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

MAR 10 2015

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy

FROM: Cynthia Giles
Assistant Administrator

TO: Regional Administrators

I am pleased to issue the 2015 Update to the EPA Supplemental Environmental Projects Policy (Update or 2015 Update), which reflects and incorporates by reference all of the guidance and implementation decisions made about Supplemental Environmental Projects (SEPs) since the issuance of EPA's SEP Policy in 1998. This Update supersedes the 1998 Policy, and is effective immediately.

Consolidating the wealth of existing SEP guidance is intended to encourage use of the Policy by helping facilitate and streamline the inclusion of SEPs in civil enforcement settlements whenever appropriate. The 2015 Update is also intended to underscore the Agency's continuing strong support for SEPs, which can be powerful tools to secure significant environmental and public health benefits beyond those achieved by compliance, and to help address the needs of communities impacted by violations of environmental laws.

The Update covers when it is appropriate to include a SEP in an enforcement settlement, how to evaluate proposed SEPs, and the information and certifications that must be included in settlement documents. It reflects all SEP-related guidance documents issued by OECA over the past seventeen years, as well as the policy and implementation decisions made during two national meetings organized by OECA's Principal Deputy Assistant Administrator.[1] It also provides clarifying language on points of longstanding implementation practice and technical corrections. The 2015 Update highlights some notable Agency priorities, including Children's Health, Environmental Justice, Innovative Technology and Climate Change. In addition, for ease of use and clarity certain sections of the Update have been edited and reordered, and the Policy now includes a topical Table of Contents.

[1] A complete list of these policy and implementation memoranda and decisions can be found at http://intranet.epa.gov/oeca/oce/slpd/sep.html.

The Update reflects the collaborative efforts of our National SEP Work Group, our Regional Counsel and Enforcement staff, our Office of General Counsel, the Department of Justice, and OECA staff from the Office of Civil Enforcement, the Federal Facilities Enforcement Office, the Office of Environmental Justice and the Office of Site Remediation Enforcement, as well as input from several EPA program offices. I appreciate their collective efforts and thank them for their willingness to help facilitate this Update.

My hope is that this Update will enable case teams to more efficiently and effectively include SEPs in settlement of civil enforcement cases, and I continue to actively encourage all enforcement practitioners to consider SEPs wherever they may be appropriate.

Questions regarding the 2015 Update may be directed to Caroline Makepeace (202-564-6012), Beth Cavalier (202-564-3271) or Jeanne Duross (202-564-6595) in the Special Litigation and Projects Division, Office of Civil Enforcement.

Attachment

cc:

Office of General Counsel
Regional Counsels and Deputy Regional Counsels
Regional Enforcement Directors
Chief, Environmental Enforcement Section, Department of Justice
OECA Office Directors
Regional Enforcement Coordinators
Headquarters and Regional SEP Policy Coordinators

U.S. Environmental Protection Agency
Supplemental Environmental Projects Policy
2015 Update

United States Environmental Protection Agency
Supplemental Environmental Projects (SEP) Policy
2015 Update

Contents **Page**

I. Introduction **1**
- A. Background 1
- B. Using this Policy 1
- C. Applicability 2

II. Supporting the EPA's Mission **3**
- A. Children's Health 3
- B. Environmental Justice 3
- C. Pollution Prevention 4
- D. Innovative Technology 5
- E. Climate Change 5

III. Definition and Key Characteristics of a SEP **6**
- A. "Environmentally beneficial" 6
- B. "In settlement of an enforcement action" 6
- C. "Not otherwise legally required to perform" 6

IV. Legal Guidelines 7
- A. Nexus 7
- B. Augmentation and Other Issues 8
  - 1. EPA Management or Control of SEPs 8
  - 2. Federal Appropriations and Federally-Performed Activities 9
    - a. EPA-Specific 9
    - b. Other Federal Agencies 10
- C. Augmentation: Reasonable Inquiry and Certification 10
  - 1. By Defendants 10
  - 2. By the EPA 11
- D. Augmentation Exception: Diesel Emissions Reduction Projects 11

V. Categories of SEPs **11**
- A. Public Health 12
- B. Pollution Prevention 12
- C. Pollution Reduction 13
- D. Environmental Restoration and Protection 13
- E. Assessments and Audits 14
  - 1. Pollution Prevention Assessments 14
  - 2. Environmental Quality Assessments 14
  - 3. Environmental Compliance Audits 15
- F. Environmental Compliance Promotion 16
- G. Emergency Planning and Preparedness 16
- H. Other Types of Projects 17

ED_002597_00000049-00005

VI. Projects Not Acceptable as SEPs **17**

VII. Community Input **18**

VIII. Evaluation Criteria **20**
A. Significant, Quantifiable Benefits to Public Health or the Environment 20
B. Environmental Justice 20
C. Community Input 20
D. Innovation 20
E. Multimedia Impacts 21
F. Pollution Prevention 21

IX. Calculation of the Final Settlement Penalty **21**
A. Components of the Settlement Penalty 21
B. Minimum and Maximum Penalty Requirements When SEPs Are Included in Settlement 22
1. Minimum Penalty Requirements 22
2. Exceptions to the Minimum Penalty Requirements 22
a. Clean Water Act (CWA) Settlements with Municipalities 22
b. Toxic Substances Control Act (TSCA) Settlements and Lead-Related SEPs 23
3. Statutory Maximum Penalty Limits 23
C. Mitigation of the Penalty When SEPs Are Included in Settlement 23
1. General Approach to Penalty Mitigation 23
2. Exceptions to General Penalty Mitigation Approach 24

X. Requirements for Settlements that Include a SEP **25**
A. SEP Description 25
B. SEP Certifications 25
C. Disclosure of Enforcement Settlement Context 26
D. SEP Completion Report 26
E. Liability for Performance/Third-Party Involvement in SEPs 26
1. Third-Party SEP Implementers 26
2. Third-Party SEP Recipients 27
F. Failure to Satisfactorily Complete a SEP and Stipulated Penalties 28
1. Stipulated Penalty Provisions in the Settlement Document 28
2. Assessment of Stipulated Penalties 30
3. Dispute Resolution 30

XI. Special Situations and Issues **30**
A. Accelerated Compliance SEPs 30
B. Third-Party Compliance Projects 31
C. Environmental Management Systems (EMS) 31
D. Profitable SEPs 32

ED_002597_00000049-00006

E. SEPs in Ability-to-Pay (ATP) Settlements 33
F. Aggregation/Consolidation of SEPs by Defendants 34
1. Where Defendants Are Jointly and Severally Liable for Performance of Consolidated SEPs 34
2. Performance of Complementary, Segregable SEPs 34
3. Other Considerations 35
4. Consultation with OECA's National SEP Policy Coordinators 35
G. Aggregation of SEP Funds by EPA 35
H. Acceptance of a SEP in Lieu of Stipulated Penalties 35

XII. EPA Procedures for SEP Approval and Documentation 36
A. Approvals 36
B. Documentation and Confidentiality 37

Appendix A:
Augmentation of Appropriations: Reasonable Inquiry Regarding Federal Appropriations 39

I. EPA's Role and Responsibilities 39
II. Defendant's Roles and Responsibilities 39
III. Definitions 40
IV. Process and Checklist 41

Appendix B:
Previously Issued SEP Policy Implementation Guidance 49

ED_002597_00000049-00007

United States Environmental Protection Agency
Supplemental Environmental Projects Policy
2015 Update

I. INTRODUCTION

A. Background

A Supplemental Environmental Project (SEP) is an environmentally beneficial project or activity that is not required by law, but that a defendant[1] agrees to undertake as part of the settlement of an enforcement action. SEPs are projects or activities that go beyond what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws. In settlements of environmental enforcement cases, the United States Environmental Protection Agency (the EPA or the Agency) requires alleged violators to achieve and maintain compliance with federal environmental laws and regulations, take action to remedy the harm or risk caused by past violations, and/or to pay a civil penalty. In certain instances, SEPs may be included in the settlement. In 1998, the EPA issued the Supplemental Environmental Projects Policy (Policy)[2] setting forth the types of projects that are permissible as SEPs, the terms and conditions under which a SEP may become part of a settlement, and the appropriate way to calculate a final penalty in light of the inclusion of a SEP in a settlement. The primary purpose of the SEP Policy is to encourage and obtain environmental and public health protection and benefits that may not otherwise have occurred in the settlement of an enforcement action.

The Agency encourages the use of SEPs that are consistent with this Policy. Case teams should consider SEPs early in the settlement process and, in appropriate cases, provide SEP ideas to defendants. SEPs are an important component of the EPA's enforcement program, but may not be appropriate in the settlement of all cases. Even in the absence of a SEP, enforcement settlements provide substantial benefits to communities and the environment. Penalties promote environmental compliance by deterring future violations by the defendant and other members of the regulated community. Penalties also help ensure a national level playing field for the regulated community. Injunctive relief measures ensure that compliance is achieved and maintained, and redress the harm caused by a violation, thereby providing long-term significant environmental and public health benefits to the impacted community. Where a proposed project could reasonably comprise part of the injunctive relief portion of a settlement, it should not be a SEP.

B. Using this Policy

This Policy establishes a framework for the EPA to use in exercising its enforcement discretion in determining appropriate settlements. To include a proposed project in a settlement as a SEP, Agency enforcement and compliance personnel should:

---

[1] For ease of use and brevity, "defendant" shall be used to mean both defendants in civil judicial settlements and respondents in administrative settlements.
[2] U.S. ENVTL. PROT. AGENCY, EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY (May 1, 1998).

1. Ensure that the project conforms to the basic definition of a SEP (Section III);

2. Ensure that all legal guidelines are satisfied (Section IV);

3. Ensure that the project fits within one (or more) of the designated categories of SEPs (Sections V and VI);

4. Determine the appropriate amount of penalty mitigation to reflect the project's environmental and/or public health benefits using the evaluation criteria (Sections VIII and IX); and

5. Ensure that the project satisfies all of the EPA procedures, settlement requirements and other criteria (Sections X-XII).

In some cases, strict application of this Policy may not be appropriate, in whole or in part. In such cases, the litigation team may use an alternative or modified approach, with advance approval from the Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA).

C. Applicability

This Policy revises and supersedes the February 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements, the May 1995 Interim Revised Supplemental Environmental Projects Policy, and the May 1998 EPA Supplemental Environmental Projects Policy. It also reflects and incorporates by reference a number of memoranda and guidance documents that have been issued by the EPA since 1998 (*see* Appendix B). Where there may be inconsistencies between these documents and this Policy, this Policy shall supersede the memoranda and guidance documents. This Policy applies to settlements of all civil judicial and administrative enforcement actions filed after the effective date of this Policy and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the specific terms of a SEP.

This Policy applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations that the EPA administers. It may be used by the EPA and the Department of Justice (DOJ) in reviewing proposed SEPs in settlement of citizen suits. This policy also applies to federal agencies that are liable for the payment of civil penalties.

This is a settlement policy and thus is not intended for use by the EPA, defendants, courts, or administrative law judges at a hearing or in a trial. Further, the Agency's decision 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 the EPA's discretion. Even though a project appears to satisfy all of the provisions of this Policy, the EPA may decide, for one or more reasons, that a SEP is not appropriate (*e.g.*, the cost of reviewing a SEP proposal may be excessive, the

ED_002597_00000049-00010

oversight costs of the SEP may be too high, the defendant may not have the ability or reliability to complete the proposed SEP, or the deterrent value of the higher penalty amount may outweigh the benefits of the proposed SEP).

This document is intended for use by EPA enforcement personnel in settling cases and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. This document is not intended to supersede any statutory or regulatory requirements. Any inconsistencies between this document and any statute or regulation should be resolved in favor of the statutory or regulatory requirement. The EPA reserves the right to change this Policy at any time, without prior notice, or to act at variance with this Policy. This Policy does not create any rights, duties, or obligations, implied or otherwise, in any third parties.

II. SUPPORTING THE EPA'S MISSION

SEPs can provide additional environmental and/or public health benefits in addition to those achieved by compliance with applicable laws. Therefore, SEPs are an important component of the EPA's enforcement program, although they may not be appropriate in the settlement of all cases. SEPs can also help to further the EPA's mission to protect public health and the environment, which includes, but is not limited to, protecting children's health, ensuring environmental justice, promoting pollution prevention, encouraging the development of innovative technologies that protect human health and the environment, and addressing climate change.

A. Children's Health

Protecting children's health from environmental risks is fundamental to the EPA's mission. Exec. Order No. 13045, *Protection of Children from Environmental Health Risks and Safety Risks*, 62 Fed. Reg. 19,885 (Apr. 23, 1997), directs each federal agency to "identify and assess environmental health risks and safety risks that may disproportionately affect children . . . ." The Executive Order recognizes the significant body of scientific knowledge demonstrating that children may suffer disproportionately from environmental health risks and safety risks.

Children are at increased risk because their neurological, immunological, and other systems are still developing and they eat, drink, and breathe more air in proportion to their body weight. Their smaller size and weight may diminish their protection from standard safety features, and their behavior patterns may make them more susceptible to exposure to environmental risks. Projects that reduce children's exposure to, or health impacts from, pollutants, and/or that reduce environmental risks to children in the community impacted by a violation are actively sought and encouraged.

B. Environmental Justice

The EPA defines "environmental justice" (EJ) as the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.

ED_002597_00000049-00011

Exec. Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7,629 (Feb. 16, 1994), acknowledges that certain segments of the nation's population are disproportionately burdened by pollutant exposure. The Executive Order requires, to the greatest extent practicable and permitted by law, that federal agencies make achieving environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental impacts of its programs, policies, and activities on minority and low income populations in the United States and its territories.

Further, the EPA has stated that the term "EJ concern" indicates "the actual or potential lack of fair treatment or meaningful involvement of minority, low-income, or indigenous populations or tribes in the development, implementation, and enforcement of environmental laws, regulations, and policies."[3]

Defendants are encouraged to consider SEPs in communities where there are EJ concerns. SEPs can help ensure that residents who spend significant portions of their time in, or depend on food and water sources located near the areas affected by violations will be protected. However, due to the non-public nature of settlement negotiations there are legal constraints on the information the EPA can share during settlement negotiations, which are discussed in more detail in Section VII. In some situations, members of a community impacted by an environmental violation may feel that they lack meaningful involvement in the enforcement process, including the selection of a SEP. While members of an impacted community ordinarily would not be part of settlement negotiations, the EPA strongly encourages defendants to reach out to the community for SEP ideas and prefers SEP proposals that have been developed with input from the impacted community. During the public comment period required for many judicial settlements and certain administrative settlements, community members are afforded an opportunity to review and comment on any of the settlement's terms, including any SEPs that may be part of the resolution.

Because many different types of projects could benefit communities with EJ concerns, and are not limited to specific techniques, processes or activities, they have not been confined to a particular SEP category. Rather, because promoting environmental justice through a variety of projects is an overarching goal, EJ is one of the six critical factors on which SEP proposals are evaluated (*see* Section VIII). SEPs that benefit communities with EJ concerns are actively sought and encouraged.

C. Pollution Prevention

The Pollution Prevention Act of 1990 (42 U.S.C. §§ 13101-13109) identifies an environmental management hierarchy in which pollution "should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated

---

[3] U.S. ENVTL. PROT. AGENCY OFFICE OF POLICY, ECON., AND INNOVATION (OPEI), OPEI REGULATORY DEVELOPMENT SERIES, INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION, EPA'S ACTION DEVELOPMENT PROCESS (July 2010).

ED_002597_00000049-00012

in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort . . . ." Selection and evaluation of proposed SEPs should be conducted in accordance with this hierarchy of environmental management (*e.g.*, SEPs that utilize techniques or approaches to prevent the generation of pollution are preferred over other types of pollution reduction or control strategies). Projects that prevent the generation of pollution often provide the chance to utilize new and innovative technologies. Pollution prevention is one of the listed SEP categories. Effectiveness in developing and implementing pollution prevention techniques and practices is also a factor in evaluating a SEP, and can be reflected in the degree of consideration accorded to the defendant in the calculation of the final settlement penalty, and such projects are actively sought and encouraged.

D. Innovative Technology

SEPs provide defendants with an opportunity to develop and demonstrate new technologies that may prove more protective of human health and the environment than existing processes and procedures. SEPs also provide the EPA with a unique opportunity to observe and evaluate new technologies which might, should they prove effective and efficient, lead to better standard industry practices. Technology innovations may also be a means to assure that future industry and other commercial practices are sustainable, reflect the best available technology, and lead to continued long-term pollution reductions and improved public and environmental health. Innovative technology can take a variety of forms and may be applied broadly across environmental media and commercial, industrial and municipal activities, processes and practices. Innovative enforcement tools supporting OECA's Next Generation Compliance, such as fenceline monitors, e-reporting, web posting of data and independent third-party audits, may be appropriate for consideration as SEPs where not achievable or appropriate as injunctive relief or mitigation in the context of a settlement.

Pollution reduction and pollution prevention projects often utilize innovative technologies, methodologies, and/or practices. Because of this wide-ranging potential for significant environmental and public health benefits, "innovation" is one of the six critical factors used to evaluate SEP proposals. SEPs that employ innovative technologies are actively sought and encouraged.

E. Climate Change

The Earth's climate is changing. Temperatures are rising, snow and rainfall patterns are shifting, and more extreme climate events – such as increased floods and droughts, coastal storms, and record high temperatures – are already taking place. These observed changes are linked to the climbing levels of carbon dioxide and other greenhouse gases in our atmosphere. Reducing greenhouse gas emissions through, for example, energy efficiency projects that reduce emissions by reducing energy demand can contribute to reducing climate change. Projects that address the causes of climate change and reduce or prevent emissions of climate change pollutants and greenhouse gases, such as carbon dioxide, may qualify as SEPs.

In addition to working to curb climate change by reducing emissions, community members are taking action to make their communities more resilient in the face of climate impacts. Preparing

ED_002597_00000049-00013

infrastructure and natural ecosystems for the changes that will occur with a changing climate can help communities adapt to climate change and be more resilient in avoiding or recovering from events resulting from a changing climate. For example, in some areas where increased rainfall is expected, increased runoff can lead to greater stress on water infrastructure and to degradation of water quality. Anticipating those impacts can help a community plan ahead to limit the negative impacts of these changes. Projects that address the impacts of climate change and that help increase a community's resilience in the face of these impacts on ecosystems or infrastructure, may qualify as SEPs.

III. DEFINITION AND KEY CHARACTERISTICS OF A SEP

Supplemental environmental projects are defined as **environmentally beneficial projects** which a defendant agrees to undertake **in settlement of an enforcement action,** but which the defendant, or any other third party, is **not otherwise legally required to perform.** The three bolded key parts of this definition are described in more detail below.

A. "**Environmentally beneficial**" means a SEP must improve, protect, or reduce risks to public health or the environment. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits public health and/or the environment.

B. "**In settlement of an enforcement action**" means:

   1. The defendant's commitment to perform the SEP is included in a legally enforceable settlement document;

   2. The EPA has the opportunity to review and comment on the scope of the project before it is implemented; and

   3. The project is not commenced until after the Agency has identified a violation (*e.g.*, issued a notice of violation, administrative order, or complaint).[4]

C. "**Not otherwise legally required to perform**" means the project or activity is not required by any federal, state, or local law or regulation or achievable under applicable environmental and other federal laws. SEPs cannot include actions which the defendant, or any other third party, is likely to be required to perform:

---

[4] Because the primary purpose of this Policy is to obtain environmental and/or public health benefits that would not have occurred "but for" the settlement, projects which the defendant has previously committed to perform or has begun implementing before the settlement is final are not eligible as SEPs.

ED_002597_00000049-00014

1. As injunctive relief,[5] including as a mitigation project,[6] in the instant case;

2. As injunctive relief in another legal action the EPA, or another regulatory agency, could bring;

3. As part of an existing settlement or order in another legal action; or

4. By any other federal, state or local requirement.

The performance of a SEP reduces neither the stringency nor the timeliness requirements of federal environmental statutes and regulations. Performance of a SEP does not alter a defendant's obligation to remedy a violation expeditiously and return to compliance. Projects or actions that are not required, but that reflect standard industry practices, are generally not acceptable as SEPs, but should be considered as part of the injunctive relief package.

IV. LEGAL GUIDELINES

The EPA has broad discretion to settle cases, including the discretion to include SEPs as an appropriate part of a settlement. The evaluation of whether a proposed SEP is within the EPA's authority and consistent with all statutory and Constitutional requirements may be a complex task. Accordingly, this Policy uses the following legal guidelines to ensure that SEPs are within the Agency's and a federal court's authority, and do not run afoul of any Constitutional or statutory requirements.[7] Legal guidelines may not be waived, and are described below.

A. Nexus

1. All projects must have sufficient nexus. Nexus is the relationship between the violation and the proposed project.[8] Nexus ensures the proper exercise of the EPA's prosecutorial discretion and enables appropriate penalty mitigation for including the SEP in the settlement.

---

[5] The statutes the EPA administers generally provide a court with broad authority to order a defendant to cease its violations, take necessary steps to prevent future violations, and to remediate any harm caused by the violations. If a court is likely to order a defendant to perform a specific activity in a particular case as injunctive relief or a mitigation project, such an activity does not qualify as a SEP.

[6] *See* Memorandum from Susan Shinkman, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Securing Mitigation as Injunctive Relief In Certain Enforcement Settlements* (2d ed., Nov. 14, 2012).

[7] These legal guidelines are based on federal law as it applies to the EPA; states may have more or less flexibility in the use of SEPs depending on their laws and this Policy does not purport to identify those requirements.

[8] The EPA's prosecutorial discretion to settle enforcement actions does not extend to the inclusion of SEPs that do not have a nexus to the violations being resolved. According to the Comptroller General of the United States (CG), enforcement settlements may contain "terms and undertakings that go beyond the remedies specifically" identified in the statute being enforced. However, the Agency's "settlement authority should be limited to statutorily authorized prosecutorial objectives: correction or termination of a condition or practice, punishment, and deterrence." *See Matter of: Commodity Futures Trading Commission – Donations Under Settlement Agreements*, 1983 WL 197623, B-210210, (Sept. 14, 1983). *See also Matter of: Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties*, 1990 WL 293769, B-238419, (Oct. 9, 1990).

ED_002597_00000049-00015

2. A project may not be inconsistent with any provision of the underlying statutes that are the basis of the enforcement action. All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action.

3. Projects must relate to the underlying violation(s) at issue in the enforcement action. The project must demonstrate that it is designed to reduce:

   a. The likelihood that similar violations will occur in the future;

   b. The adverse impact to public health and/or the environment to which the violation at issue contributes; or

   c. The overall risk to public health and/or the environment potentially affected by the violation at issue.

   Nexus is easier to establish if the primary impact of the project is at the site where the alleged violation occurred, at a different site in the same ecosystem, or within the immediate geographic area.[9, 10] SEPs may have nexus even if they address a different pollutant in a different medium, provided the project relates to the underlying violation(s).

4. SEPs may not be agreements to spend a certain amount on a project that will be defined later. For a case team to properly evaluate a SEP's characteristics (the "what, where, when" of the SEP), and establish the connection to the underlying violation being resolved, the type and scope of each project must be specifically described and defined. Without a well-defined project with clear environmental or public health benefit, the EPA cannot demonstrate nexus.

B. Augmentation and Other Issues

1. EPA Management or Control of SEPs

   a. The EPA may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP. Nor may the EPA retain authority to manage or administer the SEP. The EPA may, of

---

[9] Ecosystem or geographic proximity is not by itself a sufficient basis for nexus; a project must always demonstrate a relationship to the violation in order to satisfy subparagraph a, b, or c in the definition of nexus. In some cases, a project may be performed at a facility or site not owned by the defendant, provided there is a relationship between the violation and the SEP. The immediate geographic area will generally be the area within a 50-mile radius of the site on which the violations occurred.

[10] Where a defendant proposes to perform the same activity at multiple facilities (including facilities without violations), nexus is easier to establish if the primary impact is at the same facility, or in the same ecosystem, or within the immediate geographic area as the violations, but the global SEP may be acceptable so long as at least part of it is at one of these locations.

ED_002597_00000049-00016

course, perform oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.

b. The EPA may not direct, recommend, or propose that the defendant hire a particular contractor or consultant to carry out the SEP (the "SEP implementer"). Similarly, the Agency may not direct, recommend or propose a specific organization to be the recipient of a SEP (the "SEP recipient"). The EPA may retain the right to disapprove contractors, consultants or organizations that the defendant proposes for Agency consideration, provided the Agency's decision is based on objective criteria for assessing the entity's qualifications (*e.g.*, experience, capacity, technical expertise) and fitness. The Agency may also specify the type of organization that will be the SEP recipient.

2. Federal Appropriations and Federally-Performed Activities[11]

a. EPA-Specific:

i. A project may not be used to satisfy the EPA's statutory obligation or another federal agency's obligation to perform a particular activity. Conversely, if a federal statute prohibits the expenditure of federal resources on a particular activity, the EPA may not consider projects that do or would appear to circumvent that prohibition.

ii. A project may not provide additional resources to support (including in-kind contributions of goods and services) specific activities performed by EPA employees or EPA contractors.[12] For example, if the EPA has developed a brochure to help a segment of the regulated community comply with environmental requirements, a project may not directly, or indirectly, provide additional resources to revise, copy or distribute the brochure. A project may not provide resources (including, but not limited to, funding, services and/or goods) to perform work on EPA-owned property.

iii. SEPs may not provide the EPA with additional resources to perform a particular activity for which the EPA receives a specific appropriation. SEPs may not have the effect of providing a recipient in a particular federal financial assistance transaction with the EPA with additional resources for the same specific activity described in the terms or scope

---

[11] Appendix A, AUGMENTATION OF APPROPRIATIONS: REASONABLE INQUIRY REGARDING FEDERAL APPROPRIATIONS, provides case teams with assistance in ensuring that proposed SEPs meet the conditions of Legal Guidelines IV.B.2 and IV.C.

[12] This does not apply where the EPA has statutory authority to accept funds or other things of value from a non-federal entity.

ED_002597_00000049-00017

of work for the transaction.[13] Examples of federal financial assistance transactions include grants, cooperative agreements, federal loans, and federally guaranteed loans.

b. Other Federal Agencies:

i. A project may not provide resources (including, but not limited to, funding, services and/or goods) to perform work on federally-owned property, or provide additional support (including in-kind contributions of goods and services) for a project performed by another federal agency.[14]

ii. SEPs may not have the effect of providing a recipient in a particular federal financial assistance transaction with another federal agency with additional resources for the same specific activity described in the terms or scope of work for the transaction. Examples of federal financial assistance transactions include grants, cooperative agreements, federal loans and federally guaranteed loans.

C. Augmentation: Reasonable Inquiry and Certification

1. By Defendants: In all settlements that include a SEP, defendants must certify that they have performed a reasonable inquiry to ensure that a SEP does not inadvertently augment federal appropriations. The following must be included in all settlement documents:

Defendant certifies that:

a. It is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in paragraph X; and

b. It has inquired of the SEP recipient and/or SEP implementer [use proper names where available] whether either is a party to an open federal

---

[13] OECA's 2011 interim revisions to Legal Guideline 5.b. of the 1998 SEP Policy included an additional prohibition on projects which were described in an unsuccessful federal financial assistance transaction proposal submitted to the EPA within two years of the date of the settlement, unless the Agency had rejected the proposal as statutorily ineligible. *See* Memorandum from Cynthia Giles, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Transmittal of the Office of General Counsel's Opinion on Legal Guidelines Under the 1998 Supplemental Environmental Projects Policy Relating to Impermissible Augmentation of Appropriations* (Apr. 18, 2011). With approval of the Office of General Counsel, this prohibition has been eliminated.

[14] This does not apply to SEPs in which a federal agency expends appropriated funds on the project under a settlement of a federal facility enforcement case, or when a federal agency has statutory authority to accept funds or other items of value from a non-federal entity.

ED_002597_00000049-00018

financial assistance transaction that is funding or could fund the same activity as the SEP and has been informed by the recipient and/or the implementer [use proper names where available] that neither is a party to such a transaction.

2. By the EPA: The EPA also has an obligation to make a reasonable inquiry to ensure that a SEP does not inadvertently augment federal appropriations, and this should be documented by the case team in its SEP approval memo and case file.

D. Augmentation Exception: Diesel Emissions Reduction Projects

In past fiscal years, the EPA has received specific appropriations for diesel emissions reduction projects. Regardless of whether the EPA continues to receive a specific appropriation, diesel emissions reduction projects may be accepted as SEPs because, in 2008, Congress enacted legislation granting the EPA authority to accept diesel emissions reduction SEPs, creating an express exception to the prohibition on augmenting appropriations for these types of projects.[15] Thus, for these projects, augmentation inquiries based on Legal Guidelines IV.B.2.a.iii and b.ii need not be performed, and the certification above, in Section IV.C.1, is not required. EPA case teams should, however, make the other augmentation inquiries, based on Legal Guidelines IV.B.2.a.i and ii, and IV.B.2.b.i.

In addition, the authorizing statute[16] requires that any settlement with a diesel emissions reduction SEP include the following certification:

> *Defendant certifies under penalty of law that it would have agreed to perform a comparably valued, alternative project other than a diesel emissions reduction Supplemental Environmental Project, if the Agency were precluded by law from accepting a diesel emissions reduction Supplemental Environmental Project.*

Also, any diesel emissions reduction SEP must comport with all other conditions of this Policy, including the nexus requirement.[17] Diesel emissions reduction SEPs may not be implemented via cash donations. In the absence of a concurrent obligation for the defendant to ensure that the project occurs and is satisfactorily completed, it will be difficult to demonstrate that the SEP has nexus.

V. CATEGORIES OF SEPs

The EPA has identified seven specific categories of projects which may qualify as SEPs. Many SEPs may fall into more than one category. In addition, there is an eighth category for "Other"

---

[15] *See* Act of June 30, 2008, Pub. L. No. 110-255, § 1, 122 Stat. 2423.
[16] *Id.* at § 2, 122 Stat. 2423.
[17] *See* Memorandum from Walker B. Smith, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Supplemental Environmental Projects to Reduce Diesel Emissions* (July 18, 2008).

ED_002597_00000049-00019

projects that meet all conditions of the SEP Policy but do not readily fit in one of the seven specific categories.

A. Public Health

Public health projects include those that provide diagnostic, preventative and/or health care treatment related to the actual or potential harm to human health caused by the violation. This includes, but is not limited to, epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment and rehabilitation therapy. Examples of public health SEPs include blood lead level testing, asthma screening and treatment and mobile health clinics. Public health SEPs may also include projects such as mosquito eradication programs or donation of antimicrobial products to assist in natural disaster situations. Public health SEPs are acceptable only where the primary beneficiary of the project is the population that was harmed or put at risk by the violations.

B. Pollution Prevention

A pollution prevention project prevents pollution at its source, before it is generated. It includes any practice that reduces the quantity and/or toxicity of pollutants entering a waste stream prior to recycling, treatment, or disposal. After the pollutant or waste stream has been generated pollution prevention is no longer possible, and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods (*i.e.*, pollution reduction).

Source reduction projects may include equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project which protects natural resources through conservation or increased efficiency in the use of energy, water, or other materials, as well as "in-process recycling" wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on-site.

Projects that replace or reduce the use of traditional energy sources with alternative energy sources or that implement energy efficiency activities, potentially reducing air pollutants associated with electric power generation and greenhouse gases that contribute to climate change, may qualify as pollution prevention SEPs. Where such a proposed SEP addresses the same pollutant(s) or same health effect(s) caused by the pollutant(s) at issue in the case, and will be implemented within a fifty-mile radius of the site of the violation, the SEP should satisfy the nexus requirement and confer the required environmental benefits.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution produced and released into the environment,

ED_002597_00000049-00020

not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency and conservation in the use of energy, water, or other materials.[18]

C. Pollution Reduction

If the pollutant or waste stream already has been generated or released, a pollution reduction approach which employs recycling, treatment, containment or disposal techniques may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as "pollution prevention." This type of SEP may include the installation of a more effective end-of-process control or treatment technology, improved containment, or safer disposal of an existing pollutant source. Pollution reduction also includes "out-of-process recycling," wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for off-site production.

D. Environmental Restoration and Protection

An environmental restoration and protection project is one which enhances the condition of the ecosystem or immediate geographic area adversely affected by the violation.[19] These projects may be used to restore or protect natural environments and address environmental contamination and similar issues in man-made environments, and may include any project that protects the ecosystem from actual or potential damage resulting from the violation or that improves the overall condition of the ecosystem.[20] Examples of such projects include: restoration of a wetland in the same ecosystem along the same avian flyway in which the facility is located, or purchase and management of a watershed area to protect a drinking water supply where the violation (*e.g.*, a reporting violation) did not directly damage the watershed but potentially could lead to damage due to unreported discharges. This category also includes projects which provide for the protection of endangered species (*e.g.*, developing conservation programs or protecting habitat critical to the well-being of a species endangered by the violation).

In some projects where the defendant has agreed to restore and then protect certain lands, the SEP may, under certain circumstances, include the creation or maintenance of certain recreational improvements, such as hiking and bicycle trails. The costs associated with such recreational improvements may be included in the total SEP cost provided they do not impair the environmentally beneficial purposes of the project and they constitute only an incidental portion of the total resources spent on the project.

---

[18] This is consistent with the Pollution Prevention Act of 1990 (42 U.S.C. §§ 13101-13109) and the U.S. ENVTL. PROT. AGENCY, POLLUTION PREVENTION POLICY STATEMENT: NEW DIRECTIONS FOR ENVIRONMENTAL PROTECTION (June 15, 1993).

[19] If the EPA lacks authority to require repair of the damage caused by the violation, then repair itself may constitute a SEP.

[20] Simply preventing new discharges into the ecosystem, as opposed to taking affirmative action directly related to preserving existing conditions at a property, would not constitute a restoration and protection project, but may fit into another category, such as pollution prevention or pollution reduction.

ED_002597_00000049-00021

For a project in which the parties intend that a property be protected so that the ecological and pollution reduction purposes of the land are maintained in perpetuity, the defendant may sell or transfer the land to another party with the established resources and expertise to perform this function, such as a state park authority. In some cases, the U.S. Fish and Wildlife Service or the National Park Service may be able to perform this function.[21]

With regard to man-made environments, such projects may involve the environmental remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos and lead-based paint, which are a continuing source of releases and/or threat to individuals.

E. Assessments and Audits

There are three types of projects in the assessments and audits category: (1) pollution prevention assessments; (2) environmental quality assessments; and (3) compliance audits. These assessments and audits are only acceptable as SEPs when the defendant agrees to provide the EPA with a copy of the report and the results are made available to the public, except to the extent they constitute confidential business information (CBI) pursuant to 40 C.F.R. Section 2, Subpart B.

1. Pollution prevention assessments are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production and generation of toxic and hazardous materials and other wastes. To be eligible as SEPs, such assessments must be conducted using a recognized pollution prevention assessment or waste minimization procedure. Pollution prevention assessments are acceptable as SEPs without an implementation commitment by the defendant where the case team determines that the SEP delivers other benefits worthy of SEP credit. Pollution prevention measures may be difficult to draft before the results of an assessment are known, and many of the implementation recommendations may constitute activities that are in the defendant's own economic interest and would not warrant SEP credit.

2. Environmental quality assessments are investigations of: the condition of the environment at a site not owned or operated by the defendant; the environment impacted by a site or a facility regardless of whether the site or facility is owned or operated by the defendant; or threats to human health or the environment relating to a site or a facility regardless of whether the site or facility is owned or operated by the defendant. Environmental quality assessments include, but are not limited to, investigations of levels or sources of contamination in any environmental media at a site and monitoring of the air, soil, or water quality surrounding a site or facility. Such monitoring

[21] Certain federal agencies have explicit statutory authority to accept gifts such as land, money, or in-kind services. All projects benefitting these federal agencies must be reviewed and approved in advance by the office of the chief legal counsel of the recipient agency for consistency with statutory authority.

ED_002597_00000049-00022

activities are important as the data can empower over-burdened communities, and inform and enhance efforts to reduce potential environmental risks and hazards. To be eligible as SEPs, such assessments must be conducted in accordance with recognized protocols, if available, applicable to the type of assessment to be undertaken. An assessment without a commitment to address the findings of the assessment are permissible where the case team determines that the SEP delivers other benefits worthy of SEP credit. Expanded sampling or monitoring by a defendant of its own emissions or operations does not qualify as a SEP to the extent it is ordinarily available as injunctive relief.

Environmental quality assessment SEPs may not be performed: at sites that are on the National Priority List under Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. § 9605, and 40 C.F.R. Part 300; at specific sites that the EPA has determined to be eligible for a Brownfields assessment grant under CERCLA Section 104(k)(2), 42 U.S.C. § 9604(k)(2); and at all other sites, for assessments that the EPA or another federal agency can perform under its own authority, that a defendant or another party could be ordered to perform under an EPA or other federally-administered authority, or that are otherwise required under federal law.

3. Environmental compliance audits are independent evaluations of a defendant's compliance status with environmental requirements at a given point in time. Credit is only given for the costs associated with conducting the audit. While the SEP should require all violations discovered by the audit to be promptly corrected, no credit is given for remedying the violation since there is already a requirement to achieve and maintain compliance with environmental regulations. As most large companies routinely conduct compliance audits, mitigating penalties for such audits would reward violators for performing an activity that most companies already do. Audits may be less commonly done by small businesses or state or local governments, perhaps in part due to cost. In general, compliance audits are acceptable as SEPs only when the defendant is a small business, small community,[22] or a state or local government entity.[23]

---

[22] For purposes of this Policy, a small business is owned by a person or another entity that employs 100 or fewer individuals. Small businesses could be individuals, privately held corporations, farmers, landowners, partnerships, and others. A small community is one comprised of fewer than 2,500 persons.

[23] *See* Memorandum from Phyllis P. Harris, Principal Deputy Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Clarification and Expansion of Environmental Compliance Audits Under the Supplemental Environmental Projects Policy* (Jan. 10, 2003).

ED_002597_00000049-00023

F. Environmental Compliance Promotion

An environmental compliance promotion project provides training or technical support to other members of the regulated community in order to: (1) identify, achieve, and maintain compliance with applicable statutory and regulatory requirements or (2) go beyond compliance by reducing the generation, release, or disposal of pollutants beyond legal requirements. For these types of projects, the defendant may lack the experience, knowledge, or ability to implement the project itself and, if so, the defendant should be required to contract with an appropriate expert to develop and implement the compliance promotion project. Acceptable projects may include, for example, producing a seminar directly related to correcting widespread or prevalent violations within the defendant's economic sector. Environmental compliance promotion SEPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements that were violated and where the EPA has reason to believe that compliance in the sector would be significantly advanced by the proposed project. For example, if the alleged violations involved Clean Water Act (CWA) pretreatment violations, the compliance promotion SEP must be directed at ensuring compliance with pretreatment requirements. Environmental compliance promotion SEPs require the special approvals described in Section XII.A.4.

G. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance, such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training, to a responsible state or local emergency response or planning entity. This assistance enables these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel and to better respond to chemical spills.

EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions, Local Emergency Planning Committees, and Local Fire Departments. EPCRA's reporting requirements enable states and local communities to plan for and respond effectively to chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment and the people that could be harmed by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

Emergency planning and preparedness SEPs are acceptable where the primary impact of the project is within the same emergency planning district or state affected by the violations and there is no current federal financial assistance transaction that could fund the SEP. Further, this type of SEP is allowable only where the following violations are alleged in the complaint: violations of EPCRA; reporting violations under CERCLA Sections 103, 104(e) or 120, 42

ED_002597_00000049-00024

U.S.C. §§ 9603, 9604(E), or 9620; violations of Section 112(r) of the Clean Air Act (CAA), 42 U.S.C. § 7412(r); or violations of other emergency planning, spill, or release requirements.

H. Other Types of Projects

Projects that do not fit within one of the seven categories above, but have environmental and/or public health benefits and are otherwise fully consistent with all other provisions of this Policy, are allowable as SEPs subject to the approval requirements in Section XII.A.4.

VI. PROJECTS NOT ACCEPTABLE AS SEPs

The following are examples of the types of projects that are not allowable as SEPs. This list is not exhaustive.

A. General public educational or public environmental awareness projects (*e.g.*, sponsoring public seminars, conducting tours of environmental controls at a facility, or promoting recycling in a community);

B. Contributions to environmental research at a college or university;

C. Cash donations to community groups, environmental organizations, state/local/federal entities,[24] or any other third party;[25]

D. Projects for which the defendant does not retain full responsibility to ensure satisfactory completion;

E. Projects which, though beneficial to a community, are unrelated to environmental protection (*e.g.*, making a contribution to a non-profit, public interest, environmental or other charitable organization, donating playground equipment, etc.);

F. Studies or assessments without a requirement to address the problems identified in the study (except as provided for in Section V.E above);

G. Projects which the defendant, SEP recipient, or SEP implementer will undertake, in whole or in part, with federal loans, federal contracts, federal grants, or other forms of federal financial assistance or non-financial assistance;

H. Projects that are expected to become profitable to the defendant within the first five years of implementation (within the first three years for SEPs implemented by defendants that are small businesses or small communities)

---

[24] *See supra* footnote 21.

[25] Cash donations are prohibited because they may create the appearance of a diversion of penalty funds from the U.S. Treasury in violation of the Miscellaneous Receipts Act (MRA), 33 U.S.C. § 3302(b).

ED_002597_00000049-00025

are prohibited. After that time period, profitable projects where the environmental or public health benefit outweighs the potential profitability to the defendant may be allowable under certain circumstances. (*See* Section XI.D, for additional information and requirements);[26]

I. Projects that provide raw materials only, with no commitment from the defendant for a completed project utilizing the raw materials (*e.g.*, donating rail ties and gravel for a fish ladder but not actually ensuring that the ladder is built);

J. Projects that are not complete, discrete actions with environmental or public health benefits;

K. Projects for which completion depends on the actions or contributions of individuals or entities that are neither party to the settlement nor hired by the defendant as an implementer;

L. Except in very limited circumstances, as described in Section XI.B, SEPs may not include actions that a third party is legally required to perform by any federal, state, or local law or regulation (also referred to as "third-party compliance" projects).

VII. COMMUNITY INPUT

In appropriate cases, the EPA should encourage input on project proposals from the local community that may have been adversely impacted by the violations. Case teams should encourage defendants to seek community input as early in the SEP development process as possible.[27] Ideally, community input should be sought by the defendant and the EPA collaboratively, but in some cases the EPA should consider seeking community input even in the absence of the defendant's participation (*e.g.*, cases in areas with environmental justice concerns). If a case team is aware of community interest in particular SEPs, the case team should feel free to share that information with the defendant. Soliciting community input during the SEP development process can: result in SEPs that better address the needs of the impacted community; promote environmental justice; produce better community understanding of EPA enforcement; and improve relations between the community and the violating facility.[28]

---

[26] *See* Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects* (Dec. 5, 2003).

[27] In addition, in many civil judicial cases, the Department of Justice seeks public comment on lodged consent decrees through a Federal Register notice. 28 C.F.R. § 50.7. In certain administrative enforcement actions, there are also public notice requirements that are followed before a settlement is finalized. *See* 40 C.F.R. Part 22.

[28] *See* Interim Guidance for Community Involvement in Supplemental Environmental Projects, 68 Fed. Reg. 35,884 (June 17, 2003). This guidance includes appendices suggesting potential techniques and resources for conducting community outreach.

ED_002597_00000049-00026

Community involvement in SEPs may be most appropriate in cases where the range of possible SEPs is great and/or multiple SEPs may be negotiated.

Involving communities in consideration of SEPs enables the EPA and defendant to focus on the particular environmental priorities and concerns of a community, which is especially important if several different SEPs are being considered. The community also can be a valuable source of SEP ideas, including ideas that result in creative or innovative SEPs that might not otherwise have been considered.

Given the wide range of settlement scenarios, types of violations and communities, there are a number of factors that may help EPA staff determine whether or not community involvement may be appropriate in a particular case. Generally, these factors may include:

A. The specific facts and circumstances of each case (*e.g.*, court-ordered deadlines, imminent and substantial endangerment situations, etc.);

B. The willingness of the defendant to conduct a SEP;

C. The willingness of the defendant to solicit and respond in a meaningful way to community input;

D. The impact of the violations on the community, especially the community most directly affected by the facility's violations;

E. The level of interest of the community in the facility and the potential SEP; and

F. The amount of the proposed penalty and the settlement amount that is likely to be mitigated by the SEP.

Finally, SEPs are developed in the context of settlement negotiations. The EPA must carefully consider how to provide information to the public to facilitate its involvement in SEP consideration and development without undermining the non-public nature of settlement negotiations. Much of the information developed by the government may be privileged and therefore not appropriate for release to the public. In addition, a defendant may provide information to the government that must be kept confidential. For example, it may provide CBI to the EPA. CBI, by law, cannot be provided to the public.[29] Thus, each case will have limits on what information the EPA can make available to the public.[30] In judicial cases, DOJ will also retain authority to determine what information can be released to the community.

---

[29] *See* 40 C.F.R. Part 2, Subpart B.

[30] *See* Memorandum from Granta Y. Nakayama, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Restrictions on Communicating With Outside Parties Regarding Enforcement Actions* (Mar. 8, 2006).

ED_002597_00000049-00027

The extent of community input and participation in the SEP development process will vary with each case. Except in extraordinary circumstances and with the agreement of the parties, representatives of community groups will not participate directly in the settlement negotiations. This restriction is necessary because of the non-public nature of settlement negotiations. Although communities are generally not direct participants in settlement negotiations, appropriate outreach to affected communities (especially those with environmental justice concerns) regarding SEPs is encouraged, as this may better inform settlement negotiations.

VIII. EVALUATION CRITERIA

The EPA has identified several critical factors on which to evaluate proposed projects. SEP proposals should demonstrate that the project will effectively achieve or promote one or more of these overarching goals. The better the performance of the SEP under each of these factors, the higher the appropriate mitigation credit should be. Appropriate mitigation of the civil penalty for implementation of a SEP will be determined by the EPA based on these factors and other case-specific considerations.

A. Significant, Quantifiable Benefits to Public Health and/or the Environment

While all SEPs must benefit public health and/or the environment, SEPs that perform well on this factor will result in significant and quantifiable reduction in discharges of pollutants to the environment and reduction in risk to public health. SEPs also will perform well on this factor to the extent they result in significant and, to the extent possible, measurable progress in protecting and restoring ecosystems (including wetlands and endangered species habitats), and promoting more resilient communities, infrastructure and ecosystems in the face of climate change.

B. Environmental Justice

SEPs that perform well on this factor will mitigate damage or reduce risk to a community that may have been disproportionately exposed to pollution or is at environmental risk.

C. Community Input

SEPs that perform well on this factor will have been developed taking into consideration input received from the affected community. Projects developed with active solicitation and consideration of community input are preferred.

D. Innovation

SEPs that perform well on this factor will further the development, implementation, or dissemination of innovative processes, technologies, and/or methods which more effectively: reduce the generation, release, or disposal of pollutants; conserve natural resources; restore and protect ecosystems; protect endangered species; promote compliance; or improve climate change preparedness and resilience. This includes technology-forcing techniques which may establish new regulatory benchmarks.

ED_002597_00000049-00028

E. Multimedia Impacts

SEPs that perform well on this factor will reduce emissions to more than one medium and ensure that pollutant reductions are not being achieved by transferring pollutants from one medium to another.

F. Pollution Prevention

SEPs that perform well on this factor will develop and implement pollution prevention techniques and practices that reduce the generation of a pollutant.

IX. CALCULATION OF THE FINAL SETTLEMENT PENALTY

A primary incentive for a defendant to propose a SEP is the potential mitigation of its civil penalty. In settling enforcement actions, the EPA requires alleged violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the violations. The EPA also seeks substantial penalties in order to deter noncompliance. Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and other members of the regulated community. Penalties help maintain a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Thus, any mitigation of penalties must be carefully considered.

A. Components of the Settlement Penalty

Statutes administered by the EPA generally contain penalty assessment criteria that a court or administrative law judge must consider in determining an appropriate penalty during a trial or hearing. In the settlement context, the EPA follows these criteria, and program- or media-specific penalty policies based on the statutory criteria, in exercising its discretion to establish an appropriate penalty for purposes of settlement (settlement penalty). In calculating an appropriate penalty, the EPA considers factors such as the economic benefit associated with the violations, the gravity or seriousness of the violations and the violator's prior history of noncompliance.

Settlements that include a SEP must always include a settlement penalty that recoups the economic benefit a violator gained from noncompliance with the law, as well as an appropriate gravity-based penalty reflecting the environmental and regulatory harm caused by the violation(s).

SEPs are not penalties, nor are they accepted in lieu of a penalty. However, a violator's commitment to perform a SEP is a relevant factor for the EPA to consider in establishing an appropriate settlement penalty. All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP, compared to the violator who does not.

ED_002597_00000049-00029

B. Minimum and Maximum Penalty Requirements When SEPs Are Included in Settlement

1. Minimum Penalty Requirements

Settlements that include a SEP must always also include a penalty. In settlements in which defendants commit to conduct a SEP, the final settlement penalty must equal or exceed either:

a. The economic benefit of noncompliance plus ten percent (10%) of the gravity component; or

b. Twenty-five percent (25%) of the gravity component only; whichever is greater.

2. Exceptions to the Minimum Penalty Requirements

For certain types of settlements the minimum penalty required by the statutory penalty policy, or allowed by special exception, differs from the minimum penalty requirements of this Policy.

a. Clean Water Act Settlements with Municipalities using the NMLC

The EPA's Interim Clean Water Act Settlement Penalty Policy (Mar. 1, 1995) (CWA Penalty Policy) applies to civil judicial and administrative penalties sought under Sections 309(d) and (g) of the CWA, 33 U.S.C. §§ 1319(d) and (g), including violations of Sections 301, 307, 308, 309(a) and 405, 33 U.S.C. §§ 1311, 1317, 1318, 1319(a) and 1345. The CWA Penalty Policy sets forth how the Agency generally exercises its prosecutorial discretion in deciding on an appropriate enforcement response and determining an appropriate settlement penalty. In cases with a municipality or other public entity (such as a sewer authority) for violations of the CWA, the Agency may provide for substantially reduced penalties based on the CWA Penalty Policy's national municipal litigation considerations (NMLC).

The NMLC provisions are designed to take into account a number of different criteria unique to municipalities and are intended to recognize and account for the special circumstances faced by municipalities when settling CWA matters. However, the NMLC does not provide separate economic benefit and gravity amounts, so the analysis required to determine the minimum SEP penalty as provided above cannot be performed when using NMLC penalties. Additionally, due to the high capital costs and correspondingly high amount of economic benefit that are typical in such cases involving municipalities, if the minimum SEP penalty were calculated based on the actual economic benefit amount, the

resulting minimum penalty that would be required under the SEP policy would be greater than the entire NMLC-based penalty and would thus preclude any SEPs in municipal cases with an NMLC penalty. Consequently, to ensure that SEPs can be included in settlements with municipalities when using the NMLC, the minimum penalty requirements as provided above do not apply, and a municipality continues to be eligible to mitigate up to 40% of the penalty for a SEP, as provided for in the CWA Penalty Policy.[31]

b. Toxic Substances Control Act (TSCA) Settlements and Lead-Related SEPs

In administrative settlements resolving violations of TSCA Sections 402, 404 and 406(b), 15 U.S.C. §§ 2682, 2684 and 2686(b), and Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852(d), which include SEPs, respondents are eligible for a reduced minimum settlement penalty where the SEP is a lead-based paint abatement or blood lead level screening project and/or treatment, and where Medicare coverage is not available. In such cases, the minimum settlement penalty may be reduced: in Section 402, 404, and 406(b) settlements, to ten percent (10%) of the gravity-based penalty plus any economic benefit; and in Section 1018 settlements, to ten percent (10%) of the gravity portion of the penalty. These exceptions are not mandatory and may not be appropriate in all cases.[32]

3. Statutory Maximum Penalty Limits

In administrative enforcement actions in which there is a statutory limit (commonly called a "cap") on the total maximum penalty that may be sought in a single action, the penalty to be paid shall not exceed that limit. SEPs are not penalties, so the cost of the SEP is not included in the administrative cap.

C. Mitigation of the Penalty When SEPs Are Included in Settlement

1. General Approach to Penalty Mitigation

Penalty mitigation for performance of a SEP is considered only after all other appropriate mitigation factors in the applicable penalty policies have been applied and a bottom-line settlement penalty determined.

---

[31] *See* INTERIM CLEAN WATER ACT SETTLEMENT PENALTY POLICY, at 22 (Mar. 1, 1995).

[32] *See* Memorandum from Thomas V. Skinner, Acting Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Supplemental Environmental Projects in Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases* (Nov. 23, 2004); Memorandum from Cynthia Giles, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Exception to the Minimum Penalty Requirements for Proposed Supplemental Environmental Projects in Administrative Matters Resolving Violations of TSCA Sections 402, 404 and 406(b)* (Dec. 14, 2012).

ED_002597_00000049-00031

The amount of penalty mitigation given for a SEP should be equivalent to a percentage of the estimated cost to implement the SEP and should not exceed eighty percent (80%) of that estimated cost.

The EPA will consider a variety of factors in determining the amount of penalty mitigation including, but not limited to, the evaluation criteria described in Section VIII of this Policy. Penalty mitigation in light of a SEP is within the EPA's discretion; there is no presumption as to the correct amount of mitigation.

For any SEP where the government must allocate significant resources to monitor and review the implementation of the project, those resources should be taken into consideration when determining the appropriate penalty mitigation amount. In such instances, a penalty mitigation amount that is lower than the maximum allowable for that type of SEP may be more appropriate.

2. Exceptions to General Penalty Mitigation Approach

   a. For defendants that are small businesses, government agencies or entities, or non-profit organizations, the penalty mitigation amount may be set as high as one hundred percent (100%) of the estimated SEP cost, if the defendant can demonstrate the project is of outstanding quality.[33]

   b. For any defendant, if the SEP implements pollution prevention technologies or practices which reduce or eliminate the generation of a pollutant at its source, the penalty mitigation credit may be set as high as one hundred percent (100%) of the estimated SEP cost, if the defendant can demonstrate the project is of outstanding quality.

   c. Where a SEP provides significant benefits to a community with environmental justice concerns, case teams should be willing to consider, in consultation with OECA's National SEP Policy Coordinators, giving higher penalty mitigation credit for projects of outstanding quality.

   d. Penalty mitigation credit for SEPs that are profitable should be limited to:

      i. Eighty percent (80%) for pollution prevention projects; and

      ii. Sixty percent (60%) for all other types of projects. (*See* Section XI.D for additional guidance.)

---

[33] Outstanding quality may be based on how well a SEP meets and exceeds one or more of the evaluation criteria described in Section VIII, as well as on relevant case-specific factors.

ED_002597_00000049-00032

X. REQUIREMENTS FOR SETTLEMENTS THAT INCLUDE A SEP

A. SEP Description

The settlement agreement must accurately and completely describe the SEP. It must describe the specific actions to be performed by the defendant, and should include a completion deadline and, where appropriate, interim milestones for long-term or complex SEPs, as well as a detailed cost estimate. The defendant should also be required to provide documentation supporting its cost estimate. Negotiating teams should determine what potential SEP costs are not eligible for inclusion in the cost estimate on which the penalty mitigation is based. Examples of costs to consider that are generally not appropriate for inclusion include: overhead; additional employee time and salary; administrative expenses; most legal fees; and contractor oversight. If the defendant is unable or unwilling to provide documentation supporting its cost estimate, the SEP should not be accepted. The settlement agreement should also include a reliable and objective means to verify that the defendant has completed the project on time and in a satisfactory manner. For complex or long-term SEPs, including a requirement for the defendant to submit periodic status reports is recommended.

B. SEP Certifications

In all settlements with SEPs, the defendant must make a number of certifications. The following language should be included in the settlement document:

> *With regard to the SEP, Defendant certifies the truth and accuracy of each of the following:*
>
> *a. That all cost information provided to the EPA in connection with the EPA's approval of the SEP is complete and accurate and that Defendant in good faith estimates that the cost to implement the SEP[, exclusive of _____ costs,] is $_____;*
> *b. That, as of the date of executing this Decree, Defendant is not required to perform or develop the SEP by any federal, state, or local law or regulation and is not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;*
> *c. That the SEP is not a project that Defendant was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Decree;*
> *d. That Defendant has not received and will not receive credit for the SEP in any other enforcement action;*
> *e. That Defendant will not receive reimbursement for any portion of the SEP from another person or entity;*

ED_002597_00000049-00033

f. That for federal income tax purposes, Defendant agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP; [34]

g. Augmentation Certification (see Section IV.C);and

h. Diesel Emissions Reduction SEP Certification (where applicable, see Section IV.D).

C. Disclosure of Enforcement Settlement Context

Further, the defendant must agree that whenever it publicizes a SEP or the results of a SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action. The settlement document should also include the following provision:

> *Any public statement, oral or written, in print, film, or other media, made by Defendant making reference to the SEP under this Agreement/Decree from the date of its execution of this Agreement/Decree shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action United States v. Defendant, taken on behalf of the U.S. Environmental Protection Agency to enforce federal laws."*

D. SEP Completion Report

The settlement agreement should require submission of a final SEP completion report from the defendant. This report should be certified by an appropriate corporate official acceptable to the EPA. At a minimum, the report should provide evidence of SEP completion (which may include, but is not limited to, photos, vendor invoices or receipts, correspondence from SEP recipients, etc.) and document all SEP expenditures. To the extent feasible, defendants should be required to quantify the benefits associated with the project and provide the EPA with a report setting forth how the benefits were measured or estimated. Additional requirements may be necessary, depending on the nature of the SEP.

E. Liability for Performance/Third-Party Involvement in SEPs

Defendants may not simply provide funds to a third-party SEP implementer or SEP recipient (*see* Sections VI.B and C). Defendants must remain responsible for ensuring that a SEP is completed satisfactorily (*see* Section VI.D). A defendant may not transfer this responsibility to any other party.

1. Third-Party SEP Implementers

Defendants may use third parties, including contractors, to assist with the implementation of a

---

[34] *See* Memorandum from Granta Y. Nakayama, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Advisory Memorandum on Internal Revenue Service Directive Regarding the Deductibility of Supplemental Environmental Projects* (Dec. 21, 2007).

ED_002597_00000049-00034

SEP.[35] However, the settlement document (including any appendices) should not require the defendant to select a particular third party to assist in implementing the SEP because, as noted in Legal Guideline IV.B.1.b, this could be perceived as the EPA managing or directing the SEP. It could also appear to provide a competitive advantage or preferential treatment to the third party. In some instances, it may be appropriate for the EPA to define criteria or qualifications that potential SEP implementers must meet. In that event, the EPA may reject a SEP if the SEP implementer selected by the defendant does not meet the required criteria (*e.g.*, a contractor that is not sufficiently experienced or is not properly certified to perform the work required).

The settlement document may identify a SEP implementer chosen by the defendant and, in that case, the agreement should explicitly note that the implementer was chosen by the defendant. The settlement document should not include any agreements made between the defendant and the SEP implementer (including which elements of the SEP the implementer will perform) because inclusion of detailed agreements between the violator and a third party could create ambiguity about who is responsible in the event of nonperformance of the SEP. The defendant is responsible for the satisfactory completion of the SEP and cannot transfer that responsibility to a third party. Therefore, the agreement should spell out the activities to be performed, in as much detail as necessary for the particular SEP. However, any agreements between the defendant and implementer about how the SEP will be accomplished should not be part of the settlement agreement.

To avoid ambiguity, enhance enforceability, avoid the appearance of augmentation or that the EPA is managing the SEP and to avoid ethical issues with regard to third parties, settlement documents may include language such as:

a. *Defendant may use a contractor/consultant to implement the SEP;*

b. *Defendant has selected (name of contractor/consultant or SEP implementer) as a contractor/consultant to assist with implementation of the SEP;*

c. *The contractor/consultant chosen by Defendant must meet the following criteria [define criteria in terms of qualifications, experience, knowledge of particular geographic area or ecosystem, etc.]; and/or*

d. *Defendant shall provide the EPA with notice of the contractor/consultant and the EPA has the right to disapprove a SEP implementer if it does not meet the required criteria.*

2. Third-Party SEP Recipients

The settlement document should not require the defendant to select or identify a particular third-party recipient for the SEP, as this could similarly be perceived as the EPA managing the SEP and/or providing an unfair competitive advantage or preferential treatment to the recipient. The

[35] Non-profit organizations, such as universities and public interest groups, may function as contractors or consultants.

ED_002597_00000049-00035

settlement document may, however, identify a SEP recipient selected by the defendant.

In some instances, it may be appropriate for the EPA to define criteria or qualifications that potential SEP recipients must meet. In that event, the EPA may reject a SEP if the SEP recipient selected by the defendant does not meet the required criteria (*e.g.*, the EPA may reject a SEP where the recipient is a land trust that is financially incapable of preserving and maintaining land donated by the defendant).

Settlement documents may include language such as:

a. *Defendant has selected (name of SEP recipient) to receive SEP [define activity, service, or product to be provided to SEP recipient];*

b. *The SEP recipient chosen by Defendant must meet the following criteria [define criteria in terms of qualifications, experience, knowledge of particular geographic area or ecosystem, etc.];*

c. *Defendant shall provide the EPA with notice of the SEP recipient and the EPA has the right to disapprove the SEP if the recipient does not meet the required criteria.*

F. Failure to Satisfactorily Complete a SEP and Stipulated Penalties

Defendants who agree to perform a SEP as part of an enforcement settlement will generally pay a smaller penalty than if the settlement does not include a SEP. Thus, it is important that the SEP be completed in a timely and satisfactory manner, to ensure that the EPA and the public receive the benefits expected from the SEP. Therefore, stipulated penalty liability for failure to adequately perform or complete a SEP should always be included in the settlement document and be established as appropriate to the individual case.

1. Stipulated Penalty Provisions in the Settlement Document

The settlement document should provide stipulated penalties for failure to satisfactorily complete a SEP, based on the description of the SEP and definition of satisfactory completion in the settlement document. As noted in Sections IV.A.4 and X.A, the SEP description provided by the defendant should be as detailed and clear as possible, in terms of specific activities, actions, and/or anticipated results. The settlement agreement should clearly define satisfactory completion of the SEP in terms of such activities, actions and/or anticipated results, so that all parties understand the terms on which satisfactory completion will be judged.

The definition of satisfactory completion may include a commitment to expend an agreed-upon amount on performance of the SEP. The defendant's estimation of the SEP cost and commitment to expend a certain amount on the SEP can help the case team properly assess the scope and scale of the SEP and ensure that any penalty mitigation based on its performance is appropriate.

ED_002597_00000049-00036

However, with rare exceptions, expenditure of funds should not be the sole parameter on which satisfactory completion is to be determined.[36]

The settlement agreement should also include a deadline for final completion of the SEP. For very large or complex SEPs, or SEPs with extended implementation schedules, it is strongly recommended that defendants be required to submit a SEP workplan that includes specific actions to be taken, interim milestones (where appropriate), a final completion date and cost estimates.

Stipulated penalty provisions in the settlement document may be structured to include daily or one-time lump-sum penalties, or a combination of both, as deemed appropriate by the case team. For example:

a. For failure to meet interim milestones, to submit required progress reports, and/or to provide a SEP completion report, daily penalties may be appropriate.

b. For failure to satisfactorily complete the SEP as described (including situations where the EPA deems the SEP to have been abandoned by the defendant and situations where the SEP has not been satisfactorily completed because the defendant has not expended the agreed-upon SEP cost), either daily or lump-sum penalties may be appropriate.

c. Lump-sum stipulated penalties for failure to complete the SEP must exceed the estimated cost of the SEP. Stipulated penalties that exceed the estimated cost of the SEP provide an incentive to the defendant to complete the SEP satisfactorily and ensure that the EPA receives the full benefit of the settlement.

In judicial settlements, where SEPs are often larger projects with extended implementation schedules, stipulated penalty liability for failure to satisfactorily complete a SEP should generally be structured as daily penalties, in the same manner as stipulated penalty liability for failure to complete required injunctive relief. This will help ensure that the SEP is being implemented in a timely and satisfactory manner, according to the schedule/workplan submitted by the defendant as part of the SEP description. For small, easy-to-implement SEPs, the alternative of a lump-sum penalty that exceeds the SEP cost may also be appropriate.

---

[36] Consultation with the appropriate OECA National SEP Policy Coordinators is recommended at the drafting stage in situations where a case team believes that the only means for defining satisfactory completion of a SEP is through expenditure of an agreed-upon amount. In most cases, the defendant should be able to identify a minimum activity or number of actions that can be the basis of satisfactory completion. For instance, in land purchase/conservation SEPs, the purchase of a minimum amount of acreage should be required, even where market fluctuations make it difficult to determine the exact amount of land that can be purchased for the SEP cost. Similarly, for example, in settlements where the SEP involves diesel retrofits, a minimum number of retrofits should be required. If the defendant is not able to clearly define the SEP so that it is not possible to agree upon what constitutes "satisfactory completion," the SEP may not be appropriate to pursue.

ED_002597_00000049-00037

2. Assessment of Stipulated Penalties

The assessment of stipulated penalties is always at the EPA's discretion. Therefore, it is appropriate to include the following in settlement documents:

> *The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due under this Consent Decree/Consent Agreement.*

Where appropriate, settlements may also include provisions for reducing or waiving stipulated penalties to address certain situations where discretion may be desired. Examples of such situations include:

a. Where all elements of a SEP have been satisfactorily completed, but the defendant has expended less than the agreed-upon amount on the SEP, the EPA may, in its discretion, choose to reduce or waive stipulated penalties otherwise due under the settlement agreement.

b. Where a SEP has not been satisfactorily completed, but the defendant can demonstrate that the partially completed SEP provides some of the expected environmental and/or public health benefits, the EPA may, in its discretion, choose to reduce or waive stipulated penalties otherwise due under the settlement agreement.

c. Where a fully completed SEP does not produce the environmental or public health results required by the agreement, the enforcement case team may, in its discretion, deem the SEP satisfactorily completed and choose to reduce or waive stipulated penalties otherwise due under the settlement agreement. This may occur when a SEP is being implemented to test a new technology or process, or where circumstances beyond the defendant's control have had an impact on the results.

Consultation with the appropriate Headquarters enforcement division director is recommended prior to waiving or reducing stipulated penalties, to ensure consistency across settlements.

3. Dispute Resolution

Settlements including SEPs may include provisions for dispute resolution over determination of whether the SEP has been satisfactorily completed, pursuant to the terms of the agreement.

XI. SPECIAL SITUATIONS AND ISSUES

A. Accelerated Compliance SEPs

Accelerated compliance SEPs include activities that a defendant will become legally obligated to undertake two or more years in the future. Such projects are acceptable as SEPs provided the

ED_002597_00000049-00038

project will result in the facility coming into compliance at least two years prior to the effective date of the requirement. Accelerated compliance projects are not allowable, however, if the regulation or statute provides a benefit (*e.g.*, a higher emission limit) to the defendant for early compliance.

B. Third-Party Compliance Projects

Activities that are legally required of any party are generally prohibited as SEPs. Under some circumstances, however, an exception may be appropriate, but requires prior Headquarters approval from the appropriate media enforcement division director in OECA (*see* Section XII.A.5). Exceptions to this prohibition have been granted where:

1. The SEP involves a defendant's implementation of an activity that is legally required of residents of a community with environmental justice concerns (*e.g.*, maintaining or establishing connection to a sewer lateral line);

2. The residents are financially unable to comply with the legal requirement; and

3. The SEP provides significant public health and/or environmental benefits.

A specific exception has been made for chemical clean-out projects in schools. Although schools may be required to manage chemicals and hazardous wastes appropriately, many lack the skills and resources to do so. SEPs that identify, remove and properly dispose of hazardous chemicals from schools are acceptable under certain conditions, given their impact on children's health and communities with EJ concerns. Such projects may be acceptable when:

1. The recipient school is a primary or secondary public school;

2. The project provides a one-time identification, removal, and proper disposal of chemicals and/or hazardous wastes; and

3. The project includes a beyond-compliance component, such as establishing a chemical tracking system.

As with all third-party compliance projects, prior Headquarters approval from the appropriate media enforcement division director in OECA is required (*see* Section XII.A.5).

C. Environmental Management Systems (EMS)

EMSs are formal facility or corporate-wide plans and systems for ensuring current and future compliance with environmental requirements. EMSs describe the organizational structure and responsibilities of management and staff in ensuring environmental compliance. They also describe standard operating practices and procedures for the facility/company and identify processes and resources for developing, implementing, achieving, reviewing and maintaining the environmental policy of the company. An EMS is more than a statement by the organization of its intentions and principles in relation to its overall environmental performance; it also provides

ED_002597_00000049-00039

a framework for action for the company to set and meet its environmental objectives and targets. EMSs are allowable as SEPs only for small businesses. For large businesses with multiple environmental requirements, EMSs are more appropriate as part of the injunctive relief sought for environmental violations. Case teams considering EMSs proposed as SEPs by a large business must seek prior approval from the Director of the Special Litigation and Projects Division (SLPD) in OCE before accepting the SEP, per the special approval requirements for "Other" SEPs in Section XII.A.4.[37]

D. Profitable SEPs

Certain types of beneficial projects, such as pollution prevention or innovative technology projects, may ultimately be profitable to the defendant, and may well be actions it would have undertaken on its own for economic business reasons. SEPs are, by definition, projects that would not have occurred "but for" the settlement of an enforcement action, and the associated mitigation of a penalty. In almost all cases, providing penalty mitigation for SEPs that are inherently profitable would undermine the deterrent value of penalties, as well as contribute to "un-leveling the playing field" between violators and their competitors who stayed in compliance with the law.

However, in some instances the EPA may consider a SEP's environmental and/or public health benefits sufficiently compelling that a "profitable" SEP could nevertheless be approved. In addition, the potential positive returns for some innovative projects may be so speculative that a defendant, especially if it is a small business or community, would hesitate to pursue them outside of the enforcement settlement.

Thus, consistent with the criteria below, for defendants that are small businesses or small communities, projects that will become profitable after the first three years of implementation are allowable as SEPs. For all other entities, only projects that will become profitable after the first five years of implementation are allowable as SEPs.[38]

To be allowable, such projects must, of course, meet all the terms and conditions of this Policy and, because such projects provide benefits to the defendant as well as to the environment or public health, these projects must demonstrate:

1. A high degree of innovation (*e.g.*, projects that use new technologies or processes not commonly in use by the industry or sector) with the potential for widespread application;

---

[37] *See* Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects* (June 12, 2003).
[38] *See* Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects* (Dec. 5, 2003).

ED_002597_00000049-00040

2. Technology that is transferable to other facilities or industries, with a defendant that agrees to share information about the technology;

3. Extraordinary environmental benefits that are quantifiable (*e.g.*, project will result in measurable reductions in air pollutant emissions or measurable improvement in water quality);

4. Exceptional environmental and/or public health benefits to a community with environmental justice concerns; and/or

5. A high degree of economic risk for the alleged violator.

The EPA's economic model, PROJECT, provides useful information about the net present value of SEP expenditures and its use is recommended in order to assess whether a proposed project may be profitable to the defendant. Because a defendant will benefit from the implementation of a profitable SEP, it is not appropriate for such SEPs to receive the maximum allowable penalty mitigation. Regions should consider how well the project meets the above criteria, the length of time before the project becomes profitable, and the degree of profit. Projects that become profitable early on or show a significant profit should receive a lower amount of penalty mitigation as described in Section IX.C.2.d.

E. SEPs in Ability-to-Pay (ATP) Settlements

In certain settlements, the EPA may determine that the defendant is unable to pay the full amount of the settlement penalty. The defendant's ability to pay (ATP) can be determined using the EPA's financial models: ABEL or INDIPAY (if the defendant is an individual).[39] Using financial information provided by the violator, these models evaluate a defendant's ability to afford compliance costs, clean-up costs, or civil penalties. In more complex scenarios, a violator's ATP may be evaluated by financial analysis experts using other methods.

In situations where the defendant is unable to pay the full settlement penalty, a SEP may be included in the settlement only in certain circumstances:

1. The defendant must be able to pay the minimum penalty required by the SEP Policy. The required minimum penalty, as described in Section IX.B.1, must be determined before the settlement penalty is reduced based on ATP considerations.

2. For global/multiple settlement initiatives with unique penalty calculations, the defendant must be able to pay the minimum penalty required under the initiative's settlement construct.

3. Penalty calculations in ATP cases where SEPs are considered typically result in the need to allow one hundred percent (100%) credit for the SEP.

---

[39] Available at http://www2.epa.gov/enforcement/penalty-and-financial-models.

ED_002597_00000049-00041

Therefore, the project must be of outstanding quality and meet at least one of the SEP Policy exceptions for one hundred percent (100%) mitigation credit (*see* Section IX.C.2).

4. SEPs in ATP cases should be considered only where the defendant has demonstrated the capacity to effectively manage and implement a SEP.

F. Aggregation/Consolidation of SEPs by Defendants[40]

Where several defendants are settling separate cases for similar violations in the same general geographic area and at approximately the same time, the aggregation of SEPs could be considered.

1. Where Defendants Are Jointly and Severally Liable for Performance of Consolidated SEPs

The aggregation of SEPs where the defendants are jointly and severally liable for the completion of the consolidated project may be acceptable if the settlements are crafted carefully. For instance, defendants may propose pooling resources to hire a contractor to manage and/or implement a consolidated SEP. Such an approach could be acceptable if the defendants each remain liable under their separate settlement agreements to perform the consolidated project in the same manner as they would under a typical settlement. Defendants are generally held accountable through the inclusion of stipulated penalties, should the SEP not be completed as agreed upon.

2. Performance of Complementary, Segregable SEPs

Another potentially acceptable approach is to allow defendants in separate cases to perform discrete and segregable tasks within a larger project. Such an approach must meet the following conditions to address potential concerns relating to the Miscellaneous Receipts Act (MRA):

a. Each discrete project must have a nexus to the violations at issue in the particular settlements and meet all conditions of the SEP Policy;

b. Each discrete project must itself be worthwhile with environmental or public health benefits;

c. The settlement must hold each defendant responsible for implementation and completion of a specific portion of the larger project; and

---

[40] *See* Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance Concerning the Use of Third Parties in the Performance of SEPs and the Aggregation of SEP Funds* (Dec. 15, 2003).

ED_002597_00000049-00042

d. The segregable pieces must not be dependent on each other. If the settlements are structured carefully, such an approach can result in significant environmental or public health benefits that might otherwise be unavailable.

3. Other Considerations

While the aggregation of SEPs under these scenarios can be designed, as described above, to avoid MRA concerns, other practical implementation issues need to be considered in addition to those set forth above. For example, aggregation of SEPs in this manner may require that all settlements be completed at approximately the same time and that defendants in separate settlements are willing to cooperate with one another, because they are all responsible for completion of the entire project.

4. Consultation with OECA's National SEP Policy Coordinators

Regions should consult with the National SEP Policy Coordinators in OCE early in the process when considering proposals by defendants to aggregate or coordinate SEPs. When the settlement involves a federal agency, the consultation should be with the Federal Facilities Enforcement Office (FFEO) in OECA. Similarly, if the case involves a CERCLA violation by a non-federal responsible party, the consultation should be with the Office of Site Remediation Enforcement (OSRE) in OECA.

G. Aggregation of SEP Funds by the EPA[41]

Federal appropriations law and principles, including the MRA, restrict the Agency's ability to establish SEP accounts or otherwise manage SEP funds. EPA may not establish accounts for pooling SEP funds from multiple defendants to apply towards projects that would be too large or too expensive for a single defendant to complete. In other words, the EPA may not hold or manage SEP funds from several settlements that would otherwise have been used by defendants for SEP projects in each individual enforcement settlement. Establishing a SEP account for which the Agency manages SEP funds and determines how the funds are to be spent would amount to an augmentation of appropriations.

H. Acceptance of a SEP in Lieu of Stipulated Penalties

Stipulated penalties are an important tool in ensuring consent decree (CD) and settlement agreement compliance. Both the amount and the certainty of assessment should act as a strong deterrent for noncompliance. Where penalties have been stipulated for violations of CDs or other settlement agreements, those penalties may not be mitigated by the use of SEPs, or converted into a project.[42] However, future CDs or settlements may be crafted to stipulate that a defendant

---

[41] *See id.*

[42] The Assistant Administrator for OECA may consider mitigating potential stipulated penalty liability using SEPs where: (1) despite the circumstances giving rise to the claim for stipulated penalties, the violator has the ability and intention to comply with a new settlement agreement obligation to implement the SEP; (2) there is no negative impact on the deterrent purposes of stipulated penalties; and (3) the settlement agreement establishes a range for

ED_002597_00000049-00043

will perform a particular SEP in addition or as an alternative to paying specified penalties, in the event of noncompliance with specified requirements.[43] Such stipulated SEPs may provide significant benefits to affected communities and are encouraged.

XII. EPA PROCEDURES FOR SEP APPROVAL AND DOCUMENTATION

A. Approvals[44]

The authority of a government official to approve a SEP is included in the official's authority to settle an enforcement case and thus, subject to the exceptions set forth here, no special approvals are required. Special approvals and consultations, however, are required for both administrative and judicial enforcement actions as follows:

1. If a proposed SEP will be implemented in more than one Region, the case team negotiating the settlement should notify the Enforcement and SEP Coordinators in the other affected Regions and provide a written description of the proposed SEP to allow an opportunity for review and comment.

2. In all cases including a SEP which may not fully comply with the provisions of this Policy (*e.g.*, the proposed settlement penalty is less than the minimum required penalty), except for the third-party compliance SEPs described in Section XII.A.5 below, the settlement and the SEP must be approved by the Assistant Administrator for OECA.

   The case team must prepare a request for approval that sets forth its legal analysis supporting the conclusion that the project is within the EPA's legal authority and is not otherwise inconsistent with applicable law. The request for approval should describe the violations being resolved and the terms of the proposed settlement, and provide a justification for deviating from the provisions of this Policy. The request for approval should be submitted to the Assistant Administrator for OECA through the Director of OCE. If the settlement involves a federal agency, the request for approval should be submitted through the Director of FFEO. Similarly, if the case involves a

---

stipulated penalty liability for the violations at issue. For example, if a defendant has violated a settlement agreement that provides that a violation of X requirement subjects it to a stipulated penalty between $1,000 and $5,000, then the Agency may consider SEPs in determining the specific penalty amount that should be demanded. Any SEP used to mitigate a stipulated penalty must have nexus to the action or inaction that gave rise to the penalty.

[43] Such stipulated SEPs must be fully identified and set forth in a final settlement agreement (*i.e.*, to the same extent and level of detail as any other SEP) and must meet all the requirements of this Policy. A later amendment to a final settlement agreement may also include such stipulated SEP(s), as follows: (1) for noncompliance with the new requirements added by the amendment; or (2) for noncompliance with certain, specified requirements that were part of the original agreement, provided that the defendant is and has been in compliance with the terms of the original consent decree or agreement (both before and during the drafting of the amendment) to which the stipulated SEP would apply.

[44] This supersedes and replaces Memorandum from Eric V. Schaeffer, Dir., Office of Regulatory Enforcement, U.S. Envtl. Prot. Agency, *Revised Approval Procedures for Supplemental Environmental Projects* (July 21, 1998).

ED_002597_00000049-00044

CERCLA violation by a non-federal responsible party, then the request for approval should be sent through the Director of OSRE.

Consultation with OCE's National SEP Policy Coordinators is recommended prior to submission of a request for approval from the Assistant Administrator for OECA. If the settlement involves a federal agency, the consultation should be with FFEO. If the settlement involves a CERCLA violation by a non-federal responsible party, the consultation should be with OSRE.

3. In all cases in which a SEP would involve activities outside the United States and territories, the SEP must be approved in advance by the Assistant Administrator for OECA and, for judicial settlements, the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice.

4. In all cases in which an environmental compliance promotion project or a project in the "Other" category is contemplated (*see* Sections V.F and H, and Section XI.C), the project must be approved in advance by the appropriate enforcement division director in OECA after consultation with the National SEP Policy Coordinators in OCE or, as appropriate, FFEO or OSRE.

5. In all cases in which the proposed SEP will implement the legal requirement of a third party (*see* Section XI.B), in order to protect the integrity of the media enforcement program, the project must be approved in advance by the appropriate enforcement division director in OCE or, as appropriate, FFEO or OSRE.

B. Documentation and Confidentiality

In each case in which a SEP is included as part of a settlement, a justification for inclusion of the SEP and any supporting materials must be included as part of the case file. The SEP justification should explain the criteria used to evaluate the project and include a description of the expected benefits associated with the SEP. The justification must include a description by the enforcement attorney of how nexus and the other legal guidelines are satisfied.

Documentation and explanations of a particular SEP may constitute confidential settlement information that is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552, is outside the scope of discovery, and is protected by various privileges, including the attorney-client privilege and the attorney work-product privilege. While Agency evaluations of proposed SEPs are generally privileged documents, this Policy is a public document and may be released to anyone upon request.

ED_002597_00000049-00045

Appendix A

AUGMENTATION OF APPROPRIATIONS:
REASONABLE INQUIRY REGARDING FEDERAL APPROPRIATIONS[1]

I. EPA's Role and Responsibilities:

The EPA will determine that a proposed SEP does not:

1. Provide the EPA with additional resources to perform a particular activity for which it has received a specific appropriation, meet a statutory obligation, or circumvent a statutory prohibition;

2. Provide additional support for a project managed by the EPA or another federal agency;

3. Provide additional resources to perform work on federally-owned property; or

4. Augment an "open federal financial assistance transaction" between the EPA and the defendant, any third-party SEP recipient, or any third-party SEP implementer that is funding or could fund "the same activity as the SEP."

- If the SEP would do any of the above, it cannot be approved.

See Section IV of this Appendix for step-by-step instructions on making these determinations.[2]

II. Defendant's Roles and Responsibilities:

The defendant will:

---

[1] This appendix provides case teams with assistance in ensuring that proposed SEPs meet the conditions of Legal Guidelines in Section IV.B.2, Federal Appropriations and Federally-Performed Activities, and Section IV.C, Augmentation: Reasonable Inquiry and Certification.

[2] In the context of federal facilities enforcement, the EPA must also determine whether a proposed SEP presents an augmentation issue. However, because there are fiscal and appropriations law issues and statutory authorities for agency action that are unique to the federal facilities context, the EPA's inquiry differs from the process set forth in this document. Federal agencies must comply with the Purpose Statute, 31 U.S.C. § 1301(a), in expending their appropriations. Any time a federal agency respondent agrees to perform a SEP, the federal agency should make a determination that it has the authority to use its appropriations to perform the SEP. The Federal Facilities Enforcement Office (FFEO), Office of Civil Enforcement, and Office of General Counsel intend to develop a short checklist, much like this one, to assist federal facilities case teams. In the meantime, for assistance in evaluating augmentation issues in a federal facilities enforcement case, please contact FFEO's SEP coordinator.

ED_002597_00000049-00047

1. Determine whether, and certify that it does not, have an "open federal financial assistance transaction" with the EPA or any other federal agency that is funding or could fund "the same activity as the SEP";[3] and

2. Ask, and certify that it has asked, any SEP recipient or third-party SEP implementer whether that entity does or does not have an "open federal financial assistance transaction" with the EPA or any other federal agency that is funding or could fund "the same activity as the SEP."

- Where the defendant, SEP recipient, or third-party SEP implementer has an open federal financial assistance transaction that is funding or could fund the same activity as the proposed SEP, the SEP cannot be approved.

- Where the defendant, SEP recipient, or third-party SEP implementer has identified an open federal financial transaction that it believes *arguably* could fund the same activity as the SEP (*i.e.,* there is some uncertainty), but the case team wishes to pursue approval of the project, the case team should bring the SEP proposal and any available information concerning the terms of the transaction to the EPA's National SEP Policy Coordinators in the Office of Civil Enforcement (OCE) in the Office of Enforcement and Compliance Assurance (OECA) for analysis and an augmentation determination. Such a determination will usually include input from augmentation experts in the Office of General Counsel (OGC). If the settlement involves a federal agency, the consultation should be with the Federal Facilities Enforcement Office (FFEO) in OECA. If the settlement involves a CERCLA violation by a non-federal responsible party, the consultation should be with the Office of Site Remediation Enforcement (OSRE).

See Section IV of this Appendix for step-by-step instructions on making these determinations.

III. Definitions:

"Open federal financial assistance transaction" refers to a grant, cooperative agreement, federal loan, or federally guaranteed loan. It is often abbreviated as "FFAT."

"Could fund the same activity" describes a federal financial assistance transaction that is not currently funding the same activity as a proposed SEP, but whose scope of work is written broadly enough to include the same activity as the SEP. When the holder of the federal financial assistance transaction is spending its federal dollars on some other activity, but could have opted, under the terms of the transaction, to spend those federal dollars to fund the same activity as the proposed SEP, then that federal financial assistance transaction "could fund the same activity" as the SEP.

---

[3] Although it may seem duplicative to have the defendant make inquiry regarding the existence of open federal financial assistance transactions with the EPA when the Agency has performed that inquiry, the defendant's separate inquiry provides additional assurances to supplement the EPA's internal due diligence.

ED_002597_00000049-00048

"Reasonable inquiry to prevent augmentation" means a reasonable, not heroic, inquiry to determine whether a SEP is prohibited due to augmentation. A reasonable inquiry need not exhaust every theoretical possibility that there is an open federal financial assistance transaction that could fund the same activity as a proposed SEP.

"Specific EPA appropriation" is a unique term for the SEP Policy. It does not include lump-sum appropriations such as those for Superfund or Underground Storage Tanks that fund broad programs involving a variety of activities that the EPA carries out both directly and through financial assistance. For purposes of this Checklist, the phrase "specific EPA appropriation" refers only to EPA appropriations that have been identified as such by the EPA's Office of General Counsel (OGC) for the applicable fiscal year. OGC's list of specific EPA appropriations is available on OCE's SEP intranet site and will be updated as necessary.

"The same activity as the SEP" means the SEP as proposed by the defendant, in terms of scope, purpose, and location.

It does not mean "the same *type* of activity" (*e.g.*, the specific equipment to be donated; services to be provided; or project to be implemented). Detailed proposals are easier to evaluate than general ideas or concepts. To evaluate whether a transaction covers the same activity as the SEP, look to the terms of the SEP and scope of work for the transaction. The National SEP Coordinators are available to assist with this analysis.

"SEP recipient" means the direct beneficiary of the SEP activity (*e.g.*, local fire departments receiving equipment donations; or conservation groups taking possession of land donated and conserved as a SEP).

"SEP recipient" does not extend to the community generally. For example, citizens served by a fire department receiving equipment donations are not considered SEP recipients for augmentation purposes.

"Third-party SEP implementer* or *SEP implementer" means a contractor/consultant or another third party engaged by the defendant to implement the SEP.

An implementer may also be a SEP recipient (*e.g.*, a land trust that accepts a land donation and agrees to maintain a conservation easement).

IV. Process and Checklist

The objective of this process is to allow the EPA to make a reasonable, not heroic, inquiry to ensure that SEPs included in settlement of the EPA's enforcement actions do not augment federal appropriations. In most cases, this inquiry should be relatively simple and straightforward for both case teams and defendants.[4] Below is a process checklist containing questions the EPA

[4] EPA's statutory authority to accept diesel emissions reduction SEPs eliminates the need to consider whether EPA receives a specific appropriation and whether federal grant monies are directed to those

ED_002597_00000049-00049

case team and/or the defendant should ask to complete these inquiries; bulleted suggestions on how to make the necessary determinations; and instructions on the effect of certain results on the augmentation analysis (*i.e.*, whether the SEP cannot be approved based on a particular determination, or whether the analysis should continue on to the next question).

A. <u>For the EPA Case Team:</u>

1. Does the SEP provide EPA with additional resources to perform a particular activity for which EPA has a specific appropriation?

- Review the EPA Specific Appropriations List on the EPA's SEP Intranet site for an Annual OGC Report on EPA Specific Appropriations to ensure there is no specific appropriation available for the particular activity that is proposed as a SEP.

- Annually, OGC will provide the SEP Coordinators with the appropriations bill and conference committee reports for the fiscal year and identify specific appropriations that pose augmentation concerns to be listed on the SEP Intranet site.

➢ If IT DOES, STOP. The SEP cannot go forward, unless it is a diesel emissions reduction SEP (*see* Footnote 4).
➢ If NOT, GO on to Question 2.

2. Does the SEP provide EPA with additional resources to meet a statutory obligation or circumvent a statutory prohibition?

- To the extent appropriate, based on the specific activities that will be involved in performing the SEP, consult EPA and other federal statutes to determine whether there is already a statutory obligation to perform the activity, or if the activity is specifically prohibited by statute.

➢ If IT DOES, STOP. The SEP cannot go forward.
➢ If NOT, GO on to Question 3.

---

projects. *See* Legal Guideline IV.D in the Update. Case teams evaluating diesel emission reduction SEPs need only make determinations regarding Appendix Questions IV.B.2.a.i., IV.B.2.a.ii., and IV.B.2.b.i. Determinations about Questions IV.B.2.a.iii. and IV.B.2.b.ii. are not required, nor is the federal-funding-focused inquiry by the defendant that is outlined in IV.C.

ED_002597_00000049-00050

3. Does the SEP provide additional support for a project performed by EPA or another federal agency?

- Consult, to the extent considered appropriate by the case team, with the Regional media, geographic and/or special program contacts relevant to the type of SEP being proposed, who are likely to know about projects being performed by the EPA or another federal agency that relate or overlap with the location and/or the activities in the SEP proposal.

- The relevant question to ask: "Is there a federal agency already performing a project (through a contract or with federal personnel) with the same specific purpose of the SEP and in the same location (per the scope of work), such that the SEP will have the effect of supplementing the resources available for the federal project?"
    - A project that is overseen by a federal agency to ensure compliance with regulatory standards but that is carried out by a non-federal entity is not a "project performed by the EPA or another federal agency" for purposes of this inquiry. This is true even though a federal agency might have authority to direct or provide guidance to the entity performing the project to the extent allowed by applicable regulations.

- In some cases, a federal agency may have specific statutory gift authority to accept such support. In that event, the SEP is approvable with regard to this part of the inquiry.

- In most cases, the existence of a federal project should be fairly obvious. For example, to vet a proposed SEP for wetlands restoration immediately adjacent to the Florida Everglades, the EPA would contact the Army Corps of Engineers, which is performing such work in the area, to ensure the proposed parcel and project are not part of work already being performed. Where a case team finds this inquiry difficult, it should come to the National SEP Coordinators in OCE (or in FFEO or OSRE, as appropriate) for assistance.

- As part of its reasonable inquiry, the EPA is not required to consult personnel at other federal agencies unless there is some compelling reason to do so. However, the EPA may, at its discretion, choose to consult with other federal agencies if it finds that such consultation may be helpful.

➢ If IT DOES, STOP. The SEP cannot go forward, unless the agency has statutory gift acceptance authority (*see* third bullet above).
➢ If NOT, GO on to Question 4.

ED_002597_00000049-00051

4. **Does the SEP provide resources to perform work on federally-owned property?**

- Make sure that the SEP is not on federally-owned property (or that the agency involved has specific statutory gift acceptance authority which would allow this).

- In most cases, the ownership of the proposed property should be fairly obvious. Where a case team finds this inquiry difficult, it should come to National SEP Coordinators in OCE (or in FFEO or OSRE, as appropriate) for assistance.

➢ If IT DOES, STOP. The SEP cannot go forward, unless the agency has specific statutory gift acceptance authority which would allow this.
➢ If NOT, GO on to Question 5.

5. **Is there an open EPA federal financial assistance transaction (FFAT) with the defendant, the SEP recipient, or any third-party SEP implementer that is funding or could fund the same activities as the SEP (*i.e.,* the FFAT's scope of work lists or includes the same activities as the SEP, in terms of scope, purpose and location)?**

- Consult regional grants officers, relevant regional programs, and/or regional grants databases as appropriate and/or available in the relevant region to inquire about open FFATs involving the defendant, SEP recipient, or any third-party SEP implementer.

- The EPA's Office of Grants and Debarment has developed the EPA Grant Awards Database that case teams can also be used to perform this inquiry. The EPA Grant Awards Database contains a summary record for all non-construction EPA grants awarded in the last 10 years as well as records for grants awarded earlier which are still open. Grant listings are available by recipient and by type, and there is a separate list breaking out all awards to nonprofits, which may be particularly helpful. Visit http://yosemite.epa.gov/oarm/igms_egf.nsf/HomePage?ReadForm to search and review the list of EPA Grant Awards for potentially relevant listings.
    - If a grant award that could potentially fund the same activity as the SEP is identified, consult with the EPA contact listed for that grant award to determine or to verify that the open FFAT could fund the same activity as the SEP.

- The Catalog of Federal Domestic Assistance (CFDA, availabw.cfda.gov) lists all EPA domestic federal financial assistance programs and includes points of contact for each program, and is a third resource for this inquiry. Visit https://www.cfda.gov/?s=agency&mode=form&tab=program&id=1135d1667

2c45b40dc20729acdb1e903 to search and review the list of EPA grant programs for potentially relevant grant programs.

- If a grant program that could fund the same activity as the SEP is identified, consult with the EPA contact listed for that program to determine whether there is an open FFAT that could fund the same activity as the SEP.

- If THERE IS such an OPEN FFAT between EPA and any of these parties, that is funding or could fund the SEP (*i.e.*, FFAT's scope of work lists or includes the same activities as the SEP), STOP. The SEP cannot go forward, unless it is a diesel emissions reduction SEP.

- If the OPEN FFAT ARGUABLY COULD FUND the SEP (*i.e.*, there is some uncertainty), the case team should consult the National SEP Coordinators in OCE (or in FFEO or OSRE, as appropriate) and OGC augmentation experts, who may be familiar with EPA program activities or can help identify program contacts. The names and contact information for the current SEP contacts and experts are available on the SEP intranet site: http://intranet.epa.gov/oeca/oce/slpd/sep.html

- If there is NO such OPEN FFAT, and assuming acceptable results from the defendant's inquiry, and its required certification in the settlement agreement: **the SEP is appropriate from an augmentation standpoint, and may be included in settlement.**

B. For the Defendant:

1. Does the defendant itself have an open FFAT with the EPA, or any other federal agency, that is funding or could fund the same activities as the proposed SEP (*i.e.*, the FFAT's scope of work lists or includes the same activities as the SEP, in terms of scope, purpose and location)?

- The defendant must inquire internally whether it has an open FFAT with the EPA or any other federal agency that is funding or could fund the same activities as the proposed SEP (*i.e.*, the FFAT's scope of work lists or includes the same activities as the SEP, in terms of scope, purpose and location).

- If the defendant DOES HAVE an OPEN FFAT that IS FUNDING or COULD FUND the same activity, STOP. The proposed SEP cannot be approved because it presents an augmentation.

- If the defendant has an OPEN FFAT that ARGUABLY COULD FUND the same activity (*i.e.*, there is some uncertainty), the case team should bring the SEP proposal and any available information concerning the terms of the transaction to the National SEP

Coordinators in OCE (or in FFEO or OSRE, as appropriate) and OGC augmentation experts for analysis and an augmentation determination.

- ➢ If the defendant DOES NOT HAVE such an OPEN FFAT, GO on to Question 2 below.

2. Does the SEP recipient or any third-party SEP implementer have an open FFAT with the EPA, or any other federal agency, that is funding or could fund the same activity as the proposed SEP (*i.e.*, the FFAT's scope of work lists or includes the same activities as the SEP, in terms of scope, purpose and location)?

- The defendant should ask the SEP recipient and any third-party SEP implementer if they have an open FFAT with the EPA or any other federal agency that is funding or could fund the same activity as the proposed SEP (*i.e.*, the FFAT's scope of work lists or includes the same activities as the SEP, in terms of scope, purpose and location).
- At its own election, the defendant may choose to ask the SEP recipient or implementer for certification of its answers.

- ➢ If either the SEP recipient or the third-party SEP implementer indicates that it HAS an OPEN FFAT that IS FUNDING or COULD FUND the same activity, STOP. The proposed SEP cannot be approved because it presents an augmentation.

- ➢ If either the SEP recipient or the third-party SEP implementer indicates that it has an OPEN FFAT that ARGUABLY COULD FUND the same activity (*i.e.*, there is some uncertainty), the case team should bring the SEP proposal and any available information concerning the terms of the transaction to the National SEP Coordinators in OCE (or in FFEO or OSRE, as appropriate) and OGC augmentation experts for analysis and an augmentation determination.

- ➢ If the SEP recipient and third-party SEP implementer indicate that they DO NOT HAVE such an OPEN FFAT, GO on to Question 3 below.

3. Will the defendant make the required certification in the Consent Agreement or Consent Decree?

Defendant certifies that —

(1) It is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in paragraph X; and

(2) It has inquired of the SEP recipient and/or SEP implementer [use Proper Names where available] whether either is a party to an open federal financial assistance transaction that is funding or could fund the same activity as the SEP and has been

informed by the recipient and/or the implementer [use Proper Names where available] that neither is a party to such a transaction.

- IF SO, and assuming acceptable results from the EPA's inquiry -- **the SEP is appropriate from an augmentation standpoint, and may be included in settlement**

Previously Issued SEP Policy Implementation Guidance

Memorandum from Cynthia Giles, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Exception to the Minimum Penalty Requirements for Proposed Supplemental Environmental Projects in Administrative Matters Resolving Violations of TSCA Sections 402, 404 and 406(b)* (Dec. 14, 2012)

Memorandum from Susan Shinkman, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Securing Mitigation as Injunctive Relief In Certain Enforcement Settlements* (2d ed., Nov. 14, 2012)

Memorandum from Cynthia Giles, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Transmittal of the Office of General Counsel's Opinion on Legal Guidelines Under the 1998 Supplemental Environmental Projects Policy Relating to Impermissible Augmentation of Appropriations* (Apr. 18, 2011)

U.S. Envtl. Prot. Agency, Office of General Counsel, *Revising the Augmentation of Appropriations Standard in Legal Guideline 5.b. of EPA's 1998 Policy on Supplemental Environmental Projects* (Mar. 3, 2011)

Memorandum from Walker B. Smith, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Supplemental Environmental Projects to Reduce Diesel Emissions* (July 18, 2008)

Memorandum from Granta Y. Nakayama, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Advisory Memorandum on Internal Revenue Service Directive Regarding the Deductibility of Supplemental Environmental Projects* (Dec. 21, 2007)

U.S. Envtl. Prot. Agency, Office of Site Remediation and Enforcement, *Fact Sheet: Brownfield Sites and Supplemental Environmental Projects* (Nov. 2006)

Memorandum from Mark Pollins, Dir., Water Enforcement Div., and Robert Kaplan, Dir., Multimedia Enforcement Division, U.S. Envtl. Prot. Agency, *Clean Water Act Municipal Settlements and Supplemental Environmental Projects (SEPs)* (Nov. 4, 2005)

Memorandum from Walker B. Smith, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Reminder That Waiver is Required for Supplemental Environmental Projects Not Meeting All Conditions of SEP Policy* (Mar. 21, 2005)

ED_002597_00000049-00057

Memorandum from Thomas V. Skinner, Acting Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Supplemental Environmental Projects in Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases* (Nov. 23, 2004)

Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds* (Dec. 15, 2003)

Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects* (Dec. 5, 2003)

Interim Guidance for Community Involvement in Supplemental Environmental Projects, 68 Fed. Reg. 35,884 (June 17, 2003)

Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects* (June 12, 2003)

Memorandum from John Peter Suarez, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Expanding the Use of Supplemental Environmental Projects* (June 11, 2003)

Memorandum from Phyllis P. Harris, Principal Deputy Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Clarification and Expansion of Environmental Compliance Audits Under the Supplemental Environmental Projects Policy* (Jan. 10, 2003)

Memorandum from Walker B. Smith, Dir., Office of Civil Enforcement, U.S. Envtl. Prot. Agency, *Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy* (Oct. 31, 2002)

Memorandum from Sylvia K. Lowrance, Acting Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Supplemental Environmental Projects (SEP) Policy* (Mar. 22, 2002)

Memorandum from Eric V. Schaeffer, Dir., Office of Regulatory Enforcement, U.S. Envtl. Prot. Agency, *Appropriate Penalty Mitigation Credit Under the SEP Policy* (Apr. 14, 2000)

ED_002597_00000049-00058

Memorandum from Eric V. Schaeffer, Dir., Office of Regulatory Enforcement, U.S. Envtl. Prot. Agency, *Revised Approval Procedures for Supplemental Environmental Projects* (July 21, 1998)

Memorandum from Steven A. Herman, Assistant Adm'r, Office of Enforcement and Compliance Assurance, U.S. Envtl. Prot. Agency, *Issuance of Final Supplemental Environmental Projects Policy* (Apr. 10, 1998)

ED_002597_00000049-00059