



DEPARTMENT OF ENVIRONMENTAL PROTECTION

Serving Maine People & Protecting Their Environment

SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY

1. INTRODUCTION

Title 38, section 349(2-A) of the Maine Revised Statutes authorizes the Maine Department of Environmental Protection (“Department”) and the Maine Department of the Attorney General (“AG”) to settle civil enforcement actions with agreements that include environmentally beneficial projects, referred to in that law as Supplemental Environmental Projects (“SEPs”). This Policy provides guidance in implementing that law. SEPs are not a tool for bringing persons charged with a violation into compliance with environmental requirements. Rather, SEPs are environmentally beneficial activities that a person charged with a violation voluntarily agrees to perform as part of an enforcement resolution, but that the violator is not otherwise obligated to perform or previously planned and budgeted to complete. SEPs may be incorporated only into settlements.

2. DEPARTMENT AND AG DISCRETION

The decision on the part of the State to settle an environmental enforcement action is that of the Department and AG. Acceptance of a SEP as part of settling an enforcement action is solely within the Department’s and AG’s discretion. Even though a proposed SEP may otherwise satisfy the provisions of this policy, the Department or AG may decide that the SEP is not appropriate. In exercising their discretion, the Department and AG may take action that varies from the policies or procedures contained in this document if such action is appropriate in a specific case.

3. APPLICABILITY

The provisions in this Policy are not relevant at hearing, trial, or any judicially determined remedy except as consented to by the parties. This Policy is not a rule and, as such, does not create any rights or benefits, substantive or procedural, enforceable at law or in equity, for any person or entity.

4. SEP CATEGORIES

- A. SEP Defined.** A SEP is a project that primarily benefits public health or the environment and that persons charged with a violation are not otherwise obligated to perform or previously planned and budgeted to complete. A person charged with a violation may voluntarily agree to perform a SEP as part of resolving an enforcement action. While not a requirement, SEPs with a meaningful relationship to the area and resource impacted by a violation are preferred.

A project that "primarily benefits public health or the environment" is one that furthers the Department's statutory mission by conferring significant, direct benefits to public health or the environment which substantially outweigh any benefits that may accrue to the person charged with a violation. The primary public benefit requirement does not preclude a person charged with a violation from achieving some direct or indirect benefit from a project.

- B. Project Categories.** The Department will only consider proposals meeting the SEP definition in at least one of seven categories: pollution prevention; pollution reduction; environmental enhancement; environmental awareness; scientific research and data collection; emergency planning and preparedness; and public health.

(1) Pollution Prevention Projects. A pollution prevention project must eliminate all or a significant portion of pollutants at the point of generation. For example, this elimination or reduction may result from: (1) input substitution and product reformulation, such as replacing



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- toxic substances or raw materials with a nontoxic or significantly less toxic substance; (2) redesigning or modernizing operations and equipment; or (3) improving operation and maintenance controls. The appropriate penalty reduction will be scrutinized when this category is proposed because economic benefits commonly accrue to a source as a result of implementing a pollution prevention project.
- (2) **Pollution Reduction Projects.** A pollution reduction project must significantly decrease the release of pollutants to the environment. Pollution reduction operates to reduce the level of pollutants at the point of discharge. A pollution reduction SEP must bring a facility significantly beyond compliance with environmental requirements, for example, by substantially reducing the amount of pollution that would otherwise be legally discharged to the environment. “Off-site recycling” that significantly reduces waste materials discharged into the environment will be considered pollution reduction for the purposes of this policy. The appropriate penalty reduction will be scrutinized when this category is proposed because economic benefits commonly accrue to a source as a result of implementing a pollution reduction project.
- (3) **Environmental Enhancement Projects.** An environmental enhancement project must significantly go beyond the remedial work required to restore or mitigate the environmental damage caused by a violation in order to enhance the natural environment, or use and enjoyment of that environment, in the ecosystem or geographic area affected by the violation. Examples include: restoration, purchase, improvement, and preservation of lands in the affected ecosystem; and significantly reducing similar discharges from sources upwind, upgradient, or upstream of the violating facility.
- (4) **Environmental Awareness Projects.** An environmental awareness project must provide training, publications, or technical support to the regulated community for the purpose of: (1) achieving compliance with environmental requirements; or (2) reducing the generation, release, and disposal of pollutants beyond legal requirements. All such projects must be substantially related to the types of violations which are the subject of the administrative enforcement action, and the Department must find that compliance in the sector of the regulated community would be significantly advanced by the proposed project. Any materials made available under an environmental awareness project must contain a statement that the project has been undertaken by the person charged with a violation as part of settling an environmental enforcement action brought by the State.
- (5) **Scientific Research and Data Collection Projects.** A scientific research or data collection project must significantly advance the scientific basis upon which regulatory decisions will be made. Such projects may include initiation of new research or support of an ongoing research project regarding conditions in, or effects on, the natural environment but does not include a project aimed at meeting current or foreseeable licensing or regulatory requirements.
- (6) **Emergency Planning and Preparedness Projects.** An emergency planning and preparedness project will assist state or local emergency response and planning entities to improve activities under the Federal Emergency Planning and Community Right to Know Act (“EPCRA”) or Local Civil Emergency Preparedness Program provisions in Maine Law.



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Such projects may include purchasing computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training.

- (7) **Public Health Projects.** A public health project is one undertaken to evaluate potential human health impacts where pollution is released into the environment. For example, the effect of exposure to a particular pollutant on a population located in a specific place may be studied.

5. LIMITATIONS AND EXCLUSIONS ON SEP PROPOSALS

- A. Required Actions.** SEPs will not be accepted for activities that are required by law, that are required by law in the near future, or are likely to be required by law in the near future.
- B. Previously Planned Actions.** SEPs will not be accepted for activities that the person charged with a violation has planned, budgeted for, initiated, or completed prior to the current enforcement action. Persons charged with a violation must certify to the Department and AG that the project was not previously planned or approved for budget expenditure.
- C. Economic Benefit.** A SEP may not be used to offset or mitigate any calculable economic benefit of noncompliance.
- D. Intentional Violations.** The resolution of knowing, intentional, or reckless violation(s) cannot include a SEP.
- E. Violator Primary Benefactor.** A SEP is not permissible where the project primarily benefits the violator.

6. THRESHOLD QUALIFICATIONS AND REQUIREMENTS

- A. Project Management.** Public policy and legal considerations require that the Department's involvement in administration and management of a SEP be limited to an oversight role. A SEP may be disapproved where the Department determines that the time and resources which it must dedicate to project oversight are overly burdensome. The factors that should be considered in determining whether a SEP is overly burdensome are: time required, staff workload, length of the proposed project, technical complexity of the project, and the complexity of Department oversight. **Preference will be given to projects in which the violator is neither the implementer or manager of the project and is solely providing funding for the SEP. When considering varying projects, the staff will evaluate projects based on their environmental benefit and the resources required from the Department to manage or oversee each project.**
- B. Project Implementation.** A SEP must contain timely and defined goals and milestones for implementing the project. To ensure that persons charged with a violation meet prescribed milestones, a SEP must adequately provide for progress reporting and a final accounting to the Department or its designee. A person charged with a violation must demonstrate the technical and economic resources needed to implement the SEP. The Department may require a letter of credit, escrow agreement, or third-party oversight as part of this demonstration.
- C. Project Proposals: Details, Timing and Department Involvement.**
- (1) **Timing and Department Involvement.** Any discussion of a SEP proposal with the violator should be initiated by the Department staff member with immediate responsibility for



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managing the action. Any proposal to incorporate a SEP into a settlement should be made only following the Department's calculation of the penalty amount, but early enough in the process to provide sufficient time for consideration. Department staff may suggest project concepts, but it is the responsibility of the violator to develop and implement the SEP proposal.

- (2) **Details.** Parties seeking to perform a SEP as part of settling a pending enforcement action must provide the following information to the extent applicable to the project:
- (a) **Name of the Project.** Provide the name that will be commonly used when referring to the project.
 - (b) **Project Implementer.** Provide the name, mailing address, telephone, and fax number for the project's director. Also, provide this information for any contractor or other organization conducting the project and the person responsible for submitting status reports, if different from the project director.
 - (c) **Geographic Area to Benefit from the Project.** Identify the municipalities, counties, watersheds, or non-attainment area benefiting from the project.
 - (d) **Enforcement Action.** Indicate the name of the entity and location of the site associated with this enforcement action. The location should include municipality, county, watershed, and non-attainment area designations.
 - (e) **Type of Project.** Indicate the type of SEP proposed using the project categories identified in Section 4 of this Policy.
 - (f) **Project Description.** Describe the project in detail, the need for and any benefits to be attained by it, any similar services in the area, the project implementation tasks, technology operation, process change, etc.
 - (g) **Existing Regulatory Requirements.** Identify any applicable local, state, or federal requirements that would require implementation of any portion of the project and the legal deadline for implementation.
 - (h) **Total Project Budget.** With specificity, identify the total out-of-pocket cost of the project, not just that part which may be applied as a mitigating factor in figuring the final penalty. The costs should be divided by year and expenditure categories.
 - (i) **Project Schedule.** With specificity, provide the project's task implementation schedule, including any interim deadlines and goals.
 - (j) **Expected Project Benefits.** Explain the expected environmental benefits of this project and how the benefits can be quantified. For pollution prevention projects, identify the media (air, water, land) affected and quantify the amount of each pollutant that will be reduced beyond that required for environmental compliance. For any other type of



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project, quantify the number of participants, programs offered, sites cleaned, types of contamination contained or removed, acres of land restored or affected, etc. Also, provide an analysis of the project's rate-of-return and the calculable economic benefit that may accrue.

- (k) **Reporting.** Describe the information that will be included in each report that is scheduled to be submitted upon completion of each project goal. Each report must contain information that can be used to evaluate the effectiveness and benefits of the SEP. Less complex projects may only require a summary report upon completion of the activities.
- (l) **Certification.** Provide a certification that the proposed SEP is not the result of substantive planning that occurred prior to the enforcement action.
- (3) **Approval of a SEP proposal.** A SEP proposal must be reviewed by the Enforcement Specialist, Commissioner and AG prior to final discussion with the violator.
- (4) **Incorporation into settlement agreement.** Any approved SEP must be appropriately described in the Administrative Consent Agreement or Court Order that is part of the settlement agreement in order to ensure that it is enforceable by the Department and AG. A copy of the actual SEP should be incorporated as an attachment to the settlement agreement.

7. PENALTY MITIGATION CALCULATION

- A. **Penalty.** The Department will assess monetary penalties in each enforcement action that, at least, capture any economic benefit of non-compliance. A violator's out-of-pocket expenses may mitigate a portion of a penalty, other than for economic benefit, as set forth herein.
- B. **Project Cost Calculation.** The Department's and AG's staff will use their discretion in determining the type and detail of cost calculation required for a given project. The level of detail required when calculating costs will depend largely upon the complexity of a proposed project, its costs, and benefits. For example, the net present after-tax cost of a SEP may require certification by an independent Certified Public Accountant where appreciable future costs and benefits exist.

Actual out-of-pocket expenses incurred by the person charged with a violation in performing the SEP must be calculated as part of the proposal. Expenditures that may be considered in calculating out-of-pocket expenses include: (1) capital costs, *e.g.*, equipment and buildings; (2) one-time non-depreciable costs, *e.g.*, removing contaminated materials, purchasing land, and developing a compliance promotion seminar; and, (3) annual operation costs reduced by any savings, *e.g.*, labor, water, raw materials, and power. The time-period during which costs will be incurred while implementing the project and the period during which benefits will be received from the project will be considered in calculating the out-of-pocket expenses incurred. These out-of-pocket expenses may not be used for tax deduction purposes. Any equipment installation is ineligible for tax exemption certification as a pollution control facility.
- C. **Mitigation Calculation.** Upon approval of a SEP, the Department and the AG will mitigate on a dollar-for-dollar basis up to the full penalty, excluding that portion of the penalty addressing economic benefit or required for dedicated funds, based on approved out-of-pocket expenses associated with a SEP as provided herein.



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8. OVERSIGHT

- A. Monitoring Responsibility.** The violator is responsible for demonstrating compliance with the requirements of a SEP proposal. Responsibility for monitoring a violator's compliance with the requirements of a SEP lies with the Department staff member immediately responsible for managing the enforcement action, except as otherwise provided for in this section. Third-party monitoring may be provided by another agency of government, *e.g.*, Inland Fisheries and Wildlife or the University of Maine, or an independent contractor acceptable to the Department. All costs of demonstrating compliance with the SEP's requirements shall be borne by the person charged with a violation.
- B. Cross-Media SEPs.** In the event of a cross-media SEP (*e.g.*, an air quality SEP is incorporated into a water resource settlement), the responsibility for monitoring a violator's compliance with the requirements of the SEP shall lie with a staff member designated from the Departmental unit with the area of expertise most closely related to the subject matter of the SEP.
- C. Failure to Comply.** If a violator fails to comply with the terms of a SEP, the responsible staff member shall report the failure to their Bureau and Division Directors, Unit Manager, and to the Enforcement Specialist.

9. FINALITY OF SETTLEMENT AGREEMENT

The finality of each settlement agreement that incorporates a SEP is contingent upon satisfactory completion of the SEP in accordance with the terms of the written agreement. Failure to satisfactorily implement or complete the SEP in accordance with the terms of the settlement agreement will result in the assessment of penalties, and may also void the settlement and subject the violator to other remedies. Settlement agreements should state that determinations as to whether a SEP has been satisfactorily completed (*i.e.*, pursuant to the terms of the agreement) are reserved to the sole discretion of Department and the AG.

10. PENALTIES FOR BREACH OF AGREEMENT TERMS

Where appropriate, settlement agreements incorporating a SEP will provide for stipulated penalties for both missed deadlines and failure to complete the project to assure that the SEP is performed in a timely manner and otherwise as required. Penalties for missed deadlines should be assessed on a per day basis for each day beyond the required completion date. A penalty for failure to complete the project should be assessed if a SEP project is unacceptably late or is not completed satisfactorily. The penalty for failure to complete the project shall be an amount greater than the original penalty offset granted for the SEP, plus interest at the statutory post judgment rate.

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