

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

POLICY AND PROCEDURE

SUBJECT: STANDARD OPERATING PROCEDURES FOR INCORPORATING SUPPLEMENTAL ENVIRONMENTAL PROJECTS INTO SETTLEMENT AGREEMENTS

EFFECTIVE DATE: 12/5/2011

APPROVED BY: Wolfgang Skacel, Assistant Commissioner

Scope

This policy shall be in effect for and satisfied by all organizational units of the Department of Environmental Protection (DEP) that incorporate Supplemental Environmental Projects into settlement documents as a condition of settling an enforcement matter.

Overview of Supplemental Environmental Projects

Until a SEP rule is adopted, this interim document serves to provide a general overview on what a Supplemental Environmental Project (SEP) is, the current conditions under which the Division of Compliance and Enforcement (C&E) incorporates a SEP into a settlement agreement, and best practices for integrating a SEP into a settlement document.

During settlement discussions C&E staff is encouraged to communicate with regulated entities about SEPs and their benefits. C&E staff is encouraged to include SEPs in settlement agreements where possible and practical and in a manner consistent with the contents of this document. SEPs are not available when there is minimal litigation risk as to liability for the violation(s), or as to the amount of penalties assessed for the violation(s).

Staff is to follow the same chain of command approval for settlement agreements with a SEP as they would for settlement agreements without a SEP. Deviation from the following conditions may be considered on a case by case basis and must be approved by the program Director. Experience with deviations will be used to inform the development of a SEP rule.

SEP Purpose

In the settlement of an enforcement matter, the DEP requires the alleged violator to achieve and maintain compliance with the State environmental laws and regulations and to pay a civil penalty. While punitive penalties play an important role in deterring noncompliance, SEPs play an additional role in securing significant public health or environmental protection, improvement, or enhancement. Inclusion of a SEP in a settlement agreement is an opportunity to maintain deterrence for non-compliance while encouraging regulated entities to take voluntary actions that achieve direct environmental improvement that would not have occurred otherwise.

Introduction

A SEP is 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 respondent would not otherwise have been required to perform, and in which the public or the environment is the primary beneficiary. Once included in the settlement document, completion of the SEP becomes a binding requirement and if not completed as required, could be subject to stipulated penalties.

Alignment with Department Goals

SEPs should advance Department goals. Specifically C&E is looking to direct SEPs at reducing the environmental impact on overburdened communities or enhancing the Barnegat Bay. If neither of these

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two goals is directly advanced by a proposed SEP, C&E should encourage a SEP that aligns with a category of the Stewardship program, such as environmental enhancement project, environmental management system, or hazardous materials reduction.

Department's Discretion

Acceptance of a SEP as part of a settlement agreement is the discretion of the Department, and though a proposed SEP may satisfy criteria outlined in this document, the Department may decide that a SEP is not an appropriate component of the settlement agreement. Such criteria for not approving a SEP may include, among other things, the seriousness of the violation in which anything other than a penalty payment seems inappropriate or whether the SEP addresses the needs of the community impacted by the alleged violation. Experience with proposed SEPs will be used to develop additional criteria for acceptance or rejection of a SEP.

Department's Role

Currently C&E's role is 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. C&E will review interim and final project reports, and visit the site of the SEP as necessary to verify the SEP is being completed as required. 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

The respondent is responsible for developing and submitting a SEP proposal; implementing, managing, and completing the SEP as required; and submitting necessary verification to the Department to illustrate that the SEP has been completed. In developing a SEP proposal, 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

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.

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Relationship between the SEP and the violation

A SEP may have a direct or indirect relationship with the underlying violation, statute, and geographic area impacted.

A direct relationship is one in which the SEP occurs near the site of the violation and: (1) reduces the adverse impact to public health and/or the environment to which the violation contributes, or (2) reduces the likelihood that similar violations will occur in the future, or (3) reduces overall risk to public health or the environmental potentially affected by the violation at issue.

The multi-media characteristics of many of our environmental problems contrasted with the single media approach of our laws and regulations may in some instances make finding a SEP with direct relationship challenging. Recognizing this, C&E may allow a SEP that has an indirect relationship to the violation in order to bring about meaningful environmental improvement. A SEP with an indirect relationship to the underlying violation, statute, or geographic area impacted, may be approved if it advances the Department's mission or a Department priority (such as reducing environmental burdens in overburdened communities or enhancing Barnegat Bay), and directly benefits public health and/or environment.

When proposing a SEP, respondents should first consider a SEP that has a direct relationship to the community and ecosystem impacted by the noncompliance. If a SEP with a direct relationship can not be developed, a SEP with an indirect relationship may be considered.

Benefits to Respondent

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

Managing Funds

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

After the final penalty settlement amount has been determined, the penalty is then adjusted to account for the cost of the SEP. 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. However, 50% is the maximum

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offset allowed for violations of the Water Pollution Control Act. The fact that the respondent is conducting a SEP should not be incorporated into the calculation of the final penalty amount.

SEP Types

Four general categories of SEPs that C&E has approved include pollution reduction, pollution prevention, remediation, and environmental enhancement. Some projects that DEP has previously approved include 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, and land preservation.

All SEPs are to include concrete and measurable environmental benefits. 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.

A monetary donation to a charity, environmental organization, or other non-governmental organization is not an approved SEP. However, a SEP may include payment to such entities, if the entity is acting as a third party for the purpose of completing a specific activity related to the SEP.

SEP Proposal

Once a respondent has indicated that they are interested in conducting a SEP as part of the settlement, the inspector should share with them general guidance on what a SEP is. The respondent shall then submit to the Department a detailed description of the proposed SEP. This proposal should include the following:

- 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

After reviewing the project proposal, C&E may consider several factors in determining whether to approve the SEP as a condition of settlement. Below is a list of several, but not all factors, C&E may consider:

- 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

C&E may accept the proposal as is, recommend modifications, or reject. Recognizing that our Department colleagues possess unique technical knowledge, C&E representatives are encouraged to contact other programs in the Department for technical guidance on any component of the SEP, including the project plan, anticipated costs and benefits, and meaningfulness of the environmental benefits.

Inclusion of SEP in Settlement Document

The settlement agreement should accurately and completely describe the terms of the SEP. It should describe the specific actions to be performed by the respondent and provide for a reliable means to verify that the respondent has completed the project. Once C&E has agreed to integrate the SEP into the settlement, the following components are to be included in the settlement document:

- start and end date
- project deliverables
- DEP contact to whom interim and final project updates should be sent
- Terms for if SEP is not completed as required

See Attachment A: "Template SEP Language for Administrative Consent Order"

Verification of SEP Completion

As specified in the settlement document the respondent is to submit to the Department necessary updates on the progress of completing the SEP. The intervals at which periodic project status updates must be submitted will vary depending on the SEP. Similarly the contents of the interim project reports will vary. Two types of verification include: photos illustrating project progress and invoices detailing

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equipment or supply purchases. The intervals and contents are to be detailed in the settlement document. For multi-year projects, at a minimum, a SEP update should be submitted to the Department once every 3 months. For short-term projects, such as a year or less, monthly updates may be more appropriate. However, these timelines will depend primarily on the complexity of the SEP. C&E should include timelines that it deems appropriate to determine that the SEP is being completed as required. C&E may need to visit the site of the SEP while in progress or once completed to verify that the SEP is completed as required by the settlement document.

Notating SEPs in NJEMS

If a SEP is incorporated into a settlement agreement the “Supplement Environmental Project” check box in NJEMS is to be checked. 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.”

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Attachment A: Template SEP Language for Administrative Consent Order

[Facility Name/Party] shall satisfy \$_____ of the civil charge by satisfactorily completing the Supplemental Environmental Project (SEP) described in Appendix A of this document.

By signing this order [Facility Name/Party] certifies that it has not commenced performance of the SEP.

By signing this order [Facility Name/Party] certifies that the SEP is not required by any federal, state, or local law or regulation, nor is it required by any other agreement, grant or as injunctive relief in this or any other case.

[Facility Name/Party] acknowledges that it is solely responsible for completing the SEP project. Any transfer of funds, tasks, or otherwise by [Facility Name/Party] to a third party, shall not relieve [Facility Name/Party] of its responsibility to complete the SEP as described in this Order.

In the event [Facility Name/Party] publicizes the SEP or the SEP results, [Facility Name/Party] shall state in a prominent manner that the project is part of a settlement of an enforcement action.

In the event that [Facility Name/Party] fails to comply with any of the terms or provisions of this Agreement relating to the performance of the SEP described in Appendix A and/or to the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP described in Appendix A, [Facility Name/Party] shall be liable for stipulated penalties according to the provisions set forth below:

(i) Except as provided in subparagraph (ii) immediately below, for a SEP which has not been completed satisfactorily pursuant to this Administrative Consent Order, the Department may assess the greater of either stipulated daily penalties or the remainder of the SEP value plus 25% of the estimated SEP cost.

(ii) If the SEP is not completed in accordance with the above paragraphs and Appendix, but the Department determines that the [Facility Name/Party]: a) made good faith and timely efforts to complete the project; and b) certifies, with supporting documentation, that at least 95 percent of the amount of money which was required to be spent was expended on the SEP, Respondent shall not be liable for any stipulated penalty.

(iii) If the SEP is completed in accordance with the provisions outlined above and in the Appendix, but the [Facility Name/Party] spent less than 95 percent of the amount of money required to be spent for the project, Respondent shall pay the difference to the Treasurer, State of New Jersey or propose an additional SEP to expend the remaining funds.

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(iv) If the SEP is completed in accordance outlined above and in the Appendix, and the [Facility Name/Party] spent at least 95 percent of the amount of money required to be spent for the project, Respondent shall not be liable for any stipulated penalty.

The determinations of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion of DEP.

APPENDIX A

[Facility Name/Party] shall perform the SEP identified below in the manner specified in this Appendix.

1. The SEP to be performed by [Facility Name/Party] is [description of SEP, including specific actions to be taken and results to be achieved].
2. Funds dedicated for the SEP shall not be used to pay for consultant oversight costs. If [Facility Name/Party] requires the assistance of a consultant, it shall provide funds directly to the consultant in addition to the funds dedicated to the SEP.
3. The penalty specified in Paragraph [insert number], above, shall represent civil penalties assessed by DEP and the respondent hereby agrees not to represent otherwise to any taxing authority or other governmental entity.
4. The SEP shall be completed by [date] OR [specify schedule including SEP completion].
5. [Facility Name/Party] shall submit progress reports on the SEP [insert frequency of submission of progress reports, ex: on a quarterly basis, due the 10th day of each quarter]. The progress reports shall include [specify documentation required].
6. [Facility Name/Party] shall submit a written final report on the SEP, verifying that the SEP has been completed in accordance with the terms of this Administrative Consent Order, and certified either by a Certified Public Accountant or by a responsible corporate officer or owner. [Facility Name/Party] shall submit the final report and certification to the Department within [number] days from the completion of the SEP.
7. The SEP Completion Report shall contain the following information:
 - (i) A detailed description of the SEP as implemented;
 - (ii) A description of any operating problems encountered and the solutions thereto;
 - (iii) Itemized costs;
 - (iv) Certification that the SEP has been fully implemented pursuant to the provisions of this Administrative Consent Order; and
 - (v) A description of the environmental and public health benefits resulting from

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implementation of the SEP (with a quantification of the benefits and pollutant reductions, if feasible).

8. Unexpected issues related to the successful completion of the SEP must be brought to the attention of the Department. If the SEP has not or cannot be completed as described in the Administrative Consent Order, [Facility Name/Party] shall notify DEP in writing no later than [Date]. Such notification shall include:

- a. an alternate SEP proposal, or
- b. payment of the amount specified in [paragraph number].

It is the Department's sole discretion to approve an alternate SEP proposal.

9. [Facility Name/Party] hereby consents to reasonable access by DEP or its staff to property or documents under the party's control, for verifying progress or completion of the SEP. The Department may demand at any time, and [Facility Name/Party] shall forthwith provide, any documents relating in any way to the SEP, including but not limited to its implementation, progress, and completion.

10. SEP documents to be submitted to the Department, shall be sent to:

[Insert Name and Contact information of appropriate C&E or DEP representative]