



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

SUBJECT: Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy

FROM: Walker B. Smith, Director *WBS*
Office of Regulatory Enforcement

TO: Regional Counsel
Regional Enforcement Division Directors
Regional Media Division Directors

The purpose of this memo is to emphasize the importance of nexus in evaluating proposed Supplemental Environmental Projects (SEPs). The Office of Regulatory Enforcement (ORE) continues to receive many inquiries from enforcement staff regarding nexus in reviewing proposed SEPs. This memorandum explains what nexus is and why it is important, with emphasis on avoiding problems related to the Miscellaneous Receipts Act (MRA).

I. What is Nexus?

Nexus is the relationship between the violations being enforced and the proposed SEP. Nexus ensures that SEPs are within the Agency's or the Court's authority, and do not run afoul of any Constitutional and statutory requirements. Nexus exists only if a proposed project meets one of the following criteria:

- a. the project is designed to reduce the likelihood that similar violations will occur in the future; or
- b. the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
- c. the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.

In most cases, nexus is not difficult to establish. For example, a company that eliminates its use of the particular chemical that was the basis for the violation in the underlying settlement reduces the likelihood that similar violations will occur in the future. A company that has violated the Clean Air Act could hold an asthma screening day for the community that was

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affected by the company's failure to comply. This type of project would reduce the adverse impact to public health by identifying and referring for treatment those people in the community suffering from asthma. A company that has violated the Emergency Planning and Community Right-to-Know Act could agree to operate a reverse 911 system for the community that would be affected by a release of hazardous pollutants from the violating facility. This type of project would reduce the overall risk to public health in the affected community by ensuring that potentially affected people receive a phone call notifying them of a release, so they can take prompt action to avoid exposure. In some cases, however, the nexus is not as clear. In such cases, we urge your staff to contact us so that we can fully discuss case-specific information and evaluate the proposed project under the SEP Policy and the MRA. Many times, after further review and discussion, we determine that the original project has a nexus to the violations. Sometimes, projects must be modified in order to establish nexus. In a few cases, even after discussions, no nexus is found. In those cases, we can suggest alternative projects that do have a nexus to the violations at issue. It is helpful, therefore, for any case team that has questions about nexus to contact my staff early in the process.

It is important to note that geography alone does not create nexus. The mere fact that a SEP is beneficial to an area near the facility does not by itself satisfy the nexus requirement. Enforcement staff must be able to demonstrate how the project relates to the violations that are the subject of the enforcement action.

II. Importance of Nexus and Appropriations Law in Developing SEPs

An adequate nexus is important because it ensures that the Agency complies with the SEP Policy and the requirements of the MRA. The MRA requires that, unless otherwise provided by law, "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). It is intended to preserve Congressional prerogatives to appropriate funds as provided for in the U.S. Constitution. Penalties for violating the MRA include removal from office and, in some cases, personal liability for the amount of money misappropriated. 31 U.S.C. § 3302(d). If there is a relationship between the alleged violation and the SEP, then it is within the Agency's discretion to take the SEP into account as a mitigating factor when determining the amount of a penalty that the Agency will agree to as part of an overall settlement. If there is no nexus, then the Agency does not have that discretion.

A related concern involves augmentation of appropriations. EPA must be careful not to accept any project that augments or supplements, or appears to supplement, its appropriations or the appropriations of any other Federal agency. Augmentation of appropriations can occur if a proposed SEP is for an activity or project for which the EPA or another Federal agency has already received appropriated funds, or where the Federal Government is required by law to carry out the project or activity, or the activity is something for which the Agency has an established program to perform or fund, and the SEP would provide EPA with additional resources to perform or fund that particular program. For example, a proposed SEP that would print and

distribute EPA pamphlets describing the dangers of lead-based paint would augment EPA's appropriations. EPA is required by law to provide such pamphlets and receives funding in its budget for this activity. Augmenting an agency's appropriation is not permitted, as only Congress has the authority to appropriate funds for Federal agencies.

III. Resources for reviewing SEPs

Attached are some helpful SEP documents, including the model SEP Consent Agreement and Final Order language, the Questions and Answers for the Practitioner (January 1999) and the Revised Approval Procedures for SEPs (July 1998). Also, for SEP ideas, many regions have web-based SEP databases that may provide examples of acceptable SEPs.

IV. Conclusion

We appreciate your continued efforts to include SEPs in settlements, and hope that this memorandum has been helpful in explaining the importance of ensuring that a proposed SEP meets the nexus requirement in the SEP Policy. We recognize that in some instances, enforcement staff may need to seek a waiver from the Office of Enforcement and Compliance Assurance on other aspects of the SEP Policy. For the reasons noted above, however, nexus cannot be waived.

Should you have any questions on implementation of the SEP Policy, please contact Beth Cavalier (202) 564-3271 or Melissa Raack (202) 564-7039; questions concerning the MRA should be directed to James Drummond, Office of General Counsel, at 202-564-5456. Also, questions regarding SEPs and CERCLA should be directed to Michael Northridge (202)-564-4263; questions regarding SEPs and Federal Facilities should be directed to Melanie Garvey (202) 564-2579.

Attachments

cc: Regional SEP Coordinators
Headquarters SEP Coordinators
ORE Division Directors
Enforcement Coordinators
Karen Dworkin, DOJ