

VERMONT DEPARTMENT OF ENVIRONMENTAL CONSERVATION

SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP) POLICY

October 27, 2020

1. BACKGROUND AND AUTHORITY

Title 10, section 8007(b)(2) of Vermont Statutes Annotated authorizes the Agency of Natural Resources and the Natural Resources Board to settle administrative enforcement actions through an Assurance of Discontinuance which may include "contribution toward other projects related to the violation, which the respondent and the secretary or the land use panel agree will enhance the natural resources of the area affected by the violation, or their use and enjoyment:" Such contribution projects are referenced to in this policy as "Supplemental Environmental Projects" (SEP). A SEP is defined as: a project that primarily benefits public health or the environment and that persons charged with a violation are not otherwise obligated or likely to perform. A respondent charged with a violation may voluntarily agree to perform a SEP as part of resolving an enforcement action. This policy outlines the practices the Agency will follow in implementing the law.

2. AGENCY DISCRETION

Acceptance of a SEP proposed by a respondent as part of settling an enforcement action is solely within the Agency's discretion. Even though a proposed SEP may otherwise satisfy the provisions of this policy, the Agency may decide that the SEP is not appropriate. In exercising its discretion, the Agency may take action that varies from the practices contained in this policy, if such action is appropriate in a specific case.

3. SEP CATEGORIES

The Agency will only consider proposals meeting the SEP definition in at least one of the following six categories.

- A. Environmental Enhancement and Protection Projects.** An environmental enhancement project enhances the natural environment of the area affected by the violation for the use or enjoyment of the general public and includes natural resource preservation and protection projects. These projects may be used to restore or protect natural environments and address environmental contamination and similar issues in man-made environments.
- B. Environmental Education and Awareness Projects.** An environmental awareness project provides training, publications, or technical support to the regulated community or the public at-large for the purpose of achieving compliance with environmental requirements, reducing the generation, release, or disposal of pollutants beyond legal requirements, or educating the public about environmental protection and resource conservation. All such projects should be substantially related to the types of violations which are the subject of the administrative

enforcement action. These projects are typically conducted by an outside or third party expert or consultant. Any materials made available must contain a statement that the project has been undertaken by the person or entity charged with a violation as part of settling an environmental enforcement action brought by the Agency.

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- C. Scientific Research, Monitoring and Data Collection Projects.** A scientific research, monitoring or data collection project furthers an understanding of the environmental condition of a natural resource or the methods that can be employed to restore the resource. This category includes public health projects that evaluate human health impacts where pollution has been released into the environment.
- D. Emergency Planning and Preparedness Projects.** These projects enable local communities in the geographic area of the violation to plan for and effectively respond to any qualifying event that threatens public health, safety, or the environment. Projects can include public outreach and education on associated environmental risks in the community.
- E. Pollution Prevention Projects.** These types of projects are only approved in very rare circumstances. A pollution prevention project must eliminate all or a significant portion of pollutants at the point of generation. For example, this elimination or reduction may result from: (1) input substitution and product reformulation, such as replacing a toxic substance or raw material with a nontoxic or significantly less toxic substance; (2) redesigning or modernizing operations and equipment; or (3) improving operation and maintenance controls. The appropriate penalty reduction will be scrutinized when this category is proposed because economic benefits commonly accrue to a facility as a result of implementing a pollution prevention project. A clear community or public health benefit must be demonstrated in order for pollution prevention projects to be considered (i.e., reduced public exposure to pollutants).
- F. Pollution Reduction Projects.** These types of projects are only approved in very rare circumstances. Except as provided in Section 4(H) of this policy, a pollution reduction project must significantly decrease the release of pollutants to the environment. Pollution reduction reduces the level of pollutants at the point of discharge through pollution control technologies and methods. A pollution reduction SEP must bring a facility significantly beyond compliance with environmental requirements, for example, by substantially reducing the amount of pollution that would otherwise be legally discharged to the environment. A clear community or public health benefit must be demonstrated in order for pollution reduction projects to be considered (i.e., reduced public exposure to pollutants).

4. LIMITATIONS AND EXCLUSIONS ON SEP PROPOSALS

- A. Repeat Violators.** Respondents who have been the subject of an enforcement action within the past five years of the current action are, without good cause shown otherwise, ineligible for a SEP.
- B. Violator as Primary Benefactor.** A SEP is not permissible where the project primarily benefits the violator.
- C. Willful, Deliberate or Reckless Violations.** Except in specific cases where the Agency exercises its discretion under Section 2, the resolution of willful, deliberate, or reckless

violations will not include a SEP.

- D. Required Actions.** A SEP will not be accepted for activities that are required of the respondent by law, likely to be required of the respondent by law in the near future, or reasonably associated with the respondent's usual course of conduct or business.
- E. Previously Planned Actions.** A SEP will not be accepted for activities which the respondent has planned, budgeted for, initiated, or completed prior to or during the current enforcement action.
- F. Economic Benefit.** A SEP cannot include that part of the penalty calculated as the economic benefit of noncompliance.
- G. Contrary to Federal Law.** In federally delegated programs an SEP will not be accepted when it is contrary to the delegation or federal law.
- H. Activities that are Legally Required of Another Party.** An activity that is legally required of a third party is generally prohibited as a SEP and may only be approved in very rare circumstances by the Agency. The Agency may grant an exception to the prohibition on SEPs that are legally required when:
 - 1. The SEP involves a respondent's contribution to a project occurring in a community with environmental justice concerns¹;
 - 2. The legal requirement is required of a third party and the third party benefiting from the SEP contribution is financially unable to comply with the legal requirement;
 - 3. The project is not associated with a violation caused by ongoing activity and there is no reasonable possibility that the third party will repeat the violation; and
 - 4. The SEP provides significant public health or environmental benefits to the community in which the project occurs.

5. THRESHOLD QUALIFICATIONS AND REQUIREMENTS

- A.** A SEP must have a nexus (relationship) to the violation. A nexus exists where there is an appropriate connection between the nature of the violation and the environmental benefit that would result from the project.
- B.** The respondent may conduct a SEP project or provide funds to a SEP recipient for the purposes of conducting a specific project.
- C.** A SEP must be a specific project which is described in reasonable written detail. (See Section 6).
- D.** The Agency must be satisfied that the respondent or SEP recipient is capable of conducting the proposed SEP.
- E.** Although the Agency may suggest potential SEPs for the respondent to consider, the respondent is responsible for developing the SEP proposal.
- F.** The respondent must agree in the Assurance of Discontinuance that funds directed to a SEP

¹ Until the State or ANR develops an Environmental Justice definition, "environmental justice concerns" should include consideration of a community's minority, low-income, indigenous or tribal populations.

are not tax deductible and consequently shall not deduct nor attempt to deduct, any SEP expenditures from its taxes.

- G. The respondent must agree in the Assurance of Discontinuance that whenever it publicizes a SEP or the results of the SEP, it will state in a prominent manner that the project has been undertaken as part of the settlement of an enforcement action with the Agency.

6. SEP PROPOSALS: CONTENT, REPORTING, AND AGENCY REVIEW

- A. **Required Elements of a SEP Proposal.** A SEP proposal, whether submitted by the respondent or a third party on behalf of the respondent, should include the following information to the extent applicable to the project:
 - (1) **Project Implementer.** Provide the name and contact information for the project's manager and the person responsible for submitting any required status reports, if different from the project manager.
 - (2) **Geographic Area to Benefit from the Project.** Identify the municipalities, counties, watersheds, and other entities, areas, or interests benefiting from the project.
 - (3) **Project Description and Budget.** Provide a narrative description of the project in sufficient detail that addresses expected project benefits (see 4 below); identify tasks to be accomplished; provide a project schedule, including timelines for completion of tasks; and identify deliverables in the project. A project budget shall be provided which identifies project expenditures by expenditure category, including personnel costs, equipment, travel, supplies, contractual, other, and indirect (overhead) costs.
 - (4) **Expected Project Benefits.** Explain the expected project benefits and how the benefits can be quantified.
 - (5) **Certification.** If respondent is the SEP implementer, provide a certification that the proposed SEP is not the result of substantive planning that occurred prior to or during the enforcement action.
- B. **Reporting Requirements.** The following reporting requirements apply to the respondent and a third party SEP recipient as specified below:
 - (1) **Receipt of SEP Funds By Third Parties.** Third parties must verify the receipt of SEP funds by providing the Agency a confirming letter and a copy of the SEP check from the respondent. When SEP funds are paid in periodic installments, the recipient must send a confirmation letter and a copy of the check for each installment.
 - (2) **Interim and Final Reports.** Projects of short duration (a year or less) will require a project summary report upon completion of the SEP with a confirmation letter that the project, as approved, was completed. More complex projects and those projects of longer duration (multi-year) will require periodic progress reports as determined on a case-by- case basis.

(3) Required Content of Reports. All required reports, both interim and final reports, shall provide adequate detail describing tasks accomplished and deliverables met, adherence to project schedule and timeline, and any problems encountered in achieving deliverables. All final reports shall also include a description of how the project benefits described in (A)(4) above were achieved.

(4) Certification. A third party recipient of SEP funds and a respondent that conducts a SEP must provide a signed certification with the final project report indicating that SEP funds were used as intended.

C. Review and Approval of the SEP Proposal. Review of a SEP proposal will be conducted by the point person assigned in the involved regulatory program(s), in conjunction with the assigned Agency attorney. Finally, approval for an SEP shall be made by the Agency attorney. If there is a disagreement regarding an SEP the Director of the Compliance & Enforcement Division shall be consulted and will make the final decision.

7. DETERMINATION OF FINAL SEP AMOUNT

- A.** In the event of a penalty assessment in an enforcement settlement, up to 75 percent of the penalty, other than that portion of the penalty addressing economic benefit, may be included in a SEP.
- B.** Pollution prevention and pollution reduction SEPs will have a penalty offset ratio of at least 1.5:1, meaning that \$1 of the penalty will be offset for each \$1.50 expended on the SEP.
- C.** Where the respondent has failed to fulfill all or part of the SEP as agreed, the SEP will be converted to a penalty amount in a pro rata manner and deemed immediately due and payable to the state unless an extension of time is granted by the assigned Agency attorney. Prior to granting an extension of time Agency attorney must first obtain authorization for the extension from the Compliance & Enforcement Division Director.

Dated: October 27, 2020

By:



Peter Walke, Commissioner
Department of Environmental Conservation