

# Discussion of SEP Policy with C&E Managers and Interested Staff

Dec 21, 2011  
Public Hearing Room

## SEP Definition

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- ▶ An **environmentally beneficial project** that a respondent voluntarily agrees to perform as **a condition of settling** an enforcement action. A SEP is an activity that the violator would **not otherwise have been required to perform**, and in which the **public or the environment** is the primary beneficiary.



## **Why do SEPs?**

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To maintain deterrence for noncompliance while also getting environmental improvement that would not have occurred otherwise.



# Examples of completed SEPs

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- ▶ retrofitting diesel vehicles
- ▶ installation of pollution control devices in advance of a timeline required by pending regulations
- ▶ storm water basin improvement
- ▶ solar panel installation
- ▶ remediation of a closed gas station
- ▶ land preservation



# Timeline for SEP Policy development

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Date	Action
Fall 2010	SEP Research: NJDEP, other states, EPA
Dec 2010	Present findings to C&E Managers
Early 2011	SEP ID'd as Transformation priority
March 2011	Present to C&E Transformation Steering Committee
April 2011	Internal Stakeholder meeting
Summer - Fall 2011	Develop policy with AC, Directors and DAG
Dec 2011	Release final SEP Interim Policy



# Themes from Internal Stakeholders

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- ▶ Maintain deterrence for non-compliance
- ▶ Seek maximum environmental benefits
- ▶ Measureable Environmental benefits
- ▶ “Rigid-flexibility” to allow for consistent and easy incorporation into settlements



# Implementing the Policy will...

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- ▶ Provide for consistency in SEPs
- ▶ Reduce unnecessary delay in settling cases that have SEPs
- ▶ Enable more SEPs
- ▶ Inform future rule development



# General

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- ▶ Follow standard Chain of Command approval
- ▶ Deviations from policy allowed on case by case basis with approval from Director
- ▶ Work with DEP colleagues on determining the meaningfulness or measuring the benefits of the SEP





# DEP's Discretion and Role in SEPs

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- ▶ Acceptance of a SEP as part of a settlement agreement is the discretion of the Department
- ▶ C&E's role:
  - ▶ to review SEP proposals, recommend changes to the SEP proposal when necessary,
  - ▶ incorporate the SEP description and schedule into the settlement document,
  - ▶ monitor the compliance with the settlement agreement, and verify that the SEP was completed as required in the settlement agreement.
  - ▶ review interim and final project reports, and visit the site of the SEP as necessary to verify
  - ▶ Neither C&E nor the Department will manage or implement the SEP. Managing and implementing the SEP will be the sole responsibility of the respondent.



# Respondent's Role

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- ▶ develop and submit a SEP proposal;
- ▶ implement, manage, and complete the SEP as required;
- ▶ submit necessary verification to the Department to illustrate that the SEP has been completed.
- ▶ respondents are encouraged to engage with local residents or community organizations to identify potential SEPs.
- ▶ Failure to complete the SEP may require full penalty payment, payment of stipulated penalties, or to complete a substitute SEP.



# Third Party

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- ▶ The respondent may contract with a third party for the third party to execute the SEP on behalf of the respondent entity.
- ▶ Absent specific approval from the Department, oversight costs to perform the SEP may not be paid from the SEP total.
- ▶ The respondent maintains full responsibility for completing the SEP regardless of the role of the third party. Under exceptional circumstances the Department will accept requests for release of responsibility upon payment to a third party.
- ▶ Decisions will be made on a case by case basis, and these exceptions will be evaluated in developing a rule. The Department will consider exceptions for good cause and for the purpose of gathering examples to help develop a rule.



# Relationship to Violation

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- ▶ A SEP may have a direct or indirect relationship with the underlying violation, statute, and geographic area impacted.
- ▶ Look for direct relationship first
- ▶ Indirect Ok if advances DEP goals, and directly benefits public health and/or environment



# Benefits to Respondent

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(1) The public or environment is to be the primary beneficiary of any SEP.

(2) The respondent may incidentally receive some indirect or direct benefit from conducting the SEP. These benefits to the respondent may be reduced from the amount of penalty offset by the SEP

(3) The SEP cost represents civil penalties assessed by DEP and the respondent must agree not to represent otherwise to any taxing authority or other governmental entity.

(4) In any publication, promotion, or statement in writing or spoken generated by the respondent, it must be clear and in a prominent manner, that the SEP was completed as a condition of a settlement of an enforcement action.

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# Managing Funds

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- ▶ Unless specific approval from the Assistant Commissioner is given, neither the DEP nor any other state agency may play any role in managing or controlling SEP funds.
- ▶ Another state agency may control SEP funds only if it is for the purpose of carrying out its own SEP as part of an enforcement action.



# Penalty Calculation

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- ▶ For each dollar spent on the SEP, one dollar can be deducted from the penalty amount, up to 75% of the total penalty agreed to in the settlement. (except for Water Pollution Control Act in which case only 50% offset allowed)
- ▶ The fact that the respondent is conducting a SEP should not be incorporated into the calculation of the final penalty amount.



# SEP Types

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- ▶ pollution reduction, pollution prevention, remediation, and environmental enhancement
- ▶ SEPs that are unacceptable include: monetary donation, general education in which the benefit is not measureable, or any project that lacks environmental benefit.
- ▶ A SEP should not allow for potential further damage to the environment.
- ▶ A SEP should not include activities that the respondent has previously planned, initiated, implemented, budgeted for, or completed. Nor should a SEP include actions that are required by law or part of activities required in order to return to compliance.






# SEP Proposal

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The respondent shall submit to the Department a detailed description of the proposed SEP.

- ▶ Name and contact information of facility personnel knowledgeable of SEP
  - ▶ Project description
  - ▶ start date
  - ▶ completion date
  - ▶ project deliverables
  - ▶ project milestones and timeline for reaching milestones
  - ▶ timeline for submitting interim and final verification to DEP for review
  - ▶ detail of costs
  - ▶ **project benefits**
  - ▶ identification of parties that benefit from the project
  - ▶ role of third party (if applicable)
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# Review of SEP Proposal

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A variety of factors you'll want to consider, such as:

- ▶ capacity of the respondent to complete the proposed SEP
- ▶ availability of C&E/DEP's resources required for effective negotiation and drafting of the SEP provision
- ▶ availability of C&E/DEP's resources or capacity to verify that the SEP was completed as required
- ▶ the compliance history of the respondent
- ▶ the likelihood of environmental benefits being obtained
- ▶ if the SEP advances Department priorities
- ▶ if the SEP reduces environmental burden in an overburdened community
- ▶ if local residents or community organizations were consulted in the development of the proposed SEP



# Inclusion of SEP in Settlement Document

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The settlement agreement should accurately and completely describe the terms of the SEP, including:

- ▶ start and end date
- ▶ project deliverables
- ▶ specific actions to be performed by the respondent
- ▶ reliable means to verify that the SEP is completed
- ▶ DEP contact to whom interim and final project updates should be sent
- ▶ Terms for if SEP is not completed as required SEP.

Template ACO included in Policy document.

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# Verification of SEP Completion

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- ▶ As specified in the settlement document the respondent is to submit to the Department necessary updates on the progress of completing the SEP
- ▶ These intervals will vary based on the SEP
- ▶ C&E may need to visit the site of the SEP while in progress or once completed to verify that the SEP is completed



# Notating SEPs in NJEMS

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- ▶ “check” the SEP Checkbox
- ▶ *This checkbox is located on the Enforcement Action screen, on the Corrective Actions tab, at the bottom of the Penalty Type box (left side of the screen/tab). The checkbox is entitled "Supplemental Environmental Project."*



## 5 Key Take Aways

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- (1) Yes to SEPs... where practical and consistent with this policy
  - (2) SEPs should be targeted to advancing agency goals
  - (3) Encourage respondents to talk with community when developing the SEP
  - (4) Environmental outcomes of SEP are to be measured
  - (5) The settlement agreement should accurately and completely describe the terms of the SEP
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# Moving Forward...

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- ▶ Incorporate SEPs based on policy
- ▶ Document SEPs in NJEMS
- ▶ Evaluate SEPs, our policy, etc. to inform future rule development

