

IOWA DEPARTMENT OF NATURAL RESOURCES

SUPPLEMENTAL ENVIRONMENTAL PROJECT GUIDANCE

August 2017

The purpose of this document is to provide general guidance for Iowa Department of Natural Resources (DNR) enforcement staff on the proper use of a supplemental environmental project (SEP) in an administrative consent order (Order) to resolve environmental enforcement actions. This guidance does not create any rights, privileges or obligations in any party.

Whether to include a SEP in an Order, as well as the terms of the SEP, are entirely at the discretion of the DNR.

DNR notes that while various alternatives may be considered as SEPs, given the administrative penalty cap of \$10,000.00, and the prohibition on partial-payment SEPs as explained below, DNR anticipates that most SEPs entered pursuant to this guidance will involve donations to respective County Conservation Boards that have existing agreements with the DNR.

I. Applicability

This guidance applies to administrative enforcement actions taken by the DNR. This guidance is not a rule. This guidance does not apply to any civil or criminal enforcement actions filed or prosecuted by the Iowa Attorney General's Office at the request of the DNR. Further, this guidance is not intended for use by DNR staff or any other person at a hearing or at a trial.

II. Definitions

A SEP is an environmentally beneficial activity which an individual or entity agrees to perform in partial settlement of an enforcement action, but which the individual or entity is not otherwise legally obligated to perform.

An "environmentally beneficial activity" is an activity that reduces the emission or discharge of pollution into the environment or otherwise improves, protects, or reduces risks to public health or the environment.

III. SEP Categories

The DNR anticipates that SEPs included in Orders will authorize a portion of the penalty to be paid as a contribution to County Conservation Boards. Such a SEP would only be authorized if the County has an existing agreement with the DNR to accept and manage such contributions. Further, such contributions must be kept in a separate SEP

account and be used for outdoor projects within the county that will have a lasting beneficial impact on the natural resources and the environment.

Other categories of SEPs may be considered by DNR. These include, but are not limited to: pollution prevention projects, public health projects, environmental restoration and protection projects, and environmental audits.

NOTE: The SEP MUST cover the entire cost of a project. A payment toward completion of a project cannot be considered a SEP. Payment to a county is considered a project.

IV. Criteria for Acceptability

The following criteria are intended to ensure that SEPs are consistent with DNR's core function to enhance the safety and well being of the public through the enforcement of state and federal laws, and are within the respective authorities of, and statutory and constitutional requirements applicable to, the DNR.

1. Enforceability

Performance of a SEP is enforceable in the same manner as any other term or condition of an Order.

2. Geographic Nexus

The SEP should have a reasonable geographic nexus to the violation(s) that prompted the enforcement action.

3. SEP/ Fund Administration

DNR may not exercise or retain any authority to manage or administer a SEP, or play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP.¹

V. SEP Amount

A SEP serves to offset a certain amount of monies that would otherwise be paid to the State of Iowa as part of an administrative enforcement settlement.² A SEP can offset up to 75% of the total penalty. DNR generally authorizes SEPs that offset 50% or less of the total penalty. Note: there may be unique circumstances that allow for a different SEP amount.

¹ DNR may, of course, perform oversight to ensure that a project is implemented pursuant to the provisions of the Order and DNR has legal recourse if the SEP is not adequately performed.

² Claims for stipulated penalties for violations of consent decrees or other settlement agreements should not be mitigated by the use of SEPs.

The amount of this offset is still considered part of the overall settlement figure. For example, if DNR agrees to settle an enforcement case for \$10,000.00, with \$4,000.00 of that amount to be credited for a SEP in lieu of payment to the State of Iowa, then the overall administrative penalty settlement amount remains \$10,000.00. The \$6,000.00 payment to the State of Iowa is the “monetary penalty” and the \$4,000.00 is considered the “SEP amount.” As set forth below, in settlements that include a SEP, the final “monetary penalty” should equal or exceed 25% of the final penalty calculation. The remainder of the final penalty calculation may be offset by a SEP, at the discretion of DNR.

VI. Liability for Performance

Individuals/entities (or their successors in interest) are responsible and legally obligated to ensure that a SEP is completed satisfactorily. An individual/entity may not transfer this responsibility and liability to a third party. However, an individual/entity may use contractors or consultants acceptable to DNR to provide assistance in implementing a SEP.

VII. Public Statements

Any public statement concerning the SEP, including press releases, by the responsible party must reference that the SEP project or payment was required as part of the settlement of an enforcement action initiated by the DNR.

VIII. SEP Oversight and Enforceable Agreements

The Order should accurately and completely describe the SEP and include enforceable provisions and provide completion deadlines.

IX. Failure of a SEP and Stipulated Penalties

If the agreed upon SEP is not completed satisfactorily, the individual/entity should be required, pursuant to the terms of the Order, to pay the appropriate SEP amount to DNR or an alternative administrative penalty amount as specified in the Order.

X. Additional Criteria

Some additional criteria to consider in evaluating SEPs include the following:

1. Compliance history and resources of individual/entity.
2. Performance. The individual/entity must show that it and any intended recipient are ready, willing and able to perform the proposed SEP before any such agreement is presented to the Director.
2. Oversight/Tracking. Additional staff resources may be required to monitor

performance. Every effort should be made to ensure that the individual/entity provides sufficient and timely data to facilitate any required staff oversight/tracking efforts. If third-party oversight is necessary, these costs must be borne by the individual/entity.

Finally, a payment of a SEP to an approved County Conservation Board should include a letter explaining that the payment is a SEP and must be deposited and used in a manner consistent with the Board's agreement with the DNR. Additionally, the letter should request that the Board confirm receipt of the payment via email to the appropriate contact at the DNR.