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POLICY ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS
And SEP Examples

Effective 2/21/2007 (Revised 03/12/09)
ENF-07.001

I. INTRODUCTION

This policy supplements the 1997 Enforcement Response Guidance (ERG), and should be read in conjunction with it. All applicable sections of the ERG, including the definitions at section II therein, are expressly incorporated by reference.

Historically, Supplemental Environmental Projects ("SEPs") have played an important role in MassDEP settlements. In appropriate cases, implementation of a SEP furthers MassDEP's compliance and enforcement goals and provides an increased level of environmental protection.

MassDEP staff can suggest that a violator consider a SEP that is consistent with the guidelines set forth below.

II. DEFINITION AND PURPOSE OF SEPs

SEPs are environmentally beneficial projects, the implementation of which primarily benefits public health, safety and welfare, and the environment.

In settlement of environmental enforcement cases, MassDEP will require regulated entities to achieve and maintain compliance with the environmental laws and regulations administered by MassDEP and may require them to pay an administrative penalty. Penalties play an important role in environmental protection by deterring violations and ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply in a timely manner.

In addition to the assessment of penalties, the performance of SEPs can also play a role in furthering MassDEP's goals to protect public health, safety and welfare, and the environment. SEPs may be particularly appropriate to further the objectives in the statutes administered by MassDEP, and to achieve other policy goals, including the promotion of pollution prevention and environmental justice. In certain enforcement cases, SEPs may be included as an appropriate condition of settlement and, as such, may be considered as a factor in mitigating a penalty.

This settlement policy is not intended for use by MassDEP, regulated entities or administrative law judges at a hearing or in a trial. It does not apply to settlements of claims for stipulated penalties or to the collection of suspended penalties.

III. LEGAL GUIDELINES

A. AGENCY DISCRETION

Acceptance of a SEP as part of a settlement is solely within the discretion of MassDEP. MassDEP is under no obligation to approve any SEP.

B. ADMINISTRATIVE CONSENT ORDER

As an express condition of any SEP approval, the regulated person or entity seeking the SEP will be subject to the terms of an Administrative Consent Order (“ACO”). Provisions of such an ACO will require, inter alia, the timely submission of certain reports required by MassDEP. These may include, for example, SEP designs and SEP implementation plans. ACOs will require timely verification of SEP completion.

C. ‘GEOGRAPHICAL LOCATION’ AND ‘NEXUS’ REQUIREMENTS

Where feasible, a SEP approved by MassDEP must be located in the geographical area where the violations occurred. In addition, any SEP approved by MassDEP must have a sufficient ‘**nexus**’, meaning that it must be substantially related to the type of violation that is the subject of the administrative enforcement action.

- 1) A nexus relationship can be shown where the proposed SEP:
 - a) advances at least one of the declared objectives of the environmental statutes that form the basis of the underlying enforcement action, although a SEP can neither be inconsistent with, nor reduce the stringency or timeliness of requirements of environmental statutes and regulations; and either
 - b) remediate’s or reduces the actual or probable overall environmental or public health impacts or risks to which the violation at issue contributes; or
 - c) is designed to reduce the likelihood that similar violations will occur in the future.

D. AGENCY’S LIMITED ROLE

MassDEP’s role relative to the performance of any SEP is limited. In particular:

- 1) MassDEP can have no role in managing or otherwise administering funds that may be set aside or escrowed for performance of a SEP, although MassDEP retains regulatory authority to oversee a project, ensure that it is implemented pursuant to the provisions of a consent order, and establish a basis for legal recourse if the project is not adequately performed;

