

Department of Toxic Substances Control Official Policy

SUPPLEMENTAL ENVIRONMENTAL PROJECTS

DTSC-OP-035

Subject/Title of Policy

Official Policy Number

N/A

5/5/16

Supersedes Number(s)

Date Issued/Effective Date

All Staff

Hazardous Waste Management Program

Target Audience

Issuing Unit

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Director

Name

Title of Approving Authority

Original signed by Barbara A. Lee

5/15/16

Signature

Date Signed

Reference(s):

California Government Code section 65040.12(e); Public Resources Code sections 71116, and 71118; CalEPA Recommended Guidance on Supplemental Environmental Projects (2003); U.S. EPA Supplemental Environmental Projects Policy (1998); California Health and Safety Code sections 25180.2, 25244.12-25244.23, and 39711; California Code of Regulations, title 22, section 66260.2; U.S. Code, title 42, chapter 116, section 11001 et seq.; and Penal Code section 14300.

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I. PURPOSE

The purpose of the Department of Toxic Substances Control's (DTSC's) Policy on Supplemental Environmental Projects (SEPs) is to guide DTSC's use of SEPs for administrative and civil enforcement actions.

II. BACKGROUND

SEPs are environmentally beneficial projects that a Defendant agrees to voluntarily undertake in the settlement of an enforcement action, but which the Defendant is not otherwise legally required to perform. In return, DTSC agrees to reduce the monetary penalty that would otherwise apply as a result of the violation(s).

DTSC has broad discretion to settle enforcement actions, including discretion to include a SEP as a part of an administrative order or civil judgment. To further DTSC's statutory mandate to protect public health and the environment, a SEP may be included in the settlement of any enforcement action in which administrative or civil penalties are assessed.

A decision to accept a proposed SEP is within DTSC's sole discretion and may depend on the specific facts of a particular case. Even though a project may appear to satisfy all provisions of this Policy, DTSC may decide that a SEP is not appropriate for a particular enforcement matter.

DTSC recognizes that many Californians live in the midst of multiple sources of pollution, and that some people and communities are more vulnerable to the effects of pollution than others. DTSC believes it is important that its programs and funding are appropriately directed toward improving the environmental health and economic vitality of impacted communities. For example, consistent with statutory requirements, DTSC prioritizes compliance and enforcement actions affecting communities identified by CalEPA as disadvantaged pursuant to Health and Safety Code section 39711. In selecting SEPs to resolve these and other enforcement actions, DTSC will give preference to proposals benefiting disadvantaged communities.

III. DEFINITIONS

A. Defendant: Defendant is the individual, company, or entity responsible for a violation of an environmental law or regulation. In this policy, a defendant also refers to a Respondent in an administrative action.

B. Disadvantaged Community: A disadvantaged community is described in California Health and Safety Code section 39711:

...These communities shall be identified based on geographic, socioeconomic, public health, and environmental hazard criteria, and may include, but are not limited to, either of the following:

(1) Areas disproportionately affected by environmental pollution and other hazards that can lead to negative public health effects, exposure, or environmental degradation.

(2) Areas with concentrations of people that are of low income, high unemployment, low levels of homeownership, high rent burden, sensitive populations, or low levels of educational attainment.”

C. Environmental Justice: The “fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies,” as defined by California Government Code section 65040.12.

D. Non-profit Entity: Any corporation, trust, association, cooperative or other organization that meets all of the following criteria:

1. Operates primarily for scientific, educational, service, charitable, or other similar purposes in the public interest;
2. Not organized primarily for profit;
3. Uses its net proceeds to maintain, improve or expand, or any combination thereof, its operations; and
4. Is a tax-exempt organization under federal Internal Revenue Code section 501(c)(3), or is able to provide evidence that the State of California recognizes the organization as a non-profit entity.

E. Recipient: An entity that receives SEP funds in accordance with this Policy.

F. Supplemental Environmental Project: An environmentally beneficial project that a Defendant subject to an enforcement action voluntarily agrees to undertake in settlement of the action to offset a portion of an administrative or civil penalty.

IV. SEP PROJECT GUIDELINES

In general, the following guidelines apply to DTSC SEP projects:

A. A project cannot be inconsistent with any provision of the underlying statutes that are the basis for the enforcement action and, when there are declared objectives of a statute, must advance at least one of the declared objectives.

B. A project should have adequate nexus to the regulatory responsibilities of DTSC. Regulatory nexus is the relationship between the violation and the proposed project. A project has an adequate relationship only if:

1. The project reduces the likelihood that similar violations will occur again; or

2. The project provides environmental or public health benefits that remediate or reduce the overall environmental or public health impacts or risks to which the violation contributes.
- C. An enforcement action issued by DTSC that includes a SEP shall never directly financially benefit DTSC's functions, its staff, or family members of DTSC staff, other than reimbursing DTSC's SEP oversight costs.
- D. The SEP penalty offset amount shall be no more than fifty percent (50%) of the total monetary settlement paid as penalties and exclusive of any enforcement costs awarded to DTSC.
- E. A project cannot be used to satisfy DTSC's or another government agency's statutory or regulatory requirements, or to satisfy the Defendant's statutory obligation to perform a particular activity.
- F. Unless expressly authorized by DTSC, administrative expenses charged by the Recipient related to the administration of SEPs are to be no greater than ten percent (10%) of the total SEP award.

V. ACCEPTABLE SEPs

SEPs shall consist only of measures that go beyond the obligations that a Defendant is already legally required to perform. The performance of a SEP may not reduce the stringency or delay the timing of compliance requirements of statutes and regulations, nor may it alter the Defendant's obligation to remedy a violation expeditiously and return to compliance. SEPs are an adjunct to DTSC's enforcement program and may not be the basis or reason for bringing an enforcement action. A SEP must be enforceable against a Respondent pursuant to an administrative order or a Defendant pursuant to a civil judgment. Nothing in this Policy should be interpreted or construed as requiring the use of a SEP in resolving an enforcement case. Penalties for violations of administrative orders or civil judgments may not be completely mitigated by the use of SEPs.

A proposed SEP project must satisfy the requirements of at least one of the SEP categories below in addition to all of the other requirements established in this Policy:

A. Public Health

A public health project provides diagnostic, preventative, and/or remedial components of human health care related to the actual or potential damage to human health caused by the violation. This may include epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood, fluid, or tissues samples, medical treatment, health fairs, and rehabilitation therapy. Public health SEPs are acceptable only when the project primarily benefits the population harmed or put at risk by the violations.

B. Pollution Prevention

A pollution prevention project reduces the generation of pollution through “source reduction,” i.e., any practice that reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise being released into the environment prior to recycling, treatment, or disposal.

Source reduction may include modifications to equipment, technology, processes, or procedures; reformulation or redesign of products; substitution of raw materials; and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project that protects natural resources through conservation or increased efficiency in using energy, water, or other materials. Another form of a pollution prevention activity called “in process recycling,” wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on-site, is a pollution prevention project.

In all cases, 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.

C. Pollution or Hazardous Waste Reduction

A pollution reduction project results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means that does not qualify as “pollution prevention.” This may include the installation of more effective end-of-process control or treatment technology, improved containment, or safer disposal of an existing pollutant source. Pollution reduction also includes “out-of-process recycling” wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for production off-site, reducing the need for treatment, disposal, or consumption of energy or natural resources.

D. Environmental Restoration and Protection

An environmental restoration and protection project enhances the condition of the ecosystem or immediate geographic area adversely affected. These projects may restore or protect natural environments (such as ecosystems) and fabricated environments (such as facilities and buildings). This category also includes any project that protects the ecosystem from actual or potential damage resulting from the violation; improves the overall condition of the ecosystem; protects endangered species; or remediates facilities and buildings by removing or mitigating contaminated materials, provided such activities are not otherwise legally required.

E. Assessments and Audits

There are three (3) types of projects in this category: a) pollution prevention assessments; b) environmental quality assessments, and c) environmental compliance audits. The assessments and audits proposed must exceed compliance requirements specified by statute, regulation, or permit. The Defendant must provide DTSC with a copy of the report and the results should be provided to the public, except to the extent they constitute confidential business information, pursuant to California Code of Regulations, title 22, section 66260.2.

F. Environmental Compliance Promotion

An environmental compliance promotion project may include trainings or technical support to members of the regulated community or the public to identify, achieve, or maintain compliance with applicable statutory and regulatory requirements or to reduce the generation, release, or disposal of pollutants beyond legal requirements. For example:

1. The Defendant may agree to contract with an expert to develop and implement the compliance promotion project. Acceptable projects may include producing a seminar directly related to correcting widespread or prevalent violations within the Defendant's industry; or
2. The Defendant may agree to support community-based environmental compliance projects, which may include support of community-based violation reporting networks, community task forces, fence-line monitoring projects, trainings, forums, or projects that promote community-based environmental enforcement and reduction of adverse environmental impacts.
3. The Defendant may agree to pay directly to CalEPA's 14300 Environmental Enforcement and Training Account (Pen. Code, § 14300 et seq.) or CalEPA's Environmental Justice Small Grant Program, as allowed for under Public Resources Code, section 71116.

G. Enforcement Enhancement

SEP funds may be directed towards enforcement enhancement activities, such as training and equipment, for environmental compliance and enforcement personnel or community members, or for acquisition of surveillance and monitoring equipment to support community-based environmental monitoring.

H. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance, such as training, computers and software, or other equipment, to an emergency response or planning entity. SEPs under this category enable these

organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. section 11001 et seq. and applicable state statutes to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction; develop emergency response plans; train emergency response personnel; better respond to chemical spills; and provide disaster preparedness resources to the public.

I. Other Types of Projects

This category includes projects determined by DTSC to have public health or environmental benefit and that do not fit within one of the categories above, but otherwise fully follow all other provisions of this Policy.

VI. PREFERENCES

In implementing this Policy, DTSC establishes the following preferences for submitted SEP proposals:

A. Community Nexus

Projects with a community nexus will receive preference over projects without a community nexus. A community nexus exists when a SEP benefits the community in which potential or actual harm from the violations addressed in the order or judgment occurred.

B. Environmental Justice

DTSC will prioritize projects benefitting disadvantaged communities that are adjacent to or in close proximity to the community in which potential or actual harm from the violations addressed in the order or judgment occurred.

VII. ELIGIBILITY CRITERIA

A Recipient is the entity authorized by DTSC to receive SEP funds and implement the SEP. To be eligible to propose and potentially receive a SEP, the Recipient shall be one of the following:

A. The company or individual responsible for the violations (“Defendant”).

B. A non-profit entity.

C. A federally recognized Tribal government.

D. A local, regional, or state government entity.

VIII. REQUEST FOR SEPs

Potential Recipients may submit a Letter of Intent proposing a SEP to DTSC. The Letter of Intent shall provide an outline for a proposed agreement between DTSC and the Recipient for implementation of the SEP. The outline may include a scope

of work, timelines, deliverables, reporting requirements, and information to address the criteria in section IX.B below.

IX. SEP PERFORMANCE OPTIONS

This Policy provides two (2) options for performing an approved SEP:

- A.** SEPs proposed and performed directly by the Defendant;
- B.** SEPs performed by a Recipient other than the Defendant, using funds provided by the Defendant. In selecting a Recipient to perform or oversee SEP funds, DTSC should consider the following criteria:
 - 1. Experience in working with disadvantaged communities or Tribal governments;
 - 2. Experience with grant-making and/or project oversight;
 - 3. Experience working with environmental or public health issues;
 - 4. Sufficient organizational capacity;
 - 5. Ability to provide full accountability, tracking, and reporting of project expenditures to DTSC; and
 - 6. Ability to sponsor educational and training programs relating to environmental enforcement.

X. REQUIREMENTS FOR ADMINISTRATIVE ORDERS OR CIVIL JUDGMENTS AUTHORIZING SEPs

A SEP must be enforceable through an administrative order or civil judgments. The order or judgment shall:

- A.** Accurately and completely describe the SEP, including a scope of work, budget, relevant supporting materials, and provide reliable, measureable, and objective means to verify timely completion.
- B.** Require periodic reporting to DTSC on agreed upon SEP performance milestones by the Recipient in order to monitor the timely, quantifiable, and successful completion of the SEP.
- C.** Require that whenever the Defendant, Recipient, or any organization, with which the Defendant contracts to perform a SEP, or contracts to publicize a SEP or results of a SEP, it will be stated prominently that the project is undertaken as part of an order or judgment.
- D.** Specify on a case-by-case basis the extent of the Defendant's continuing responsibility for implementing the SEP. Address the consequences of failure to

complete the SEP in accordance with the terms and conditions of the order or judgment.

XI. PROJECT PAYMENT, REPORTING, AND OVERSIGHT PROVISIONS

Administrative orders or civil judgments containing SEPs shall include provisions for project payment, tracking, reporting, and oversight as follows:

- A.** Each Recipient must provide DTSC with a written acknowledgment that SEP funds will be spent in accordance with the terms of the administrative order or civil judgment. The Recipient performing the SEP must agree to an audit of its SEP expenditures, if requested by DTSC.
- B.** The Recipient must provide DTSC with a completion report, submitted under penalty of perjury, declaring the completion of the SEP in accordance with the terms of the order or judgment, and this Policy.
- C.** The Recipient shall provide DTSC with a full accounting of project expenditures. Any SEP project with a budget of \$250,000 or greater will be subject to an audit. DTSC will require an audit of any SEP, regardless of budget size, unless DTSC determines such an audit is unduly onerous and has other means to verify expenditures for the work. Any auditing or accounting costs must be paid by the Defendant and must be performed by an entity acceptable to DTSC.
- D.** If the SEP is not fully implemented in accordance with the terms of the order or judgment, DTSC may require the Defendant or Recipient to immediately pay any SEP penalty offset amount.
- E.** If DTSC oversight costs or auditing costs are not paid as agreed, DTSC is entitled to recover the full amount of these costs from the Defendant. Full payment of the SEP or a portion thereof shall be in addition to any other applicable remedies for noncompliance with the administrative order or civil judgment.

XII. COMPLETION OF SEPs

Unless otherwise specified, in addition to the Defendant, the Recipient performing a SEP is responsible for completion of the SEP. The Recipient shall provide the Department with a "completion report" within 60 days upon completion of the SEP. DTSC will provide the Defendant with a written statement indicating the SEP has been completed to satisfy the administrative order or civil judgment.

XIII. PUBLIC OUTREACH

DTSC will provide a public process to solicit potential SEPs from Recipients. DTSC will publish a list of approved and completed SEPs on its website. Annually, DTSC will provide CalEPA with a list of proposed SEPs approved by DTSC.