

Idaho Department of Environmental Quality

Guidance Document 98-1: Supplemental Environmental Projects

To: All DEQ Staff

From: Wallace N. Cory, Administrator

By statute, the imposition or computation of monetary penalties for an enforcement action brought under the Environmental Protection and Health Act (EPHA), Idaho Code §§ 39-101, *et seq.*, or the Hazardous Waste Management Act of 1983 (HWMA), Idaho Code §§ 39-4401, *et seq.*, may take into account an enforceable commitment by the person against whom the penalty is directed to implement a supplemental environmental project. For these purposes, "supplemental environmental project" (SEP) is defined as an environmentally beneficial project which the person is not otherwise required to perform, and which falls into at least one of four categories: pollution prevention, pollution reduction, public awareness, and general enhancement of the quality of the environment. Idaho Code §§ 39-108(5)(b), -4414(1)(c). Environmentally beneficial means a SEP must improve, protect, or reduce risks to public health or the environment.

As a general policy, DEQ encourages the use of SEPs as a way of furthering the objectives of the EPHA and HWMA while deterring noncompliance with the provisions of those statutes and the administrative rules which implement them. At the same time, DEQ's consideration of a particular SEP proposal must take into account the scope of DEQ's authorities under Idaho law and federal requirements. While this consideration must necessarily be conducted on a case-by-case basis, the purpose of this guidance document is to provide a framework to be applied when a SEP is proposed to resolve or partially resolve an administrative enforcement action initiated by DEQ under the EPHA or HWMA. By developing a consistent approach to SEPs, it is believed that DEQ can ensure fairness and consistency in the use of SEPs as a settlement option.

This document is to be used as guidance in settlement negotiations and is not intended to create substantive or procedural rights or legal obligations. This guidance does not change or affect any existing obligation to remedy damage caused by a person's noncompliance or to assure future compliance. This guidance may be considered in all enforcement actions filed after its effective date and in all pending actions in which DEQ and the person against whom a penalty is directed have not reached agreement in principle on the specific terms of a SEP. This guidance document shall supersede the Interim Guidance Document adopted by DEQ on March 3, 1997.

Substantive Nexus

Preference may be given to those SEPs with an environmental benefit which has some relationship to the specific violations for which the enforcement action was brought or at least one of the more broad objectives of the underlying statute(s) which was violated. A project cannot be inconsistent with any provision of the underlying statute(s).

Geographic Nexus

Preference may be given to those projects with a benefit in the actual or general geographic location where the violations occurred.

Categories of SEPs

To be considered by DEQ a SEP proposal must conform to one or more of the following categories:

Pollution Prevention: A pollution prevention project is one which reduces, at the source, the amount or toxicity of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise being released into the environment. These projects will often involve changing an industrial process, substituting fuels and raw materials, as well as closed loop recycling and re-use. Pollution prevention also includes any project which protects natural resources through conservation or increased efficiency in the use of energy, water, or other materials.

Pollution Reduction: A pollution reduction project employs recycling, treatment, containment, or disposal techniques to reduce the amount or toxicity of a pollutant or waste stream which has already been generated or released.

Public Awareness: Public awareness projects may include publications, broadcasts or seminars aimed at the regulated community and underscoring the importance of environmental compliance and pollution reduction and/or prevention. These projects may be accomplished through donations to non-profit groups, or emergency planning and preparedness support or training to responsible state or local emergency response or planning entities.

Environmental Enhancement: An environmental enhancement project is one which goes beyond repairing environmental damage caused by the violation to protect, restore, or otherwise enhance the environment. Cleanups required by law do not fall under this category. Included in this category are proposals to donate money to a local government or non-profit entity to advance the goals of a specific environmental program or project, or to conduct qualifying research.

A study or assessment may be a viable SEP if it is designed to explore pollution prevention or reduction, and the person making the proposal commits to implementing one or more of the study solutions. Consideration of a SEP proposal which includes a study or assessment shall take into account the likelihood that technically feasible and cost effective solutions can be identified.

Contents of the SEP Proposal

DEQ shall, as fully as possible, require that the details of a SEP be set out prior to the signing of the Consent Order rather than being left open for negotiation after the primary agreement is signed. To the extent practicable, the SEP proposal shall set out an itemized projected budget for the project including a detailed breakdown of equipment, labor and capital costs, and a schedule, with specific dates, for implementation and completion of implementation of the SEP. To be subject to consideration by DEQ, a SEP proposal shall specifically identify the nature and amount of any tax or other direct, quantifiable, and traceable economic benefits which will be realized by the person proposing the SEP as a result of the SEP performance.

Not Otherwise Required to Perform

DEQ shall only consider those SEP proposals describing activities the person is not otherwise required to perform by virtue of any local, state, or federal statute, regulation, rule, order, decree, permit, or other law or agreement. The person making the proposal shall not receive a credit for the SEP as part of another enforcement action or a grant from a state, federal, or local entity. A SEP must go beyond what a violator must do to achieve and maintain compliance; SEPs cannot include actions which the person may be required to perform as injunctive relief in the instant case or as part of a settlement or order in another legal action.

SEP Proposals and Existing Agency Duties

DEQ shall not consider a SEP proposal which conflicts with Idaho Const. Art. VII, § 13 ("No money shall be drawn from the treasury, but in pursuance of appropriations made by law."), or Idaho Code § 67-3516(2) (An agency cannot supplement its appropriation with outside funds unless the agency has received prior approval from DFM.). Specifically barred from consideration are SEP proposals which 1) involve an activity a state agency is already legislatively required to perform, 2) provide a state agency with additional resources to perform an activity for which the Legislature has specifically appropriated funds, or 3) appear to expand existing state programs.

DEQ Oversight of SEPs

SEPs which would be resource intensive for DEQ are unacceptable. DEQ shall not consider SEP proposals which would require DEQ to manage funds, control SEP performance, or provide substantial oversight. If warranted by the SEP implementation schedule, a person performing a SEP shall be required to submit periodic progress reports. Once implementation has been completed, the person shall submit to DEQ a written statement of completion accompanied by appropriate documentation (such as invoices, receipts, or tax statements) which can be used by DEQ to verify the amount of the expenditures made and the acceptable implementation and completion of the SEP. In the event that actual expenditures for a SEP fall short of projected expenditures, the person performing the SEP may be required to submit the amount of the shortfall (or some percentage thereof) to the State as a penalty payment.

Calculating SEP Value and Penalty Mitigation

The net present value of any economic benefits - including tax relief - identified in the SEP proposal shall be deducted from the SEP value used to determine the appropriate amount of penalty mitigation. After the deduction of the identified economic benefits, a ratio of \$2 in project dollars for every \$1 in penalty dollars mitigated shall generally be applied. To preserve the deterrent effect of enforcement, the amount of a penalty reduction a violator will receive in exchange for a commitment to undertake a SEP shall not generally exceed 75% of the total penalty amount. Under no circumstances shall the cash penalty obtained combined with the amount of penalty mitigation resulting from the SEP exceed the statutory administrative penalty limit.

Failure of SEP Implementation and Completion

In the event a SEP is not timely implemented or completed as required by a settlement agreement, the person shall be required to pay some or a portion of the penalty mitigation as a stipulated penalty.

Public Statements

DEQ shall require that any public statement made about the SEP by the person implementing it shall 1) identify the fact the SEP is being or has been implemented as part of the settlement of a DEQ enforcement action, and 2) specifically cite the statute violated.

Conclusion

This guidance document shall be used by authorized DEQ staff to determine the types of projects that are permissible as SEPs, the penalty mitigation appropriate for a particular SEP, and the terms and conditions under which a SEP may become part of a settlement. Subject to statutory and constitutional limitations, DEQ's decision to accept or reject a particular SEP as part of a settlement is discretionary. Even though a proposal appears to satisfy all of the provisions of this guidance, the federal requirements and Idaho law, DEQ may decide, for one or more reasons, that the SEP is not appropriate. In such case, the SEP need not be taken into account in mitigating the civil penalty

amount. Acceptance of a particular SEP proposal shall be made only after review by and consultation with the Attorney General's Office and the DEQ Administrator.

WNC/rma

Attachment: [Model Consent Order Language](#)