



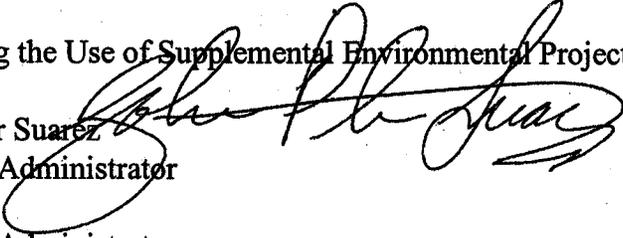
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 11 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Expanding the Use of Supplemental Environmental Projects

FROM: John Peter Suarez 
Assistant Administrator

TO: Assistant Administrators
Regional Administrators
Deputy Assistant Administrators
Deputy Regional Administrators
All OECA Staff
All Regional Enforcement Staff

As a follow up to my February 21, 2003 memorandum, Steve Shimberg, Associate Assistant Administrator and staff from the Office of Regulatory Enforcement (ORE) have discussed a variety of Supplemental Environmental Projects (SEP) Policy issues and ideas for new SEPs with Headquarters program offices and Regions. We have found the discussions to be extremely helpful in gaining insight into ways to simplify the SEP Policy, and useful in educating senior Agency staff about SEPs. These discussions reinforced our belief that certain SEP Policy revisions and clarifications are necessary. The purpose of this memorandum, therefore, is to summarize the foundation underlying our SEP Policy and to announce the actions we are taking to encourage and expand the use of SEPs in the settlement of enforcement actions.

During FY2002, 10% of our civil judicial and administrative penalty settlements included SEPs valued at a total of \$56.5 million dollars. While we should be proud of these figures, I believe that we have a tremendous opportunity to achieve greater benefits for the environment and communities affected by violations. Through settlements containing SEPs, we have the opportunity to not only bring regulated entities into compliance, but to secure public health and environmental benefits in addition to those achieved by compliance with applicable laws. As such, all enforcement staff should consider every opportunity to increase our use of SEPs and include more environmentally significant SEPs wherever possible.

In order to facilitate such efforts, we have begun to implement some activities to assist in maximizing the opportunity to include SEPs in settlements. For example, this week we are

issuing an Interim Final Guidance on Community Involvement in SEPs, and a guidance on when it is appropriate to give penalty mitigation for entities who undertake environmental management systems as SEPs. In addition, as discussed in further detail below, we are launching an effort to simplify the SEP Policy, and are piloting a SEP library which will serve as a clearinghouse for possible SEPs.

SEP Basics

SEPs are environmentally beneficial projects that a violator is not otherwise legally required to perform but agrees to undertake in settlement of an enforcement action. While the Agency has secured significant environmental benefits through SEPs, we must remain mindful of the legal guidelines that limit the Agency's ability to consider and approve some SEPs. These guidelines flow from the U.S. Constitution and Miscellaneous Receipts Act¹ (MRA) and preserve congressional prerogatives to appropriate funds as provided for in the U.S. Constitution. As such, these guidelines define the foundation on which the SEP Policy is premised. Within these legal boundaries, the Agency has broad discretion to settle environmental enforcement cases, including the discretion to include SEPs as an appropriate part of the settlement.

To ensure the Agency's enforcement discretion is used appropriately and in compliance with the U.S. Constitution and the MRA, all SEPs must satisfy several key elements. To be approved as a SEP, a project must:

- Be related to or have a "nexus" to the underlying violation;
- Provide significant environmental and public health benefits;
- Benefit the community affected by the violation; and
- Secure public health and/or environmental improvements beyond what can be achieved under applicable environmental laws.

Moreover, in light of the legal boundaries set by the U.S. Constitution and the MRA, there are several types of commonly proposed projects that are not acceptable as SEPs, and other limitations on SEPs, including:

- Donations to third parties;
- EPA management of funds obtained through a SEP;
- Augmentation of appropriations (absent express congressional authorization); and
- Projects for which a violator is already receiving federal financial assistance, i.e, a federal loan, contract or grant.

These concepts and legal guidelines are fundamental to the success and appropriateness of

¹ The Miscellaneous Receipts Act, 31 U.S.C. § 3302, requires that penalties due and owing the United States must be placed into the U.S. Treasury.

any project and are more fully defined in the SEP Policy. While they do limit the Agency's discretion in agreeing to some SEPs, we believe that the enforcement program's track record has established that they do not limit our ability to develop and approve creative and important SEPs. With these concepts in mind, we have begun taking steps to review and, where appropriate, revise certain aspects of the SEP Policy and how it is implemented. We believe that these changes, outlined in the list of action items attached, will help promote the use of SEPs in enforcement settlements by simplifying some provisions in the SEP Policy and by providing additional incentives to violators to agree to conduct SEPs.

Next Steps

Attached is a list of action items that represents a significant commitment to promoting the use of SEPs. Included in this list are projects designed to provide greater information on SEPS to Agency enforcement staff, violators and the public.

SEP Policy Simplification

During the discussions to date, several Regional and Headquarters offices raised questions about the complexity of the existing SEP Policy. Specifically, we heard a number of questions concerning how to define an appropriate nexus in certain situations, and whether or not nexus can be waived in a particular circumstance. As discussed above, nexus is important to ensure compliance with the MRA, and as such cannot be waived. Given this, however, we believe that there may be ways to simplify nexus, and still ensure that there remains a connection between the underlying violation and the SEP.

In addition to nexus, some offices raised questions about the appropriate minimum penalty that must be collected as part of a settlement that includes a SEP. Specifically, the issue raised is whether or not going below economic benefit would be appropriate in some cases. The current SEP Policy is based upon the premise that collection of at least economic benefit ensures that violators are not allowed to obtain an economic advantage over their competitors who complied with the law.

We recognize that there are a number of strongly held opinions about how to proceed with any proposed changes to such basic premises and, as such, no decisions have been made on whether to change these two critical parts of the existing SEP Policy. Therefore, we will initiate a dialogue on these important issues to more fully understand the implications of change and, if necessary, to clarify various aspects of the SEP Policy.

In addition to the dialogue, we understand that it may be helpful to shorten and simplify the current SEP Policy. We have begun work on several such changes, e.g., clarification on the role of EPA staff in community involvement, and will have a draft revised SEP Policy to the Regions for comment in November 2003.

Information on SEPs

We have also included in the action item list, two projects designed to provide greater access to information on both SEPs that are part of concluded settlements, and ideas for new SEPs. Specifically, an EPA intranet link, which includes information on SEPs that are part of concluded settlements, will be available in August 2003 through the Integrated Compliance Information System (ICIS). OECA plans to make this SEP link available on the internet in the near future. With respect to ideas for new SEPs, OECA will create a SEP Library Pilot, whereby staff from ORE will work with Headquarters Program Offices and Regions to solicit and develop project ideas generated from within the Agency and will include these ideas in a repository of potential SEPs. During the pilot, the list of project ideas will be available to Agency staff only via the Intranet.

Conclusion

We sincerely appreciate the time and effort that the Regions and Headquarters offices put into providing us with information on specific program ideas, and on ways to clarify/simplify the SEP Policy. Your efforts to include SEPs and ensuring their implementation shows your sincere commitment to finding creative ways to better the environment for the communities and environment affected by violations. We look forward to continuing to work with you on finding ways to encourage SEPs, and welcome your participation in our efforts to do so.

Attachment

cc: Christine Todd Whitman
Linda Fisher
Tom Gibson
Tom Sansonetti, US DOJ
John Cruden US DOJ
Bruce Gelber US DOJ

ATTACHMENT

SIGNIFICANT ACTION ITEMS TO BE IMPLEMENTED IN FURTHERANCE OF “SUPPLEMENTAL ENVIRONMENTAL PROJECTS”

Efforts to Provide Information on SEPs to the Public and EPA staff

- **Community Involvement in SEPs**

- Provide education and guidance to EPA, violators and communities on SEPs
 - Allows for better understanding of SEPs;
 - Provides additional incentives to violators who reach-out to affected communities
 - Emphasis on environmental justice
 - Office of Regulatory Enforcement (ORE)
 - Interim Guidance signed May 21, 2003

- **Guidance on the Use of Environmental Management Systems (EMSs) in Enforcement Settlements as Injunctive Relief and SEPs**

- Provides that EMSs by State and local governments and small businesses that meet the criteria in the SEP Policy will be eligible for SEP penalty mitigation credit as “other types of projects” without advance Headquarters approval
 - Office of Planning, Policy Analysis and Communication (OPPAC) and ORE
 - Guidance to be issued in June 2003

- **Promoting Appropriate SEPs**

- Development of SEP link to the ICIS Database via Intranet and Internet
 - Enhances ability to review SEPs that are part of a concluded settlement, from FY 1998 to present
 - ORE
 - Intranet ready, August 2003
 - Internet ready, First Quarter, FY 2004
- Implement a SEP Library Pilot, whereby Regions and Program offices can propose possible SEPs
 - Provides vehicle for proposing potential projects that are important to a particular office mission
 - Pilot library will include project ideas generated by Agency-staff only; available to Agency personnel only via Intranet, during pilot timeframe

- Pilot library for one year; review success, then revise if necessary and evaluate ability to make internet available
 - ORE
 - Memorandum soliciting project ideas sent to Regions, Sept. 2003
 - Intranet ready, FY 2004
 - Review/revise, August 2004
- Institute periodic memorandum from OECA AA advising enforcement staff (Regions and HQ and DOJ), of priority SEPs to support program priorities
 - Provides an opportunity for program offices to promote office priorities
 - ORE
 - First memorandum issued September 2003
- Encourage the use of SEPs in state settlements
 - Begin dialogue with states regarding the benefits of including SEPs in state settlements
 - Use existing discussions, i.e., MOA discussions, meetings with ECOS and NAAG to encourage SEPs
 - ORE, Regions

Efforts to Simplify and Provide Additional Guidance on SEP Policy

● **Simplify SEP Policy**

- Review various sections of the SEP Policy to simplify and shorten 1998 Policy;
 - Allows for better understanding and easier application of SEP Policy
 - ORE
 - Draft for Regional, Headquarters and Department of Justice (DOJ) review, November 2003
- Begin dialogue on nexus and minimum cash penalty provision with Regional and HQ SEP Coordinators
 - ORE
 - August 2003

● **Guidance on Use of Third Parties** (will be combined with Guidance on Aggregating SEPs and SEP Dollars, as issues are closely related)

- Provides information to EPA on proper use of third parties by defendants/respondents to implement SEPs, i.e, a contractor
 - Includes recommended approach for including language into settlements to allow for use of third parties
 - ORE

- Guidance to be issued June 2003

- **Guidance on Aggregating SEPs and SEP dollars**

- Provides information and guidance to EPA on legal impediments to aggregating or “pooling” SEP dollars
- Provides guidance on possibility of aggregating several SEPs, i.e., where several different defendants undertake discrete pieces of a SEP
 - Recommends contacting ORE for assistance when considering aggregating SEPs
 - ORE
 - Guidance to be issued June 2003

- **Guidance Permitting Profitable Projects as SEPs**

- Provides guidance for determining the value of profitable projects for mitigation purposes and parameters for determining whether to accept a profitable project as a SEP
 - ORE
 - Guidance to be issued August 2003