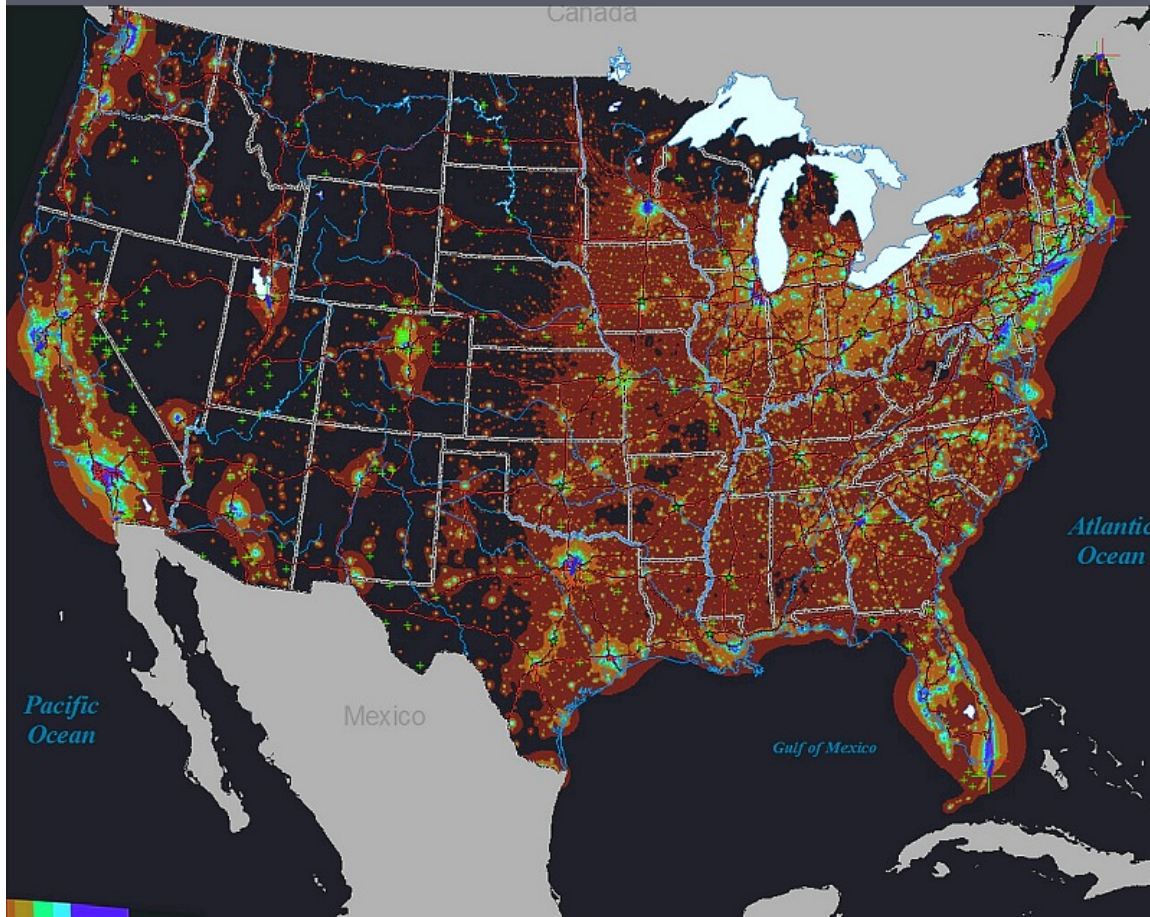


# SEPs and the 50 States

Perspectives on Innovative Environmental  
Settlement Agreements



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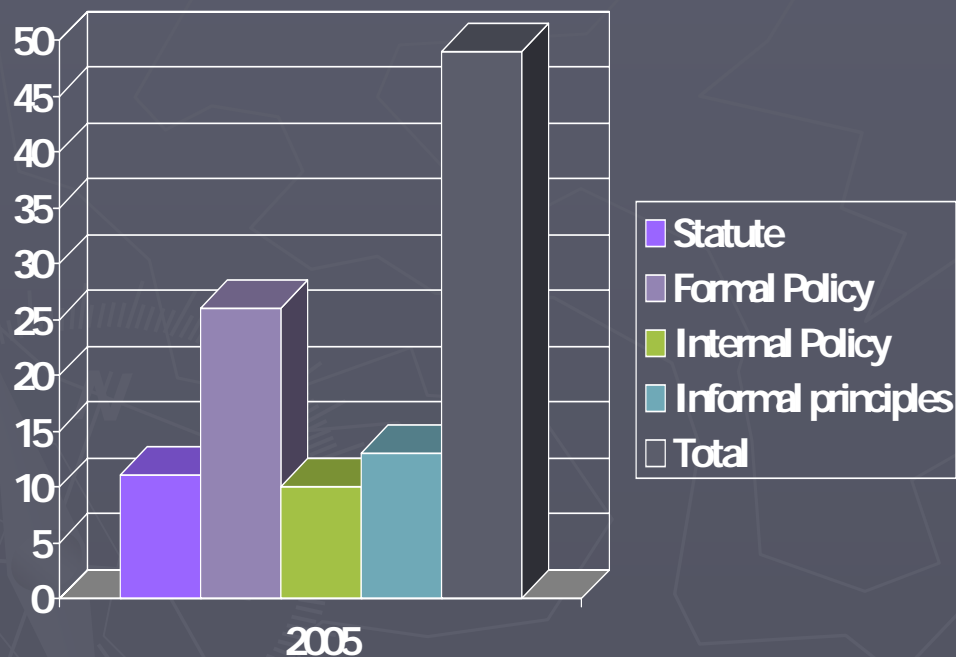


- ▶ Provides legal research to California state government, legislature largely bereft of institutional memory due to term limits, budget cuts.
- ▶ Collaborated with the ABA's Environmental Justice Committee on the 2003 survey *Environmental Justice for All*, and forthcoming 2006 update.
- ▶ Current project is *SEPs and the Fifty States: Survey and Model Practices* (forthcoming 2006).

# Road map

- ▶ Comments welcomed on the Hastings/ABA SEP study (publication in mid-2006)
- ▶ Study highlights of the study, with an emphasis on the academic and regulated industry perspectives on collaborative SEPs
- ▶ Concerns of pitfalls of SEPs, addressed in part by the procedures embedded in EPA's and states' policies
- ▶ SEPs with full and effective collaboration may do an even better job at making SEPs safe
- ▶ The corporate perspective

# States with SEP laws and policies



Source: PLRI research

**2005:** 11 statutes; 26 formal, published policies; 10 internal policies; 13 proceeding by informal principles.

**1997** ASTSWMO survey: roughly 19 states with policies; another 13 proceeding informally

# EPA SEP requirements as mirrored by the states

- Environmentally beneficial: required by all
  - Beyond compliance: required by most
  - Not legally required, not funded by government sources, not previously planned: required by all
  - Not inconsistent with underlying statute: required by most
  - Must advance objective of environmental statute: required by most
  - Agency may not play role in managing/controlling funds: required by most
  - Cannot support agency authorized activities: required by many
  - Project cannot satisfy agency's obligation to perform an activity (by law); provide funds to agency to perform an activity for which legislature has appropriated funds: required by many states
  - Perform activities performed by agency employees or contractors: required by many
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- **Nexus:** roughly 25 states (divided between EPA "hard" nexus, and "soft" nexus, or general relation back to general statutory objectives or agency mission)
  - **EJ:** nine states, divided between preference and favorable mitigation ratio
  - **Community input:** just two – Utah and Colorado (affecting offset ratio)

# The academic take on SEPs

- ▶ **Procedural and social justice** may be advanced. SEPS have the capacity to redress past injustices by providing benefits beyond compliance, promoting capacity building in affected communities.
- ▶ **Improved relationships** between community, regulator and regulated community, beyond the immediate benefits of the SEP itself.
- ▶ **So-called “regulatory contracts”** can be more efficient than command and control regulation (avoiding the overbreadth of “one size fits all” regulation); may also allocate tasks to those best suited to them through comparative advantage and core competencies.
- ▶ **Anticipatory compliance** is fostered, with potential discovery and early adoption of new pollution prevention technologies.

## Academic concerns with traditional SEPs

- ▶ Regulatory opportunism? Funding projects that otherwise lack political support (circumvention of the separation of powers and role of legislatures); Quackenbush-styled self-dealing, particularly with respect to SEP cash payments.
- ▶ Solution: checks and balances (nexus as guardrail on executive discretion), and collaborative politics to ensure that benefits of the statute still accrue to the affected community.
- ▶ Corporate opportunism? Overestimating SEP costs and underestimating SEP benefits yielding excessive penalty mitigation
- ▶ Solution: community implementation monitoring; certification; performance bonds (?).

# A brief history of citizen participation in the administrative state

- ▶ Ever increasing democracy, transparency and accountability in government processes: Federal Register only 70 years old, with its public, systematized announcement of federal regulations; Administrative Procedures Act (1946), notice and comment rulemaking: at first, voice of public interest entrusted solely to agencies.
- ▶ Enforcement actions have been the least well attended by publicity and public participation: strong judicial deference to enforcement and prosecutorial discretion (*Heckler v. Chaney*).
- ▶ Taking cues from the criminal justice system -- victim rights' movement and "restorative justice" where community concerns weighed in the sculpting of punishments that will best advantage the community. Goal is restitution, not retribution.
- ▶ Ceding the monopoly on environmental enforcement: community health an emerging value, as voiced by communities themselves.

# The solution: Community Input?

- ▶ EPA SEP policy regarding community input mostly hortatory, a few noteworthy features:
  - EPA rewards SEPs with a higher mitigation ratio if community input involved.
  - Community groups not involved in negotiations, the details of which are kept secret, FOIA-proof.
- ▶ More substantive community input would fulfill three goals:
  - Openness of enforcement process mirrors creation of environmental standards, particularly critical in states without nexus requirements (which also bind settlements to public goals).
  - Public interest protected; SEPs do not merely benefit regulatory or corporate interests.
  - Especially important when the violation affected an EJ community. Already an enforcement gap there, and communities underrepresented at the standard-setting and permitting states, creating possibility for restorative justice.

# Community input – state practices

- ▶ Following EPA lead, a higher mitigation ratio:
  - Colorado provides higher mitigation ratio for SEPs that “actively solicit and incorporate input into the SEP.”
  - Utah Division of Air Quality looks at the extent to which community input was considered in the SEP as a factor to determine the mitigation percentage.
- ▶ SEP libraries (Maine and Illinois) also tap community input. Advantages: a one-time effort, minimizing cost burden on community groups. Still, community groups complain that complying with federal SEP policy difficult (technical *and* legal challenges).

# More state examples

## Delaware

- ▶ SEPs used to further environmental and public health goals otherwise not achievable under current law.
- ▶ In 2004, the legislature created the **Community Environmental Project Fund**, financed by 25% of all environmental penalties and used to implement environmentally beneficial projects at the direction of the Department of Natural Resources and Environmental Control.
- ▶ Mandatory consultation with standing community advisory board.

## New York

- ▶ Nexus re-imagined as exclusively geographic.
- ▶ **Escrow** accounts, for unspecified future SEPs. Interest and remaining balance given over to state at project's conclusion. Involves additional process, naturally. Violator bound to SEP policy's terms in settlement agreement.

# Corporate perspectives

## Enthusiasm

- ▶ Interested in the public relations and correcting past wrongs (Bob Harris, VP Environmental Affairs at PG&E: a chance to undo what had be done wrong in the first place, the permitting/siting decision often made without the meaningful participation of environmental justice communities)
- ▶ Interested in undertaking risky investments that cannot be justified on business grounds, but may still improve processes, and prevent pollution (best positioned to advance the technology, as regulators constrained by scarce resources and inability to experiment).

## Reservations

- ▶ SEPs reserved to “good actors” – self-reporters, first-time violators, and actors in good faith.
- ▶ So, why should it be necessary to navigate the additional layers of process for a SEP settlement, when some mitigation already available for self-reporting?
  - Fear that SEP will be too successful, or not successful enough.

# The corporate bottom line

- ▶ **Still, businesses are not charitable institutions, and owe shareholders “fast and cheap” settlements.** Concerned about unbounded costs of SEPs (failure means possible reinstatement of entire penalty, at least in Oregon). And, in particular, corporations desire to resolve liabilities (the potential fine) expeditiously. A great deal of concern about the delays and transaction costs inherent in bringing additional parties to the bargaining table.
- ▶ **Substantive concerns** about community group involvement in SEP negotiations: have the bridges been burned? Are the community groups willing to compromise, and be unwilling to sign off on SEPs that do not directly fund community-based SEPs (as opposed to process-oriented SEPs)
- ▶ And, a lesser concern about **regulatory certainty**, consistent application of SEP principles in different regions, states.

## Open Questions

What are the limitations in existing SEP guidelines

What are the opportunities for improvement?

- ▶ Nexus: too permissive or too restrictive?
- ▶ Clarity of guidelines
- ▶ Consistency in guideline application
- ▶ Enforceability of SEPs
- ▶ Accountability and Oversight
- ▶ Aggregation: super-sizing SEPs?
- ▶ Leveraging SEPs for other goals and investments: improper steering on part of agencies?