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3. Supplemental Environmental Projects

EPA has determined that the owner of a manufacturing facility violated both CERCLA and EPCRA by failing to report the accidental release of a CERCLA hazardous substance in a timely and truthful manner. In order to reduce the dollar amount of the penalty, the owner has negotiated with EPA to perform a supplemental environmental project (SEP) as part of the settlement. How does EPA take the SEP cost into account when calculating the final penalty for a settlement that includes a SEP?

EPA has broad discretion to settle environmental enforcement cases with appropriate penalties. To further EPA's goal to protect and enhance public health and the environment, a settlement may also include a supplemental environmental project (SEP). SEPs are environmentally beneficial projects which the violator agrees to undertake in settlement of an enforcement action, but which the violator is not otherwise legally required to perform. Evidence of a violator's commitment and ability to perform a SEP is a relevant factor for EPA to consider in establishing an appropriate settlement penalty, but whether the Agency decides to accept a proposed SEP as part of a settlement, and the amount of any penalty mitigation that may be given for a particular SEP, is purely within EPA's discretion. The EPA Supplemental Environmental Projects Policy, May 1998, describes the legal guidelines and criteria that EPA considers when evaluating SEPs.

In settlements in which defendant/respondents commit to conduct a SEP, the final settlement penalty must equal or exceed the greater of:

a) the economic benefit of noncompliance plus 10 percent of the gravity component; or
b) 25 percent of the gravity component only.

Calculating the final penalty in a settlement which includes a SEP is a five step process.

Step 1: Calculate the settlement amount without a SEP

a) We use the applicable EPA penalty policy to calculate the economic benefit of noncompliance.

b) We use the applicable EPA penalty policy to calculate the gravity component of the penalty. The gravity component is all of the penalty other than the identifiable economic benefit amount, after gravity has been adjusted by all other factors in the penalty policy (e.g., audits, good faith, litigation considerations), except for the SEP.
c) We add the amounts in steps 1.a and b. This sum is the minimum amount that would be necessary to settle the case without a SEP.

Step 2: Calculate the minimum penalty amount with a SEP - The minimum penalty amount must equal or exceed the economic benefit of noncompliance plus 10 percent of the gravity component, or 25 percent of the gravity component only, whichever is greater. The minimum penalty amount is calculated as follows:

a) Calculate 10 percent of gravity (multiply amount in step 1.b by 0.1).
b) Add economic benefit (amount in step 1.a) to amount in step 2.a.
c) Calculate 25 percent of gravity (multiply amount in step 1.b by 0.25).
d) Identify the minimum penalty amount: the greater of step 2.c or step 2.b.

Step 3: Calculate the SEP cost - The net present after-tax cost of the SEP is the maximum amount that EPA may take into consideration in determining an appropriate penalty mitigation for performance of a SEP. Consult the EPA Supplemental Environmental Projects Policy for details on how to calculate the SEP cost.

Step 4: Determine the SEP mitigation percentage and then the mitigation amount - After the SEP cost has been calculated, EPA determines what percentage of that cost may be applied as mitigation against the amount EPA would settle for but for the SEP. EPA examines the quality of the SEP as to whether and how effectively it achieves each of the following six factors listed below:

- Benefits to the public or environment - resulting in significant and quantifiable reduction in discharges of pollutants to the environment and the reduction in risk to the general public.

- Innovativeness - furthering the development and implementation of innovative processes, technologies, or methods.

- Environmental justice - mitigating damage or reducing risk to minority or low-income populations which may have been disproportionately exposed to pollution or are at environmental risk.

- Multimedia impacts - reducing emissions to multiple environmental media (soil, groundwater, surface water).

- Pollution prevention - developing and implementing of pollution prevention techniques and practices.

- Community input - taking into consideration input from the affected community in the development of the SEP.

The better the performance of the SEP under each of these factors, the greater the penalty may be reduced. The percent of penalty mitigation is within EPA's discretion. As a general guideline, the final reduction should not exceed 80 percent of the SEP cost. However, reduction for small businesses, government agencies or entities, and non-profit organizations, or for SEPs of outstanding quality implementing pollution prevention, may be set as high as 100 percent. On the other hand, a lower mitigation percentage may be appropriate if the government allocates significant resources to monitoring and reviewing the implementation of a project.

After EPA determines the mitigation percentage, multiply that percentage by the SEP cost to obtain the SEP mitigation amount, which is the amount of the SEP cost that may be used in potentially mitigating the preliminary settlement penalty.

Step 5: Final settlement penalty - The SEP mitigation amount is then subtracted from the settlement amount without a SEP (step 1.c).

The greater of this number and the minimum penalty amount identified in step 2 is the minimum final settlement penalty allowable based on the performance of the SEP.