



Montana Department of
ENVIRONMENTAL QUALITY

Judy H. Martz, Governor

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MEMORANDUM

TO: Senator McNutt, Chairman
Environmental Quality Council

FROM: John Arrigo, Administrator 
DEQ Enforcement Division

DATE: August 30, 2004

SUBJECT: Proposed DEQ Supplemental Environmental Projects Policy

You requested that DEQ outline a proposed policy for Supplemental Environmental Projects (SEPs) and explain how DEQ may deviate from the policy. DEQ hopes to have legislation introduced to establish its ability to accept SEPs in lieu of cash penalty payments. Highlighted language in the attached proposed bill states: "The department of environmental quality may accept a supplemental environmental project as mitigation for a portion of the penalty." If this legislation is passed, DEQ anticipates writing rules to govern the penalty calculation process for the environmental laws administered by DEQ.

SEPs are usually discussed in cases where the penalty is greater than \$10,000. Most of the SEPs accepted by DEQ have occurred in settlement of Clean Air Act and Water Quality Act enforcement actions. However, SEPs have also been accepted in Asbestos Control Act, Hazardous Waste Act, Solid Waste Management Act and Sanitation in Subdivisions Act cases. Of the total of 280 cases processed under these six laws since 1996, 24 SEPs have been approved. These SEP projects mitigated a total of \$3.3 million in assessed penalties with projects worth \$5.3 million, for a net gain of \$2 million. DEQ recommends that SEP guidelines be written as a Department policy. The proposed policy will generally follow EPA's policy and contain the following elements:

Outline of Proposed DEQ SEP Policy

A. Definition

A SEP is an environmentally beneficial project, which is not otherwise legally required, that a violator conducts in lieu of paying a portion of a cash penalty assessed for environmental violations. SEPs cannot be conducted to fulfill any statutory, regulatory or permit requirement.

B. Project Guidelines

1. Cannot be inconsistent with the provisions of any environmental statute.
2. Must advance at least one objective of an environmental statute.
3. Should have a nexus in at least one of the following areas:
 - a. Designed to reduce the likelihood that similar violations will occur;
 - b. Reduces an adverse impact or risk to public health or the environment; and/or
 - c. Impact of the project is within the area of the violation.

4. DEQ may not play a role in managing or controlling funds or retain authority or control over the project.
5. Project cannot be used to satisfy DEQ's statutory obligation.
6. Cannot provide DEQ with additional resources to perform a legislatively mandated activity.
7. Cannot provide additional resources to support activities performed by DEQ employees or contractors.
8. Cannot provide DEQ grantee with additional funds to perform a task identified within an assistance/service agreement.

C. Acceptable SEP Projects

1. Public Health.
2. Pollution Prevention.
3. Pollution Reduction.
4. Environmental Restoration and Protection.
5. Assessments or Audit.
6. Environmental Compliance Promotion.
7. Emergency Planning and Preparedness.

D. Unacceptable SEPs

1. General public education or public environmental awareness projects.
2. Contributions to environmental research at a college or university.
3. Projects that are beneficial to the community, but not related to environmental protection – e.g., making a contribution to a non-profit or charitable organization.
4. Studies or assessments without a requirement to address the problems identified in the study.
5. Projects conducted with the assistance of state or federal grants or loans.

E. Implementation Guidelines

1. Policy does not create a right to conduct a SEP to mitigate a cash penalty.
2. Opportunity for a SEP may be offered after settlement penalty is finalized. Generally, this would only be offered when the penalty is greater than \$10,000. Violator is normally responsible for proposing a SEP, but DEQ may propose a project. DEQ cannot mandate a particular project or be responsible for project management.
3. Cash component of penalty: Equal to the economic benefit or 25% of penalty, whichever is greater.
4. Value of SEP to penalty mitigation ratio shall be no less than 1.5 to 1.
5. SEP project must be described in an enforceable agreement, typically an administrative order on consent or a consent decree.
6. No separate legal analysis of SEPs (DEQ attorneys are involved in negotiations and review and approve all settlements).
7. No general public review of SEPs. Consultation with community officials will occur as needed to implement a SEP.

F. Acceptable Deviations

1. DEQ may deviate from the policy on a case-by-case basis in the following areas:
 - a. Percent of cash payment required (minimum 10%)
 - b. Penalty mitigation ratio; and
 - c. Nexus.
2. Degree of deviation will depend upon the factors listed below:
 - a. Violator is a federal, state or local government entity, or a nonprofit organization.
 - b. Project is considered outstanding because:
 - i. The project provides a high level of pollution reduction or elimination;
 - ii. Cost of the project is high compared to the mitigated penalty; or
 - iii. The project provides a direct benefit desired by the local community or provides statewide benefits.
3. The rationale for any deviation will be documented in writing by DEQ.

Attachment

Proposed draft legislation that contains authorization for DEQ to accept Supplemental Environmental Projects

NEW SECTION. Section 1. Penalty factors. (1) In determining the amount of an administrative or civil penalty assessed under the statutes listed in subsection (4), the department of environmental quality or the district court, as appropriate, shall take into account the following factors:

- (a) the nature, extent, and gravity of the violation;
 - (b) the circumstances of the violation;
 - (c) the violator's prior history of violations. To be considered as "prior history", a violation:
 - (i) must be a violation of a requirement under the authority of the same chapter and part as the violation for which the penalty is being assessed;
 - (ii) must be documented in an administrative or judicial order issued within three years prior to the date of the occurrence of the violation for which the penalty is being assessed; and
 - (iii) must not, at the time the penalty is being assessed, be undergoing or subject to administrative appeal or judicial review;
 - (d) the economic benefit or savings resulting from the violator's action;
 - (e) the violator's good faith and cooperation;
 - (f) the amounts voluntarily expended by the violator, beyond what is required, to address or mitigate the violation or impacts of the violation; and
 - (g) other matters that justice may require.
- (2) After the amount of a penalty is determined under (1), the department of environmental quality or the district court, as appropriate, may consider the violator's financial ability to pay the penalty, and may institute a payment schedule or suspend all or a portion of the penalty.

(3) The department of environmental quality may accept a supplemental environmental project as mitigation for a portion of the penalty.

(4) This section applies to penalties assessed by the department of environmental quality or the district court under the following sections: 75-2-401, 75-2-413, 75-2-514, 75-2-515, 75-5-611, 75-5-631, 75-6-114, 75-10-228, 75-10-417, 75-10-424, 75-10-542, 75-10-711, 75-10-714, 75-10-1222, 75-10-1223, 75-11-223, 75-11-516, 75-11-525, 75-20-408 and 76-4-109, MCA.

(5) The board of environmental review and the department of environmental quality may adopt rules to implement this section, for the statutes listed in subsection (4) for which each has rulemaking authority.