



Evaluating and Approving Supplemental Environmental Projects: Appendix G

Internal Management Directive



This document was prepared by
Oregon Department of Environmental Quality

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Table of contents

1. Intent/purpose/statement of need	5
2. Applicability.....	6
3. Authority.....	7
4. Directive.....	8
4.1 Required criteria	8
4.2 Preference criteria	10
4.3 Small community wastewater treatment plant SEPs	12
4.4 Determining the amount of penalty mitigation	12
4.5 SEP proposal procedures	13
4.6 SEP settlement procedure	15
4.7 SEP listening sessions	15
5. Record of revisions to the directive.....	17

1. Intent/purpose/statement of need

A Supplemental Environmental Project is an environmentally beneficial project or activity that is not required by law, but that a respondent agrees to undertake as part of the settlement of an enforcement action. SEPs reduce the risk of further pollution, benefit public health, restore and protect the environment, and promote environmental compliance. In many instances, a SEP is a critical remedy that may address the harm to a community caused when a polluter violates the law. SEPs are an important component of the Department of Environmental Quality's (DEQ) enforcement program, although they may not be appropriate in the settlement of all enforcement actions.

This Directive outlines the conditions under which DEQ will consider mitigating a penalty with a SEP and the actions DEQ will take to engage communities in the SEP selection process.

2. Applicability

1. This Directive applies to assessment of penalties for violations of all environmental statutes, rules, permits and orders administered by DEQ.
2. This Directive sets forth factors for DEQ to consider in exercising its prosecutorial and settlement discretion. The Directive is not final agency action and is intended only as guidance for staff. DEQ may take action at variance with this Directive.
3. The Directive does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. It is not intended for use in pleading, at hearing, or at trial.

3. Authority

DEQ may consider SEPs in settlement pursuant to Oregon Revised Statute 468.130(3) and (4) and Oregon Administrative Rule 340-012-0170, which allow the Director to mitigate penalties when the respondent is willing to employ extraordinary means to maintain compliance and when the settlement is consistent with protecting public health and the environment. In addition, DEQ has a duty to consider the effects of settling enforcement actions on environmental justice¹ issues. ORS 182.545.

¹ Environmental Justice is defined as “the equal protection from environmental and public health risks, fair treatment and meaningful involvement in decision making of all people regardless of race, color, national origin, immigration status, income or other identities with respect to the development, implementation and enforcement of environmental laws, regulations and policies that affect the environment in which people live, work, learn and practice spirituality and culture.” [2022 Session Laws 0058, HB4077, Section 10](#).

4. Directive

This Directive creates a means through which DEQ may offer to conditionally reduce penalties when respondents agree to fund projects that benefit public health and the environment in Oregon. A respondent is solely responsible for the obligations imposed by a Mutual Agreement and Final Order. However, a Respondent may elect to execute an agreement with a SEP recipient to ensure proper implementation of an approved project. In addition, this Directive encourages DEQ staff to promote meaningful community engagement in the SEP selection process.

DEQ is committed to implementing this directive in a manner consistent with its mission, to be a leader in restoring, maintaining, and enhancing the quality of Oregon's air, land, and water. SEPs can advance DEQ's mission by protecting children's health, the health of vulnerable populations, and the health of all Oregonians; advancing environmental justice; pollution prevention; encouraging the development of innovative technologies that protect human health and the environment; and addressing the harmful impacts of climate change.

To ensure that performance of a SEP advances DEQ's mission, benefits the environment, and deters violations of environmental laws, DEQ staff are directed to approve a SEP proposal if it is consistent with the direction in section 4.1 through 4.6 below.

4.1 Required criteria

To be approvable, a SEP must meet the following Required Criteria:

1. The SEP primarily benefits public health or the environment in furtherance of DEQ's mission to be a leader in restoring, maintaining, and enhancing the quality of Oregon's air, land and water.
2. The SEP must meet one of the following categories:²
 - a. **Public Health** – Public health projects include those that provide diagnostic, preventative and health care treatment related to the actual or potential harm to human health caused by the violation or in the community where the violation occurred. Examples of public health SEPs include blood lead level testing, asthma screening and treatment and mobile health clinics.
 - b. **Pollution Prevention** – Pollution prevention projects prevent waste or pollution at the source, before its generated, by conserving energy or natural resources, or by making process changes (such as chemical substitutions) or by making a process more efficient so that less waste is created for a given amount of product;

² Additional information about SEP categories may be found in the U.S. Environmental Protection Agency Supplemental Environmental Projects Policy 2015 Update, available here: [sepupdatedpolicy15.pdf \(epa.gov\)](https://www.epa.gov/sepupdatedpolicy15.pdf)

- c. **Climate Mitigation or Resilience** - A climate mitigation project may promote measures to mitigate the harmful impacts of climate change by reducing greenhouse gas emissions or analyze the life cycle of materials to reduce consumption of natural resources. A climate resilience project may enhance a community's ability to adapt to or cope with the harmful effects of climate change;
 - d. **Pollution Reduction** – Pollution reduction projects reduce the amount and/or danger presented by some form of pollution, often by providing better treatment and disposal of the pollutant;
 - e. **Environmental Restoration and Protection** – Environmental restoration and protection projects improve the condition of the land, air or water. For example, by planting native riparian vegetation, a respondent could improve aquatic habitat by reducing water temperatures. Projects that include plantings must include at least two years of vegetation maintenance;
 - f. **Environmental Compliance Promotion** – Environmental compliance promotion projects provide training or technical support to other members of the regulated community to 1) identify, achieve, and maintain compliance with applicable statutory or regulatory requirements or 2) go beyond compliance with applicable environmental requirements by reducing the generation, release, or disposal of pollutants;
 - g. **Emergency Planning and Preparedness** – Emergency planning and preparedness projects provide assistance to responsible state or local emergency response or planning entities. Such assistance may include the purchase of computers, software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training. This assistance enables these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act (EPCRA).
 - h. **Environmental Education, Training, or Community Outreach** – A project in this category may provide assistance, either through direct contracting or through funding, to prepare, publish, produce, and/or distribute outreach, training, or educational materials on environmental issues significant to Oregon. Examples might include direct training or assistance to an operator of a small community wastewater treatment plant or contribution to environmental inspection training programs conducted by non-profit organizations. Some general educational projects, sponsorship of seminars, tours of environmental controls, or contributions to research at a college or university may not be suitable projects under this category;
 - i. **Other Project Category** – DEQ may consider a potential SEP project that does not fit within one of the categories above but is otherwise consistent with all other provisions of this Directive.
3. The respondent's contribution to the SEP is worth at least as much as the penalty reduction;
 4. The work and the environmental result under the SEP are not otherwise required by statute, rule, permit, or order; and is not set to become a future enforceable requirement as identified by a law, regulation or government register.

5. The portion of the SEP attributable to the penalty reduction will not be funded by state or federal government loans, contracts or grants;
6. In-kind work: if the respondent is doing work itself rather than conferring funds to a third party to do the work, the responsibilities of the respondent under the SEP must be commensurate with the respondent's expertise and capabilities. In addition, penalties for violations done willfully or flagrantly, or violations done by chronic or recalcitrant violators may not be mitigated through the in-kind work of the respondent;
7. The SEP must not call for DEQ to manage or control funds; or to manage or administer the SEP (though it may involve DEQ in an oversight role);
8. The SEP will not necessitate significant DEQ staff time to plan, review, implement, monitor, or follow up;
9. The SEP will not be used to satisfy any statutory or other legal obligation or circumvent any statutory prohibition;
10. The SEP does not create a significant market or economic advantage for the respondent; however, an otherwise acceptable project that has incidental advantage to the respondent may be accepted by appropriately valuing the SEP (see Section 4.3, below); and
11. The SEP must include a Final SEP Report to be submitted to the Department and may include interim reporting.

4.2 Preference criteria

In negotiating settlement of an enforcement order, DEQ staff are encouraged to advocate for the SEP preference criteria listed below. The following criteria help OCE appropriately allocate limited staff resources and advance the interest of environmental justice by promoting meaningful participation by communities in SEP selection and redressing the harm done by non-compliance and pollution on overburdened communities:

1. **Minimum SEP amount** - Generally, OCE staff should not offer SEP penalty mitigation unless the SEP amount is at least \$10,000. However, the penalty mitigated by the SEP may be less than \$10,000 if the violator contributes to a pre-approved project according to section 4.5(2) of this Directive or if the penalty mitigation will induce settlement prior to a contested case hearing.
2. **Contributions in excess of penalty mitigation** - Projects should have a higher monetary value than the penalty reduction, either because the respondent donates additional resources or money beyond the amount of the penalty mitigation or because the respondent or recipient leverages the money to gain additional resources or money for the project;
3. **Nexus** – SEPs should demonstrate a sufficient nexus between the violation and the proposed project. A SEP that has sufficient nexus should address the harm caused by the violation, have relevance to the same environmental program as the violation, and

be implemented in the same geographic area or community where the violation occurred. A project with a sufficient nexus may help address environmental harm to overburdened communities;

4. **Community involvement** – In appropriate cases, DEQ should encourage input on SEP proposals from the local community that may have been adversely impacted by violations. In most cases community input should be sought by the respondent or the respondent and DEQ collaboratively. However, DEQ may seek community input in the absence of the respondent's participation. In addition, where there has been robust community involvement and support for the selected project, DEQ may consider a SEP that has less sufficient nexus to the violation.

Soliciting community input during the SEP development process can: result in SEPs that better address the needs of the impacted community; promote environmental justice; produce better community understanding of DEQ enforcement; and improve relations between the community and the violating facility. DEQ staff should consider the following factors to determine whether a SEP should include community involvement:

- a. Size of the civil penalty – whether the size of the potential SEP contribution is large (in excess of \$100,000) with the potential to fund significant community improvements;
- b. Nature of the violation – whether the violation resulted in excessive pollution that posed harm or a risk of harm to public health or the environment and the local community;
- c. Characteristics of the violator – whether the violator is willing to develop a SEP and respond meaningfully to community involvement (this may be done in partnership with community-based organizations); and
- d. Characteristics of the impacted community – whether the community impacted by the violation is an overburdened community.³

Robust community involvement in the SEP selection process may result in a proposed project that does not have a strong nexus between the type of harm caused by the violation. For example, a project that improves local drinking water conditions may not be connected to air quality violations. In evaluating a SEP application, DEQ staff may prioritize the breadth and depth of community involvement over a strong programmatic nexus.

³ DEQ may use EPA's environmental justice screening tool (EJScreen), any other mapping or screening tool developed by DEQ, or information provided by community members to inform the determination of whether the violation occurred in an overburdened community. Screening level results, such as those produced by EJScreen, do not, by themselves, determine whether an environmental justice concern exists. For more information on EPA's EJScreen please visit [EJScreen: Environmental Justice Screening and Mapping Tool | US EPA](#).

DEQ publishes all Notices of Civil Penalty Assessment and Orders the month following their issuance. However, SEPs are developed in the context of settlement negotiations. DEQ staff must carefully consider how to provide information to the public to facilitate involvement in SEP selection without undermining the non-public nature of settlement negotiations. Staff must act in accordance with the Oregon Public Records Law and prevent from disclosure records that are privileged or confidential, including confidential business information.

4.3 Small community wastewater treatment plant SEPs

DEQ issues civil penalties against both industrial and municipal sources of pollution, including cities that operate wastewater treatment plants. On a case-by-case basis DEQ staff should consider accepting a SEP application for violations at a wastewater collection or treatment facility that does not meet the conditions of Section 4.1(4), (5), and (9) of this Directive if the following small community criteria are met:

1. The respondent is either:
 - a. a city, including areas within a city's urban growth boundary, an urban unincorporated community, service district, or a private non-profit operator of a waste water treatment plant that has or serves a population of 5,000 or less and a median household income less than the state average, or
 - b. a community within the reservation of a federally recognized Indian tribe that is provided with services related to water pollution control by a public agency;
2. the SEP addresses existing effluent violations;
3. the SEP improves the ability of the wastewater facility to comply in the long term, and
4. it is likely that the respondent would not otherwise be financially capable of meeting the requirement that is being violated.

In determining whether to offer a Small Community WWTP SEP and what percentage of the penalty to mitigate, DEQ staff may consider the Respondent's history of non-compliance.

4.4 Determining the amount of penalty mitigation

SEPs are valued by the following method:

1. Add all the qualifying costs of the SEP proposed by the respondent. Qualifying costs are all the reasonable costs of executing the SEP, which may include:
 - a. reasonable costs of preparing an approved SEP proposal;
 - b. costs of materials and services;
 - c. wages (appropriate to the work) paid to a respondent's employees for time spent on the SEP so long as the time is only spent on the SEP and the respondent

documents the days and hours during which the employee worked on the SEP and includes that accounting in its final close-out report;

- d. wages and benefits (appropriate to the work) to employees of a third party executing the SEP ; and
 - e. any other reasonable and proper costs of preparing, organizing, and executing the SEP.
 - f. Under no circumstances may SEP monies be used for entertainment or refreshment costs, including costs to purchase prizes, participation awards or other gifts for participants involved in the execution of a SEP.
2. In cases where the respondent will likely gain an economic benefit from the SEP, DEQ may reduce the value of the SEP accordingly. In making this determination, DEQ may use the US EPA PROJECT computer model or consult other EPA guidance⁴
 3. When a SEP calls for payments to be made in the future, the value of the SEP may be adjusted to reflect the difference in value of present vs. future payments.
 4. Department staff may consider a SEP that might not otherwise meet preference criteria if the value of the SEP exceeds the value of the penalty reduction, or if the SEP has components that benefit the public or environment at large, are innovative, address environmental justice concerns, incorporate community input, or have multimedia benefits.
 5. Determine the final penalty as follows: Determine the settleable penalty which is the dollar value of the penalty after taking into consideration all information and agreements other than the value of the SEP. Subtract the amount respondent will contribute to the SEP from the settleable penalty. Generally, a settleable penalty may not be reduced by more than 80%.⁵

4.5 SEP proposal procedures

1. Case-by-case SEPs
 - a. Proposals for SEPs are solely the responsibility of the respondent and must include the information required on DEQ's SEP application form, including the following:

⁴ The PROJECT model and user's manual can be found at <https://www.epa.gov/enforcement/penalty-and-financial-models> See also EPA's 2003 memo "Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental projects, and How to Value Such Projects" <https://www.epa.gov/sites/default/files/2018-10/documents/seps-profitableprojectstab10.pdf>

⁵ Example: Respondent receives a Notice of Civil Penalty Assessment for \$100,000. During informal discussions, DEQ learns information leading it to reduce the penalty to \$80,000. The maximum penalty mitigation would be 80% of the settleable penalty of \$80,000 (\$64,000). The lowest final penalty, to which DEQ and respondent could agree, would be a final penalty of \$16,000 and an SEP value of at least \$64,000.

- i. (if applicable) A description of the impacted community, its involvement in the SEP selection process, and how that impacted community will benefit from the project;
 - ii. A description of expected benefits and results and how benefits and results will be measured or assessed;
 - iii. A summary of the estimated value of the SEP, listing the costs that will be paid by the respondent and crediting any leveraged amounts that will cover other related costs; and
 - iv. A proposed schedule including milestones for completion, culminating in the submission of a Final Close-out Report to DEQ. Department staff may assist a respondent in identifying possible SEPs. However, staff should not advocate for a particular project or particular SEP recipient of the funds without first obtaining the approval of the Manager of the Office of Compliance and Enforcement. The Manager of the Office of Compliance and Enforcement has sole authority to reduce a penalty with a SEP and to commit DEQ to agreeing to a particular SEP.
- b. A final SEP proposal must be submitted to the Environmental Law Specialist (ELS) handling the case on the SEP application form provided by DEQ. An address and phone number for the ELS will be listed on the cover letter of the Notice of Civil Penalty Assessment and Order.
- c. In determining whether any given SEP proposal fits within this Directive, the ELS may consult with the relevant regional staff or managers, regional solutions staff, or subject matter experts, and DEQ's SEP Coordinator. The SEP Coordinator must evaluate the SEP proposal to determine whether it adheres to the elements of this Directive. A SEP proposal must be approved by the SEP Coordinator and the Manager of the Office of Compliance and Enforcement.

2. Pre-Approved SEPs

- a. At any time a potential SEP recipient may send to DEQ's SEP Coordinator a SEP application for pre-approval via an online form maintained by DEQ. The application for pre-approval must include the following information:
- i. Description of the SEP recipient and organizational contact information,
 - ii. Environmental issue addressed by the project,
 - iii. Description of the project,
 - iv. Project location,
 - v. Description of the environmental benefits of the project, including benefits to overburdened communities, and
 - vi. Estimated cost and timeline of the project.

- b. DEQ will post all pre-approved SEP applications on its website for one year. After one year, if the project still needs funding, the pre-approval applicant may resubmit the project application for pre-approval.
- c. If a Respondent selects a pre-approved SEP, the Respondent and the SEP applicant will have to submit a SEP application according to section 4.5(1) above. Actual SEP amounts may differ from pre-application approval cost estimates.

4.6 SEP settlement procedure

1. A SEP must be accurately and completely described in a Mutual Agreement and Final Order which may incorporate the SEP proposal if the proposal itself provides sufficient detail.
2. The MAO must include the following conditions:
 - a. Respondent must not use the value of a SEP as a tax deduction or as part of a tax credit application;
 - b. Respondent must agree that whenever it or the SEP recipient publicizes a SEP or the results of the SEP, it or the SEP recipient will state in a prominent manner that the project is being undertaken as part of the settlement of an Oregon DEQ enforcement action;
 - c. A requirement for a Final SEP Report to be submitted to DEQ according to a schedule defined in the MAO. The Final SEP Report must include a detailed description of the expenses, copies of relevant receipts, explanation of measurable results, and a certification that the SEP is complete as described in the report. SEPs are not considered complete until DEQ receives a complete Final SEP Report from the respondent; and
 - d. If respondent fails to complete the SEP as required, the penalty will become due (including the portion of the penalty that would have been mitigated because of the SEP, plus statutory interest (currently 9% annual) on the whole amount). At its discretion, DEQ may give credit for a partially completed project; and
 - e. If a project will take more than one year to complete, Respondent must provide DEQ with periodic project implementation reports.
3. DEQ at its discretion may generate a public news release after a MAO is finalized with an approved SEP.

4.7 SEP listening sessions

DEQ's office of Compliance and Enforcement will host at least one SEP listening session per year to promote and expand awareness of the SEP policy, educate potential recipients, and receive community feedback on the implementation of the SEP policy and process. DEQ will make the listening sessions available both virtually and in-person in differing locations around the state. In addition, DEQ will provide advance notice of the listening sessions through

GovDelivery, the SEP webpage, and social media. Interpretive services will be provided upon request.

DEQ will maintain a list of all approved and finalized SEPs on its website.

5. Record of revisions to the directive

Revision	Date	Changes	Editor
Cover page	1/10/13	Add small communities and educational SEPs	Les Carlough
Full directive update	12/7/2023	Substantial changes throughout directive, focusing on environmental justice	Kieran O'Donnell