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

APR 18 2011

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ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of Office of General Counsel's Opinion on Legal Guidelines under the 1998 Supplemental Environmental Projects Policy Relating to Impermissible Augmentation of Appropriations

FROM: Cynthia Giles, Assistant Administrator

TO: Regional Administrators
Regional Counsel
Regional Enforcement Managers
Regional Enforcement Coordinators
OECA Office and Division Directors

Attached is an opinion (OGC SEP Opinion) from EPA's General Counsel, Scott C. Fulton, concurring in the analysis underlying OECA's plan to revise EPA's 1998 Supplemental Environmental Projects (SEP) Policy. The OGC SEP Opinion clarifies the standard for determining whether a SEP improperly augments either EPA's appropriations, or those of other agencies, so that application of the standard will be less burdensome. This memorandum provides: a) OECA's guidance on implementing the OGC SEP Opinion pending revision to the SEP Policy; b) a model certification procedure for ensuring compliance with the standard; and c) examples illustrating the application of the standard.

In the coming months, OECA will revise the SEP Policy to conform with the OGC SEP Opinion and address additional implementation issues. In addition, OECA will soon issue a Frequently Asked Questions document to assist the regions in implementing this revised legal guideline. **In the meantime, effective immediately, staff may implement this revised approach consistent with this memorandum and the attached opinion.**

Background. The SEP Policy currently states, at Legal Guideline 5.b., that a SEP "may not provide EPA or another federal agency with additional resources to perform a particular activity for which Congress has specifically appropriated funds." EPA has interpreted the phrase "particular activity for which Congress has specifically appropriated funds" by determining whether a federal grant program that was under a specific appropriation, or a Congressional

earmark, already existed, and could potentially fund the same sort of activity as the proposed SEP. Under this analysis, the existence of such appropriations would foreclose inclusion of the SEP in settlement, regardless of whether any open grant was actually funding the activity proposed as a SEP. In other words, if a SEP could theoretically be funded by a federal grant program receiving a specific appropriation, it would be disallowed. This analysis has been characterized as "the appropriations-level analysis."

For example, application of the "appropriations-level" analysis to a "particular activity" in the context of wetlands conservation SEPs could prohibit *any* wetlands conservation SEP because Congress appropriates monies to the Department of Interior to award grants for wetlands conservation activities under the North American Wetlands Conservation Act. It is irrelevant to the appropriations-level analysis whether a specific wetlands conservation project is receiving federal funds.

This same type of analysis has been, and will continue to be, applied in the context of EPA appropriations. The revised approach described in detail below will not change the way in which EPA appropriations are analyzed, but does change the analysis of other agencies' appropriations in a way that will ease the burden of applying the SEP Policy.

EPA Appropriations. Based on the OGC SEP Opinion and after consultation with the Department of Justice (DOJ), we are retaining the appropriations-level standard for EPA's own appropriations. Thus, if EPA receives specific appropriations for an activity, we will not include in settlement a SEP that funds that activity. Also, even where EPA has no specific appropriation but is providing federal funding for a particular activity, we would preclude a SEP that would effectively supplement EPA's resources for funding that activity. In addition, a SEP cannot provide resources for work performed on federal property[1] or managed by EPA. Finally, to establish a "bright line," any particular activity described in an unsuccessful proposal for federal financial assistance submitted to EPA within two years of the date of settlement will not qualify as a SEP, unless EPA's denial of funding was based on statutory ineligibility.

In summary, to determine whether a proposed SEP impermissibly augments EPA's appropriations, regional and headquarters enforcement personnel must ensure that the proposed SEP does not:

1) Provide resources to perform work on federally-owned property;[2]
2) Provide additional support for a project managed by EPA;
3) Provide EPA with additional resources to perform a particular activity for which EPA receives a specific appropriation;

[1] 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 things of value from a non-federal entity.

[2] *See id.*

4) Have the effect of providing a recipient in an open EPA federal financial assistance transaction with additional resources for the same specific activity described in the terms or scope of work for the transaction; or
5) Provide funds for activities described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date of the settlement. Proposals rejected by EPA as statutorily ineligible are not barred by this restriction.

Please note that the standard described in 4) and 5) above applies even when the specific activity funded by EPA or described in the unsuccessful funding proposal was not the subject of a specific EPA appropriation.

Other Agencies. To determine whether a proposed SEP impermissibly augments another agency's appropriations, the analysis should focus on whether the same specific activity is being, or could be, funded by another federal agency through a currently open financial assistance transaction. In other words, a project that is already receiving federal funds – or could receive such funds under an open grant's[3] scope of work – should not be allowed as a SEP.

Whether a specific activity "could receive funds" depends on whether it is an eligible and allowable cost under the terms and scope of work of an open transaction for federal financial assistance. An "open transaction" is a grant or other such federal funding mechanism whose performance period has not yet expired. (*See* examples on p. 4.) Once the performance period for the transaction has expired, however, and the proposed SEP could no longer be funded through that mechanism, that activity would no longer be foreclosed as a SEP on augmentation grounds. Finally, any SEPs that would fund work performed on federal property or projects managed by a federal agency are also precluded.[4]

Regional and headquarters enforcement personnel must ensure that a proposed SEP implicating another agency's appropriations does not:

1) Provide resources to perform work on federally-owned property;[5]
2) Provide additional support for a project managed by another federal agency; or
3) Have the effect of providing a recipient in an open federal financial assistance transaction with another federal agency with additional resources for the same activity described in the terms or scope of work for the transaction.

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[3] For purposes of this discussion, we will use the word "grant" to refer interchangeably to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance.

[4] *See* footnote 1 *supra.*

[5] *See id.*

As the OGC SEP Opinion notes, one of the most significant difficulties with implementing the Agency's prior approach to preventing augmentation of other agency appropriations has been the complexity associated with implementing an "appropriation-level" analysis for other agencies' financial assistance programs. OGC SEP Opinion at 3. Using the "transaction level" analysis described above will be less burdensome, and will reduce the number of SEPs that are ineligible for inclusion in a settlement only because another federal agency receives appropriations for the same type of activity.

Certification. To further facilitate implementation, defendants (or respondents, in administrative matters), will be required to certify in the settlement agreement that (a) the same specific activity as the proposed SEP is not already being funded and could not be funded under the terms or scope of work of an open federal financial transaction with another federal agency and (b) that the same activity has not been described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date of settlement (unless the project was barred from funding as statutorily ineligible).

The certification by the defendant in the settlement agreement should read as follows:

> I certify that I am not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP. I further certify that, to the best of my knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For the purposes of this certification, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance whose performance period has not yet expired.

Examples. The following examples illustrate the implementation of the standard for other agencies in the context of various emergency responder SEP proposals. (This type of SEP is discussed in Section D.7. of the SEP Policy.)

1) The proposed SEP calls for the defendant to provide a new hazardous materials response kit to Town X. Town X is currently the recipient of a FEMA grant to purchase hazardous materials response equipment, and this kit would be an allowable cost under that grant. Since Town X is currently the recipient of an open grant that could fund the same purchase, the purchase cannot be included as a SEP in the settlement.

2) The proposed SEP calls for the defendant to provide a new mobile hazardous materials unit to Town X. Under Town X's FEMA grant, such equipment would not be an allowable cost. The SEP can be included in the settlement.

3) The proposed SEP calls for the defendant to provide a new mobile hazardous materials unit to Town X. Town X was the recipient of a FEMA grant to purchase hazardous materials response equipment, purchased a new mobile hazardous materials unit, and the performance period for the grant has expired. Since that grant can no longer fund Town X's purchase of a mobile hazardous materials unit, the SEP can be included in the settlement.

4) The proposed SEP calls for the defendant to provide a new mobile hazardous materials unit to Town Z. Town Z could have applied for a FEMA grant like the one Town X received, but chose not to. Since Town Z is not the recipient of a grant to purchase hazardous materials response equipment, the SEP can be included in the settlement.

Of course, in addition to meeting the anti-augmentation standards described above and in the attached memorandum, SEPs must also meet all other conditions set forth in the 1998 SEP Policy. As we implement this clarified augmentation standard, OECA requests that regional and headquarters offices continue to consult with Beth Cavalier, OECA's National SEP Policy Coordinator, at (202) 564-3271, or Jeanne Duross, Attorney Advisor, at (202) 564-6595, before including a SEP in settlement.

Attachment

cc: OECA SEP Contacts
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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Revising the Augmentation of Appropriations Standard in Legal Guideline 5.b. of EPA's 1998 Policy on Supplemental Environmental Projects

FROM: Scott Fulton, General Counsel

TO: Cynthia Giles, Assistant Administrator,
Office of Enforcement and Compliance Assurance

This is in response to your office's request for an opinion regarding whether the Agency has the discretion to revise Legal Guideline 5.b. of EPA's 1998 "Supplemental Environmental Projects Policy" (SEP Policy) to establish an alternative standard for determining whether a SEP improperly augments the appropriations of other federal agencies. OECA has proposed to re-focus the anti-augmentation standard for other agencies from a broad "appropriation-level" basis to a narrower "transaction-level" basis. We have coordinated with the U.S. Department of Justice on the legal analysis below and believe that it is permissible to revise Legal Guideline 5.b. to retain the "appropriation-level" standard for SEPs that implicate EPA's own appropriations but use a "transaction-level" standard to determine whether a SEP augments another agency's appropriations. We have also concluded that this alternative standard may be implemented under the current language of Guideline 5.b. in the short term, pending issuance of the revision to the Guideline

Background

Legal Guideline 5.b. currently states:

"A project may not provide EPA or another federal agency with additional resources to perform a particular activity for which Congress has specifically appropriated funds. A project may not provide EPA with additional resources to perform a particular activity for which Congress has earmarked funds in an appropriations committee report. Further a project cannot be used to satisfy EPA's statutory or earmark obligation, or another federal agency's statutory obligation, to spend funds on a particular activity. A project, however,

may be related to a particular activity for which Congress has specifically appropriated or earmarked funds. (footnote omitted).[1]

The Agency included Legal Guideline 5.b. in the 1998 SEP Policy in response to an opinion by the Comptroller General (CG) contending that EPA's 1991 SEP Policy allowed the Agency to improperly augment its own appropriations by providing funding for public education programs that furthered the Agency's statutory mission. See, *The Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives*, 1993 WL 798227, B-247155.2, March 1, 1993 *affirming* 1992 WL 726317, B-247155, July 7, 1992 (hereinafter "*Mobile Sources Case*").[2] The CG, however, did not address whether EPA could augment the appropriations of another agency if a SEP funded an environmentally beneficial activity that the other agency could also carry out with appropriated funds. Additionally, a significant element of the CG's position that the 1991 SEP Policy was illegal was the absence of a provision that would ensure that all SEPs had an adequate "nexus" to the underlying violation such that accepting a SEP as part of the settlement of cases would be a proper exercise of enforcement discretion.

To resolve the CG's concerns, EPA established a stringent nexus requirement in the 1998 SEP Policy. SEPs must reduce the likelihood of future violations or reduce the adverse impacts or risks to public health or the environment that stem from the violation. 1998 SEP Policy, Legal Guideline 2. The Agency also established safeguards, including Legal Guideline 5.b., to ensure that SEPs do not improperly augment EPA's or another federal agency's appropriations. Other features of the SEP Policy designed to prevent augmentation include prohibitions on Agency personnel managing and controlling SEP funds (Legal Guideline 3), using SEP funds to meet the Agency's statutory obligations (Legal Guideline 5.a.), providing additional resources for EPA employees and contractors to conduct specific activities (Legal Guideline 5.c.), and providing a federal grantee with additional resources to perform a specific task in an assistance agreement (Legal Guideline 5.d.). Section 9 of the 1998 SEP Policy included other features that responded to the CG's concerns, including prohibitions on SEPs for general education or public awareness projects, contributions for environmental research at academic institutions, and charitable donations.

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[1] The footnote in this passage from the 1998 SEP Policy refers to EPA's policy at the time of honoring earmarks in Congressional committee reports. That policy is no longer in effect in light of Executive Order 13547, "Protecting American Taxpayers From Government Spending on Wasteful Earmarks," (January 29, 2008) which prohibits agencies from honoring earmarks that are not specified in statutory text.

[2] Although CG opinions and legal interpretations are useful sources on appropriations law matters, DOJ's Office of Legal Counsel (OLC) has determined that the CG's views are not binding on executive agencies. See *Implementation of the Bid Protest Provisions of the Competition in Contracting Act*, 8 Op. O.L.C. 236, 246 (1984); Memorandum for Janis A. Sposato, General Counsel, Justice Management Division, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel. (August 5, 1991); Memorandum for Emily C. Hewitt, General Counsel, General Services Administration from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel. (August 11, 1997).

We understand that Legal Guideline 5.b. has proven to be extremely difficult to administer. Congress may pass more than twelve major appropriation acts each fiscal year in addition to supplemental or special appropriations. The language in appropriation acts often includes references to other statutes that specify the particular activities that may be carried out with the specific appropriation. It is not practicable for Agency personnel to identify all specific appropriations for particular activities contained in the federal budget that may implicate SEPs. Further, the provision in Legal Guideline 5.b. relating to other agencies' appropriations has curtailed SEPs for environmentally beneficial activities such as restoring wetlands, abating lead-based paint, and equipping emergency responders. Other agencies receive specific appropriations to provide grants for these purposes under statutes that authorize funding for particular activities.

OECA's proposal to revise Legal Guideline 5.b. would retain the prohibition on SEPs that effectively provide EPA with additional resources to carry out a particular activity for which the Agency itself receives a specific appropriation. The proposal would revise the standard for determining whether a SEP augments other agencies' appropriations, so that it focuses on whether the SEP provides resources for work on federal property or projects or provides supplemental funding for a particular federal financial transaction. We understand that this shift in focus would have the salutary effects of both reducing the substantial administrative burden in implementing Legal Guideline 5.b. and avoiding preclusions of entire classes of environmentally beneficial SEPs that may be similar to particular activities carried out by other federal agencies. The exact language of OECA's proposed revision is reproduced below.

> EPA: SEPs 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 managed by EPA.[3] SEPs may not provide EPA with additional resources to perform a particular activity for which EPA receives a specific appropriation. SEPs may not have the effect of providing a recipient in a particular federal financial assistance transaction with EPA 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. Additionally, SEPs may not provide funds for activities, even for matters that are not the subject of a specific appropriation, described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years

[3] The preceding sentence does not apply to SEPs in which EPA expends appropriated funds on the project under a settlement of a federal facility enforcement case in which EPA is the responsible party, or when EPA has statutory authority to accept funds or other things of value from a non-federal entity.

of the date of the settlement unless the Agency rejected the proposal as statutorily ineligible.

Other federal agencies: SEPs 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 managed by a federal agency.[4] Additionally, 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.

OECA's proposed revision would allow the Agency to eliminate Legal Guidelines 5.c. and 5.d. Currently, Legal Guideline 5.c. provides that "[A] project may not provide additional resources to support specific activities by EPA employees or contractors." This language would no longer be necessary because OECA's proposed revision includes the same prohibition and expands it to encompass other federal agencies. Legal Guideline 5.d., which currently states "[A] project may not provide a federal grantee with additional funds to perform a specific task identified within an assistance agreement," would also be unnecessary. This coverage would be subsumed in the revised version of Legal Guideline 5.b., which would prohibit supplementing federal financial assistance agreements. OECA's proposed revision would expand the current coverage of 5.d. to preclude a defendant from providing resources, in the form of in-kind support as well as funds, to financial assistance recipients, and would add federal loans and loan guarantees to the types of transactions covered by the prohibition.

The OECA proposal focuses the augmentation analysis for other agencies' appropriations on whether the SEP has the effect of directly supplementing another agency's budget by providing it with additional resources for its own projects or the funding that agency provides to a recipient of a particular federal financial assistance transaction. The recipient may be the defendant or another entity that would directly benefit from the activities the defendant carries out under the SEP by providing that entity with more resources for the same specific activities described in the terms or scope of work for the transaction. We believe that all of the "transaction level" preclusions on SEPs could be effectively implemented by requiring that a defendant has determined, following due diligence, that the SEP will comply with the preclusions.

[4] The preceding sentence 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 things of value from a non-federal entity.

In determining whether a proposed SEP is precluded by anti-augmentation concerns, EPA would no longer analyze whether other federal agencies receive specific appropriations for particular activities authorized by financial assistance program statutes. Instead, EPA would recognize the SEP as a project that is permissibly "related to" another agency's program, unless the SEP provides additional resources to a recipient of federal financial assistance for a specific activity in the applicable scope of work.

Under the OECA proposal, SEPs also must not provide funds for a project that was submitted for competitive EPA funding within the last two years but denied by the Agency, unless that denial was because the project was ineligible under the statute which authorized the financial assistance. This exception for statutorily ineligible projects will not result in improper augmentation of the Agency's appropriations because EPA could not have legally funded the proposal in the first place.

We believe it is appropriate to limit the prohibition on SEPs that duplicate unsuccessful financial assistance proposals to those submitted to EPA within two years of the date of the settlement agreement. After a two-year period the proposal would be too "stale" for the Agency itself to fund the proposal without initiating a new competitive process. It is also legally permissible to focus solely on proposals submitted to EPA. As discussed below, the CG opinions on using enforcement authority to require defendants to fund projects that are similar to those eligible for federal financial assistance have only criticized that practice when it had the effect of augmenting the enforcing agency's own appropriations.

It is our understanding that with the exception of eliminating Legal Guidelines 5.c. and 5.d., the other provisions of Legal Guideline 5 and the other Legal Guidelines designed to prevent augmentation would remain the same. The prohibitions in Section 9 of the 1998 SEP Policy on SEPs for general education or public awareness projects, contributions for environmental research at academic institutions, and charitable donations will also be retained.

Legal Analysis

The rule against augmentation of federal appropriations flows from a number of sources, including the Constitution. Its objective is "to prevent a federal agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity." Government Accountability Office, *Principles of Federal Appropriations Law, Vol. II (3rd ed.)* at 6-176 to 6-177 (2006). However, every opinion that has examined augmentation in the enforcement settlement context has focused on whether a proposed settlement would augment that agency's *own* appropriations. The Comptroller General

has not opined, and no federal court has expressly ruled, on whether beneficial environmental projects with appropriate nexus to the underlying violation would improperly augment another agency's appropriations.

The *Mobile Sources Case* cited two prior cases that involved the proposed enforcement policies of federal agencies that allowed settlements of claims for civil penalties calling for violators to pay less in penalties in exchange for funding beneficial projects. In *Matter of Commodities Futures Trading Commission—Donations under Settlement Agreements*, 1983 WL 197623, B-210210, September 14, 1983 ("*CFTC Case*"), the CG found that the CFTC lacked authority to consider a defendant's offer to make a donation to an educational institution as part of a settlement of an enforcement case. The CG found that such a donation did not bear an adequate relationship to legitimate prosecutorial objectives such as "correction or termination of a condition or practice. . . ." *CFTC Case* at 2. As noted above, OECA's alternative version of Legal Guideline 5.b. will continue the prohibition against a defendant merely making a donation as part of a SEP and will retain the Agency's practice of ensuring that there is an adequate nexus between the violation and the activities the defendant will carry out under the SEP.

The CG expressly raised the issue of whether an enforcement agency's settlement practice could impermissibly augment its appropriations in *Matter of: Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties*, 1990 WL 293769, B-238419, October 9, 1990 ("*NRC Case*"). In the *NRC Case*, the CG examined a proposed NRC policy of entering into settlements with defendants that required payments to universities for nuclear safety research and concluded that it would improperly augment NRC's appropriations. The CG observed that the practices the NRC intended to follow would circumvent the congressional appropriations process by allowing NRC to increase the amount of funding available to carry out the NRC's statutorily authorized program for nuclear safety research. According to the CG, the NRC should "submit a legislative proposal to either [amend its enforcement statute to provide authority to require payments for nuclear safety research in lieu of penalties] or to increase its appropriations for its nuclear safety research program." *NRC Case* at 3. Significantly, in the *NRC Case*, the CG did not mention nuclear safety research programs of other agencies such as the Department of Energy or the Department of Defense in its augmentation analysis.

The CG decisions that prompted EPA to establish Legal Guideline 5.b. addressed only situations in which agencies proposed to use their prosecutorial discretion to supplement funding for their own programs. The CG's views on augmentation in the enforcement settlement context seem to be heavily influenced by the potential for an agency to use its prosecutorial authority to coercively obtain additional resources to further other objectives of that agency. See *CFTC Case* at 2 (opining that donations by violators made in the expectation of a reduction in civil penalties are not truly voluntary). Its augmentation analyses have been intertwined with admonitions that an agency should be furthering legitimate prosecutorial objectives such as deterrence and remedying the harm caused by the violation. That a settlement agreement may require a defendant to carry out a project that another agency could fund has not been a part of the CG's analysis. Indeed, in the *Mobile Sources Case*, the CG stated, "as we pointed out in [the *NRC*

Case], an interpretation of an agency's prosecutorial authority to allow an enforcement scheme involving supplemental projects that go beyond remedying the violation in order to carry out other statutory goals of the agency, would permit the agency to improperly augment its appropriations for those other purposes, in circumvention of the congressional appropriations process." *Mobile Sources Case* at *2 (emphasis added, citation omitted).

Like the CG, the courts have only applied the augmentation prohibition to situations in which a federal agency used coercive means to obtain additional resources to carry out its own statutory mission. For example, the Fourth Circuit held in *Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958, 964-965 (4th Cir. 1984), that the Federal Aviation Administration could not accept funds deposited into a trust by the airlines in lieu of paying fees to the FAA to purchase buses for ground transportation at Dulles Airport. In overturning the arrangement, the court characterized the trust as an "end run around normal appropriations channels" that would have enabled the FAA "effectively to supplement its budget by $3 million without congressional action." 725 F. 2d. at 968. The court did not extend its analysis beyond FAA augmenting its own appropriations. Moreover, because OECA's proposed revision to Legal Guideline 5.b. precludes SEPs that provide other federal agencies with private funds for their own projects, it will ensure that EPA does not fund activities that would be inconsistent with the decision in *Motor Coach Industries*.

While the CG has not examined the issue of interagency augmentation in the enforcement context, the CG and OLC have addressed the question of interagency augmentation with respect to actions which have the effect of transferring resources between agencies without statutory authority. Interagency transfer cases implicate the Purpose Statute, 31 U.S.C. § 1301(a), which requires that appropriations be spent only in accordance with the purpose set by Congress, and the transfer statute, 31 U.S.C. § 1532, which prohibits transfers of funds between appropriation accounts without statutory authority. However, not every action by one agency that has the effect of providing resources to another agency is an impermissible augmentation. One line of cases involving non-reimbursable interagency details or "loans" of employees by one agency to another is instructive.[5]

As a general matter, formal, non-reimbursable details of employees between agencies violate the Purpose Statute and impermissibly augment the benefiting agency's appropriations. 10 Op. O.L.C. 115, 119-120 (August 22, 1986) (citing 64 Comp. Gen. 370, 377 (1985)). The CG, however, has held that non-reimbursable interagency details are permissible in certain circumstances, e.g., if the detail involves work by the detailed employee that is similar or related to matters ordinarily handled by the loaning agency and that will aid the loaning agency in accomplishing a purpose for which its appropriations are provided. See e.g. *Matter of*

[5] A "non-reimbursable" detail involves a federal agency temporarily assigning an employee to perform work that benefits another agency or a separately funded component of the same agency which does not pay the employee's salary. Generally, non-reimbursable details are not permitted under 31 U.S.C. § 1301(a), because the agency "loaning" the employee to another agency is using funds appropriated for the employee's salary to perform work for the receiving agency for purposes other than those specified in the appropriation bearing the cost for the salary. By not paying for the services on a reimbursable basis the agency receiving the benefit of the detailed employee's services improperly augments the funds Congress appropriated to it and exceeds its personnel ceiling.

Department of Health and Human Services Detail of Office of Community Services Employees, 1985 WL 50667, B-211373 (Comp. Gen., March 20, 1985); *Matter of Nonreimbursable Transfer of Administrative Law Judges*, 1986 WL 60643, B-221585 (Comp. Gen., June 9, 1986). In other words, the CG found that any augmentation, in the context of these interagency details, is merely incidental – and, hence, permissible.

It is true that the OECA proposal to eliminate the "appropriation level" standard for other agency's appropriations may lead to SEPs which indirectly provide resources to support another agency's statutory mission. But any such provision of resources is merely incidental where a SEP meets the criteria of the 1998 SEP Policy (as revised by proposals discussed in this Memorandum) and coincides with both EPA's prosecutorial objectives and the other agency's environmental protection or restoration mission. Accordingly, OECA's proposal falls within the reasoning of the CG cases permitting non-reimbursable, interagency details of personnel.

OLC has opined that one agency may not draw on the appropriations of another to perform a function that, by statute, is the exclusive province of the agency that would benefit from the additional resources. 10 Op. O.L.C. at 120. The CG has also determined that if one agency receives appropriations to carry out a statutory function, other agencies may not supplement that appropriation by directly providing funds to the other agency to perform that function in the absence of explicit statutory authorization. 59 Comp. Gen. 415 (1980) *aff'd on reconsideration*, 61 Comp. Gen. 419 (1982).

OECA's proposed "transactional level" standard follows the OLC's and the CG's direction. EPA and other agencies share responsibility for environmental protection; it is not a function that is by law exclusive to one federal agency. See generally, 42 U.S.C. 4332(1) and 42 U.S.C. 4335. The OECA proposal will prevent augmentation of the appropriations of other agencies by prohibiting a defendant from providing funds or other resources directly to another federal agency unless that agency has statutory authority to accept them. Consequently, it is our opinion that the OECA proposal is consistent with OLC's and the CG's views on the prohibition on interagency augmentations of appropriations.

The most recent CG case in the area of enforcement discretion and augmentation indicates that the CG analysis has shifted even more towards allowing settlements that further legitimate prosecutorial objectives. In *Matter of: Office of Federal Housing Enterprise Oversight—Settlement Agreement with Freddie Mac*, 2006 WL 527217, B-306,860 (Comp. Gen., February 28, 2006) ("*OFHEO Case*") the CG found that a settlement between Freddie Mac and OFHEO that required Freddie Mac to pay a vendor selected by OFHEO to electronically format Freddie Mac documents did not result in a *de facto* augmentation of OFHEO's appropriations. The CG noted that although the *CFTC Case* and the *NRC Case* continue to stand for the proposition that agencies may not engage in *de facto* augmentation by using enforcement authority to obtain additional resources to pursue other statutory missions, OFHEO's actions were "consistent with its prosecutorial discretion to correct an improper practice." *OFHEO Case* at *4. Satisfaction of this prosecutorial objective indicated to the CG that the Freddie Mac payment to OFHEO would not improperly augment OFHEO's appropriations. We believe that

compliance with the SEP Policy's nexus requirement ensures that SEPs fulfill a prosecutorial objective and thus satisfy the standard set forth in the *OFHEO Case*.

The legislative history of the recent diesel SEP legislation is also illustrative. Public Law 110-255 (June 30, 2008) authorizes EPA to enter into diesel emission reduction SEPs even where the Agency receives specific appropriations to provide grants for such projects. The Senate Report accompanying the legislation suggests that the narrower augmentation inquiry OECA proposes here is consistent with Congressional intent when enacting legislation and appropriating funds for grant programs:

> This legislation is intended *to clarify* that Congress did not intend the funding of [Diesel Emissions Reduction Act grants] to affect EPA's ability to enter into SEPs that fund diesel retrofit projects.
>
> The [Miscellaneous Receipts Act] was passed in order to ensure that government agencies did not bypass the appropriations authority of Congress by augmenting *their budgets* via other means, for example . . . civil penalties. *It is a misunderstanding of Congressional intent to interpret the use of funds to mitigate environmental damage as part of an environmental enforcement agreement as an augmentation of a Congressionally funded grant program* . . . . Congress never intended the [DERA] to limit EPA's ability to negotiate additional diesel retrofit projects as part of enforcement settlements.

Senate Report 110-266 (Committee on Environment and Public Works) (emphasis added).[6]

While the *OFHEO Case* and the Senate Report suggest that EPA could narrow the Legal Guideline 5.b. standard to the transactional level for EPA as well as for other agencies, we believe that the OECA proposal's retention of the appropriation-level standard for EPA itself is warranted. The *Mobile Sources Case*, the *NRC Case*, and the *CFTC Case* all indicate that the Agency should, as a prudential matter, continue to ensure that SEPs do not have the effect of providing EPA with additional, external resources for particular activities, such as grant programs, for which the Agency receives specific appropriations from Congress. Applying a more stringent rule to EPA's own appropriations helps to assure the public and the Congress that EPA's enforcement program furthers its mission and is not being used to improperly supplement funding for Agency programs in contravention of Congress's authority to determine the level of resources for EPA. This in turn preserves public confidence in the Agency's judicious exercise of its prosecutorial discretion, which is important to the continued success of the Agency's enforcement program. Prudential considerations, such as these, argue strongly in favor of retaining this limitation on SEPs.

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[6] Although this Senate Report is not legally binding, it does provide support for reexamining Legal Guideline 5 as it applies to specific appropriations for particular grant programs.

Conclusion

In sum, we believe that OECA's proposed revision to the SEP Policy is sufficiently respectful of Congress' appropriations power, given that: 1) adequate nexus remains mandatory; 2) neither the CG nor a court has raised the issue of augmenting another agency's appropriations; 3) the *OFHEO Case* and Senate Report 110-266 suggest that EPA could reconsider the parameters of Legal Guideline 5.b.; and 4) the OECA proposal's "transaction-level" standard for determining whether a SEP impermissibly augments other agencies' appropriations provides adequate safeguards to ensure compliance with applicable law.

Under the OECA proposal, EPA would no longer have to determine whether another agency receives a specific appropriation for a grant program that covers the same particular activities as the SEP. Rather, Legal Guideline 5.b. would be revised to prohibit SEPs that effectively supplement another agency's federal financial transactions. During the process of expeditiously revising the Guideline, it is permissible to interpret Legal Guideline 5.b. as encompassing this "transaction-level" standard.

If you have any questions regarding this opinion, you may contact me at (202) 564-6600, or your staff may contact Stephen Pressman, Associate General Counsel of the Civil Rights and Finance Law Office, at (202) 564-5439.

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