

# DTSC POLICY MEMORANDUM

NUMBER:

SUBJECT:

DATE ISSUED:

**SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY**

March 2015

REFERENCES:

California Government Code section 65040.12(e); Public Resources Code section 71116; CalEPA Recommended Guidance on Supplemental Environmental Projects (2003); U.S. EPA Supplemental Environmental Projects Policy (1998); California Health and Safety Code section 25180.2; California Health and Safety Code sections 25244.12-25244.23; 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.

## **A. INTRODUCTION AND BACKGROUND**

### **1. Purpose of this Policy**

The purpose of the Department of Toxic Substances Control's (DTSC or Department) Policy on Supplemental Environmental Projects (SEPs) is to identify and articulate the general principles guiding DTSC's use of SEPs. This Policy outlines the Department's priorities for the use of SEPs, lists the permissible categories of projects, establishes an allowable penalty offset for SEPs, and explains the terms and conditions under which SEPs may become part of a final settlement of an enforcement action.

In 2003, the California Environmental Protection Agency (CalEPA) provided a recommended guidance on SEPs. SEPs are environmentally beneficial projects that a defendant/respondent agrees to voluntarily undertake in settlement of an enforcement action. CalEPA's recommended guidance on SEPs was intended to apply to all civil and administrative enforcement actions taken under the authority of the environmental statutes and regulations administered by DTSC and other boards and departments. This Policy is consistent with CalEPA's recommended guidance.

### **2. Importance of Penalties**

DTSC possesses a broad range of enforcement tools including, but not limited to, the issuance of orders imposing administrative penalties, the referral of violations to prosecutors for civil and criminal prosecution, and the settlement of cases. In settlements of enforcement cases, DTSC requires defendants/respondents to achieve and maintain compliance with federal and state environmental laws and regulations, and typically, to pay a monetary penalty. DTSC requires alleged violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the violations. DTSC seeks substantial monetary penalties to deter non-compliance.

Penalties promote environmental compliance and protect public health by deterring future violations. Penalties help promote a level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to maintain compliance.

### **3. Definition of a SEP**

A “Supplemental Environmental Project” means an environmentally beneficial project that a defendant/respondent agrees to undertake or fund in settlement of an enforcement action, which the defendant/respondent is not otherwise legally required to perform. The main components of this definition are outlined below.

“Environmentally beneficial” means a SEP must improve, protect, or reduce risks to public health or the environment at large. While in some cases a SEP may provide an alleged defendant/respondent with certain benefits, there must be no doubt that the project primarily benefits public health and/ or the environment.

“In settlement of an enforcement action” means: (1) DTSC has the opportunity to shape the scope of the project before it is implemented; and (2) the project is not commenced until after DTSC has identified a violation(s), e.g., issued a notice of violation, administrative order, or complaint. Expenditures for a SEP may, in effect, be substituted in part for a penalty as part of a settlement.

“Not otherwise legally required to perform” means the SEP is not required by any federal, state, or local law or regulation or previous administrative or judicial order. Further, SEPs cannot include actions the defendant/respondent is legally required to perform:

- a. As injunctive relief in a legal action that DTSC or another regulatory agency could bring;
- b. As part of an existing resolution in another legal action; or
- c. By a federal, state, or local requirement.

When SEPs are appropriate, they shall be included in an administrative order or a judgment against a defendant/respondent in a judicial action.

The performance of a SEP may not reduce the stringency or the timing of compliance requirements of statutes and regulations, nor may it alter the defendant/respondent’s obligation to remedy a violation expeditiously and return to compliance.

### **4. Benefits of SEPs**

While penalties play an important role in environmental protection by deterring violations, encouraging compliance, and ensuring fairness to law-abiding regulated entities that comply on time, SEPs can play an important role in securing direct and tangible environmental or public health protection, improvements, and benefits for communities, as well as in preventing future harm.

### **5. Use of SEPs in Administrative Orders and Civil Judgments**

To further DTSC’s statutory mandate to protect public health and the environment, SEPs may be included in the settlement of any enforcement action in which administrative or civil penalties are assessed.

DTSC has broad discretion to settle cases, including discretion to include a SEP as an appropriate part of a settlement. Nothing in this Policy should be interpreted or construed as requiring the use of a SEP in the resolution of an enforcement case. A decision to accept a proposed SEP as a part of a settlement as

well as the amount of penalty mitigated for a particular SEP are decisions entirely within DTSC's sole discretion and may depend on the specific facts of a particular case. Even though a given project may appear to satisfy all of the provisions of this Policy, DTSC may decide, for one or more reasons, that a SEP is not appropriate for a particular enforcement matter. SEPs shall consist only of measures that go beyond compliance and the applicable obligations that a defendant/ respondent is already legally required to perform. 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.

## **6. Environmental Justice Priority**

DTSC recognizes that a large number of 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 programs and funding are appropriately directed toward improving the environmental health and economic vitality of disadvantaged communities.

In 2013, CalEPA and the Office of Environmental Health Hazard Assessment released the California Communities Environmental Health Screening Tool (CalEnviroScreen). CalEnviroScreen is a science-based tool for evaluating multiple pollutants and stressors in communities. Various agencies throughout the state now use CalEnviroScreen to prioritize and direct funding to environmental justice communities.

DTSC is required by statute to prioritize an enforcement action affecting communities that have been identified by CalEPA as being the most impacted environmental justice communities. Therefore, DTSC will prioritize the use of SEPs that benefit a community in which potential or actual harm from the violations may have occurred. A community identified within the top 25 percent highest scoring census tracts of the most current version of CalEnviroScreen will receive the highest priority. (California Health and Safety Code section 25180.2.)

## **B. CATEGORIES OF ACCEPTABLE SEPs**

In accordance with U.S. Environmental Protection Agency and CalEPA SEP Policies, a proposed project must satisfy the requirements of at least one of these categories in addition to all of the other requirements established in this Policy.

### **1. 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, and rehabilitation therapy. Public health SEPs are acceptable only when the project primarily benefits the population harmed or put at risk by the violations.

### **2. 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. (After the generation of a pollutant or waste stream, pollution prevention is no longer possible and appropriate recycling, treatment, containment or disposal methods must handle the waste.)

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 the use of 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 considered 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. This decrease achieved directly or through increased efficiency (conservation) in the use of energy, water or other materials is consistent with the Pollution Prevention and Hazardous Waste Source Reduction and Management Review Act (California Health and Safety Code sections 25244.12-25244.23).

### 3. Pollution or Hazardous Waste Reduction

If the pollutant or waste stream is already generated or released, a pollution reduction approach – which employs recycling, treatment, containment or disposal techniques – may be appropriate. 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.

### 4. Environmental Restoration and Protection

An environmental restoration and protection project is one that enhances the condition of the ecosystem or immediate geographic area adversely affected. These projects may be used to 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; provides for the protection of endangered species; or remediates facilities and buildings by removing or mitigating contaminated materials, provided such activities are not otherwise legally required.

### 5. Assessment and Audits

Assessments and audits, if they are not otherwise available as injunctive relief, are potential SEPs under this category. There are three types of projects in this category: a) pollution prevention assessments; b) environmental quality assessments, and c) environmental compliance audits. The defendant/respondent must provide DTSC with a copy of the report, and the results may be made available to the public, except to the extent they constitute confidential business information, pursuant to California Code of Regulations, title 22, section 66260.2.

#### 6. Environmental Compliance Promotion

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

- a. The defendant/respondent may select a project that contracts with an appropriate expert to develop and implement the compliance promotion project. Acceptable projects may include, for example, producing a seminar directly related to correcting widespread or prevalent violations within the defendant/respondent's economic sector; or
- b. The defendant/respondent may select a SEP that supports community-based environmental compliance projects, which may include support of community-based violation reporting networks, community task forces, fence-line monitoring projects, and forums or projects that promote community-based environmental enforcement and reduction of adverse environmental impacts.

#### 7. Enforcement Enhancement

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

#### 8. 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.

#### 9. 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 that are otherwise fully consistent with all other provisions of this Policy.

#### 10. Examples of projects unacceptable as SEPs

The following are examples of the types of projects that should not be allowed as SEPs:

- a. General educational or public environmental awareness projects that do not have a nexus to the community or environmental impacts identified through the enforcement action (e.g., sponsoring general topic public seminars, conducting tours of environmental controls at a facility, or promoting general recycling in a community); and
- b. Conducting a project which, though beneficial to a community, is unrelated to environmental protection (e.g., donating playground equipment.)

### **C. GUIDELINES FOR THE USE OF SEPs IN ADMINISTRATIVE ORDERS AND CIVIL JUDGMENTS**

This Policy applies to all DTSC administrative and civil enforcement actions. Penalties for violations of administrative orders or civil judgments may not be mitigated by the use of SEPs.

The following guidelines apply to SEPs used by DTSC:

1. 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.
2. A project must 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:

- a. The project is designed to reduce the likelihood that similar violations will occur again; or
  - b. The project provides environmental or public health benefits that remediate or reduce the probable overall environmental or public health impacts or risks to which the violation at issue contributes. A SEP may have an adequate nexus even if the benefits provided address a different pollutant in a different medium.
  - c. 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. Where the enforcement case does not have an identified community subject to potential or actual harm from the violations at issue, DTSC will consider projects that benefit an area identified within the top 25 percent highest scoring census tracts of the most current version of CalEnviroScreen.
3. 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.
  4. In general, SEPs should be no more than twenty-five percent (25%) of the total monetary settlement that would be paid as penalties and exclusive of any enforcement costs that are awarded to DTSC.

5. A project cannot be used to satisfy DTSC's or another government agency's statutory obligation to perform a particular activity.

## **D. SEP PERFORMANCE OPTIONS AND LIABILITY TREATMENT**

### **1. SEP Performance Options:**

This Policy provides three options for the performance of SEPs:

- a. SEPs proposed and performed directly by the defendant/respondent;
- b. SEPs paid by the defendant/respondent directly to CalEPA's 14300 Environmental Enforcement and Training Account Program (Penal Code section 14300 et seq.) or CalEPA's Environmental Justice Small Grant Program, as allowed for under Public Resources Code section 71116; and
- c. SEPs performed by a third-party using funds provided by the defendant/respondent. For SEPs performed by a third-party, there are two options:
  - i. SEPs directly performed by a third-party through payments by the defendant/respondent; or
  - ii. SEPs overseen by a qualified Non-Governmental Organization (NGO) through grants to an entity performing the SEP. DTSC may approve an NGO to oversee and re-grant funds for qualifying SEPs if the NGO meets all of the following criteria:
    1. 501(c) (3) status;
    2. Expertise and experience in working with environmental justice communities;
    3. Expertise and experience with grant making and/or project oversight;
    4. Experience working with environmental and public health issues;
    5. Institutional capacity and sufficient geographical service area;
    6. Ability to provide full accountability, tracking, and reporting of project expenditures to DTSC;
    7. Ability to evaluate potential grantees to perform SEPs in conformance with this Policy; and,
    8. Administrative expenses charged by the NGO related to the administration of SEPs are to be no more than 10% of the SEP award.

### **2. Defendant/Respondent Liability for SEP Performance:**

DTSC shall treat and credit the portion of the penalty payment identified for the purpose of a SEP as a suspended liability upon issuance of the administrative order or civil judgment providing for the SEP to the defendant/respondent. Upon satisfactory completion of the SEP in accordance with the terms and conditions of the administrative order or civil judgment as further set forth herein, the liability associated with the SEP will be waived. For a SEP that is directed to CalEPA for deposit into CalEPA's 14300 Environmental Enforcement and Training Account Program or CalEPA's Environmental Justice Small Grants, the payment of the SEP amount to CalEPA shall constitute full satisfaction of the SEP obligation.

The entity implementing a SEP is responsible for prudent conduct and diligent oversight in the performance and oversight of the SEP. If the SEP is not fully implemented in accordance with the terms of the administrative order or civil judgment, or if any costs of DTSC oversight or auditing are not paid, DTSC is entitled to recover the full amount of the suspended liability from the defendant/respondent, less any amount that has been waived based on the timely and successful completion of any interim milestone(s). Full payment of the suspended penalty or a portion thereof shall be in addition to any other applicable remedies for noncompliance with the terms of the administrative order or civil judgment.

#### **E. REQUIREMENTS FOR ADMINISTRATIVE ORDERS OR CIVIL JUDGMENTS AUTHORIZING SEPs**

All administrative orders or civil judgments that include a SEP must, when appropriate:

1. Accurately and completely describe the SEP, including a scope of work, budget, relevant supporting materials, and a reliable, measureable, and objective means to verify timely completion.
2. Require periodic reporting to DTSC on the performance of the SEP by the defendant/respondent to monitor the timely, quantifiable, and successful completion of the SEP.
3. Include a time schedule for implementation with single or multiple milestones that identify the amount of liability that will be permanently suspended or waived upon the timely and successful completion of each milestone.
4. Contain or reference performance standards or indicators of performance in the scope of work.
5. Specify that the defendant/respondent is ultimately responsible for the completion of the SEP.
6. Require that whenever the defendant/respondent, or any organization with whom the defendant/respondent contracts to perform a SEP, publicizes a SEP or the results of a SEP, it will state in a prominent manner that the project is undertaken as part of the settlement of a DTSC enforcement action. Any portion of the penalty liability that is not suspended shall be paid to the appropriate fund or account as authorized by statute.
7. State that failure to complete the SEP as agreed, and in accordance with the terms and conditions of the settlement, will cancel the provisions for suspended penalties for SEPs. The suspended amounts will become immediately due and payable.
8. Require the defendant/respondent to pay the suspended amount(s) to DTSC when due and payable, regardless of any agreements between the defendant/respondent and any third-party contracted to implement or perform the project.
9. Require payment of the costs incurred by DTSC in overseeing the implementation of the SEP as a condition of receiving a written statement of completion described in G., below.

## **F. PROJECT PAYMENT, TRACKING, REPORTING, AND OVERSIGHT PROVISIONS**

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

1. For any SEP that requires oversight by DTSC, the defendant/respondent must cover the full costs of such oversight. If no arrangement for the payment of oversight costs can be made, the SEP shall not be approved.
2. Generally, SEP oversight costs are not costs that should be considered part of the direct cost of the SEP to the defendant/respondent for the purposes of determining the value of the SEP for settlement purposes unless DTSC expressly finds otherwise.
3. Each qualifying organization overseeing the performance of a SEP or managing any SEP funds it receives from a defendant/respondent as described under D.1.c.2. of this Policy must provide DTSC with a written acknowledgment and other appropriate verification and enforceable representation, that SEP funds will be spent in accordance with the terms of the administrative order or civil judgment. The entity performing the SEP must agree to an audit of its SEP expenditures, if requested by DTSC.
4. The defendant/respondent must provide DTSC with a completion report, submitted under penalty of perjury, declaring the completion of the SEP and addressing how the expected outcome(s) or performance standard(s) for the project were met. In cases where a third-party performed or oversaw implementation of the SEP, that third-party may provide the report and the certification.
5. The defendant/respondent shall provide DTSC with a post-project accounting of expenditures. Any SEP project with a budget of \$200,000 or greater shall be subject to an audit. DTSC may 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/respondent and must be performed by an entity acceptable to DTSC.
6. DTSC will not manage or control funds that may be set aside or escrowed for performance of a SEP unless placed in an account authorized by statute or permitted by a control agency over DTSC.
7. DTSC does not have authority to directly manage or administer the SEP.
8. Where appropriate, it is permissible for a SEP funding agreement between a defendant/respondent and third party performing a SEP to require pre-approval of invoices or confirmation of completed work by DTSC before escrowed or set-aside funds are disbursed to the party performing the work.

## **G. COMPLETION OF SEPs**

Upon completion of the SEP in compliance with the terms of the administrative order or civil judgment, DTSC will provide the defendant/respondent with a written statement indicating the SEP has been completed in satisfaction of the terms of the administrative order or civil judgment and that any remaining suspended liability is waived.

## **H. PUBLIC REPORTING OF SEP STATUS INFORMATION**

DTSC will maintain a list of completed SEPs that it has authorized pursuant to enforcement settlements. This list shall be made available on DTSC's website and will be updated annually.

## **I. NON-CONFIDENTIALITY**

In each case in which a SEP is included as part of a settlement, an explanation of the SEP with supporting documents must be included as part of the settlement agreement. Settlement agreements should expressly provide that such SEP documentation is information that may be made available to the public and is not confidential.

DRAFT