



DEPARTMENT OF ENVIRONMENTAL QUALITY  
POLICY AND PROCEDURES

**SUBJECT:** SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION

**Number:** 04-002

**Date:** November 10, 1997

**Revised:** April 15, 2005

**Page 1 of 8**

**ISSUE:**

In settlement of environmental enforcement actions, the Department of Environmental Quality (DEQ) requires alleged violators to promptly cease the activities contributing to or causing the alleged violations and to abate any harm caused by the violations. The DEQ may also require an alleged violator to enter into a legally enforceable agreement (Settlement) that includes provisions for achieving and maintaining compliance with applicable statutes and to pay monetary fines that arise from the alleged violations. The monetary fines assessed by the DEQ to resolve alleged violations are typically determined in accordance with established state and federal enforcement policies that may differ based on the program area(s) involved in the enforcement action (e.g., air, waste, water, etc.). In lieu of payment of a portion of the monetary fines assessed for alleged violations, an alleged violator may propose to undertake a Supplemental Environmental Project (SEP) under the terms of the Settlement.

SEPs are neither required nor prohibited by regulations administered by the DEQ. Properly developed and administered SEPs have the potential to secure significant improvements in environmental quality for Michigan citizens and can promote an atmosphere of cooperation and partnership between the DEQ, the regulated community, and those directly benefiting from the projects. This policy has been developed to further the DEQ goal of protecting and enhancing public health and the environment via the implementation of quality SEPs approved by the DEQ in the mitigation of monetary fines to be paid under the terms of a Settlement. This policy sets forth: (1) the criteria that each SEP proposal must meet to be considered in the settlement process; (2) the type of projects that are permissible as SEPs; (3) the steps for submitting a SEP proposal and obtaining DEQ approval of the SEP; (4) the amount of fine mitigation that may be provided for the performance of a SEP; and (5) the terms and conditions that must be included in any Settlement that contains a SEP. The primary purpose of this policy is to ensure that the SEP submittal, review, and approval process is performed in a consistent manner that results in the implementation of projects that secure environmental and/or public health benefits to the general public that would not otherwise have been realized except through the Settlement.

## DEQ POLICY AND PROCEDURES

**SUBJECT:** SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

Page 2 of 8

### POLICY:

#### **I. DEQ DISCRETION AND EFFECT OF POLICY**

The DEQ acknowledges that the inclusion of SEPs may not be appropriate for all Settlements. Examples of when inclusion of a SEP in a Settlement is not appropriate include, but are not limited to, when the amount of fines assessed are not sufficient to justify mitigation through use of a SEP or when the SEP may require more DEQ resources than appropriate. Consequently, the DEQ review and approval of a SEP is entirely discretionary. The DEQ retains the ability to approve or deny any SEP proposal at any time for any reason, including SEP proposals that otherwise meet the requirements of this policy.

This policy pertains solely to the inclusion and use of SEPs in Settlements and is not intended for use by the DEQ, alleged violators, administrative law judges, or the court during administrative hearings or court proceedings. Further, this policy is not intended to provide policy guidance for assessing natural resource damages or for the selection of a natural resource damage mitigation project. This policy creates no rights, substantive or otherwise, for the alleged violator.

#### **II. DEFINITIONS**

For the purposes of this policy, the following terms will be defined as follows:

1. "Economic benefit" means an economic or monetary gain. It may be the economic gain accrued to the violator due to noncompliance or it may be the economic gain accrued to the violator due to the implementation of a SEP. Economic benefit from noncompliance may be accrued by delaying necessary pollution control expenditures, avoiding necessary pollution control expenditures, and/or by gaining an illegal competitive advantage during the period of noncompliance (via selling banned products or capturing extra market shares through selling products at a lower cost than complying competitors). Economic benefit from a SEP may include tax relief accrued, reduced material costs, and/or reduced disposal costs accrued to the violator due to implementation of the SEP.
2. "Monetary fine" means an administrative, civil, or statutory fine.
3. "Mitigation" means the reduction of the amount of monetary fine assessed in resolution of alleged violations in consideration of the performance of a DEQ-approved SEP pursuant to the terms of the Settlement.

## DEQ POLICY AND PROCEDURES

**SUBJECT:** SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 3 of 8**

4. "Supplemental Environmental Project" or "SEP" means an environmentally beneficial project that an alleged violator agrees to undertake in settlement of an enforcement action, but which the alleged violator is not otherwise legally required to perform.
5. "Settlement" means a legally binding civil or administrative agreement entered into by and between the DEQ and the alleged violator for the purpose of resolving the alleged violations of statutes or regulations administered by the DEQ.

### **III. SEP CRITERIA**

The DEQ must determine whether a proposed SEP is within the DEQ's authority to consider. Accordingly, the alleged violator shall ensure all proposed SEPs meet the criteria outlined below and any other criterion or requirement set forth in this policy before the DEQ may consider it for approval:

1. The proposed SEP cannot be inconsistent with any provision of the underlying statutes.
2. The proposed SEP must advance at least one of the objectives of the environmental statutes and shall be shown to have adequate nexus. Nexus is the relationship between the violation and the proposed project.<sup>1</sup> Nexus only exists if:
  - a. The proposed SEP is designed to reduce the likelihood that similar violations will occur in the future;
  - b. The proposed SEP reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
  - c. The proposed SEP reduces the overall risk to public health or the environment potentially affected by the violation at issue.
3. The proposed SEP must be environmentally beneficial in that the project will improve, protect, or reduce risks to public health and/or the environment at

---

<sup>1</sup> Nexus is easiest to establish if the primary impact of the SEP occurs at the site where the alleged violation occurred or at a different site within the same ecosystem or immediate geographic area. The SEP may address different pollutants in a different environmental medium.

## DEQ POLICY AND PROCEDURES

**SUBJECT:** SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 4 of 8**

large. In some cases, a SEP may provide the alleged violator with certain limited benefits; however, in all cases, the project must primarily benefit public health or the environment.

4. The proposed SEP cannot be an activity or project that the alleged violator is otherwise legally required to perform pursuant to any local, state, or federal law or regulation. Except as provided herein, the proposed SEP cannot include actions that the alleged violator is likely to be required to perform: (a) as injunctive relief in the instant case; (b) as injunctive relief in another legal action brought or which could be brought against the alleged violator by another state or federal agency; (c) as part of an existing Settlement order in another legal action; or (d) by a local, state, or federal law or regulation. Activities for which the alleged violator will become legally obligated to undertake in two or more years in the future may be included as a SEP if the project will result in the facility coming into compliance earlier than the regulatory deadline. However, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the alleged violator for early compliance, the project is not allowable under the SEP policy.
5. Implementation of the project shall not have commenced prior to the DEQ's identification of the alleged violations and the DEQ review and approval of the project.
6. The proposed SEP must not fulfill a DEQ statutory obligation or activity that the DEQ is mandated to perform that is funded or expected to be funded by a state and/or federal appropriation. A SEP may not in any way allow for an activity that is otherwise prohibited under state or federal law. Similarly, a project may not provide the DEQ with additional resources to perform activities mandated by state or federal statutes, nor may a project provide funds to support specific activities already performed by the DEQ (e.g., a project cannot be used to revise, distribute, or copy guidance documents already produced with state or federal appropriations).
7. The DEQ may not manage the project nor control any funds that may be set aside or escrowed for the performance of a SEP unless specifically authorized by statute.
8. The type and scope of each project must be defined in the Settlement. Specifically, the Settlement must identify what is to be performed, where, by when, and by whom. A Settlement that includes provisions for the alleged violator to spend a certain sum of money on a project to be defined after the Settlement is executed is not acceptable.

#### **IV. ACCEPTABLE SEP CATEGORIES**

## DEQ POLICY AND PROCEDURES

**SUBJECT:** SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 5 of 8**

A proposed SEP must be consistent with one of the following SEP categories as further described in Appendix A to this policy:

1. Pollution Prevention
2. Pollution Reduction
3. Environmental Restoration and Protection
4. Public Health
5. Environmental Assessments
6. Environmental Awareness
7. Emergency Planning and Preparedness
8. Other

### **V. AUTOMATIC SEP EXCLUSIONS**

This SEP policy is intended to foster the use of resources that would otherwise not have been utilized to benefit public health and the environment had it not been for the incentives created as a result of the settlement process. Therefore, proposed SEPs that commenced before the violation was identified by the DEQ or for which the funding source was identified before the violation was identified by the DEQ are not acceptable. Further, SEPs are also not appropriate for repeat violators, for use in "fast track" Settlements, or for mitigating stipulated penalties.<sup>2</sup> Any SEP proposal that delays the execution of the Settlement resolving alleged violation(s) is not timely and, therefore, is not acceptable.

### **VI. SEP SUBMITTAL PROCESS**

The alleged violator should notify the DEQ of any interest in pursuing a SEP early in the Settlement negotiation process. Therefore, the SEP proposal should be submitted no later than thirty (30) days following the DEQ proposal of a monetary fine for Settlement. All projects proposed as SEPs must provide sufficient information to demonstrate that the proposal meets all applicable requirements listed in this policy. The information provided is to include all of the specific information identified in the SEP Submittal Guideline provided in Appendix B and is to be formatted in the same manner as Appendix B.

### **VII. SEP REVIEW PROCESS**

---

<sup>2</sup> In extraordinary circumstances, the DEQ may consider mitigating potential stipulated penalty liability using SEPs where: (1) despite the circumstances giving rise to the claim for stipulated penalties, the alleged violator has the ability and intention to comply with a new Settlement and the obligation to implement the SEP and perform other compliance activities thereunder; (2) there is no negative impact on the deterrent purposes of stipulated penalties; (3) the effective Settlement giving rise to the claim for stipulated penalties must be reopened and revised to incorporate a new compliance program for resolving the violations; and (4) the claim for stipulated penalties did not arise out of a failure to meet a SEP requirement in the effective Settlement.

## DEQ POLICY AND PROCEDURES

**SUBJECT:** SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 6 of 8**

After receipt of a SEP proposal meeting the requirements of Section VI (SEP Submittal Process) and Appendix B (SEP Submittal Guideline) of this policy, the DEQ will review the proposal to determine whether the proposed SEP is consistent with the requirements set forth in this policy. The DEQ may also require financial information verifying the alleged violator's ability to complete the proposed SEP in advance of proposing language for implementing the SEP under a Settlement. In the event the DEQ determines that the proposed SEP meets all of the applicable requirements listed in this policy and is acceptable to the DEQ, the DEQ will determine the amount of mitigation to be granted to the alleged violator in consideration of the performance of the proposed SEP. Upon completion of the DEQ review, the DEQ will notify the alleged violator of any modifications to the proposed SEP required for DEQ approval, the amount of mitigation to be granted in consideration of performance of the SEP, and the provisions (e.g., implementation schedules, reporting requirements, fines for failure to perform, other compliance provisions, etc.) required to be included in the Settlement for DEQ approval of the SEP. In the event the DEQ and the alleged violator agree to the SEP language and the other compliance provisions necessary to resolve the alleged violations, the DEQ will approve the SEP, and the SEP, along with all other required provisions, shall be incorporated into the Settlement.

In the event a SEP proposal submitted pursuant to Section VI is denied, the DEQ will provide notification of the SEP denial identifying the reasons for denial (e.g., proposal failed to meet the SEP qualifications, inadequate financial data was provided, etc.) and provide the information necessary for DEQ reconsideration, if appropriate. In the event SEP negotiations delay or threaten to delay resolution of the alleged violations through a Settlement, the DEQ may deny the SEP. The DEQ, in its sole discretion, may deny any SEP proposal at any time during the negotiation process for any reason.

### **VIII. SEP MITIGATION**

Although a Settlement may include a SEP, penalties are still a necessary and important part of any Settlement. Without penalties, there would be no deterrence, as regulated entities would have little incentive to comply. Also, penalties are necessary as a matter of fairness to those regulated entities that make the necessary expenditures to comply on time. Violators should not be allowed to obtain an economic advantage over their competitors who complied. As a general rule, the SEP COST or the net present after-tax cost of the SEP is to be used for determining the appropriate amount of mitigation to be allowed due to the performance of a SEP (see Appendix C to this policy for a description of the SEP COST). In Settlements in which alleged violators commit to conducting a SEP, the final monetary fine must, unless otherwise specified under applicable state or federal laws, equal or exceed the greater of: (a) the economic benefit of noncompliance plus ten percent of the gravity component of the

## DEQ POLICY AND PROCEDURES

**SUBJECT:** SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 7 of 8**

monetary fine; or (b) 25 percent of the gravity component of the monetary fine only.

The mitigation percentage for a given SEP will be based on the quality of the proposal. The quality of a SEP proposal will be examined based on how effectively it achieves the following six factors:

1. Provides a clear benefit to the public at large.
2. Is innovative – uses new technologies for minimizing or eliminating pollution.
3. Results in pollution prevention – eliminates or reduces pollution.
4. Results in multimedia impacts – reducing emissions to more than one medium.
5. Promotes environmental justice – reducing pollution damage/risk to minority or low-income populations.
6. Includes community input in the development of the SEP.

Calculating the final penalty for a Settlement that includes a SEP is a five-step process, each step of which is explained further in Appendix C to this policy.

### **IX. REQUIREMENTS OF SETTLEMENT**

A Settlement, under which the alleged violator is obligated to perform an approved SEP in lieu of paying monetary fines or a portion thereof, shall contain the following provisions and any other provision or requirement that the DEQ determines is appropriate to ensure that the SEP will be conducted in accordance with the Settlement and that the Settlement is in the best interest of the State of Michigan:

1. A detailed scope of work of the approved SEP that identifies the activities or actions to be performed, the implementation schedule, and the amount to be expended in performance of the SEP.
2. A reliable and objective means of verifying that the alleged violator has timely completed the project. This may require the alleged violator to submit periodic reports to the DEQ and to submit the identity of persons involved in the implementation of the SEP (e.g., third-party auditors).
3. A statement identifying that the alleged violator remains responsible for the quality and timeliness of any actions performed or any reports prepared or submitted by an auditor.
4. A provision for, to the extent feasible, the alleged violator to quantify the benefits associated with the project and provide the DEQ with a report setting forth how the benefits were measured or estimated.

DEQ POLICY AND PROCEDURES

**SUBJECT:** SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 8 of 8**

5. A provision for the alleged violator to submit a final report certified by an appropriate corporate official, acceptable to the DEQ, evidencing completion of the SEP and documenting SEP expenditures.
6. A provision for the assessment of stipulated penalties for failure to implement the approved SEP in accordance with the scope of work.
7. A provision for a statement identifying that the obligation to perform the SEP is not transferable to any other person.
8. A provision for a statement identifying that whenever the alleged violator publicizes a SEP or the results of a SEP, the alleged violator will state in a prominent manner that the project is being undertaken as part of the Settlement of a DEQ enforcement action.

Approved: \_\_\_\_\_



Date: \_\_\_\_\_

4-15-05

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX A  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION

**Date:** November 10, 1997

**Revised:** April 15, 2005

**Number:** 04-002

**Page 1 of 6**

# Supplemental Environmental Project Categories

## Pollution Prevention

For the purposes of developing a Supplemental Environmental Project (SEP), a pollution-prevention project is any project that substantially reduces or prevents the generation or creation of pollutants through:

- **Source reduction:** eliminating the source of pollution by changing industrial processes or substituting less polluting fuels or less toxic raw materials in existing processes.
- **Alternative/renewable energy, energy efficiency:** application of measures and technologies to reduce/eliminate dependency upon traditional resources. Examples include, but are not limited to, wind, solar, biomass, geothermal-powered generation of electricity, and ethanol-based (E-85) or biodiesel fuels for vehicles.
- **Waste minimization:** conserving those materials that are sources of pollution; this includes application of closed-loop processes or other resource-efficiency measures.
- **In-process recycling:** returning waste materials produced during a manufacturing process immediately and directly to production within the same manufacturing process using dedicated, fixed, and physically integrated equipment so that no releases, including fugitive releases, occur.
- **Innovative recycling technologies:** substantially reducing the discharge of generated pollutants through innovative recycling technologies that keep the pollutants out of the environment in perpetuity.
- **Conservation:** protecting natural resources through conservation or increased efficiency in the use of energy, water, or other materials. A specific example of such a project that the Department of Environmental Quality (DEQ) encourages is an up-front capital investment in energy-efficiency improvements and reinvestment of the resulting cost savings into a long-term, green energy program either on-site or in a community-based program or a combination of both.

In order for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution released to the environment, not merely a transfer of pollution among environmental media.

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX A  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION

**Date:** November 10, 1997

**Revised:** April 15, 2005

**Number:** 04-002

**Page 2 of 6**

### **Pollution Reduction**

A pollution reduction project is defined as a project that goes substantially beyond compliance with permit or regulatory limitations to further reduce the amount of pollution discharged into the environment. Where a pollutant or waste stream already has been generated or released, a pollution reduction approach (recycling, treatment, containment, or disposal techniques) may be appropriate, as long as it does not create an increased or adverse cross-media impact on public health or the environment. Examples include: (a) a project that reduces the discharge of pollutants through more effective end-of-pipe or stack removal technologies; (b) improved operation and maintenance; (c) recycling of residuals for use as raw materials in production off-site, thereby reducing the need for treatment, disposal, or consumption of energy or natural resources; and (d) sponsoring a community household hazardous waste collection.

### **Environmental Restoration and Protection**

The objective of an environmental restoration project is to repair damage done to the environment beyond the need to remediate the damage done by the violation. Multimedia projects are a preferred option for this type of SEP. Examples of approvable projects include: (a) reduction in discharges of pollutants that are not the subject of the violation or the subject of other regulatory requirements within an affected air basin or watershed; (b) restoration of environmentally sensitive areas and/or habitat types, such as, but not limited to, wetlands, streams, floodplains, dunes, etc.; (c) development of a conservation program or protection of habitat critical to the well-being of a species or ecosystem; (d) purchase and management of a watershed area as an open-space buffer zone to protect sensitive species or drinking water supply; and (e) conservation easements. Preference will be given to projects that benefit the same community or ecosystem as was affected by the violation and when the community is involved in the process. In all cases, environmental restoration projects must take place within the state of Michigan. Environmental restoration projects could include, in appropriate circumstances, projects that involve the remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as contaminated soils, asbestos, and leaded paint, which are a continuing source of releases and/or threats to individuals.

Environmental restoration projects must be performed within the area affected by the alleged violation(s). For purposes of proposing environmental restoration projects, the affected area is: (a) for air violations, the air basin in which the alleged violation(s) occurred; (b) for water, the watershed in which the alleged violation(s) occurred; and (c) for environmentally sensitive areas having unique plant and/or animal life or physical

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX A  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 3 of 6**

characteristics, the same geographic region or alternate region that has or is capable of having a relatively similar homogeneous ecological character as the area affected by the alleged violation(s).

### **Public Health**

A public health project provides diagnostic, preventative, and/or remedial human health care related to actual or potential damage to human health caused by the type of violation cited against the violator. This may include epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment, or rehabilitation therapy.

### **Environmental Assessments**

The DEQ will consider two types of environmental assessment projects as SEPs, a pollution-prevention assessment and a comprehensive environmental management system (EMS):

- **Pollution Prevention Assessment:** Pollution prevention assessments are essential and valuable tools used to evaluate any or all of the following: manufacturing processes; operational procedures; energy consumption; raw materials; toxins; waste streams; disposal costs; etc. They may be of an entire facility or a specific process. Assessments are a proven approach to identifying cost-saving energy conservation and pollution-prevention technologies that enhance a facility's performance. Companies can realize significant financial savings and protect the environment at the same time. Savings can result from reduced costs for materials, energy use, waste handling and disposal, and more efficient production. Assessments can also identify ways to reduce negative environmental impacts and improve sustainable product development.

An all-media approach, which deals with all air, water, and waste emissions and releases, is most effective. Typical considerations for prioritizing the assessment target or the resulting opportunities include the cost of waste management, the quantity of waste, the hazardous properties of the waste or toxin, potential for improvement, and compliance with current and anticipated regulations. Assessments can target the most important waste problems, moving on to lower-priority problems as resources permit.

An assessment can also be described as an action taken toward these program goals:

Cleaner production  
Energy efficiency  
Lean manufacturing

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX A  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION

**Date:** November 10, 1997

**Revised:** April 15, 2005

**Number:** 04-002

**Page 4 of 6**

Preferred purchasing  
Product design  
Material substitution  
Source reduction  
Sustainability  
Waste minimization  
Waste reduction

- **Comprehensive EMS:** The first-time development and implementation of an EMS, which has the principal objectives of ensuring compliance and preventing and/or reducing pollution, may be acceptable as a SEP. The major components of an EMS are: development of an environmental policy; identification of significant environmental aspects and impacts of the operations with defined objectives and specific targets for those impacts; reporting and record-keeping; emergency preparedness and response; staff training; internal and external communication; and environmental compliance and EMS auditing.

An EMS project typically has five parts. First, the alleged violator should conduct an initial assessment of its environmental compliance policies and procedures. Second, the initial assessment is followed by development of a comprehensive EMS that is fully documented. Third, the alleged violator implements the EMS. Fourth, after a sufficient time period, the alleged violator has a third party conduct an independent evaluation of the effectiveness of the EMS and reports the findings and recommendations to the DEQ. Fifth, the alleged violator submits a report to the DEQ that identifies how it will address the findings and recommendations contained in the evaluation report.

Expenses directly related to the first-time development and implementation of the EMS, including developing and delivering training, equipment purchases directly related to the EMS, and staff solely dedicated to developing and/or implementing the EMS, may be included in the project cost provided they are properly documented. In contrast, the cost of employee time spent in environmental compliance training or in learning about the new EMS may not be included as part of the SEP. Basic costs to achieve compliance with applicable environmental standards cannot be included as part of the project cost. Such nonallowed compliance expenses include operating and maintaining pollution-control equipment with properly trained and equipped staff.

### Environmental Awareness

Public awareness projects are defined as publications or seminars that underscore the importance of complying with environmental laws or disseminate technical information about the means of complying with environmental laws. These projects provide

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX A  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Number:** 04-002

**Date:** November 10, 1997  
**Revised:** April 15, 2005  
**Page 5 of 6**

necessary training and technical support to: identify, achieve, and maintain compliance with applicable regulatory requirements; avoid violations; and go beyond compliance by reducing the generation, release, or disposal of pollutants beyond legal requirements. Public awareness projects may include: (a) sponsoring industry-wide seminars directly related to correcting widespread or prevalent violations within an industry; (b) organizing a conference on pollution-prevention solutions for compliance in a particular sector; or (c) community projects that encourage/promote good environmental stewardship, such as participation in recycling and conservation efforts. If the violator lacks the necessary expertise to perform an environmental-awareness SEP, the SEP must require the alleged violator to contract with an appropriate expert to develop and implement the project.

### **Emergency Planning and Preparedness**

An emergency planning and preparedness project provides assistance, such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training, to a responsible state or local emergency response or planning entity. This is to enable these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel, and to better respond to chemical spills.

Emergency planning and preparedness SEPs are acceptable where the primary impact of the project is within the same emergency planning district or state affected by the violations. Further, this type of SEP is allowable only when the SEP involves noncash assistance and there are alleged violations of the EPCRA; Clean Air Act, § 112(r); reporting violations under the Comprehensive Environmental Response, Compensation and Liability Act, 1980 PL 96-510, § 103; or of other emergency planning, spill, or release response requirements.

### **Other**

Companies may propose other types of projects, which will be considered on a case-by-case basis. These projects will require the approval of the appropriate DEQ Division Chief or his/her designee and must be consistent with the rest of the SEP policy.

### **PROJECTS WHICH ARE NOT ACCEPTABLE AS SEPs:**

Except for projects that meet the specific requirements of one of the categories enumerated above, the following are examples of the types of projects that are not

**DEQ POLICY AND PROCEDURES**

**SUBJECT:** APPENDIX A  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 6 of 6**

allowable as SEPs:

General educational or public environmental awareness projects that do not address the specific regulations that were violated.

Conducting a project that, though beneficial to a community, is unrelated to environmental protection, e.g., making a contribution to charity or donating playground equipment.

Studies or assessments without a commitment to implement the results.

Projects that were commenced or the funding source was identified before the violation was identified by the DEQ.

Projects that are being funded in whole or part by low-interest local, state, or federal loans or grants.

Projects that may cause additional damage to the environment or public health if they are done poorly or left uncompleted at any time during implementation.

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX B  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION

**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

Page 1 of 3

### Supplemental Environmental Project Submittal Guideline

This submittal guideline is to be used by alleged violators seeking to mitigate monetary fines imposed by the Department of Environmental Quality (DEQ) in settlement of an enforcement action through the performance of a Supplemental Environmental Project (SEP). In order for enforcement staff to consider a SEP proposal, the following information is to be submitted within thirty (30) days of the DEQ proposal of the monetary fine for settlement:

1. **Name and Location of Entity Subject to the Enforcement Action** - Identify the name of the entity and the location of the site associated with the enforcement action. Include the city and county.
2. **Regulatory Information** - Provide a brief summary of the violations to be resolved through the enforcement action and describe any other environmental enforcement actions taken against the site identified above. For on-site projects, provide all DEQ and U.S. Environmental Protection Agency permit and account numbers related to this facility for all environmental media.
3. **Project Name** - SEP title.
4. **Project Manager** - Provide the name, mailing address, telephone number, fax number, and electronic mail address for the project manager, organization conducting the project (if different from the alleged violator), and the person who will be responsible for submitting status reports (if different from the project manager). If the project will be conducted by a third party to the DEQ enforcement action, the proposal should be accompanied by a letter or resolution from the appropriate board, governing body, or executive staff expressing the organization's commitment to the project if approved.
5. **DEQ Contact Person** - Provide the name, division, and telephone number of any DEQ staff person who has assisted with the development of this project.
6. **Geographical Area to Benefit from the Project** - Identify cities, counties, watersheds, etc., that would benefit from the project.
7. **SEP Categories** - Identify which of the following SEP categories the proposal meets:

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX B  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 2 of 3**

- a. Pollution Prevention
  - b. Pollution Reduction
  - c. Environmental Restoration and Protection
  - d. Public Health
  - e. Environmental Assessments
  - f. Environmental Awareness
  - g. Emergency Planning and Preparedness
  - h. Other
8. **Project Description** – Describe, in detail, the project, including the following information: need for the project; availability of other similar services or projects in the area; and project implementation tasks such as technology, operation, or process changes.
9. **Expected Environmental Benefits** - Explain the expected environmental benefits of this project and quantify the environmental benefits to the greatest extent possible.
- a. For example, in some pollution prevention or pollution reduction projects, the amount of each pollutant that is expected to be reduced beyond the level required for environmental compliance may be quantified; and
  - b. For other types of projects, the expected environmental benefit may include the quantity of participants, programs offered, sites cleaned, types of contamination contained/removed, acres restored or affected, etc.
10. **Project Budget** - Provide projected initial and annual project costs with specific line item expenditures. Costs must be clearly and solely attributable to the proposed SEP. Also include the following information:
- a. Whether the company is a “C” corporation, an “S” Corporation, a partnership, a proprietorship, a municipality, or other entity for tax purposes.
  - b. Capital costs of project.
  - c. Useful life of capital equipment in years.
  - d. The one-time, non-depreciable costs and whether they are tax deductible.
  - e. Annual operation costs of the project.
11. **Project Schedule** - Provide a schedule that addresses project implementation, the submittal of status reports to the DEQ, and the anticipated completion date. Project implementation must not commence until after the DEQ has approved the SEP in a settlement. The schedule must provide sufficient detail for DEQ staff to

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX B  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 3 of 3**

monitor progress towards completion of the SEP.

12. **Accounting** - Describe how SEP expenditures would be accounted for if a third party is the proposed project implementer.
13. **Reporting** - Describe the specific information and documentation to be included in project status reports. Project reports must provide sufficient information for the DEQ to monitor the project implementation status, to verify and document the proper expenditure of SEP funds, and to evaluate the effectiveness and benefits of the SEP.
14. **Prior Commitments and/or Regulatory Requirements:**
  - a. Identify any applicable local, state, or federal regulations that would require implementation of this project or any part of this project.
  - b. Identify any binding private commitments to implement this project or any part of this project.
  - c. Identify any other requirement to implement this project or any part of this project.
  - d. Indicate the time frame for implementation of the project under any aforementioned commitments.
15. **Certification of Expenditures by the Alleged Violator** - Provide a separate certification that the proposed SEP is solely attributable to the settlement of the current enforcement action and that no funding has been budgeted to the project prior to the approval of the project, nor is the proposed project funded by grants, donations, low interest loans, or other sources of funding not attributable to the alleged violator's normal budgetary process. Also, certify that the proposed project is not being done, nor will receive credit, as part of an environmental incentive or awards program offered by local, state, or federal government, industry, etc.

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX C  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION

**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

Page 1 of 4

## Calculation of the Final Monetary Fine

### **Step 1: Minimum Monetary Fine Amount Without a Supplemental Environmental Project (SEP)**

Step 1.a: The applicable Department of Environmental Quality (DEQ) or United States Environmental Protection Agency (U.S. EPA) penalty policy and models (e.g., the BEN<sup>1</sup> model) are to be used to calculate the economic benefit of noncompliance.

Step 1.b: The applicable DEQ or U.S. EPA penalty policy is used to calculate the gravity component of the monetary fine. The gravity component is all of the monetary fine other than the identifiable economic benefit amount, after gravity has been adjusted by all other factors in the penalty policy (e.g., audits, good faith, litigation considerations), except for the SEP.

Step 1.c: The amounts in Steps 1.a and 1.b are added. This sum is the minimum fine amount that would be necessary to settle the case without a SEP.

### **Step 2: Minimum Monetary Fine Amount with a SEP**

In settlements in which alleged violators commit to conducting a SEP, the final monetary fine must, unless otherwise specified under applicable federal or state laws, equal or exceed the greater of: (a) the economic benefit of noncompliance plus ten percent of the gravity component of the monetary fine; or (b) 25 percent of the gravity component of the monetary fine only.

Step 2.a: Calculate ten percent of gravity (multiply amount in Step 1.b by 0.1).

Step 2.b: Add economic benefit (amount in Step 1.a) to amount in Step 2.a.

Step 2.c: Calculate 25 percent of gravity (multiply amount in Step 1.b by 0.25).

Step 2.d: Identify the minimum monetary fine amount: the greater of Step 2.b or Step 2.c.

---

<sup>1</sup> The user's manual for the U.S. EPA's BEN model can be found at <http://www.epa.gov/Compliance/civil/programs/econmodels/ben.pdf>

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX C  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

Page 2 of 4

### **Step 3: Calculate the SEP COST**

The net present after-tax cost of the SEP, hereinafter called the "SEP COST," is the maximum amount that the DEQ may take into consideration in determining an appropriate monetary fine mitigation for performance of a SEP. There are three types of costs that may be associated with performance of a SEP that are to be entered into the PROJECT<sup>2</sup> model to determine the SEP COST and appropriate monetary fine mitigation: capital costs (e.g., equipment, buildings); one-time non-depreciable costs (e.g., removing contaminated materials, purchasing land, developing a compliance promotion seminar); and annual operation costs and savings (e.g., labor, chemicals, water, power, raw materials).

The PROJECT calculated SEP COST is a reasonable estimate of the net present after-tax cost of the SEP to the alleged violator. It is not an exact, after-tax calculation because the PROJECT model does not evaluate the potential for market benefits that may accrue with the performance of a SEP (e.g., increased sales of a product, improved corporate public image, or improved employee morale). Nor does it consider costs imposed on the government, such as the cost to the DEQ for oversight of the SEP or the burden of a lengthy negotiation with an alleged violator who does not propose a SEP until late in the settlement process. Such factors should be considered when determining a mitigation percentage rather than calculating after-tax cost.

To use PROJECT, the alleged violator must provide, as part of the SEP proposal, reliable estimates of the costs associated with an alleged violator's performance of a SEP, as well as any savings due to such factors as energy efficiency gains, reduced materials costs, reduced waste disposal costs, or increases in productivity. For example, if the annual expenditures in labor and materials of operating a new waste recycling process is \$100,000 per year, but the new process reduces existing hazardous waste disposal expenditures by \$30,000 per year, the net cost of \$70,000 is entered into the PROJECT model (see variable 4 in the model). In the event reliable cost information is not provided by the alleged violator, the SEP proposal should be denied.

In order to run the PROJECT model properly and, thus, produce a reasonable estimate of the net present after-tax cost of the project, the number of years that annual operation costs or savings will be expended in performing the SEP must be specified. At a minimum, the alleged violator must be required to implement the project for the same number of years used in the PROJECT model calculation. For example, if the settlement requires the alleged violator to operate the SEP equipment for two years, two

---

<sup>2</sup> The user's manual for the U.S. EPA's PROJECT model can be found at <http://www.epa.gov/Compliance/civil/programs/econmodels/project.pdf>

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX C  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 3 of 4**

years should be entered as the input for number of years of annual expense in the PROJECT model. If certain costs or savings appear speculative, they should not be entered into the PROJECT model.

The DEQ does not offer tax advice on whether an alleged violator may deduct SEP expenditures from its income taxes. If an alleged violator states that it will not deduct the cost of a SEP from its taxes and is willing to commit to this in the settlement and provide the DEQ with certification upon completion of the SEP that it has not deducted the SEP expenditures, the PROJECT model calculation should be adjusted to calculate the SEP COST without reductions for taxes. This is a simple adjustment to the PROJECT model: just enter a zero for variable 7, the marginal tax rate. If a business is not willing to make this commitment, the marginal tax rate in variable 7 should not be set to zero, rather the default settings (or a more precise estimate of the business's marginal tax rates) should be used in variable 7.

If the PROJECT model reveals that a project has a negative cost during the period of performance of the SEP, this means that it represents a positive cash flow to the alleged violator and is a profitable project. Such a project is not acceptable as a SEP. If a project generates a profit, an alleged violator should, and probably will, based on its own economic interests, implement the project. While the DEQ encourages regulated entities to undertake environmentally beneficial projects that are economically profitable, the DEQ does not believe the alleged violators should receive a bonus in the form of penalty mitigation to undertake such projects as part of an enforcement action.

### **Step 4: Determine the SEP Mitigation Percentage and then the Mitigation Amount**

Step 4.a: Mitigation Percentage. After the SEP COST has been calculated, the DEQ will determine what percentage of that cost may be applied as mitigation against the amount the DEQ would settle for but for the SEP. The quality of the SEP will be examined as to whether and how effectively it achieves each of the following six SEP quality factors listed below:

- i. **Clear Benefit to the Public at Large** – Projects that provide a direct benefit to the general public that is measurable.
- ii. **Innovative** – Projects that introduce new processes, technology, or methods to more effectively reduce the generation of pollutants, reduce the release or disposal of pollutants, conserve natural resources, restore and protect ecosystems, protect endangered species, and/or promote compliance.
- iii. **Pollution Prevention** – Projects that result in waste elimination, waste reduction, or render a waste less hazardous or toxic.

## DEQ POLICY AND PROCEDURES

**SUBJECT:** APPENDIX C  
SUPPLEMENTAL ENVIRONMENTAL  
PROJECTS FOR PENALTY MITIGATION  
**Date:** November 10, 1997  
**Revised:** April 15, 2005

**Number:** 04-002

**Page 4 of 4**

- iv. **Multimedia Impacts** – Projects that reduce emissions to more than one medium (air, water, and land).
- v. **Environmental Justice** – Projects that mitigate damage or reduce risk to minority or low income populations that may have been disproportionately exposed to pollution or are at environmental risk.
- vi. **Community Input** – Projects that were developed taking into consideration input received from the affected community.

Step 4.b: SEP Mitigation Amount. The SEP COST calculated pursuant to Step 3 is multiplied by the mitigation percentage identified in Step 4.a to obtain the SEP mitigation amount or the amount of the SEP COST that may be used in potentially mitigating the monetary fine.

### **Step 5: Final Settlement Monetary Fine**

Step 5.a: The SEP mitigation amount identified in Step 4.b is then subtracted from the settlement amount without a SEP identified in Step 1.c.

Step 5.b: The greater of Step 2.d or Step 5.a is the minimum final settlement monetary fine allowable based on the performance of the SEP.

## SEP Quality Rating Procedure

This document provides preliminary guidance to Department of Environmental Quality (DEQ) staff to facilitate the review of Supplemental Environmental Project (SEP) proposals for the purposes of determining the amount of penalty mitigation to be granted by the DEQ in consideration of the performance of the proposed SEP. In accordance with DEQ Policy No. 04-002, *Supplemental Environmental Projects (SEPs) for Penalty Mitigation*, the review and acceptance of a SEP is entirely subject to the discretion of the DEQ. Therefore, this guidance is not intended, nor can it be relied upon, to convey any rights, substantive or procedural, to any party. Further, the content and format of this guidance is subject to change.

When evaluating the quality of a SEP for purposes of determining the amount of penalty mitigation to be assigned, the SEP should be evaluated based on how effectively or whether it achieves the following six factors: (1) provides a benefit to the public at large; (2) is innovative; (3) results in pollution prevention or pollution reduction; (4) results in multimedia impacts; (5) fosters environmental justice; and (6) was developed with community input. To determine how effective or whether a SEP rates well in each of the above factors, the following guidance below should be used.

1. **Clear Benefit to the Public at Large** – Projects that provide a direct benefit to the general public that is measurable provide a clear benefit to the public at large.
  - a. High Rating – Assign a high rating under this SEP quality criteria if the project results in a quantifiable reduction in the release of a regulated pollutant or regulated toxic substance to the environment. Also, assign a high rating if the project provides information about exposure to pollution or toxic substances in the community. In this case, a direct environmental benefit will be accrued to the general public.
  - b. Average Rating – Assign an average rating under this SEP quality factor if there is no quantifiable reduction in the release of a regulated pollutant or regulated toxic substance to the environment, but the primary beneficiary of the project is clearly the public. In this case, an indirect environmental benefit will be accrued to the general public.
  - c. No Rating – A SEP with no rating in this category cannot be clearly proven to provide a direct or indirect benefit to the public and should be denied.
2. **Innovative** – Projects that introduce new processes, technology, or methods to more effectively reduce the generation of pollutants, reduce the release or disposal of pollutants, conserve natural resources, restore and protect ecosystems, protect endangered species, and/or promote compliance.
  - a. High Rating – Assign a high rating under this SEP quality factor if the project has never been tried and is expected to result in the reduction or elimination of the

release of a regulated pollutant or regulated toxic substance. Also, assign a high rating if the project has been tried with limited success, but requires further development for consistent success and common use by the regulated community and the project is expected to result in the reduction or elimination of the release of a regulated pollutant or regulated toxic substance.

- b. Average Rating – Assign an average rating under this SEP quality factor if the project uses existing technology and/or equipment in a different manner than commonly used and the project is expected to result in the reduction or elimination of the release of a regulated pollutant or regulated toxic substance.
- c. No Rating – Do not assign any rating under this SEP quality factor if the project proposes the use of practices and/or technology commonly used by the regulated community.

**3. Pollution Prevention** – Projects that result in waste elimination, waste reduction, or render a waste less hazardous or toxic.

- a. High Rating – Assign a high rating under this SEP quality factor if the project results in elimination of a waste or renders a waste less hazardous or toxic due to product substitution. For example, substituting ascorbic acid for trichloroethylene (TCE) in a degreasing operation or switching from use of high velocity low pressure application of solvent-based coatings to electrostatic application of powder coatings would be a high quality pollution prevention project. In process recycling involving the immediate reuse of a byproduct or secondary product and source reduction projects, both result in waste elimination and, thus, qualify as high quality projects under this quality rating factor.
- b. Average Rating – Assign an average rating under this SEP quality factor if the project involves a reduction in the amount of waste being disposed. This would include on or off-site recycling projects that reduce the amount of waste destined for disposal.
- c. No Rating – Do not assign any rating under this SEP quality factor if the project does not include specific waste elimination or waste reduction activities.

**4. Multimedia Impacts** – Projects that reduce emissions to more than one medium (air, water, and land).

- a. High Rating – Assign a high rating under this SEP quality factor if the project reduces the emission or release of a regulated pollutant or regulated toxic substance to air, water, and land (e.g., all three media). For example, a TCE remediation project that removes TCE from soil and groundwater and eliminates the volatilization of TCE to the air would qualify as a high quality project under this quality rating factor.

- b. Average Rating – Assign an average rating under this SEP quality factor if the project reduces the emission or release of a regulated pollutant or toxic substance to two of the three media. For example, a wastewater treatment plant process change that results in the reduction of wastewater discharged to the sanitary sewer and the amount of filter press sludges sent to the landfill would qualify as an average quality project under this quality rating factor.
- c. No Rating – Do not assign any rating under this SEP quality factor if the project reduces the emission or release of a regulated pollutant or toxic substance to a single medium.

**5. Environmental Justice** – Projects that mitigate damage or reduce risk to minority or low income populations that may have been disproportionately exposed to pollution or are at environmental risk.

- a. High Rating – Assign a high rating under this SEP quality factor if the project will provide a benefit to low income or minority populations.
- b. No Rating – Do not assign any rating under this SEP quality factor if neither low income nor minority population will benefit from the project.

**6. Community Input** – Projects that were developed taking into consideration input received from the affected community.

- a. High Rating – Assign a high rating under this SEP quality factor if significant public input was sought in developing the project proposal. For example, a project that was presented at a public meeting where public input was sought and addressed in the proposal would qualify as a high quality project under this quality rating factor, as would a project that was reviewed by a focus group that included representatives from the general public.
- b. Average Rating – Assign an average rating under this SEP quality factor if limited public involvement was sought in developing the project proposal. For example, a project that was presented to the public via a public notice in the local newspaper or for which a letter of support from local authorities was provided to the DEQ would qualify as an average quality project under this quality rating factor.
- c. No Rating – Do not assign any rating under this SEP quality factor if no public input was sought in the development of the proposal.

After determining the SEP rating for each SEP quality factor, the SEP Quality Factor Matrix should be used to assign mitigation points to the project, the mitigation points should be totaled, and the SEP Mitigation Matrix should be used to determine the range of mitigation that can be offered for the SEP.

**SEP Quality Rating Matrixes**

		SEP Quality Factor Matrix					
		Clear Benefit to Public at Large	Innovative	Pollution Prevention	Multimedia Impacts	Environmental Justice	Community Input
SEP Quality Rating	High	7	7	7	5	3	5
	Average	5	5	5	3	3	3

		SEP Mitigation Matrix			
		Exceptional	High	Average	Low
Total SEP Quality Rating <sup>1</sup>		34 - 32	31 - 25	24 - 14	13-9
Allowable SEP Mitigation		80%	75%	50%	25%

<sup>1</sup> Two (2) points may be added to the Total SEP Quality Rating for cooperation during negotiations or subtracted for protracted negotiations.

## Model Consent Order Language

### [Insert Section No.] SUPPLEMENTAL ENVIRONMENTAL PROJECT

**[Insert paragraph No.]** In partial settlement of the civil fine for the violations alleged in the **[Notice of Violation (NOV), Letter of Warning (LOW), Letter of Violation (LOV), Notice of Noncompliance (NON)]**, **[owner/operator]**<sup>1</sup> agrees to undertake the Supplemental Environmental Project (SEP) described in Exhibit A<sup>2</sup>, which is attached, incorporated by reference, and made enforceable under this Consent Order. Performance of the SEP will benefit the environment and is a project that **[owner/operator]** is not otherwise legally required to perform. **[Owner/operator]** agrees to implement the SEP in accordance with the details specified in Exhibit A and the following terms and conditions:

- a. The total expenditure for the SEP shall not be less than \$ **[Total amount to be expended in performance of the SEP]**. All costs of the SEP shall be the responsibility of **[owner/operator]**. **[Owner/operator]** certifies that any economic benefit, including tax abatement(s), tax credit(s), or similar tax relief that **[owner/operator]** will realize as a result of the SEP, is detailed in Exhibit A. INCLUDE THE FOLLOWING LANGUAGE ONLY WHEN THE SEP EXPENDITURE IS DIFFICULT TO ESTIMATE ACCURATELY: **[For any SEP that is fully and completely implemented, to the extent that the actual expenditures for the SEP totals less than 90 percent of \$ [Total amount to be expended in performance of the SEP], [owner/operator] shall pay to the Department of Environmental Quality (DEQ) as a civil fine, within thirty (30) days of submission of the SEP certificate of completion required in subparagraph (h) below, the amount of the monetary shortfall after it has been adjusted by the amount of any economic benefit, including abatement(s), tax credit(s), or similar tax relief, realized by [owner/operator].**
- b. The plan included as Exhibit A contains a schedule, including specific dates for the implementation of the SEP. **[Owner/operator]** shall fully implement all aspects of the SEP within the specified schedule.
- c. **[Owner/operator]** certifies that **[owner/operator]** is not otherwise required by any local, state, or federal statute, regulation, rule, order, decree, permit, or other law or agreement to develop or implement the SEP activities specified in Exhibit A. **[Owner/operator]** further certifies that **[owner/operator]** has not received, and is not presently negotiating to receive, a credit for the SEP as part of any other enforcement action or any grant from the state, U.S. Environmental Protection Agency (U.S. EPA) or any other entity.

---

<sup>1</sup> Insert the name of the alleged violator wherever "[owner/operator]" is referenced within the document.

<sup>2</sup> Exhibit A is a complete description of the SEP that includes all of the information requested in the SEP Submittal Guidelines, Appendix C to the SEP Policy.

**[Owner/operator]** also certifies that **[owner/operator]** will not seek tax benefits following completion of the SEP.

- d. Disputes between the DEQ and **[owner/operator]** regarding the SEP cost, mitigation amounts, and fulfillment of the SEP obligations under Exhibit A are not subject to dispute resolution.
- e. In the event **[owner/operator]** fails to fully and completely implement the SEP as provided herein to the reasonable satisfaction of the DEQ, the DEQ will provide written notice to **[owner/operator]** describing the nature of the deficiency. **[Owner/operator]** shall have thirty (30) days from receipt of the notice to submit documentation to the DEQ demonstrating that the deficiency has been corrected. In the event the deficiency is not corrected to the satisfaction of the DEQ, **[owner/operator]** will be notified and **[owner/operator]** shall be in violation of this Consent Order and required to pay a stipulated penalty of \$ **[SEP expenditure amount in (a)]** minus **[owner/operator's]** SEP expenditures documented to the DEQ to date, to the DEQ within thirty (30) days of notification from the DEQ. The amount of the stipulated penalty may be reduced or waived by the DEQ if **[owner/operator]** made good faith and timely efforts to complete the project. Payment of stipulated penalties under the terms of this Paragraph **[\*(e)]** shall satisfy **[owner/operator]**'s obligation to complete the SEP under this Consent Order.
- f. **[Owner/operator]** agrees that any public statement, oral or written, making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the DEQ for violations of **[air, water, hazardous waste, liquid industrial waste, wetland, etc.]** law."
- g. After the effective date of this Consent Order, until completion of all activities specified in Exhibit A, **[owner/operator]** shall provide the DEQ with a progress report every **[fill in time]**. Each progress report shall include a description of the SEP activities **[owner/operator]** completed in the prior **[fill in time]**.
- h. No later than thirty (30) days after the completion of all activities specified in Exhibit A, **[owner/operator]** shall submit written certification of completion of the SEP to the chief of the **[insert division]** demonstrating that all SEP activities specified in Exhibit A have been completed in accordance with the terms and conditions of this Consent Order and Exhibit A. The certification shall be accompanied by appropriate documentation (such as invoices, receipts, or tax statement) to verify the total expenditure made by **[owner/operator]** as a result of implementing the activities specified under Exhibit A. It shall be the sole determination of the DEQ whether **[owner/operator]** has completely implemented the activities specified in Exhibit A.

## Exhibit A

### Environmental Management System Supplemental Environmental Projects Model Consent Order Language

- I. No later than sixty (60) days after the effective date of this Consent Order, **[owner/operator]**<sup>1</sup> shall submit to the Department of Environmental Quality (DEQ), **[\_\_\_\_\_ Division]** a copy of an executed contract that identifies the name, affiliation, and address of the company selected by **[owner/operator]** to create an Environmental Management System (EMS) that satisfies the proficiency criteria described in the International Standard of Organizations (ISO) 14001:1996 “Environmental Management Systems – Specifications with Guidance for Use,” and a schedule, including milestones, for developing, implementing, and auditing the EMS. The EMS shall include provisions that meet the 17 elements of the ISO 14001 environmental standard set forth in Paragraph III below.
- II. Within one hundred eighty days (180) from the effective date of this Consent Order, **[owner/operator]** shall submit to the DEQ, **[\_\_\_\_\_ Division]** a progress report on the development of the EMS. The progress report shall identify the milestones completed to date and any revisions in the schedule submitted pursuant to Paragraph I for developing, implementing, and auditing the EMS.
- III. Within three hundred sixty (360) days of the effective date of this Consent Order, **[owner/operator]** shall implement the EMS developed pursuant to Paragraphs I and II above, and submit the entire EMS Manual (Manual) that includes provisions addressing all of the 17 elements of the ISO 14001 environmental standards set forth in Paragraph 3) below to the DEQ, **[\_\_\_\_\_ Division]** for review and approval. In addition, no later than three hundred sixty (360) days after the effective date of this Consent Order, the **[owner/operator]** shall submit to the DEQ, **[\_\_\_\_\_ Division]**, in writing, the name, affiliation, address, and executed contract of an independent, certified, third-party auditor who will perform an audit at the **[owner/operator]**'s facility. **[Owner/operator]**'s submittal shall identify how the selected third-party auditor satisfies the independence and proficiency criteria in the ISO 14012 “Guidelines for Environmental Auditing -- Qualification Criteria for Environmental Auditors” or “American Society for Testing of Materials (ASTM) Provisional Standard 12-95 -- Provisional Standard Guide for Study and Evaluation of an Organization’s Environmental Management Systems.” **[Owner/operator]**'s submittal shall also include a schedule, including milestones, for conducting EMS audits at the facility in accordance with the ISO 14011 “Guidelines for Environmental Auditing -- Audit Procedures -- Auditing of Environmental Management Systems,” or “ASTM Provisional Standard 12-95-- Provisional Standard Guide for Study and Evaluation of an Organization’s Environmental Management Systems.” For each of

---

<sup>1</sup> Insert the name of the alleged violator wherever “[owner/operator]” is referenced within the document.

the ISO 14001 EMS elements referenced in Paragraph I above, and described in Items 1 through 17 below, the Manual shall provide a detailed description of the EMS elements to be implemented at the facility. The Manual shall identify the personnel responsible for completing the actions identified in the EMS, describe the responsibilities to be completed under the EMS, identify the procedures established for meeting the responsibilities under the EMS, and identify the timeframes provided for completing the specified activities included in the EMS. The Manual shall identify when the procedures included in the EMS were or will: (a) be established as a formal system, (b) be integrated into ongoing DEQ operations, and (c) include procedures to achieve continual improvement of the EMS.

ISO 14001 EMS ELEMENTS	
1. Environmental Policy	10. Document Control
2. Environmental Aspects	11. Operational Control
3. Legal and Other Requirements	12. Emergency Preparedness and Response
4. Objectives & Targets	13. Monitoring and Measurement
5. Environmental Management Programs	14. Nonconformance and Corrective and Preventative Action
6. Structure and Responsibility	15. Records
7. Training: Awareness & Competence	16. EMS Audit
8. Communication	17. Management Review
9. EMS Documentation	

1. Environmental Policy

The EMS must include an environmental management policy endorsed by management. The policy should be appropriate to the nature and scale of the business and should include a commitment to continual improvement in the EMS and compliance with all environmental statutes, rules, and requirements applicable to **[owner/operator]**'s operations. The site-specific policy serves as a framework for establishing and reviewing environmental objectives and targets and should be made available to the public.

2. Environmental Aspects

The EMS must include procedures for identifying **[owner/operator]**'s environmental aspects. Environmental aspects are the activities, products, and services that **[owner/operator]** can control that impact the environment. The EMS must include a ranking system for identifying the environmental aspects that have the greatest potential to impact the environment. The EMS shall include an environmental aspect list and must provide for the list to be kept up-to-date on a regular basis. The EMS must provide for environmental aspects to be reevaluated when the **[owner/operator]** changes operations and/or manufactures new products.

3. Legal and Other Requirements

The EMS must include procedures for reviewing and identifying the environmental statutes, regulations, and requirements applicable to **[owner/operator]**'s operations.

4. Objectives and Targets

The EMS shall define the environmental objectives and targets to be met at every function level within the **[owner/operator]** organization. These objectives and targets must be consistent with the environmental policy identified under Item 1, address the significant environmental aspects identified under Item 2, and result in compliance with the applicable legal requirements identified under Item 3.

5. Environmental Management Program

The EMS shall include action plans to achieve the objectives and targets defined under item 4. The action plans must designate responsibility at every relevant function level within the **[owner/operator]** organization and provide a time frame and commitment of resources necessary to achieve each EMS objective. The EMS should provide for the action plans to be amended, if necessary, in response to business changes that result in reevaluation of the environmental aspects.

6. Structure and Responsibility

The EMS must identify assigned management roles, responsibilities, and authorities to ensure proper implementation of the EMS. The EMS must identify a specific management representative as having the responsibility for defining EMS roles, responsibilities, and authorities and for meeting the EMS objectives and targets. The EMS must also provide for this management representative to report the organization's performance in meeting the EMS objectives and targets of the EMS to **[owner/operator]** management on a periodic basis.

7. Training, Awareness, and Competence

The EMS must include provisions for training personnel responsible for implementing the EMS. Therefore, the EMS must identify the training to be provided to all personnel, including vendors and contractors, whose job activities impact the environment or may impact the environment if performed incorrectly. Training must include provisions to ensure conformance with the environmental policy and procedures included in the EMS. The EMS must also identify the work activities that pose potential or actual environmental impacts, along with the consequences that result from not following operational procedures as specified

in the EMS. The EMS must include a system to demonstrate the competency of training programs.

8. Communication

The EMS must include procedures for: (a) in-house communications between various departments/functions; and (b) receiving, documenting, and responding to communication regarding the EMS and environmental aspects from external parties along with provisions for revising communication procedures when business changes result in changes in the environmental aspects.

9. EMS Documentation

The EMS must include provisions for maintaining (electronic or hard copy) documents that describe the core elements of the EMS and provisions for documenting the procedures and activities to be met pursuant to the EMS.

10. Document Control

The EMS must include procedures to maintain EMS documents. The procedure must identify where current and past documents related to the EMS are located, provide for periodic review and updating of documents by authorized personnel, ensure that current versions of relevant documents are available at all locations where essential EMS activities are performed, identify methods to remove/replace obsolete documents and procedures to retain environmental records required for compliance.

11. Operational Control

The EMS must include procedures to identify, plan, and manage operations and activities in line with the environmental policy, objectives, and targets including: documented procedures, operating criteria, and other items that relate to the environmental aspects of goods and services used by the organization. These procedures and requirements must be communicated to suppliers, vendors, and contractors.

12. Emergency Preparedness and Response

The EMS must include procedures to identify potential emergency situations. These procedures must identify how emergency situations will be responded to and must include procedures to test emergency responses on a regular basis.

13. Monitoring and Measurement

The EMS must include procedures to monitor and measure whether operations and activities performed result in **[owner/operator]** meeting the environmental

policy, objectives, and targets developed based on the organization's environmental aspects. This EMS must include a provision to periodically assess **[owner/operator]**'s compliance with applicable environmental requirements. The EMS must provide for records regarding this evaluation to be maintained.

14. Nonconformance and Corrective and Preventive Action

The EMS must include procedures that define the responsibility and authority for handling and investigating EMS and environmental regulatory nonconformances and procedures for implementing corrective action as a result of the nonconformances. The EMS must include procedures to document nonconformances with the EMS to prevent recurrence.

15. Records

The EMS must provide for records to be legible; traceable to the activity, product, or service; stored; maintained so that they are readily retrievable; and protected against damage, deterioration, or loss. Records are proof that legal requirements, training, audit results, and reviews have been successfully accomplished to achieve conformance to the requirements of the EMS standard. The duration for which records are to be maintained on file must also be identified in the EMS.

16. EMS Audits

The EMS must provide for periodic/regular EMS audits to verify that the EMS is operating as intended. The EMS must provide for EMS audit results to be communicated to management for review and response, where necessary. The EMS provisions related to the EMS audit to be performed by **[owner/operator]** must describe the audit scope, frequency, and methodologies to be used for both internal and external audits.

17. Management review

The EMS must provide for executive management to review the EMS on a regular basis to guarantee that it is consistent with the environmental policy and to identify opportunities for continual improvement.

IV. Within four hundred twenty (420) days of the effective date of this Consent Order, **[owner/operator]** shall complete the initial EMS audit as defined under Paragraph III.16 using an independent, certified, third-party EMS auditor.

V. No later than sixty (60) days following completion of the initial EMS audit, the **[owner/operator]** shall submit a copy of the entire audit report and their EMS Corrective Action Report (CAR) to the DEQ, [                     **Division**]. The EMS CAR shall include: (1) the results of the auditor's review and evaluation of the

facility's EMS relating to all activities, products, and services of the **[owner/operator]**; vendors (if applicable); and contractor operations under control and influence of the **[owner/operator]**; (2) the auditor's recommendations for improvements to achieve conformance with the EMS; and (3) the EMS corrective actions planned by **[owner/operator]** with milestone dates, roles, and responsibilities defined to come into conformance with the EMS.

- VI. The DEQ, **[\_\_\_\_\_ Division]** will provide written comments on the audit report and EMS CAR, including the planned EMS corrective actions planned by the **[owner/operator]**, within ninety (90) days of its receipt unless it notifies the **[owner/operator]**, in writing, that additional time for review and comment is required.
- VII. The **[owner/operator]** shall within thirty (30) days of receipt of the DEQ, **[\_\_\_\_\_ Division]** comments on the audit report and EMS CAR, submit a written response to such comments to the DEQ, **[\_\_\_\_\_ Division]**.
- VIII. Any submissions made to the DEQ, **[\_\_\_\_\_ Division]**, pursuant to this Consent Order, shall not be interpreted as a waiver or limitation of the United States' or the state of Michigan's authority to enforce any federal, state, or local statute or regulation including permits.