



STATE OF IDAHO  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY

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C. L. "Butch" Otter, Governor  
Curt Fransen, Director

## DEQ POLICY STATEMENT PS15-05

### SUPPLEMENTAL ENVIRONMENTAL PROJECTS

#### PURPOSE

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 environment 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.

#### STATEMENT OF POLICY

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 policy 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 a tool in settlement negotiations and is not intended to create substantive or procedural rights or legal obligations. This policy does not change or affect any existing obligation to remedy damage caused by a person's noncompliance or to ensure future compliance. This policy 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 policy 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 policy, 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 get 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 Office of the Attorney General and the DEQ director. This policy supersedes DEQ Guidance Document GD98-1 dated March 12, 1998.

### **Substantive Nexus**

Preference may be given to those SEPs with an environmental benefit that 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). 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 that 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 reuse. Pollution prevention also includes any project that 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 that 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 nonprofit 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 that 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 nonprofit 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. (Model consent order language is included in Appendix A.) 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 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 that 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 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 that 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 that would be resource intensive for DEQ are unacceptable. DEQ shall not consider SEP proposals that 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) that 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 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.

**RESPONSIBILITY**

DEQ's Waste Management and Remediation Division administrator is responsible for maintaining this policy.

**IMPLEMENTATION**

This policy is effective immediately and will remain in effect for 5 years unless amended, replaced, or rescinded prior to expiration.

Dated this 21st day of May, 2015



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Curt Fransen  
Director

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## Appendix A. Model Consent Order Language: Supplemental Environmental Projects

1. In partial settlement of the civil penalty for matters included in the NOV, **[owner/operator]** agrees to undertake a Supplemental Environmental Project (SEP) as specifically described in the plan attached hereto as Exhibit A which plan is incorporated by reference into, and enforceable as part of, this Consent Order. The Department has determined the proposed SEP is in accordance with and approvable pursuant to Idaho Code §39-108(5)(b) **[and/or 39-4414(1)(c)]**. Performance of the SEP will benefit the environment, and it is a project which **[owner/operator]** is not otherwise required to perform. **[Owner/operator]** agrees to implement the SEP in accordance with the detailed plan attached as Exhibit A and the following terms and conditions.
  - A. The total expenditure for the SEP shall not be less than \$ \_\_\_\_\_. All costs of the SEP shall be the responsibility of **[owner/operator]**. **[Owner/operator]** certifies that any economic benefit – including tax relief – that **[owner/operator]** will realize as a result of the SEP is detailed in the plan included as Exhibit A. For any SEP which is fully and completely implemented, to the extent that the actual expenditures for the SEP totals less than 90% of \$ \_\_\_\_\_. **[owner/operator]** shall pay to the Department as a penalty, within 30 days of submission of the certificate of completion required below, the amount of the shortfall after it has been proportionately adjusted by the amount of any economic benefit realized and reduced by the ratio of penalty mitigation of SEP expenditure, which ratio is \_\_:\_\_. The penalty shall be deposited by the Department into the Hazardous Waste Emergency Account as provided by paragraph \_\_\_\_ of this Consent Order.
  - B. The plan included as Exhibit A contains a time frame, including specific dates for the implementation of the SEP. **[Owner/operator]** shall fully implement all aspects of the SEP within that time frame.
  - C. **[Owner/operator]** certifies that **[owner/operator]** is not otherwise required by virtue of any local, state, or federal statute, regulation, rule, order, decree, permit, or other law or agreement, to develop or implement the SEP. **[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, EPA or any other entity.
  - D. In the event **[owner/operator]** fails to fully and completely implement the SEP as provided herein to the reasonable satisfaction of the Department, the Department will provide written notice to **[owner/operator]** of the nature of the deficiency. **[Owner/operator]** shall have thirty (30) days from receipt of the notice to submit documentation that the deficiency has been corrected. In the event the deficiency is not corrected to the satisfaction of the Department, **[owner/operator]** shall be in violation of this Consent Order and shall be required to pay to the Department a stipulated penalty of the amount of penalty mitigation originally allowed as a result of the SEP. The amount of the stipulated penalty may be reduced or waived by the Department if **[owner/operator]** made good faith and timely efforts to complete the project. Any stipulated penalty

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payment received shall be deposited by the Department into the Hazardous Waste Emergency Account as provided by paragraph \_\_\_\_\_ of this Consent Order. Payment under the terms of this paragraph shall satisfy **[owner/operator's]** obligation to complete the SEP. **[Owner/operator]** agrees that the Department has sole discretion to make the following determinations: 1) whether the SEP has been satisfactorily completed; 2) whether a timely, good faith effort has been made to implement the SEP; and, 3) the amount, if any, to be paid as a stipulated penalty.

- E. **[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 Idaho Department of Environmental Quality for violations of **[citation to law violated]**."
- F. After the effective date of this Consent Order, until completion of implementation of the SEP, **[owner/operator]** shall provide the Department with a progress report every **[fill in the time]**. The progress reports shall include a description of the SEP activities **[owner/operator]** performed in the prior **[fill in the name]** and a description of the SEP activities **[owner/operator]** expects to perform in the next **[fill in time]**.
- G. No later than ten (10) days after the completion of implementation of the SEP, **[owner/operator]** agrees to provide the Department with a statement certifying that the SEP has been implemented and completed in accordance with the terms and conditions of this Consent Order. The certification shall be accompanied by appropriate documentation (such as invoice, receipts, or tax statement) to verify the amount of the expenditures made and actions taken. It shall be the sole determination of the Department whether **[owner/operator]** has complied with the terms of this Consent Order through implementation and completion of implementation of the SEP as herein required.