



# Internal Management Directive

Subject:	Supplemental Environmental Projects	IMD Number:	ENF.00.020
Effective Date:	June 2, 2005	Pages:	
Revision Date:	March 31, 2006 (format only)		
Approval:	Stephanie Hallock, Director		

## Intent / Purpose / Statement of Need:

This internal management directive (Directive) is designed to enhance human health and the environment by encouraging respondents in enforcement actions to engage in "Supplemental Environmental Projects" (SEPs). The rationale behind SEPs is to encourage respondents to take actions that reduce the risk of further pollution, benefit public health, restore and protect the environment, and/or promote environmental compliance. The goal is to use the penalty as incentive to obtain benefits that would not otherwise occur, either because the actions are not required by law or would not be seen by the respondent as economically viable, were it not for the impending penalty action. This Directive outlines the conditions under which the Oregon Department of Environmental Quality (Department) will consider mitigating a penalty with a SEP.

## Authority:

The Department may consider SEPs in settlement pursuant to Oregon Revised Statute 468.130(3,4) and Oregon Administrative Rule (OAR) 340-012-0170, which allows the Director to mitigate penalties when the respondent is willing to employ extraordinary means to maintain compliance and when the settlement is consistent with protecting public health and the environment.

## Applicability:

1. This Directive applies to assessment of penalties for violations of all of the environmental statutes, rules, permits and Orders administered by the Department.
2. This Directive sets forth factors for the Department to consider in exercising its prosecutorial and settlement discretion. The Directive is not final agency action and is intended as guidance for staff. The Department may take action at variance with this Directive.
3. The Directive does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. It is not intended for use in pleading, at hearing or at trial.

## Definitions:

## Internal Contact:

## Policy:

The Department wishes to create a means through which respondents may reduce penalties by agreeing to conduct a project that benefits public health and the environment in Oregon. Furthermore, the Department prefers to approve those SEPs that are proposed by willing-and-able respondents who are most likely to exercise expertise, drive and discipline to succeed in completing the SEP independently. For these reasons, Department staff are directed to accept a SEP only if it meets all of the Required Criteria listed in Section A below and to give preference to those SEPs meeting the Preference Criteria listed in Section B below.

### **A. Required Criteria for an approvable SEP:**

1. It will not be used to mitigate a penalty for a violation done willfully, flagrantly or with criminal intent;
2. It primarily benefits human health or the environment in Oregon;
3. It is not otherwise required by statute, rule, permit, or order; and is not set to become a future enforceable requirement as identified by a law, regulation or government register;
4. It will not be funded by state or federal government loans, contracts or grants;
5. It must not call for the Department to manage or control funds; or to manage or administer the SEP (though it may involve the Department in an oversight role);
6. It would not be used to satisfy any statutory obligation or circumvent any statutory prohibition applicable to the Department; and
7. It does not create a significant market or economic advantage for the respondent; however, an otherwise acceptable project that has incidental advantage to the respondent may be accepted by appropriately valuing the SEP (see Section C, below).

### **B. Preference Criteria:**

1. The respondent is not a repeat, chronic, or recalcitrant violator;
2. The violation is self-disclosed;
3. The violation is corrected expeditiously;
4. The SEP proposal contains all the information described below in Section D. (Incomplete proposals may be rejected without further action);
5. The respondent submits a complete SEP proposal within 60 days of service of the Notice of Civil Penalty Assessment;
6. The SEP will not necessitate significant DEQ staff time to plan, review, implement, monitor, or follow-up (e.g., a project where the respondent arranges to have the project carried out by an organization that regularly performs the kind of work proposed would be preferable to having a respondent work outside its area of knowledge);
7. The penalty to be mitigated exceeds \$2,000;
8. The SEP relates to the same environmental program as the violation and will be implemented in the same geographic area as the violation;<sup>1</sup>
9. The SEP has measurable environmental outcome; and
10. The project fits into at least one of the following categories:<sup>2</sup>
  - a) **Pollution Prevention** – preventing waste or pollution at the source,

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<sup>1</sup> While DEQ prefers that SEPs have a "nexus" to the violation, this is not a state legal requirement as it is under EPA's final Supplemental Environmental Projects Policy, (April 10, 1998) which can be found at [www.epa.gov/Compliance/resources/policies/civil/seps/sepfinal2.pdf](http://www.epa.gov/Compliance/resources/policies/civil/seps/sepfinal2.pdf).

<sup>2</sup> Additional information about these categories can be found in the EPA final SEP policy at the above website.

through conserving energy, conserving raw materials, process changes, chemical substitutions, and improved efficiency of operation; for example, making a process more efficient so that less waste is created for a given amount of product;

- b) **Pollution Reduction** – reducing the amount and/or danger presented by some form of pollution, often by providing better treatment and disposal of the pollutant;
- c) **Public Health Protection** – an example is the medical examination of residents in a community to determine if anyone has experienced any health problems because of the violations;
- d) **Environmental Restoration and Protection** – improving the condition of the land, air or water in the area damaged by the violation. For example, by purchasing land or developing conservation programs for the land, a company could protect a source of drinking water.
- e) **Emergency Planning and Preparedness** – providing assistance to a responsible state or local emergency response or planning entity. Such assistance may include the purchase of computers and/or software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training.
- f) **Assessments and Audits** to determine if the respondent is causing any other pollution problems or can run its operations better to avoid violations in the future.
- g) **Environmental Compliance Promotion** – providing training or technical support to other members of the regulated community to achieve, or go beyond, compliance with applicable environmental requirements.
- h) **Other Projects** which have environmental merit but do not fit within the categories listed above. These types of projects must be fully consistent with all other provisions of the SEP Policy and be approved by the Department.

### C. SEP Value Calculation

SEPs are valued by the following method:

1. Add all the qualifying costs of the SEP proposed by the Respondent. Qualifying costs are all the reasonable costs of executing the SEP but do not generally include costs of preparing the SEP proposal, time a Respondent's employees spend on the SEP, or incidental entertainment or refreshment costs related to the SEP. Employee time may be considered a qualifying cost for a nonprofit entity.
2. In cases where the respondent might be expected to gain an economic benefit from the SEP, DEQ may reduce the value of the SEP accordingly. In making this determination, the Department may use the US EPA PROJECT computer model.<sup>3</sup> The net present value of projects that include payments to be made in the future may differ from the actual future cash outlay. Multiply the total cost by the applicable multiplier below:

<u>Category of Project</u>	<u>Multiplier</u>
Pollution prevention or reduction	1.00
Public health protection	1.00
Environmental restoration and protection	0.98

<sup>3</sup> The PROJECT model and user's manual can be found at [www.eap.gov/oeca/models/](http://www.eap.gov/oeca/models/).

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Emergency planning and preparedness	0.95
Environmental assessments and audits	0.90
Environmental compliance promotion (training event)	0.85
Environmental compliance promotion (brochure)	0.75
Other projects	tbd

The multiplier may be increased if the SEP has components that benefit the public or environment at large, are innovative, address environmental justice concerns, incorporate community input, or have multimedia benefits. The multiplier may be decreased if the SEP necessitates expenditure of significant Department resources.

3. Determine the final penalty as follows: Determine the settleable penalty which is the dollar value of the penalty after taking into consideration all information and agreements other than the value of the SEP. Subtract the SEP value from the settleable penalty. Generally, a settleable penalty may not be reduced by more than 80%.<sup>4</sup>

<sup>4</sup> Example: Respondent receives a Notice of Civil Penalty Assessment for \$10,000. During informal discussions, DEQ learns information leading it to believe the penalty should be reduced to \$8,000. The maximum penalty reduction would be 80% of the settleable penalty of \$8,000 (= \$6,400). The lowest final penalty, to which DEQ and respondent could agree, would be a final penalty of \$1,600 and an SEP value of at least \$6,400.

#### **D. SEP Proposal Procedure**

1. Proposals for SEPs are solely the responsibility of the respondent and must include the following:
  - A summary of the estimated costs associated with the SEP;
  - A proposed schedule for completion, including milestones; and
  - A description of expected benefits and results and how benefits and results will be measured or assessed.

While Department staff may assist a respondent in identifying possible SEPs, staff may not advocate for or recommend any particular project or any particular recipient of the funds. Under no circumstances may a staff person offer or commit to reduce a penalty with a SEP. Settlement authority lies solely with the Administrator of the Office of Compliance and Enforcement.

2. A respondent may wish to submit a pre-proposal outlining a proposed project before doing the work necessary to create a final SEP proposal. A pre-proposal should contain sufficient information to show that the project is likely to meet the requirements set forth in this guidance. Once a pre-proposal is submitted to the Environmental Law Specialist (ELS) handling the case, the ELS will consult with the relevant regional and headquarters staff, manager and administrator; and make a recommendation to the Administrator of the Office of Compliance and Enforcement. Approval of a pre-proposal by the OCE Administrator indicates that the Department agrees that the concept appears to meet the SEP criteria and will likely approve that particular SEP. However, approval and acceptance is only made final upon full agreement with the respondent on the costs, benefits, schedules and other terms of the final SEP as incorporated into a Mutual Agreement and Order described below.
3. A final SEP proposal must be submitted to the ELS handling the case. An address and phone number for that person will be listed on the cover letter of the Notice of Civil Penalty.
4. In determining whether any given SEP proposal fits within this Directive, the ELS will consult with the relevant regional staff, management and others as

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- needed. Once the ELS has completed an evaluation, the ELS will make a recommendation to the Administrator of the Office of Compliance and Enforcement.
5. A SEP must be accurately and completely described in a Mutual Agreement and Order, which also lays out the following requirements:
    - Respondent must not use the value of a SEP as a tax deduction or as part of a tax credit application.
    - Respondent must agree that whenever it publicizes a SEP or the results of the SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an Oregon DEQ enforcement action.
    - Respondent must submit a final SEP report to the Department according to a defined schedule. The report must include a detailed description of the expenses, copies of relevant receipts, explanation of measurable results, and a certification from the Respondent that it has completed the SEP as described in the report.
    - If Respondent fails to complete the SEP as required, the initial unmitigated penalty, plus statutory interest (currently 9% annual). will become due and owing. At its discretion, DEQ may reduce a reinstated penalty for a partially completed project.
  6. Proposed SEPs not incorporated into an executed Mutual Agreement and Order within six months of the date of the original Notice of Civil Penalty Assessment are presumed denied.
  7. The Department's Office of Compliance and Enforcement will give information to the appropriate Communications and Outreach person to generate a news release on every accepted SEP.

### **INTERPRETATION**

The terms and provisions of this directive are subject to reasonable interpretations of the Department.