

# Evaluating and Approving Supplemental Environmental Projects



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Department of  
Environmental  
Quality

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restoring, maintaining  
and enhancing the quality  
of Oregon's air, land and  
water.*

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## Disclaimer

This internal management directive represents the Department of Environmental Quality's current directions to staff on the criteria that must be considered when evaluating a supplemental environmental project (SEP) and the process used to approve a SEP. This IMD is not final agency action and does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. This directive should not be construed as rule, although some of it describes existing state and federal laws. The recommendations contained in this directive should not be construed as a requirement of rule or statute. DEQ anticipates revising this document from time to time as conditions warrant.

## Document Development

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# Table of Contents

1. Intent/Purpose/Statement of Need .....	1
1.1 Authority .....	1
1.2 Applicability.....	1
1.3 Internal Contact.....	1
2. Directive .....	1
2.1 Required Criteria.....	2
2.2 Preference Criteria .....	2
2.3 Determining the Amount of Penalty Mitigation .....	4
2.4 SEP Proposal Procedure.....	5
2.5 SEP Settlement Procedure .....	5
2.6 Effective Date .....	6

# 1. Intent/Purpose/Statement of Need

This internal management directive (Directive) is designed to enhance human health and the environment by encouraging respondents to complete or provide for the completion of “Supplemental Environmental Projects” (SEPs) in settlement of civil penalty actions. SEPs reduce the risk of further pollution, benefit public health, restore and protect the environment, and/or promote environmental compliance. SEPs result in 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.

## 1.1 Authority

The Department may consider SEPs in settlement pursuant to Oregon Revised Statute 468.130(3) and (4) and Oregon Administrative Rule (OAR) 340-012-0170, which allow 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.

## 1.2 Applicability

- 1) This Directive applies to assessment of penalties for violations of all of 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.

## 1.3 Internal Contact

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# 2. Directive

The Department wishes to create a means through which respondents may reduce penalties by agreeing to fund projects that benefits public health and the environment in Oregon. The objective is to ensure deterrence through payment of the appropriate penalty, but to allow a respondent to supply a portion of the penalty in the form of the benefits of a SEP rather than cash. In order to ensure that performance of a SEP benefits the environment and deters violations of environmental laws, Department staff are directed to approve a SEP proposal only if it meets all

of the Required Criteria listed in Section 2.1 below and to give preference to those SEPs meeting the Preference Criteria listed in Section 2.2 below.

## 2.1 Required Criteria

To be approvable, a SEP must meet the following Required Criteria:

- 1) The SEP primarily benefits human health or the environment in Oregon;
- 2) The respondent's contribution to the SEP is worth at least as much as the penalty reduction;
- 3) The work and/or the environmental result under the SEP 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, except this requirement does not apply to a SEP directed to a small community<sup>1</sup> wastewater collection or treatment facility if (i) the SEP addresses existing effluent violations, and (ii) the SEP improves the ability of the wastewater facility to comply in the long term, and (iii) it is likely that the community would not otherwise be financially capable of meeting the requirement that is being violated;
- 4) The portion of the SEP attributable to the penalty reduction will not be funded by state or federal government loans, contracts or grants;
- 5) The responsibilities of the respondent under the SEP are commensurate with the respondent's expertise and capabilities, if respondent is doing the work rather than conferring the funds on a third party to do the work;
- 6) The SEP 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);
- 7) 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);
- 8) The SEP will not be used to satisfy any statutory obligation or circumvent any statutory prohibition applicable to the Department;
- 9) The SEP 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 2.3, below); and
- 10) The SEP must provide for a Final SEP Report to be submitted to the Department.

## 2.2 Preference Criteria

In deciding between alternative SEPs and whether to recommend approval of a penalty reduction for any particular SEP, staff should consider the extent to which the proposed SEP meets the following Preference Criteria:

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<sup>1</sup> "Small community" means: (a) A city, including areas within a city's urban growth boundary, or an urban unincorporated community, that has a population of 5,000 or less; or (b) A community within the reservation of a federally recognized Indian tribe that is provided with services related to water pollution control by a public agency.

- 1) Projects should have a higher monetary value than the penalty reduction, either because the respondent donates additional resources or money or because the respondent or recipient leverages the money to gain additional resources or money for the project;
- 2) SEPs done to mitigate penalties for violations done willfully, flagrantly, or with criminal intent or violations done by chronic or recalcitrant violators generally should be performed by third parties rather than the respondent;
- 3) The violation was self-disclosed;
- 4) The violation was corrected expeditiously;
- 5) The SEP proposal contains all the information described below in Section 2.4. (Incomplete proposals may be rejected without further action);
- 6) The respondent submits a complete SEP proposal within 60 days of service of the Notice of Civil Penalty Assessment;
- 7) The penalty to be mitigated exceeds \$2,000 if the project is to be handled by the respondent rather than a third party;
- 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>2</sup>
- 9) The SEP has measurable, or tangible, environmental outcome; and
- 10) The project fits into at least one of the following categories:<sup>3</sup>
  - a) Pollution Prevention – preventing waste or pollution at the source, by conserving energy or natural resources, or by making process changes (such as chemical substitutions) or by 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 – for example, medical examinations 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 planting native riparian vegetation, a respondent could improve aquatic habitat by reducing water temperatures;
  - e) Planning and Preparedness for Environmental Emergencies – 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 education, training and outreach – providing assistance, either through direct contracting or through funding to prepare, publish, produce, and/or distribute outreach, training, or educational materials on environmental issues significant to Oregon. Examples might include direct training or assistance to an operator of a small

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<sup>2</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>3</sup> Additional information about these categories can be found in the EPA final SEP policy at the above website.

- community wastewater treatment plant or contribution to environmental inspection training programs conducted by nonprofits such as the Western States Project;
- h) 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.
  - i) Other projects that 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.

## 2.3 Determining the Amount of Penalty Mitigation

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, which may include:
  - (i) reasonable costs of preparing an approved SEP proposal;
  - (ii) costs of materials and services;
  - (iii) wages (appropriate to the work) paid to a respondent's employees for time spent on the SEP so long as the time is only spent on the SEP and the respondent documents the days and hours during which the employee worked on the SEP and includes that accounting in its final close-out report;
  - (iv) wages (appropriate to the work) and proportional overhead paid to employees of a third party executing the SEP; and
  - (v) any other reasonable and proper costs of preparing, organizing, and executing the SEP.
  - (vi) Under no circumstances may SEP monies be used for entertainment or refreshment costs.
- 2) In cases where the respondent will likely 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>4</sup>
- 3) When a SEP calls for payments to be made in the future, the value of the SEP may be adjusted to reflect the difference in value of present vs. future payments.
- 4) Department staff may consider a SEP that might not otherwise meet preference criteria if the value of the SEP exceeds the value of the penalty reduction, or 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.
- 5) 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 amount respondent will contribute to the SEP from the settleable penalty. Generally, a settleable penalty may not be reduced by more than 80%.<sup>5</sup>

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<sup>4</sup> The PROJECT model and user's manual can be found at [www.eap.gov/oeca/models/](http://www.eap.gov/oeca/models/).

<sup>5</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 mitigation would be 80% of the



## 2.4 SEP Proposal Procedures

- 1) Proposals for SEPs are solely the responsibility of the respondent and must include the following:
  - a) A description of expected benefits and results and how benefits and results will be measured or assessed;
  - b) A summary of the estimated value of the SEP, listing the costs that will be paid by the respondent and crediting any leveraged amounts that will cover other related costs; and
  - c) A proposed schedule including milestones for completion, culminating in the submission of a Final Close-out Report to DEQ.  
Department staff may assist a respondent in identifying possible SEPs. However, staff should not advocate for a particular project or particular recipient of the funds without first obtaining the approval of the Administrator of the Office of Compliance and Enforcement. The Administrator of the Office of Compliance and Enforcement has sole authority to reduce a penalty with a SEP and to commit DEQ to agreeing to a particular SEP.
- 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 (MAO) 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 Violation and Civil Penalty Assessment.
- 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 needed. Once the ELS has completed an evaluation, the ELS will make a recommendation to the Administrator of the Office of Compliance and Enforcement.

## 2.5 SEP Settlement Procedure

- 1) A SEP must be accurately and completely described in a MAO which may incorporate the SEP proposal if the proposal itself provides sufficient detail.

- 2) The MAO must include the following:
  - a) Respondent must not use the value of a SEP as a tax deduction or as part of a tax credit application.
  - b) 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.
  - c) A requirement for a Final SEP Report to be submitted to the Department according to a schedule defined in the MAO. The Final SEP Report must include a detailed description of the expenses, copies of relevant receipts, explanation of measurable results, and a certification that the SEP is complete as described in the report.
  - d) If respondent fails to complete the SEP as required, the penalty will become due (including the portion of the penalty that would have been mitigated because of the SEP, plus statutory interest (currently 9% annual) on the whole amount). At its discretion, DEQ may give credit for a partially completed project.
  - e) If respondent is conveying the money to a third party for execution of the SEP, the Department may agree to have the payment of the penalty be the respondent's only deliverable under the MAO, as long as the third party is required to carry out the work and provide the Final Close-out Report.
- 3) The Department's Office of Compliance and Enforcement will give information to the appropriate Communications and Outreach staff to generate a news release on every MAO that includes a SEP.

## 2.6 Effective Date

This Directive is effective on January 10, 2013.

# Appendix A

Revision	Date	Changes	Editor
	1/10/13	Add small communities and educational SEPs	Les Carlough