is in partial settlement of an environmental enforcement action brought by the Commissioner.

B. Nothing in this Section III (Civil Penalty), or in any other part of this Judgment, relieves the defendant from its continuing obligation to comply with the injunctive provisions of this Judgment. The defendant has a continuing obligation to comply with all injunctive provisions regardless of payment or non-payment of the civil penalties required by this Section III.

IV. GENERAL PROVISIONS

A. ***Approvals.*** The defendant shall use best efforts to submit to the Commissioner all documents required by this Stipulated Judgment in a timely manner and in a complete and approvable form. If the Commissioner notifies the defendant that any document or other action is deficient, and does not approve it as submitted or with conditions or modifications, it is deemed disapproved, and the defendant shall correct the deficiencies and resubmit it within the time specified by the Commissioner or, if no time is specified by the Commissioner, within thirty (30) days of the Commissioner's notice of deficiencies. In approving any document or other action under this Stipulated Judgment, the Commissioner may approve the document or other action as submitted or performed or with such conditions or modifications as the Commissioner deems necessary to carry out the purposes of this Stipulated Judgment. Nothing in this paragraph shall excuse noncompliance or delay.

B. ***Definitions.*** As used in this Stipulated Judgment, "Commissioner" means the Commissioner or a designated agent of the Commissioner.

C. ***Site Access.*** The defendant hereby grants reasonable access to the Commissioner to enter the site on which the Kohler Facility is located and to enter the Kohler facility, without liability, for the purpose of inspection, investigation or monitoring compliance with the terms of this Stipulated Judgment or any environmental statutes, regulations, permits or any order administered or issued by the Commissioner.

D. ***Dates.*** The date or date of issuance of this Stipulated Judgment shall be that date on which the court approves and enters such judgment, and the date of submission to the Commissioner of any document required by this Stipulated Judgment shall be the date such document is received by the Commissioner. The date of any notice by the Commissioner under this Stipulated Judgment, including but not limited to notice of approval or disapproval of any document or other action, shall be the date such notice is personally delivered to the defendant, or the date three (3) days after it is mailed by the Commissioner, whichever is earlier. Except as otherwise specified in this Stipulated Judgment, the word "day" as used in this Stipulated Judgment means calendar day. Any document or action that is required by this Stipulated Judgment to be submitted or performed by a date that falls on a Saturday, Sunday, or a Connecticut or federal holiday shall be submitted or performed by the next day that is not a Saturday, Sunday or Connecticut or federal holiday.

E. ***Notification of noncompliance.*** In the event that the defendant becomes aware that it did not or may not comply, or did not or may not comply on time, with any requirement of this Stipulated Judgment or of any document required hereunder, the defendant shall

immediately notify the Commissioner and shall take all reasonable steps to ensure that any noncompliance or delay is avoided or, if unavoidable, is minimized to the greatest extent possible. In so notifying the Commissioner, the defendant shall state in writing the reasons for the noncompliance or delay and propose, for the review and written approval of the Commissioner, dates by which compliance will be achieved, and the defendant shall comply with any dates which may be approved in writing by the Commissioner. Notification by the defendant shall not excuse noncompliance or delay, and the Commissioner's approval of any compliance dates proposed shall not excuse noncompliance or delay unless specifically so stated by the Commissioner in writing.

F. ***Certification of documents.*** Any document, including but not limited to any notice, which is required to be submitted to the Commissioner under this Stipulated Judgment shall be signed and certified by the defendant's duly authorized representative as defined in § 22a-430-3(b)(2) of the Regulations of Connecticut State Agencies, and by the individual(s) responsible for actually preparing such document and each such individual shall certify in writing as follows: "I have personally examined and am familiar with the information submitted in this document and all attachments thereto, and I certify, based on reasonable investigation, including my inquiry of those individuals responsible for obtaining the information, that the submitted information is true, accurate and complete to the best of my knowledge and belief. I understand that any false statement made in the submitted information may be punishable as a criminal offense under § 53a-157b of the Connecticut General Statutes, and other applicable law."

G. ***False statements.*** Any material false statement in any information submitted pursuant to this Stipulated Judgment may be punishable as a criminal offense under Conn. Gen. Stat. § 22a-438 or, in accordance with Conn. Gen. Stat. § 22a-6, under Conn. Gen. Stat. § 53a-157b, and any other applicable law.

H. ***Notice of transfer; liability of Defendant and others.*** Until the defendant has fully complied with this Stipulated Judgment, the defendant shall notify the Commissioner in writing no later than fifteen (15) days after transferring all or any portion of the operations which are the subject of this Stipulated Judgment, the site or any business thereon, or obtaining a new mailing or location address. The defendant's obligations under this Stipulated Judgment shall not be affected by the passage of title to any property to any other person, entity or municipality.

I. ***Commissioner's powers.*** Nothing in this Stipulated Judgment shall affect the Commissioner's authority to institute any proceeding or take any other action to prevent or abate violations of law, prevent or abate pollution, recover costs and natural resource damages, and to impose penalties for violations of law, including but not limited to violations of any order or permit issued by the Commissioner or violations of any statute or regulation over which the Commissioner has enforcement authority. If at any time the Commissioner determines that the actions taken by the defendant pursuant to this Stipulated Judgment have not successfully corrected all violations, fully characterized the extent and degree of any pollution, or successfully abated or prevented pollution, the Commissioner may institute any proceeding allowed by law to require the defendant to undertake further investigation or further action to prevent or abate violations or pollution.

J. ***Defendant's obligations under law.*** Nothing in this Stipulated Judgment shall relieve the defendant of other obligations under applicable federal, state and local law.

K. ***No assurance by Commissioner.*** No provision of this Stipulated Judgment and no action or inaction by the Commissioner shall be construed to constitute an assurance by the Commissioner that the actions taken by the defendant pursuant to this Stipulated Judgment will result in compliance or prevent or abate pollution.

L. ***Notice to Commissioner of changes.*** Within fifteen (15) days of the date the defendant becomes aware of a change in any information submitted to the Commissioner under this Stipulated Judgment, or that any such information was inaccurate or misleading or that any relevant information was omitted, the defendant shall submit the correct or omitted information to the Commissioner.

M. ***Submission of documents.*** Any documents required to be submitted to the Commissioner under this Stipulated Judgment shall, unless otherwise specified in writing by the Commissioner, be directed to:

Marshall A. Hoover
Department of Energy and Environmental Protection
Bureau of Water Management
79 Elm Street
Hartford, Connecticut 06106-5127

N. The defendant shall not be considered in full compliance with this Stipulated Judgment until all actions required herein of the defendant have been completed as approved and to the Commissioner's satisfaction.

O. The terms and conditions of this Stipulated Judgment shall run to and be binding on the defendant, its assigns and successors.

P. ***No effect on rights of other persons.*** This Stipulated Judgment neither creates nor affects any rights of persons or municipalities that are not parties to this Stipulated Judgment.

Q. The Stipulated Judgment resolves all violations alleged as to Kohler Mix Specialties, LLC in the complaint captioned *Gina McCarthy, Commissioner of Environmental Protection v. Kohler Mix Specialties, LLC*, Docket No. CV-08-0829240 S and dated January 18, 2008.

R. ***Recording on land records.*** A copy of this Stipulated Judgment may be recorded on the Land Records of the Town of Newington, Connecticut.

DEFENDANT
KOHLER MIX SPECIALTIES, LLC

By _____
J. Scott Toth

Its Senior Vice President, Operations

Dated: 1·10·12

By _____
Ann M. Catino, Esq.
Halloran & Sage LLP
One Goodwin Square
225 Asylum Street
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Its Attorneys

Dated: 1·11·12

PLAINTIFF

DANIEL C. ESTY,
COMMISSIONER OF ENERGY AND
ENVIRONMENTAL PROTECTION

GEORGE JEPSEN
ATTORNEY GENERAL

BY: _____
Sharon M. Seligman
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Dated: 1·11·12

ATTACHMENT A

March 25, 1993, rev'd
February 15, 1996

POLICY ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Introduction

In the settlement of an environmental enforcement case, the Connecticut Department of Environmental Protection ("Department") will require the alleged violator to achieve and maintain compliance with State environmental laws and regulations and to pay a civil penalty. To further the Department's goals to protect and enhance public health and the environment, in certain instances one or more environmentally beneficial projects, or Supplemental Environmental Projects, may be included in the settlement. While not a formal term of art, the phrase Supplemental Environmental Project ("SEP") refers to a project that may serve in addition to a monetary penalty as the basis for the consensual settlement of an enforcement case. The following is a statement of policy by which the Department will consider exercising a discretionary decision to accept an SEP as part of the settlement of an administrative enforcement case. The Department believes that these projects, if carefully crafted and executed, provide useful environmental benefits beyond what can be secured solely through administrative orders. They can be a particularly useful vehicle in promoting pollution prevention.

Guidance for Discretion

The ultimate decision as to the settlement of an administrative enforcement case rests with the sound discretion of the Commissioner of the Department or his designee. The policies and procedures in this document are intended solely for the preliminary guidance of employees of the Department. They are not intended to, nor do they, constitute rulemaking for the agency, and they may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Department may take an action that is at variance with the policies or procedures contained in this document if the Commissioner or Assistant Commissioner considers it appropriate in a specific case.

A. Criteria for SEP's

A judgment as to the appropriateness of an SEP in a particular case will generally be made in accordance with the following criteria:

1. No Potential for Further Damage to Environment from SEP

SEP's will be allowed only when the Department is satisfied that the SEP could not cause additional damage to the environment or to public health or safety if it is done poorly or if left uncompleted at any time during implementation.

2. Planned, Completed or Required Activities

An SEP will not be allowed for projects which the respondent has already completed, or which the respondent already intends to do or is likely to do.[1] An SEP will also not be allowed for activities which the respondent is required to do by statute, regulation, permit or order or which the Department has the legal authority to require the respondent to do. Under some circumstances, an SEP may provide for accelerated compliance through which a significant environmental benefit is achieved substantially sooner than is otherwise required by law (see discussion under the section entitled, "Pollution Reduction Projects" below).

3. Relationship to Monetary Penalty

An SEP will not totally displace a monetary penalty[2]. A monetary penalty is still necessary

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[1] Since the primary purpose of this Policy is to obtain environmental or public health benefits that may not have occurred "but for" the settlement, projects that have been started before the Department has identified a violation, or before the Department has initiated resolution discussions with the respondent, are not eligible as SEP's. Projects that have been committed to or started before the identification of a violation or initiation of enforcement resolution discussions may mitigate the penalty in other ways. Depending on the facts of the particular case, if a company had initiated environmentally beneficial projects before the enforcement process commenced, the initial penalty calculation could be lower due to the lack of recalcitrance, no history of other violations, good faith efforts, lesser severity of the violations, or shorter duration of the violations.

[2] Under the following circumstances, the Department may allow an SEP constituting a 100%, dollar-for dollar penalty offset: (1) the proposed SEP constitutes a pollution prevention or pollution reduction/waste minimization project; (2) the respondent's compliance history does not suggest a practice or pattern of non-compliance with environmental laws; and (3) the proposed penalty does not exceed fifteen thousand dollars ($15,000). The Department may also consider

in order to assure that the Department's enforcement actions are effective in deterring future violations by this respondent and others in the regulated community. Penalties also help ensure a level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Penalties also encourage companies to adopt pollution prevention and recycling techniques, so that they minimize their pollutant discharges and reduce their potential liabilities. Accordingly, a settlement of a case that warrants a penalty under the Department's Enforcement Response Policy shall include a monetary penalty, calculated according to the Department's Civil Penalty Policy, when adopted, which is set at a level that captures the respondents's economic benefit of non-compliance plus some appreciable portion of the gravity component of the penalty.

The degree to which the gravity component of the monetary penalty shall be adjusted to reflect the cost of the SEP shall be left to the discretion of the Department. The Department will deem the cost of a proposed SEP to be its projected cost after taxes. The respondent will be required in the consent order to agree that it will not seek or take any federal or state tax deduction, credit or benefit from the SEP. The Department will require the respondent (and generally an independent Certified Public Accountant on behalf of the respondent) to calculate the net present after-tax value of the project and certify under penalty of law that this calculation is correct (Conn. Gen. Stat. Sections 22a-6 and 53a-157 make a knowing false statement criminally actionable).

4. Availability of Resources

It is necessary for the Department to consider the availability of resources in deciding whether to accept an SEP:

a) The estimated amount of Department time and resources required for effective negotiation and drafting of SEP provisions in a consent order and for oversight by the Department of SEP implementation is an extremely important criterion to use in determining whether to include the SEP in a settlement. In addition, in deciding whether to allow an SEP or in designing the form of an SEP, the Department must consider the impact on its own programs. An otherwise eligible SEP will not be allowed if it may be inconsistent with any of the Department's ongoing programs or if it would impose a burden on a DEP program which that program is unable to assume because of resource constraints.

b) The Department will also consider whether the respondent has the technical and economic resources needed to successfully complete the SEP, and will not allow the SEP unless

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full penalty mitigation by means of an SEP when the respondent is an agency, board, commission, council or department of the state, a municipality, or a non-profit organization.

the respondent has those resources. In an appropriate case, the respondent may hire outside technical help for the proposed SEP.

5. Available Only if Violations and Pollution Corrected

An SEP may be considered only if violations and all pollution created or threatened by the violations are fully corrected and abated or will be fully corrected and abated in a timely manner under an enforceable consent order. A respondent will not be given additional time to correct the violation or pollution and return to compliance in exchange for conducting an SEP.

6. Relationship to Violation ("Nexus" Requirement)

Generally, an SEP will be approved if the Commissioner determines there is a direct and appropriate relationship between the nature of the violation(s) and the environmental benefits to be derived from the SEP. Alternatively, the Commissioner may approve an SEP which, while lacking a direct nexus to the violation, either furthers the Department's statutory mission or reduces the likelihood of future violations similar to those at issue. The Department prefers SEP's with a direct nexus.

To constitute a "direct nexus" SEP, the SEP must: (i) improve the environment injured by the violation; (ii) reduce the total risk posed to public health or the environment by the violation; (iii) result in the restoration of natural or man-made environments from the actual or potential damage resulting from the violation; or (iv) protect natural environments from actual or potential damage resulting from the violation.

An "indirect nexus" SEP is an SEP consistent with this policy that substantially furthers the Department's statutory mission or reduces the likelihood of future violations similar to those at issue.

7. Initiation

The proposal to do an SEP may be initiated by either the respondent or, with the approval of the program bureau chief, by the Department The burden of developing the SEP and convincing the staff of its benefits and likelihood of success of the SEP is the responsibility of the respondent. An SEP proposal may be made at any time during an enforcement action, although the Department should consider both the status of the action and the resources that have been committed to it before deciding whether to accept an SEP. Who in the Department has ultimate authority to approve an SEP is discussed in Section C entitled Level of Approval, below.

8. Compliance History

The respondent's compliance history and capacity to successfully and promptly complete the project must be examined during evaluation of a proposed SEP. A respondent who is a repeat offender will be a less appropriate candidate for an SEP than a first-time offender, since a repeat offender has already demonstrated an inability or unwillingness to meet environmental requirements.

9. Third Party Oversight

SEP's may require third-party oversight. In such cases, these oversight costs should be borne by the respondent, and he or she must agree as a part of the settlement to pay for an independent, third-party auditor acceptable to the Department to monitor the status of the SEP.[3] The respondent will be required by the settlement to assure that the auditor submits detailed periodic reports directly to the Department, including a final report evaluating the success or failure of the supplemental project.

10. Compliance with SEP

The consent order shall specify time-specific milestones to be met in implementing the SEP, including a completion date. If the respondent does not comply satisfactorily with the terms of the SEP, he or she shall be liable for the amount by which the assessed penalty was reduced , with interest, plus an additional ten per cent charge to cover the administrative costs incurred by the Department in reviewing and approving the failed SEP. The consent order must contain a mechanism for assuring prompt payment, e.g., through stipulated additional penalties for non-payment of the amount of the penalty reduction or the posting of a letter of credit or other acceptable financial security (in the amount by which the assessed penalty was reduced) to be forfeited if the SEP is not fully implemented as approved. Financial security is particularly appropriate when the staff thinks the respondent might use a SEP commitment to delay the payment of a penalty until after the respondent places its assets out of reach or dissolves.

11. Main Beneficiary of SEP

The Department's interest in considering SEP's is to ameliorate the adverse public health and/or environmental impacts of violations. Projects are not intended to reward respondents for undertaking activities that are in their economic self interest (e.g., updating or modernizing a plant to become more competitive). Therefore, a SEP will not be approved when the respondent, rather than the public, is likely to receive the substantial share of the benefits of the SEP. However, an otherwise eligible SEP will not be disapproved simply because it contains ultimate

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[3] In certain cases (e.g., inland wetland violations), it may be appropriate for another governmental agency to oversee implementation of the SEP if such oversight is acceptable to the Department and the other agency is willing to do it.

economic benefits to the respondent. Indeed, a legitimate purpose of an SEP may be to provide economic incentives to prevent pollution. If the Department believes that a respondent may get a significant economic benefit from a proposed SEP, the respondent must demonstrate to the Department's satisfaction that (1) he or she would not undertake the project without the additional incentive of including it in the enforcement settlement, and (2) the public health and environmental benefits are substantial and that the public interest would be best served by providing this additional incentive.

12. Benefit to DEP Programs

SEP's shall not be used for the primary purpose of obtaining additional DEP resources that are capable of being obtained through ordinary legislative or administrative means (e.g., hiring staff or buying equipment). However, an otherwise eligible SEP will not be disallowed simply because it has the incidental effect of supplementing the Department's resources (e.g., respondent funding an environmental enhancement project which is consistent with the goals of a DEP program but beyond the ability of the Department to fund or perform, and which meets the other criteria in this policy).

B. Categories of Eligible SEP's

Eight categories of SEP's will be considered, subject to meeting the criteria described in preceding sections. Of the eight categories identified below, pollution prevention projects are preferred, especially a pollution prevention project that positively impacts communities where environmental equity[4] may be an issue.

1. Pollution Prevention Projects

A pollution prevention project reduces or prevents the generation or creation of pollutants through source reduction, or through application of closed-loop processes.

For purposes of this policy, "source reduction" is any practice that reduces the amount of hazardous substance, pollutant or contaminant enters any waste stream or is otherwise released into the environment prior to recycling, treatment, or disposal. Source reduction may include equipment or technology modifications, process or procedure modifications, reformulation or

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[4] Since 1993, it has been the Department's written policy that no segment of the population should, because of racial or economic makeup, bear a disproportionate share of the risks and consequences of environmental pollution or be denied equal access to environmental benefits. The Department is committed to incorporating environmental equity into its policy making and its regulatory activities.

redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project that protects natural resources through conservation or increased efficiency in the use of energy, water or other materials. "Closed loop processes", wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on site, are a type of pollution prevention.

In all cases, for a project to constitute pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution released to the environment, not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency (conservation) in the use of energy, water or other materials.

2. Pollution Reduction/Waste Minimization Projects

A pollution reduction/waste minimization project is defined as a project that goes substantially beyond compliance with environmental legal requirements to further reduce the amount of pollution that would otherwise be discharged into the environment. The distinction between pollution prevention and pollution reduction/waste minimization is that the former is addressed to a change in the generation of pollutants as part of the industrial process whereas the latter is addressed solely at a reduction in the level of pollutants at the point of discharge or emission (e.g., end of pipe). Under some circumstances, an acceptable pollution reduction project may encompass an accelerated compliance schedule, under which the respondent would significantly reduce pollution by complying with an existing or proposed statutory or regulatory requirement substantially sooner than is required by law. Such "accelerated compliance" projects are not allowable, however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the respondent for early compliance.

3. Public Health Projects

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

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

4. Environmental Restoration and Protection Projects (Environmental Enhancement Projects)

An environmental enhancement project is a project that goes beyond repairing the damage done to the environment because of the violation, and enhances the environment in the vicinity of the harm caused by the violation. These projects may be used to restore or protect natural environments (such as ecosystems) and man-made environments, such as facilities and buildings, that are geographically removed from the violation. Included is any project that protects the ecosystem from degradation or improves the overall condition of the ecosystem.

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

5. Environmental Assessment and Auditing Projects

An environmental auditing project may constitute an acceptable SEP. Environmental auditing that simply represents general good business practice is not acceptable under this policy.[5] However, such a project may be considered as an SEP if the respondent undertakes additional auditing practices designed to correct existing management and/or environmental practice deficiencies that appear to be contributing to recurring or potential violations at the facility at issue and at other facilities owned or operated by the same respondent. In general, audits are acceptable as SEP's only when the respondent is a small business or government entity.[6] These assessments and audits are acceptable as SEP's only when the respondent agrees to provide the Department with a copy of the audit or assessment results certified under penalty of law.

There are four types of projects in this category: (a) pollution prevention assessments; (b) site assessments; (c) environmental management systems audits; and (d) compliance audits.

(a) Pollution prevention assessments are systematic, internal reviews of specific

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[5] It should be noted that the Department has the authority to unilaterally order a respondent to perform environmental audits when, given the facts of the case and the compliance history of the respondent, the Department deems the audits necessary to assure continued compliance. Staff should talk to the Department's counsel in cases where such a requirement in an order would be appropriate.

[6] For purposes of this policy, a small business is one that employs 100 or fewer individuals. Government entities are state departments and agencies, municipalities, or other political subdivisions of the state.

processes and operations designed to identify and provide information about opportunities to reduce the use, production, and generation of toxic and hazardous materials and other wastes.

(b) Site assessments are investigations of the condition of the environment at a site or of the environment impacted by a site, and/or investigations of threats to human health or the environment relating to a site. A site assessment of an appropriate site other than the site where the subject violation occurred may constitute an approvable SEP. Site assessments include but are not limited to: investigations of levels and/or sources of contamination in any environmental media at a site; investigations of discharges or emissions of pollutants at a site, whether from active operations or through passive transport mechanisms; ecological surveys relating to a site; natural resource damage assessment; and risk assessments. To be eligible for SEP's, such assessments must be conducted in accordance with recognized protocols, if available, applicable to the type of assessment to be undertaken.

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

(d) An environmental compliance audit is an independent evaluation of a respondent's compliance status with environmental requirements. The value of an environmental compliance audit for purposes of penalty mitigation under this policy is limited to the costs associated with conducting the audit. While the SEP should require all violations discovered by the audit to be promptly corrected, no credit is given for remedying the violation since persons are required to achieve and maintain compliance with environmental requirements.

6. Enforcement-Related Environmental Public Awareness Projects

These projects are defined as publications, broadcasts, or seminars that underscore for the regulated community the importance of complying with environmental laws or disseminate technical information about the means of complying with environmental laws. Permissible public awareness projects may include sponsoring and funding industry-wide seminars directly related to correcting widespread or prevalent violations within an industry, a media campaign to discourage others from similar violations, or a series of public service announcements describing how violations were corrected at a facility through the use of innovative technology and how similar facilities could also implement these production changes. Such projects must be related to the type of violations which are/were the subject of the enforcement action.

Respondents who fund or implement a public awareness project must also agree to publicly state in a prominent manner that the project was undertaken as part of the settlement of an action brought by the Department. [7]

7. Emergency Planning and Preparedness

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

8. Indirect Nexus Projects

An indirect nexus SEP is an SEP consistent with this policy that substantially furthers the Department's statutory mission or reduces the likelihood of future violations similar to those the subject of the pending enforcement action.

Examples of SEP's with an adequate indirect nexus include, in no particular order, the following:

- the purchase of open space for a not-for-profit third party (e.g. Nature Conservancy, local land trusts) to protect natural resources, preserve scenic landscapes and historical resources, or offer public recreational opportunities;
- funding greenway[8] development by a municipality or not-for-profit third party;
- funding an enforcement related public awareness project, as described above;
- funding research projects relating to environmental protection or conservation of natural resources at a site other than that at which the violation took place;
- provide a suitable fishway to a dam or other artificial obstruction;

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[7] For all other categories of eligible SEP's, if and when the respondent disseminates publicity regarding its funding of the SEP, respondent shall include a statement that such funding is in partial settlement of an enforcement action brought by the Commissioner.

[8] For purposes of this policy, "greenway" means a corridor of open space that: (1) may protect natural resources, preserve scenic landscapes and historical resources or offer opportunities for recreation or non-motorized transportation; (2) may connect existing protected areas and provide access to the outdoors; or (3) may be a greenspace along a highway or around a village.

- fish and wildlife habitat restoration;
- wetlands restoration;
- funding a household hazardous waste collection day;

Note: As noted above, the preceding eight categories give general guidance for the exercise of discretion, and a given SEP is not necessarily disqualified because it does not fit perfectly within the definition of any one of them. The following types of projects will not be allowed:

1. A project unrelated to the enforcement action, but otherwise beneficial to the community (e.g., contributing to local charity).

2. A study performed for the benefit of the respondent, unless there is a corresponding commitment in the consent order to promptly carry out the results of the study[9] (e.g., pollution prevention measures) upon approval by the Department, and the purpose of the study falls within one of the categories of acceptable SEP's discussed in this policy.

C. Level of Approval

Although this policy is intended to be used by all staff, an SEP may not be allowed without the specific approval of the Commissioner or Assistant Commissioner.

In order that staff time be used efficiently in the consideration of an SEP that has not yet received final approval, DEP personnel are encouraged to act as follows: In a major case, an SEP proposal should be taken directly to your bureau chief. In all other cases, staff are encouraged to discuss a proposed SEP at an early stage with their supervisors up to the level of division director. Staff will not initiate the proposal of an SEP to a respondent without the prior approval of the division director. If the division director rejects an SEP proposed by a respondent, it shall not be further pursued by staff. If a division director approves an SEP, it may be pursued by staff; the ultimate decision, however rests with the Commissioner or the Assistant Commissioner, and it is staff's responsibility during negotiations to inform the respondent of that fact.

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[9] If the results are not implemented, the penalty reduction would be automatically rescinded and the penalty would have to be paid in full, with interest, plus an additional ten percent charge to cover the administrative costs incurred by the Department in reviewing and approving the failed SEP.

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