



Agency-wide Supplemental Environmental Projects Policy

APPROVED BY:

Martha Rudolph
Director of Environmental Programs

4/11/18
Date

Garry Kaufman
Director, Air Pollution Control Division

4/16/18
Date

Jeff Lawrence
Director, Division of Environmental Health and Sustainability

4/18/18
Date

Gary Baughman
Director, Hazardous Materials and Waste Management Division

4/18/18
Date

Patrick Pfaltzgraff
Director, Water Quality Control Division

13 Apr 18
Date



Table of Contents

I.	Introduction.....	4
A.	Background	4
B.	Using this policy	4
II.	Creating Effective SEPs	4
A.	SEP requirements	4
B.	Supporting the department’s mission and goals	5
C.	Additional factors for department consideration	6
III.	First Party SEPs	6
A.	Definition and use	6
B.	Economic benefit	7
IV.	Third Party SEPs	7
A.	Definition and use	7
B.	SEP Idea Library	8
C.	Community SEP Process	8
D.	Requirements for third party SEP recipients	9
V.	SEP Categories	9
A.	Pollution prevention	9
B.	Pollution reduction	10
C.	Environmental restoration	10
D.	Environmental education	11
E.	Public health and safety	11
VI.	Extent to Which a SEP Can Mitigate a Penalty	11
VII.	SEP Process	12
A.	SEP Proposal	12



- B. Evaluation and approval 13
 - C. Monitoring and reporting 14
 - D. Publicizing a SEP 14
- VIII. Failure to Complete a SEP and Penalties..... 15



Colorado Department of Public Health and Environment Supplemental Environmental Projects Policy

I. Introduction

A. Background

In all settlements, regulated entities are required to achieve and maintain compliance with all applicable regulations. Most settlements include monetary penalties related to environmental damage caused and economic benefit the regulated entity has realized as a result of the violation. In some instances, a regulated entity may offset a portion of a penalty by implementing a Supplemental Environmental Project (SEP). A SEP is a project that benefits the environment and/or public health that a regulated entity agrees to undertake in settlement of an enforcement action, but that the regulated entity is not otherwise legally required to perform. The department is committed to maximizing the benefits of SEPs to communities negatively impacted by environmental violations and must approve all SEPs prior to implementation. Whether the department decides to accept a SEP as part of a settlement is solely within its discretion.

B. Using this policy

This policy is intended to be an integral part of each environmental division's Enforcement and Compliance Assurance Policy and Procedures. It is not a stand-alone document and must be applied in conjunction with the larger enforcement program implementation strategies.

II. Creating Effective SEPs

A. SEP requirements

A SEP will not be approved if the regulated entity is otherwise legally required to perform the proposed activity. For example, the SEP must not include actions required by any federal, state or local law, regulation, administrative or court order, or permit. SEPs cannot include actions that the regulated entity may be required to perform as injunctive relief, as part of a settlement or order in another legal action, or by state or local requirements.

SEPs must adhere to following guidelines:



- Because deterrence objectives must be met, SEPs may mitigate only a maximum of 80 percent of the gravity portion of a penalty¹.
- Regulated entities are precluded from seeking or receiving any tax benefit or favorable tax treatment associated with a SEP, including third party SEP payments. Exceptions may be made for renewable energy or similar tax credits, and these credits will be subtracted from the SEP amount.
- All SEPs must result in improvements to the environment or reduce the total risk burden posed to the environment and/or public health beyond what is required by law.
- Although a media nexus is not required for SEPs (e.g., an air violation can result in a SEP that improves water quality), projects should have a geographic nexus, generally defined as the county or counties where the violation(s) occurred.
- A project cannot violate any underlying statute.
- The primary purpose of SEPs is to achieve benefits that may not have occurred "but for" the settlement; thus projects that were previously planned, initiated or budgeted before the SEP Agreement is signed are ineligible.
- The department may neither play a role in managing or controlling funds to be set aside or escrowed for performance of a SEP, nor retain authority to manage or administer the SEP. The department may provide oversight to ensure a project is implemented pursuant to the provisions of the settlement and may retain recourse if the SEP is not adequately performed.
- A project may not provide additional resources to support (including in-kind contributions of goods or services) specific activities performed by the department or department contractors.
- To maximize efficiency and project quality, SEPs in the amount of \$20,000 or less must be selected from a pre-screened list of third-party projects provided by the department.
- Eligible projects must be free from actual or perceived conflicts of interest as determined by the department.

B. Supporting the department's mission and goals

SEPs can provide additional environmental and/or public health benefits in communities affected by violations that go beyond those achieved by compliance with applicable laws. Although SEPs are an important component of the department's enforcement program, they may not be appropriate in all cases. SEPs that help further the department's mission and goals to protect the environment and/or public health by providing benefits in the following areas will receive preference:

¹ Except for certain cases in which a regulated entity is a small business (See Section "Extent to Which a SEP Can Mitigate a Penalty") or as allowed in the department's *Agency-wide Policy on Assessing Administrative Penalties Eligible Governmental Entities*.



- **Health Equity and Environmental Justice** - Preferred projects will mitigate damage, reduce risk or improve access to information in communities that may have been disproportionately exposed to pollution or are at increased public health or environmental risk.
- **Pollution prevention** - Preferred projects will eliminate or prevent pollution at its source.
- **Climate change** - Preferred projects will reduce greenhouse gas emissions or improve community resilience to the impacts of climate change.

C. Additional factors for department consideration

In addition to meeting the basic eligibility requirements, the department will consider the following four factors when evaluating SEP proposals:

- **Innovation** - SEPs that further the development and implementation of innovative processes, technologies or methods to more effectively reduce the use, generation, release or disposal of pollutants; conserve natural resources; or promote compliance will be given preference.
- **Cross-media impacts** - SEPs that result in positive impacts for more than one medium, such as those that improve both air and water quality, will be given preference.
- **Community input** - SEPs that are developed taking into consideration input received from the affected community will be given preference.
- **Department's mission** - SEPs that benefit the department's mission and goals will be given preference.

III. First Party SEPs

A. Definition and use

A first party SEP is a project that a regulated entity completes within its own facility or process. First party SEPs are held to a high standard of integrity and quality and are considered only for regulated entities that are responsive in their interactions with the department. If a regulated entity wishes to pursue a first party SEP, it must first discuss the concept with the SEP coordinator and receive department approval for the project concept prior to completing a full SEP Proposal form. If a first party SEP is approved, regulated entities that have not implemented a first party SEP before are required to complete an orientation with the SEP coordinator prior to implementation.



B. Economic benefit

A first party SEP may not be used to mitigate the economic benefit component of a monetary penalty². First party SEPs include a mitigation ratio of SEP cost to penalty mitigation that is determined by the department on a case-by-case basis and shall be no less than 1.5:1 and may be much greater. Please see Section VI, “Extent to which a SEP Can Mitigate a Penalty” for details.

SEPs are not intended to reward the regulated entity for undertaking activities that are strictly in its economic self-interest (e.g., updating or modernizing a plant to become more competitive). Any economic benefit resulting from a SEP must be subtracted from the penalty mitigation value. For instance, if equipment replacement occurs as part of a first party SEP, the regulated entity must subtract the value of any equipment sold and any financial savings gained in the calculation of expenditures. Any cost savings from projects such as energy- or water-efficiency upgrades must be subtracted also. Although a SEP may benefit a regulated entity, the primary focus must be on providing significant benefit to the environment and/or public health.

SEPs that are expected to become profitable after five years or more (three years or more for local governments or businesses with fewer than 100 employees) may be approved under certain circumstances. A “profitable SEP” is defined as one from which the direct cost savings or revenue exceeds the total project cost as specified in the SEP Agreement. To be considered for approval, profitable SEPs should demonstrate a high degree of innovation and result in significant measurable environmental or public health benefits. Profitable first party SEPs may not receive a penalty mitigation credit of more than 80 percent for projects that support the department’s mission and 60 percent for all other projects. The mitigation credit does not apply to the economic benefit portion of a penalty.

IV. Third Party SEPs

A. Definition and use

In a third party SEP, the regulated entity enters into an agreement with, and submits a payment to, a third party organization for the completion of a SEP. Eligible third party SEP recipients include 501(c)(3) nonprofit organizations or governmental entities. The department may approve a payment to a third party for the implementation of a SEP to mitigate either the gravity and/or the economic benefit component of a penalty (see Section VI “Extent to Which

² Except as allowed in the department’s *Agency-wide Policy on Assessing Administrative Penalties Against Eligible Governmental Entities*.



a SEP can Mitigate a Penalty” for further clarification). The regulated entity must include with the payment a cover letter on official company letterhead, including the case number and SEP project name. Under certain circumstances, a regulated entity may also be allowed to implement a SEP that directly benefits a third party (e.g., a regulated entity providing equipment to a third party to complete a project). Third party SEPs typically receive a 1:1 ratio for penalty mitigation.

A local governmental entity that is a recipient of SEP funds is able to use those funds for a project that would enable it to come into compliance with environmental regulations, provided the payment comes from a regulated entity that is not affiliated with that local governmental entity.

Although in most cases regulated entities are liable for SEP completion, in certain instances, at enforcement staff’s discretion, it may be appropriate to allow the regulated entity’s liability for a third party SEP to end once it has provided the SEP payment to the third party. This is advisable only when the department considers the third party organization as highly likely to implement a successful SEP -- as in the case with governmental entities or organizations that have successfully completed past SEPs or other department-funded grants. In these cases, the third party organization must be willing to agree to the department’s requirements by signing the SEP Agreement.

B. SEP Idea Library

501(c)(3) nonprofit organizations and governmental entities may submit SEP ideas to the SEP Idea Library for future funding consideration. Applicants must complete the SEP Idea Form and submit it to the department’s SEP coordinator. Third party SEPs must meet all the requirements of a SEP as described in this policy and must fall within one of the categories listed in Section V, “SEP Categories.” Eligible SEP ideas will be kept in the SEP Idea Library for two years. There is no limit on the number of SEP ideas an organization may submit.

C. Community SEP Process

For third party SEP amounts of \$750,000 or more, the department encourages and supports the use of the SEP Community Process, a formal competitive process in which applicants from the affected community respond to a request for SEP proposals. Proposals are reviewed and scored by an evaluation committee comprising community representatives, department staff and the regulated entity. The SEP Community Process identifies high-quality projects through community input to maximize benefits for the affected community.



D. Requirements for third party SEP recipients

The department's SEP coordinator may assist a regulated entity with monitoring SEP progress. However, unless otherwise agreed upon, the regulated entity is ultimately responsible and legally liable for ensuring a SEP is completed satisfactorily. The department also maintains clear expectations for all third party SEP recipients.

Third parties are expected to:

- Complete projects and reporting as agreed upon in the SEP Agreement.
- Provide all necessary information to regulated entities for SEP monitoring and reporting.
- Use department-provided reporting templates.
- Provide timely, complete and accurate information in all proposals and reporting.
- Participate in a SEP orientation with the SEP coordinator prior to implementation, if the third party is a first-time SEP administrator.

Failure on the part of a third party organization to adhere to the above requirements may result in the termination of the SEP and funding forfeiture or the loss of eligibility for receiving future SEP funding.

V. SEP Categories

The department considers the following four categories of projects for potential SEPs. Each SEP proposal will be reviewed before being approved to ensure all aspects of the project(s) fulfill the legitimate objectives of the department's SEP policy.

A. Pollution prevention

Pollution prevention, also known as source reduction, is defined as any practice that reduces, eliminates or prevents pollution at its source through one of the following methods:

- **Process change** - eliminating the source of pollution by changing industrial processes or substituting less polluting fuels or less toxic raw materials in existing processes.
- **Materials substitution** - substituting less toxic raw materials.
- **Renewable energy** - applying technologies using energy generated from naturally replenishable sources that act to reduce fossil fuel use and/or related greenhouse gas emissions. Examples include, but are not limited to, wind, solar, geothermal, biomass, electric vehicles or electric vehicle infrastructure.



- **Waste minimization** - conserving materials that are sources of pollution, which includes application of closed-loop processes, lean manufacturing principles, maintenance and leak detection programs, inventory control and employee training.
- **In-process recycling** - returning waste materials produced during a manufacturing process directly to production within the same manufacturing process using dedicated, fixed and physically integrated equipment such that no releases, including fugitive releases, occur.
- **Innovative recycling technologies** - substantially reducing the discharge of generated pollutants through new technologies that keep the pollutants out of the environment in perpetuity.
- **Conservation and efficiency** - reducing the demand for natural resources such as energy or water through conservation or increased efficiency.

Pollution prevention projects will receive preference from the department. 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 media.

B. Pollution reduction

Where a pollutant or waste stream already has been generated or released, a pollution reduction approach (recycling, treatment, and containment or disposal techniques) may also be an eligible SEP, as long as it does not create an increased or adverse cross-media impact on the environment and/or public health. 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; and 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.

C. Environmental restoration

The objective of an environmental restoration project is to repair damage done to the environment beyond the need to remediate the damage caused by the violation. Projects that benefit multiple media types are preferred. Examples of approvable projects include: a) reductions 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 a wetland, c) protection of habitat critical to the well-being of a species or ecosystem, and d) purchase and management of a watershed area as a buffer zone to protect sensitive species or drinking water supply.



Environmental restoration projects could include 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 public health.

D. Environmental education

Environmental education projects increase public awareness and knowledge about environmental issues and provide the skills necessary to make informed decisions and take responsible actions. To be eligible, an environmental education project must include an action component that will result in actual environmental and/or public health improvements and an evaluation component that will measure quantifiable outcomes. The department will give priority to projects designed to change people's behavior, rather than strictly focusing on increasing knowledge or awareness. Education projects that use research-based social marketing tools³ and/or follow National Guidelines for Excellence in Environmental Education, where applicable, are preferred.

E. Public health and safety

A project that benefits public health or safety may also be an eligible SEP. This may include projects providing preventive, screening, diagnostic or therapeutic health care or education related to actual or potential threats to human health and safety. Specific examples include public health education campaigns, increased access to services (e.g., immunizations), early screening and detection programs, protective gear for emergency responders, or projects that work to increase health equity and environmental justice in disadvantaged communities. Like all SEPs, these projects must be new projects or expansions of services that would not have existed without the SEP funds.

VI. Extent to Which a SEP Can Mitigate a Penalty

There are two steps in determining the extent to which a SEP can mitigate a penalty:

Step 1: The first step is to calculate the minimum portion of the penalty assessment that must be collected in cash. Divisions determine this on a case-by-case basis based on their Enforcement and Compliance Assurance Policy and Procedures. Penalties comprise a gravity component and, when applicable, an economic benefit component.

³ For more information on social marketing tools and techniques, please see www.toolsofchange.com and www.cbsm.com.



- With regard to the gravity component, the minimum cash component of the penalty must equal 20 percent. There are exceptions for small businesses (defined as businesses with fewer than 100 employees) and eligible governmental entities⁴. These entities may be allowed to mitigate 100 percent of the gravity component with a SEP with no cash penalty, dependent solely on department discretion.
- With regard to the economic benefit component, 100 percent of the economic benefit should be collected in cash, unless the department allows a regulated entity to mitigate economic benefit through a third party SEP. Eligible governmental entities may be allowed to mitigate the entire penalty in accordance with the department's agency-wide policy on Assessing Administrative Penalties against Eligible Governmental Entities. See Section III. B. for guidance on profitable first party SEPs.

Step 2: The second step is to determine the amount of credit each dollar spent on the SEP will receive against the penalty. In general, the department will consider how well SEPs address the four "additional factors" listed in Section II in allowing penalty mitigation. Only exceptional projects will be allowed the maximum penalty mitigation credit. In determining the amount of credit each dollar spent on a first party SEP should receive, the ratio of SEP cost to penalty mitigation shall be no less than 1.5:1 (e.g., to receive \$100,000 in penalty mitigation credit, a regulated entity must spend \$150,000 on a SEP) and may be much greater. The 1.5:1 ratio of civil penalty mitigation recognizes the potential cost savings, public relations and other benefits associated with SEP expenditures that may accrue to the regulated entity. A regulated entity will typically receive a 1:1 ratio for an approved third party SEP.

VII. SEP Process

A. SEP Proposal

Regulated entities that are interested in including a SEP in their settlement agreement should first discuss it with their enforcement case person. If enforcement staff agree, the regulated entity must notify the SEP coordinator of its intent to propose a SEP. If the regulated entity wishes to pursue a first party project, it must first discuss the concept with the SEP coordinator and receive department approval for the project concept prior to completing a full SEP Proposal form.

⁴ See the department's *Policy on Settling Administrative and/or Civil Penalties against Eligible Governmental Entities*.



If the regulated entity is interested in a third party SEP, it may select a project from a list provided by the SEP coordinator from the SEP Idea Library or may propose a different third party project. All projects must meet the requirements in this policy and be approved by the department. The initial SEP Proposal must be complete to be considered, including an estimate of all environmental and/or public health benefits, a description of the methodology used to estimate those benefits, baseline data regarding the relevant environmental impact to facilitate measuring progress, and specific method(s) for measuring progress.

SEP funds may be budgeted for a variety of project expenses, including personnel, materials and supplies, major equipment, and contractors or subcontractors. For all SEP Proposals, a maximum of 10 percent of the total project budget may be allocated for indirect expenses. Indirect costs may include expenses such as rent, utilities, administrative staff, office supplies and equipment, and insurance.

B. Evaluation and approval

Once the SEP Proposal is submitted, the SEP coordinator will review it and work with the regulated entity and, where appropriate, third party organization, to gather necessary details to determine if the project is approvable. The SEP coordinator may make recommendations on ways to strengthen specific project benefits. SEPs that mitigate more than \$50,000 require written approval from the department's director of environmental programs prior to approval by the SEP coordinator.

Once a project is approved, the SEP coordinator will work with the regulated entity and, where appropriate, third party, to develop the SEP Agreement. Once finalized, SEP Agreements require signatures from the enforcement division, the SEP coordinator, the regulated entity and, where appropriate, the third party organization.

Typically, the settlement agreement must accurately and completely describe the SEP, including the specific actions to be performed. However, in some cases, the project(s) can be identified at a later date as long as the department has the final approval of the project(s). In addition, the agreement should provide for a reliable and objective means to verify the regulated entity has met its required financial commitment and completed the project in a timely manner. To the extent feasible, the regulated entity is required to estimate, at the outset, the benefits associated with the SEP and to subsequently track and measure those benefits. In general, the regulated entity is ultimately responsible and legally liable for ensuring a SEP is completed satisfactorily.

If a SEP benefits a medium different from the medium in which the violation occurred, the appropriate division will be consulted before approval of the SEP (e.g., if a water violation



occurred and a hazardous waste SEP is proposed, the SEP coordinator will consult with the Hazardous Materials and Waste Management Division prior to approval of the SEP).

C. Monitoring and reporting

Status reports are required at a minimum of every six months and more often for first party SEPs and high-risk third party SEPs. If additional time is needed to complete a SEP or for outcome measurements or project evaluation, a written SEP Modification Request must be submitted to the SEP coordinator at least 30 days prior to the original SEP completion deadline. A formal modification request is also required for budget reallocations among line items of more than 10 percent of the total SEP budget. Unless otherwise agreed upon by the regulated entity and department, a maximum of two modification requests for a SEP is allowable.

A SEP Completion Report must be submitted to the department no later than two months after project completion. At a minimum, the SEP Completion Report shall include:

- A detailed description of the SEP as implemented.
- A description of any operating problems encountered and the solutions.
- Itemized costs, documented by copies of purchase orders and receipts, canceled checks and employee pay records.
- Certification and demonstration that the SEP has been fully implemented pursuant to the provisions of the Consent Order and SEP Agreement.
- A description of the environmental and/or public health benefits resulting from implementation of the SEP (with quantification of the benefits and pollutant reductions, if feasible).
- Photographs documenting the project, if available.

For first party SEPs, the calculation of the cost and benefits of the SEP must include actual costs and economic benefits to the regulated entity. For example, the regulated entity must clearly document any benefits received by the sale of equipment being replaced as part of the SEP.

The SEP coordinator may conduct a site visit or audit and inspect SEP records, at any reasonable time during the implementation of the project and for a period of one year following the completion of the project.

D. Publicizing a SEP

The following language must be used in any public statement, oral or written (whether by the regulated entity or a third party SEP recipient), making reference to the source of project funding for the life of the project: "This project was undertaken in connection with the



settlement of an enforcement action taken by the Colorado Department of Public Health and Environment for alleged violations of the [applicable Act(s) or regulation(s)].”

VIII. Failure to Complete a SEP and Penalties

All SEPs must be completed to the satisfaction of the department by the date referenced in the SEP Agreement and must be operated for the useful life of the SEP. In the event that the regulated entity fails to comply with any of the terms or provisions of the SEP Agreement, the regulated entity shall be liable for penalties as a violation of the Consent Order. The determination of whether a SEP has been satisfactorily completed is in the sole discretion of the department. The department may elect to reduce the penalty for environmental or public health benefits created by the partial performance of a SEP. Although it is the regulated entity that is typically responsible for ensuring a SEP is completed satisfactorily, third party SEP recipients should recognize that failure on their part to successfully complete a SEP based on the requirements described in this policy and the terms of the SEP Agreement may result in the termination of the SEP and funding forfeiture or the loss of eligibility for receiving future SEP funding.

