



Brownfield Sites and Supplemental Environmental Projects (SEPs)

Office of Site Remediation Enforcement

The Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Brownfields Law) amended CERCLA to create the U.S. EPA Brownfields Program for assessing and cleaning up brownfield sites. SEPs may play a complementary role at brownfield sites by supporting activities that are not eligible for funding under the Brownfields Program. This document supersedes the 1998 “Using Supplemental Environmental Projects to Facilitate Brownfields Redevelopment.”

1. WHAT TYPES OF SITES ARE GENERALLY DEFINED AS BROWNFIELD SITES?

The Brownfields Law generally defines a “brownfield site” as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” The Brownfields Law also expressly includes property contaminated with petroleum, mine scarred land, and former sites of methamphetamine laboratories. As a result, a wide range of “real property” can be considered a brownfield site.

Congress did exclude certain sites from the definition, including those properties:

- Listed on the National Priority List, or proposed for listing;
- Subject to a CERCLA administrative order or consent decree; or
- Subject to the jurisdiction, custody or control of the U.S. government.

2. WHAT IS A SEP?

Supplemental Environmental Projects, or SEPs, are environmentally beneficial projects that a violator voluntarily agrees to undertake in settlement of an enforcement action, but which the respondent is not otherwise legally required to perform.¹

¹Steven A. Herman, *U.S. EPA Supplemental Environmental Projects Policy* (May 1, 1998) (“U.S. EPA SEP Policy”).

“Environmentally beneficial projects”

“Environmentally beneficial projects” are projects that improve, protect, or reduce risks to public health, or the environment at large.² A SEP may ultimately be profitable, but the project’s environmental or public health benefits must outweigh its potential profitability to the violator.³

“In Settlement of an Enforcement Action”

A project is undertaken “in settlement of an enforcement action” when U.S. EPA has the opportunity to help shape the scope of the project before it is implemented and the project is not commenced until after U.S. EPA has identified a violation.⁴ SEPs are subject to final approval by U.S. EPA.

“Not Otherwise Legally Required to Perform”

A respondent is “not otherwise legally required to perform” a project when that project or activity is not required by any federal, state or local law or regulation.⁵ This restriction includes actions that the respondent is likely to be required to perform: (1) as injunctive relief in the instant case; (2) as injunctive relief in another legal action U.S. EPA, or another regulatory agency could bring; (3) as part of an existing settlement or order in another legal action; or (4) by a state or local requirement. As a general rule, if a party is responsible for the environmental degradation at a site, then environmental assessment and cleanup activities cannot constitute a SEP.

A SEP cannot be used to satisfy the statutory obligations of U.S. EPA or another agency. As a general rule, site assessment and remediation SEPs are inappropriate at the following site types because of U.S. EPA’s statutory obligations:

- Sites on the National Priority List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 105, 40 CFR Part 300, Appendix B;
- Sites where the federal government is planning or conducting a removal action pursuant to CERCLA § 104(a) and the National Oil and Hazardous Substance Pollution Contingency Plan 40 CFR § 300.415; and
- Sites for which the respondent or other party would likely be ordered to perform an assessment, response, or remediation activity pursuant to CERCLA § 106; the Resource Conservation and Recovery Act (RCRA) §§ 3013, 7003, and 3008(h); the Clean Water Act (CWA) § 311; or any other federal law.

² *Id.*

³ John P. Suarez, *Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects* (December 5, 2003).

⁴ U.S. EPA SEP Policy.

⁵ *Id.*

3. WHAT DOES IT MEAN TO HAVE ADEQUATE “NEXUS”?

All SEPs must advance at least one of the objectives of the environmental statutes that are the

basis of the enforcement action and must have adequate nexus. A project has adequate nexus if: (1) the project is designed to reduce the likelihood that similar violations will occur in the future; (2) the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or (3) the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.⁶

A respondent will find it easier to establish nexus if: (1) the primary impact of the project is at the site where the alleged violation occurred; (2) the primary impact of the project is at a different site in the same ecosystem; or (3) the primary impact of the project is within the immediate geographic area, which generally will be within a 50 mile radius of the site on which the violation occurred. However, proximity itself is not sufficient to provide nexus.

4. WHAT ACTIVITIES MAY U.S. EPA’S BROWNFIELD PROGRAM FUND?

U.S. EPA is authorized to approve a variety of different grants that assist the redevelopment of

brownfield sites, including:

- Assessment grants;
- Cleanup grants; and
- Grants to capitalize cleanup revolving loan funds (RLFs).

Each grant may be used for specific activities. For example, a recipient of an assessment grant may conduct such activities as: inventorying, characterizing, assessing and certain types of planning.⁷ A recipient of a cleanup grant may use grant funds for site remediation activities.⁸ A recipient of a grant to capitalize a revolving loan fund may make loans and sub-grants for cleanup activities at brownfield sites.⁹

⁶ *Id.*

⁷ Office of Solid Waste and Emergency Response, *Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants* (October 2006).

⁸ *Id.*

⁹ *Id.*

5. HOW CAN SEPs FACILITATE THE REVITALIZATION OF BROWNFIELD SITES?

The U.S. EPA SEP policy precludes utilizing SEPs for the specific activities authorized and

funded under the Brownfields Program and described above. SEPs may be used, however, to complement brownfield program activities. For example, SEPs may be used to construct green buildings, construct urban forests, restore streams, and/or complete necessary construction related to those on site activities.¹⁰ Any activity intended to complement a Brownfields Program activity as a SEP must first meet the U.S. EPA SEP Policy.

Green Building Project: Where a brownfield site has been cleaned up and is ready for redevelopment, a respondent could (1) provide energy efficient building materials/systems or low VOC emitting materials for the redeveloper; (2) construct a “greywater” recycling system or provide superior stormwater management for a redevelopment project; (3) provide/install solar panels; and/or (4) provide recycled construction materials, or recycle construction or demolition waste at the site.¹¹

Urban Forest Project: Improving a former brownfield site with strategically planted trees and impervious paving can: (1) reduce stormwater runoff; (2) improve air quality by removing pollutants such as carbon monoxide, sulfur dioxide and particulate matter; (3) reduce summer residential energy use; and (4) reduce air temperatures. Trees assist in the replacement of the ozone layer and absorb carbon dioxide from the atmosphere.

Stream Restoration Project: Where a stream or river has been contaminated or damaged as a result of a brownfield site, restoration of the waterway may be an appropriate SEP. Activities could include: (1) removal of debris and garbage, dead trees, etc.; (2) restoration and/or stabilization of stream-banks; (3) removal of invasive species; and (4) revegetation of stream banks with native species.

6. MAY A THIRD PARTY BE USED TO CONDUCT A SEP?

A respondent may use a third party, such as a contractor or consultant, to assist in the

implementation of a SEP.¹² The respondent may use a third party to conduct these activities so long as: (1) the respondent is obligated under the settlement document to complete the project satisfactorily, (2) the respondent fully expends the amount of funds agreed to be spent in performance of the SEP, and (3) the project meets all of the conditions and requirements of the

¹⁰ U.S. EPA has started the Environmentally Responsible Redevelopment and Reuse (ER3) Initiative to provide information on sustainable redevelopment. For more information on the ER3 Initiative, please visit <http://www.epa.gov/compliance/cleanup/redevelop/er3/>.

¹¹ See EPA’s *Supplemental Environmental Projects: Green Building on Contaminated Properties* (July 2004).

¹² John P. Suarez, *Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds* (December 15, 2003).

U.S. EPA SEP Policy. Simple cash donations by a respondent to a third party are not permitted. Third party contracting is particularly valuable to SEPs that revitalize brownfield sites.

7. HOW DOES A COMMUNITY PARTICIPATE IN SEP PROJECTS?

Respondents planning on implementing a SEP to revitalize a brownfield site should encourage

the local community to provide ideas or input into possible project ideas when appropriate.

Seeking community involvement in a SEP, especially from the community directly affected by the facility's violations, can have a number of benefits. It can promote environmental justice, enhance community awareness of U.S. EPA's enforcement activities, and improve relations between the community and the violating facility. Furthermore, pursuant to the U.S. EPA SEP Policy, a respondent's inclusion of public input into a SEP is one of the factors U.S. EPA uses to determine the degree to which penalty mitigation is appropriate in a particular case.¹³

Further Information: If you have any questions regarding this fact sheet, please contact Carlos R. Evans, Office of Site Remediation Enforcement, at (202) 564-6331. To access policy and guidance documents related to SEPs, please visit <http://cfpub.epa.gov/compliance/resources/policies/civil/seps/>.

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¹³ John P. Suarez, *Interim Guidance for Community Involvement in Supplemental Environmental Projects* (December 5, 2003).