



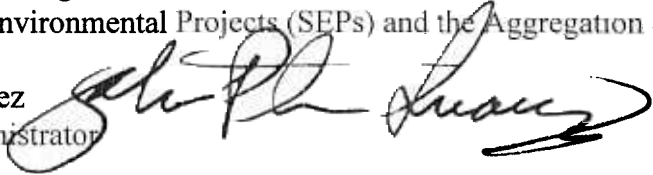
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 15 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds

FROM: John Peter Suarez 
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TO: Regional Counsels (Region I-X)
Regional Enforcement Managers (Region I-X)
Regional Media Division Directors (Region I-X)
Regional Enforcement Coordinators (Region I-X)

As part of my June 11, 2003 memorandum "Expanding the Use of Supplemental Environmental Projects," my office committed to issue guidance to assist Agency enforcement staff in encouraging and expanding the use of SEPs in enforcement settlements. 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.

The June 11, 2003 memorandum also challenged enforcement staff to consider every opportunity to include more environmentally significant SEPs wherever possible. In response to that challenge, we have seen an increase in the number of innovative and creative SEP proposals put forward by the Regions. Two frequently asked questions concern the potential for aggregating funds to be used for SEPs into SEP "banks" or escrow accounts, and working with private entities to manage and/or implement SEPs. This memorandum provides guidance on how the Regions should approach these issues to comport with the Miscellaneous Receipts Act (MRA) and appropriations law. While the conditions of the MRA may limit our ability to aggregate SEP funds, this guidance provides suggestions for including SEPs in enforcement settlements in a manner that we believe does not trigger MRA or appropriations concerns. In addition, this guidance contains suggestions on the use of private organizations in implementing SEPs.

I. Aggregation of SEPs

A. Can SEPs Be Aggregated by Defendants/Respondents?

OECA has been asked whether there are circumstances in which EPA can allow defendants/respondents to aggregate SEP funds. Where several defendants/respondents are settling separate cases for similar violations in the same general geographic area and at approximately the same time, the aggregation of SEPs could provide increased leverage and allow for projects with a greater environmental or public health benefit, and could provide an opportunity for defendants/respondents in smaller cases to take advantage of the SEP Policy.

Where Defendants/Respondents Are Jointly and Severally Liable for Performance of Consolidated SEP: The aggregation of SEPs may be acceptable if the settlements are crafted carefully. For instance, defendants/ respondents may propose pooling resources to hire a contractor to manage and/or implement a consolidated SEP. Such an approach could be acceptable if the respondents/defendants remain liable under the settlement agreement to perform the consolidated project in the same manner as they would under a typical settlement. Defendants/respondents are generally held accountable through the inclusion of stipulated penalties should the SEP not be completed as agreed upon.

Performance of Complementary, Segregable SEPs: Another approach that may be acceptable could be a situation where defendants/respondents in separate cases are interested in performing discrete and segregable tasks within a larger project. Such an approach would have to meet the following conditions to address any MRA concerns: (1) each discrete project must have a nexus to the violations at issue in the particular settlements and meets all conditions of the SEP Policy; (2) each discrete project must be itself worthwhile with environmental or public health benefits; and (3) the settlement must hold each defendant/respondent responsible for implementation and completion of a specific portion of the larger project. If the settlements are structured carefully, such an approach can result in a significant environmental or public health benefit that might otherwise be unavailable.

Example 1: A number of defendants/respondents in separate enforcement actions are interested in restoring and conserving a particular piece of property. One defendant/respondent could assume responsibility for acquiring the property and transferring ownership to a third party such as a local municipality or a land trust. A second defendant/respondent could assume responsibility for conducting a stream bank clean up and revegetation project on the property. A third defendant/respondent could take responsibility for re-establishing a fish ladder or other aquatic habitat.

Example 2: Defendants/respondents in separate settlements could develop and deliver compliance and training programs providing training and assistance to a regulated sector in a manner that reaches a significantly greater subset of that sector. For example, defendants/ respondents in separate hazardous waste enforcement cases could develop and present specialized training materials, videos, brochures, etc. relating to hazardous waste management in particular educational areas such as science labs and art schools. Because each compliance

promotion SEP would focus on a different educational area, the aggregation of SEPs in this manner could result in a much greater impact within the regulated community.

Other Considerations: While the aggregation of SEPs under these scenarios could be designed to avoid MRA concerns, in addition to the conditions set forth above, there are other practical limitations which need to be considered. For example, aggregation of SEPs in this manner may require that all settlements be completed at approximately the same time and that defendants/respondents in separate settlements are willing to cooperate with one another, either because they are all responsible for completion of the entire project or because one party's project is dependent on the timely performance by another party of its project, as in the first example above.

Consultation with ORE/SPLD: Regions are encouraged to consult with the Office of Regulatory Enforcement's (ORE) Special Litigation and Projects Division (SLPD)¹ early in the process when considering proposals by defendants/respondents to aggregate or coordinate SEPs in a manner described above.

B. Can EPA Aggregate SEP Funds?

OECA has had several inquiries into the feasibility of establishing SEP "banks" or accounts for pooling the funds applied towards SEPs. Specifically, the question is whether EPA may hold and manage, in one account, SEP funds from several settlements that would otherwise have been used by defendants/respondents for SEP projects in each individual enforcement settlement. While the aggregation of SEP funds may result in a SEP with greater public health or environmental benefits than several smaller funds, we have been advised by OGC that the MRA prohibits EPA from managing SEP funds.

The SEP Policy was written carefully to ensure compliance with the MRA. SEPs are not penalties; they are environmentally beneficial projects not otherwise required by law. The SEP Policy makes clear that defendants/respondents must perform a project and be responsible for its satisfactory completion rather than simply making a cash payment. The SEP policy is based on the premise that where a defendant/respondent performs an environmentally beneficial project, the Agency has the discretion to take the performance of the project 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. A cash payment, such as a payment or donation to a third party or to a SEP "bank," where there is no further responsibility for the defendant/respondent to ensure that a specific project is completed, is prohibited because it could easily be construed as a diversion from the Treasury of penalties due and owing the government.

There are also constraints within appropriations law that restrict the Agency's ability to establish SEP accounts. Only Congress can appropriate funds for a federal agency. Establishing a SEP account where the Agency manages the funds and determines how they are to be spent

¹ ORE's Multimedia Enforcement Division has been renamed the Special Litigation and Projects Division.

would amount to an augmentation of appropriations. The SEP Policy makes clear that EPA cannot manage or direct SEP funds. See SEP Policy, page 6 at paragraph 3.

II. Management of SEPs and SEP Funds by Private, Third Party Organizations

A. Can Defendants/Respondents Use Private, Third-Party Organizations to Manage SEPs and SEP Funds ?

We are aware that there are private organizations that are developing libraries of projects that might be suitable as SEPs. These groups hold themselves out as clearinghouses for environmental projects, and offer to obtain and manage funds, oversee the projects, and in some cases, charge a fee for their services. Private organizations that are developing libraries of projects and offering project and funds management, project implementation, and oversight services can play a valuable role in SEPs. It is permissible for defendants/respondents in enforcement actions to use a third party as a contractor or consultant to assist in the implementation of a SEP. See SEP Policy, Section F, page 17. An alleged violator could use a private organization to recommend SEPs to it during negotiations with the Agency, and then to manage a SEP, as long as (1) the defendant/respondent is obligated under the settlement document to complete the project satisfactorily, (2) the defendant/respondent fully expends the amount of funds agreed to be spent in performance of the SEP, and (3) the project meets all of the conditions and requirements of the SEP Policy. In other words, this approach is acceptable as long as the transactions with the defendants/respondents are structured such that the organizations are acting as contractual service providers to defendants/respondents as opposed to mere recipients of donated funds.

Cash Donations to Third Parties Are Not Permissible: Defendants/respondents may not simply make a cash payment to a third party conducting a project without retaining full responsibility for the implementation or completion of the project, as this appears to violate the MRA. In the context of an enforcement action, the Office of Legal Counsel (OLG) within the Department of Justice considered whether a defendant's donation of money to an organization designated by the Department of Interior (DOI) violated the MRA. In re: Steuart Transportation Company, 4 Op. Off. Legal Counsel 684 (1980), arose from a settlement of claims the United States and the Commonwealth of Virginia brought against an oil company for a spill in the Chesapeake Bay. Among other things, the federal government sought damages for the death of migratory waterfowl. The settlement terms required the oil company to resolve these claims by donating money to a waterfowl preservation organization designated by DOI and the Commonwealth of Virginia. One argument advanced to OLC by the proponents was that the proposed settlement did not violate the MRA because no money was received for the use of the United States within the meaning of the MRA since the funds did not go directly to DOI.

OLC concluded that the absence of a direct payment to DOI did not remove the transaction from the MRA. "[T]he fact that no cash actually touches the palm of a federal official is irrelevant for the purposes of [the MRA], *if a federal agency could have accepted possession and retains the discretion to direct the use of the money*. The doctrine of

constructive receipt will ignore the form of the transaction in order to get to the substance.” In re: Steuart at 688 (emphasis added).

B. Can EPA Use Private, Third-Party Organizations to Manage SEPs and SEP Funds?

Several private organizations have proposed working with EPA to maintain SEP libraries and provide project implementation and/or management services. This raises some difficult legal issues. First, a close working relationship with such organizations could create the appearance that EPA is using the organization as a means to indirectly manage or direct SEP funds. Second, there are ethical restrictions on endorsing or otherwise providing private organizations with unfair competitive advantages in selling their SEP management and implementation services to defendants/respondents. Based on consultation with OGC, we have concluded that it would be improper for EPA to enter into an agreement with such organizations at either the Headquarters or Regional level.

OGC has advised that Regions could make a list of such organizations available to defendants/respondents as long as the Region does not promote one group over another, has an open and fair process for adding other qualified groups to the list, and maintains a disclaimer making it clear that the list does not constitute an endorsement or recommendation of any of the listed entities.

If you have any questions about this memorandum, please contact Susan O’Keefe at (202) 564-4021, or either Beth Cavalier or Melissa Raack of her staff. Beth can be reached at (202) 564-3271; Melissa can be reached at (202) 564-7039.

cc: OECA Office Directors
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