



## GUIDANCE DOCUMENT ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

(Approved October 27, 2011)

### **Summary:**

This guidance document specifies the process for evaluating supplemental environmental project (SEP) proposals, for calculating the proposed mitigation of civil charges or civil penalties in connection with a proposed SEP, and for reviewing and documenting SEP performance.

### **Electronic Copy:**

An electronic copy of this guidance document is available in PDF format on the Regulatory Town Hall website at <http://townhall.virginia.gov/> under the “Guidance documents” tab (see Virginia Soil and Water Conservation Board).

### **Contact Information:**

Please contact Anne Crosier, Stormwater Enforcement Manager, Virginia Department of Conservation and Recreation (DCR), at [anne.crosier@dcr.virginia.gov](mailto:anne.crosier@dcr.virginia.gov) with any questions regarding this guidance.

### **Disclaimer:**

This guidance document is provided as guidance and, as such, sets forth the process for the Virginia Soil and Water Conservation Board (the Board) and DCR in administering SEPs. The guidance does not carry the force of law and is not intended, and cannot be relied on, to create any rights, substantive or procedural, on the part of any person or entity. DCR reserves the right to modify the guidance at any time without public notice. In addition, DCR may deviate from the guidance as it deems necessary to carry out the intent of the laws and regulations DCR is charged with enforcing.

## **Supplemental Environmental Projects**

### **I. Background:**

A regulated party may perform a SEP as part of a settlement provided for in an administrative order, or court-ordered consent decree (See Section III, Authority). A SEP may mitigate a portion of the civil charge or civil penalty that otherwise would be required as part of a settlement. This document has been prepared to provide guidance on all aspects of the SEP process.

### **II. Definitions:**

A “supplemental environmental project,” or “SEP,” means an environmentally beneficial project undertaken as partial settlement of a civil enforcement action and that is not otherwise required by law. SEPs are required to have a reasonable geographic nexus to the alleged violation or violations included in the settlement, except that, if no such project is available, the SEP shall

advance at least one of the declared objectives of the environmental law or regulation that is the basis of the enforcement action.

“Environmentally beneficial” means a SEP should improve, protect, or reduce risks to, public health or the environment, or both.

"As partial settlement of a civil enforcement action" means that a SEP may be used in an administrative consent order or court-ordered consent decree to settle alleged past violations of laws and regulations DCR is charged with enforcing. If a SEP is part of a settlement, the SEP must be independent of any corrective action that otherwise may be required; the SEP may offset only a portion of the civil charge or penalty; and the regulated party may not have begun a project proposed as a SEP before the SEP is approved.

“Not otherwise required by law” means the SEP is not required to be performed by the regulated party, nor required to be performed by another party, under any federal, state, or local statute, regulation, ordinance, order, or permit condition. A SEP may not be part of the injunctive relief in the order or decree nor a requirement in any other legal action.<sup>1</sup>

“A reasonable geographic nexus to the violation” means that the project should benefit the “general area” in which the underlying violation occurred (*e.g.*, immediate geographic area, same river basin, same planning district, same TMDL watershed, or same ecosystem, generally not to exceed 50 miles from the location of the violation without justification). All SEPs should be performed in the Commonwealth and benefit public health, the environment, or emergency planning and preparedness, or all of the categories.<sup>2</sup>

### **III. Authority:**

Pursuant to VA CODE ANN. § 10.1-104.5.B, the Board or the Director of DCR (the Director) acting on behalf of the Board or under the Director’s own authority in issuing any administrative order, or any court of competent jurisdiction as provided for under the Code of Virginia, may, in the Board or the Director’s discretion and with the consent of the person subject to the order, provide for such person to undertake one or more supplemental environmental projects. The project shall have a reasonable geographic nexus to the violation or, if no such project is available, shall advance at least one of the declared objectives of the environmental law or regulation that is the basis of the enforcement action. Performance of such projects shall be enforceable in the same manner as any other provision of the order.

Pursuant to VA CODE ANN. § 10.1-104.5.C, the categories of projects that may qualify as SEPs, provided the project otherwise meets the requirements of this section, are public health, pollution prevention, pollution reduction not otherwise required by law or regulation,

---

<sup>1</sup> A SEP will not be invalidated after the fact if the party responsible for implementing the SEP becomes subject to legal obligations requiring the activities, if the party was reasonably unaware of such obligations at the time of the SEP approval.

<sup>2</sup> If no project that otherwise would qualify as a SEP is available within the geographical area of the violation, a project located outside the area still may be acceptable as a SEP if the project would advance at least one of the declared objectives of the applicable environmental law or regulation.

environmental restoration and protection, environmental compliance promotion, and emergency planning and preparedness.

In determining the appropriateness and value of a SEP, the enforcement authority shall consider the net project costs; benefits to the public or the environment; innovation; impact on minority or low income populations; multimedia impact; and pollution prevention. The costs of those portions of a SEP that are funded by state or federal low-interest loans, contracts or grants shall be deducted from the net project cost in evaluating the project. In each case in which a SEP is included as part of a settlement, an explanation of the project with any appropriate supporting documentation shall be included as part of the case file. (VA CODE ANN. § 10.1-104.5.C.)

Pursuant to VA CODE ANN. § 10.1-104.5.D, nothing in the enabling legislation shall require the disclosure of documents exempt from disclosure pursuant to the Virginia Freedom of Information Act (VA CODE ANN. §2.2700, et seq.).

Pursuant to VA CODE ANN. § 10.1-104.5.E, any decision whether or not to agree to a SEP is within the sole discretion of the Board, Director, or court and shall not be subject to appeal.

Pursuant to VA CODE ANN. § 10.1-104.5.F, nothing in the enabling legislation shall be interpreted or applied in a manner inconsistent with applicable federal law or any applicable requirement for the Commonwealth to obtain or maintain federal delegation or approval of any regulatory program.

#### **IV. Discussion and Interpretation:**

Any decision whether or not to agree to a proposed SEP is within the sole discretion of the Board, the Director, or the court, and is not subject to appeal. Once a SEP is incorporated into an order, performance of the SEP is “enforceable in the same manner as any other provision of the order.”

##### **A. SEP Review**

Any regulated party subject to an order or decree may choose to submit a complete SEP proposal as part of the settlement process after the civil charge or penalty amount is designated. The attached form (for official use) entitled, “Analysis of Proposed Supplemental Environmental Project”, (See Attachment 1) includes an equation for calculating the civil charge mitigation and a recommendation whether or not to approve the SEP.

##### **B. Categories of Projects that May Qualify as SEPs**

The six categories of projects that may qualify as SEPs are public health, pollution prevention, pollution reduction, environmental restoration and protection, environmental compliance promotion, and emergency planning and preparedness. Below are categories of projects and lists of examples that may qualify as SEPs. In order to be approved as a SEP, a project should satisfy the requirements of at least one category listed below and meet all of the statutory requirements set out in the Definitions and Authority sections.<sup>3</sup>

---

<sup>3</sup> The lists of examples in this section do not constitute an endorsement, recommendation, or pre-approval of any specific project or type of project. Some types of projects that would not qualify as SEPs are included at the end of the section.

## **1. Public Health**

A public health project provides diagnostic, preventive, or remedial health care related to the actual or potential damage caused by the alleged violation. Public health SEPs are acceptable only if the primary beneficiary of the project is the population that was harmed or put at risk by the alleged violation.

Examples of potential public health projects include, but are not limited to, the following projects:

- Epidemiological data collection and analysis;
- Medical examinations of potentially affected persons;
- Collection and analysis of blood/fluid/tissue samples;
- Medical treatment and rehabilitation therapy;
- Repair private sanitary sewer service lines in low income areas (e.g., lines for septic systems, privately-owned treatment systems, etc.); and
- Provision of drinking water supply in low income areas.

## **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 that is entering any waste stream or that otherwise is being released into the environment, prior to recycling, treatment, or disposal.) Some pollution prevention projects protect natural resources through conservation or increased efficiency in the use of energy, water, or other materials. "In-process recycling" (the return of waste materials produced during a manufacturing process directly to production as raw materials on-site) qualifies as pollution prevention.

For a project to meet the definition of pollution prevention there should be an overall decrease in the amount of pollution released into the environment or an overall decrease in pollution toxicity.

Examples of potential pollution prevention projects include, but are not limited to, the following types of projects:

- Implementing an Environmental Management System (EMS) for construction sites with a pollution prevention component, if the EMS conforms to the criteria described in the Virginia Environmental Excellence Program (VEEP) or in a comparable standard, such as International Organization for Standardization (ISO) 14001;

- Establishing a minimum of a 35-foot permanent riparian buffer for areas not required to meet permit conditions or in order to be compliant with the Chesapeake Bay Preservation Act (e.g., planting native herbaceous grasses and flowers as well as deep-rooted shrubs and trees on land adjacent to a stream in order to prevent sediment, nitrogen, phosphorus, pesticides and other pollutants from entering the stream);
- Implementing low impact development (“LID”) design in site planning in the pre-development phase of construction to conserve natural resources and ecosystems (e.g., incorporate LID integrated management practices to reduce storm water runoff including decreasing impervious surfaces, curb and gutters; decreasing the use of storm drain piping and inlet structures; increasing the use of open swales, flatter slopes, rain gardens; and eliminating or decreasing the size of large stormwater ponds.) Such practices shall have maintenance agreements where appropriate;
- Harvesting rain by installing and maintaining systems in which rain water is collected and then used for irrigation (e.g., large outdoor shopping centers could use rainwater retention ponds to water landscaping) or other allowable uses for areas not required to meet permit conditions or in order to be compliant with the Chesapeake Bay Preservation Act; and
- Barring or removing livestock access to riparian zone (e.g., installing fence between pastureland and riparian zone to keep grazing livestock out of the riparian buffer and stream). The practice shall be built in accordance with DCR’s Virginia Agricultural BMP Cost-share Program Standards and Specifications ([http://www.dcr.virginia.gov/stormwater\\_management/costshar.shtml](http://www.dcr.virginia.gov/stormwater_management/costshar.shtml)). Any nutrient “credits” shall be retired.

Pollution prevention studies without a commitment to implement the results are not acceptable as SEPs. At the discretion of the Board or the Director, a party subject to a proposed order or decree may conduct a pollution prevention study during the negotiation process to identify an acceptable project.

### **3. Pollution Reduction**

If the pollutant or waste stream has already been generated or released, a pollution reduction project that employs recycling, treatment, containment, or disposal techniques may qualify as a SEP. A pollution reduction project decreases the amount or toxicity of any hazardous substance, pollutant, or contaminant by means that do not qualify as pollution prevention.

“Out-of-process recycling” is an acceptable pollution reduction approach and may be achieved by installing more effective end-of-process control or treatment technology.

No reduction project can be used as part of permit compliance efforts and no SEP can be used to generate tradable credits.

Examples of potential reduction projects include, but are not limited to, the following types of projects:

- Installing enhanced erosion and sediment control practices (e.g., install “faircloth skimmers” in sediment basins; biodegradable barriers)
- Enhancing an existing post-closure stormwater Best Management Practice (“BMPs) to improve efficiency (e.g., adding wetland plants and habitat to an existing wet pond);
- Restoring wetlands to reduce pollution (return wetlands from degraded or altered condition to original condition using established principles and practices of wetlands restoration);
- Protecting shorelines with structural controls, vegetation, or other approved methods to reduce erosion and sedimentation (e.g., planting native herbaceous grasses and flowers as well as deep-rooted shrubs and trees on land adjacent to a shoreline);
- Employing retrofit techniques, including LID strategies, to existing urban development to control stormwater runoff (e.g., uniform distribution of LID micro-scale management controls for small infiltration, storage, and retention and detention measures throughout the developed landscape including BMPs such as rain barrels, rain gardens, porous pavers, and vegetative filter strips and buffers to mitigate the impacts of development by reducing stormwater runoff and pollutant loading). Such practices shall have maintenance agreements where appropriate;
- Conducting study for financing and developing a stormwater utility program with commitment to implement a recommended alternative (e.g., contracting with consultant to perform study to identify and analyze adequate revenue sources to reliably support stormwater program and to implement a storm water utility and impact fee program);
- Installing water or sewer lateral lines in MS4 jurisdictions for private homeowners if other party has responsibility for connecting residences; and

#### **4. Environmental Restoration and Protection**

Environmental restoration and protection projects include projects that go beyond repairing the damage caused by the violation (i.e., the damage that can be corrected through injunctive relief in an order or decree). Environmental restoration and protection SEPs may also be used for enhancing a site to “better-than-baseline” conditions (e.g., restoration or protection of ecosystems or endangered or rare species or communities).

No environmental restoration or protection project can be used to generate transferable nutrient, wetlands, or stream restoration credits.

Examples of potential environmental restoration and protection projects, include, but are not limited to, the following types of projects:

- Installing or funding BMPs such as septic system replacements, stream restoration, or livestock exclusion in watersheds with TMDL implementation plans, TMDLs, or water quality impairments. Such practices shall have maintenance agreements where appropriate and be designed to specified standards (please see Virginia Agricultural BMP Cost-share Program Standards and Specifications);
- Implementing voluntary agricultural BMPs at businesses, particularly small businesses;
- Rehabilitating riparian buffers to restore natural stream function and aquatic habitats (e.g., reestablishing native herbaceous grasses and flowers as well as deep-rooted shrubs and trees on land adjacent to a stream in order to prevent sediment, nitrogen, phosphorus, pesticides and other pollutants from entering the stream);
- Restoring streams (e.g. use natural channel design to reduce streambank and channel erosion);
- Restoring wetlands to protect sensitive ecosystems (e.g., return wetlands from degraded or altered condition to original condition using established principles and practices of wetlands restoration including incorporation of wildlife enhancement techniques);
- Conducting fish tissue studies in the watershed that was adversely affected or in a study area of statewide importance;
- Purchasing and managing a watershed area to protect a drinking water supply under an open space or conservation easement or other protective mechanism;
- Restoring floodplains (e.g., restore a river's floodplain to its original condition or before the floodplain was affected by development, construction, and draining of wetlands and marshes);
- Restoring or creating fish or other aquatic habitat (e.g., re-establish oyster beds, remove invasive plant species, or design and install fish ladders or fish way structures to enable fish to bypass a dam and reestablish natural fish migrations);

- Restoring habitats for endangered or rare species or restoring natural communities as recognized by the Department's Division of Natural Heritage ([http://www.dcr.virginia.gov/natural\\_heritage/nchome.shtml](http://www.dcr.virginia.gov/natural_heritage/nchome.shtml)); and
- Establishing conservation easements of land to be maintained in perpetuity in its original condition (e.g., farmland, open space, forest, etc.) in order to continue to serve as a natural treatment system to protect sensitive or critical ecosystems by buffering the effects of development.

When a party has agreed to restore and protect certain lands, a question may arise whether a SEP may include the creation or maintenance of recreational improvements, such as hiking and bicycle trails. The costs associated with such recreational improvements may be included in the total SEP cost provided the recreational elements do not impair the proposed project's environmentally beneficial purposes, and provided the recreational elements constitute only an incidental portion of total resources spent on the project.

### **5. Environmental Compliance Promotion**

An environmental compliance promotion project provides training, technical support, or education to other members of the regulated community or the general public, or both, with respect to monitoring, identifying, reporting, achieving, and maintaining compliance with applicable statutory and regulatory requirements.<sup>4</sup>

Environmental compliance promotion SEPs should focus on the same regulatory program requirements that were allegedly violated. If the party proposing the SEP lacks the experience, knowledge, or ability to implement the project itself, the party may arrange with an appropriate expert to develop and implement the compliance promotion project.

Examples of potential compliance promotion projects include but are not limited to, the following types of projects:

- Producing or sponsoring a seminar for the regulated community within the construction industry directly related to correcting widespread or prevalent noncompliance with the Virginia Stormwater Management Program and Regulations;
- Producing or sponsoring a workshop or media production directly related to BMP implementation in watersheds with TMDL implementation plans, TMDLs, or water quality impairments;
- Producing or sponsoring a seminar to educate the public or local residents on pollution prevention and maintenance of on-lot LID BMPs in communities where LID BMPs are in-place and to promote citizen stewardship, awareness, and participation in environmental protection programs;

---

<sup>4</sup> If the training or level of proficiency is required as part of a regulation, permit or order, it does not qualify as a SEP.

## **6. Emergency Planning and Preparedness**

An emergency planning and preparedness project provides assistance to a responsible state or local emergency response or planning entity. Such projects enable organizations to fulfill their obligations under federal law to collect information and assess the dangers of hazardous chemicals at facilities within their jurisdiction, to train emergency response personnel, and to better respond to chemical spills or provide enhanced safety for the public living downstream of impounding structures or within areas subject to flooding.

The need that would be addressed by the project should be identified in an approved emergency response plan as an additional, otherwise unfunded resource necessary to implement or exercise the emergency plan in accordance with Section 303 of the federal Emergency Planning and Community Right-to-Know Act (EPCRA).

Examples of potential emergency planning and preparedness projects include, but are not limited to, the following types of projects:

- Funding the purchase of equipment needed for mass casualty trailers as identified in an approved emergency response plan;
- Funding expenses associated with training for hazardous materials (HAZMAT) personnel (i.e., tuition, lodging, and travel) as identified in an approved emergency response plan; and
- Funding the purchase of computers and software, communication systems, chemical emission detection and inactivation equipment, or other HAZMAT equipment as identified in an approved emergency response plan.

Dam safety and floodplain management projects that enhance public safety may be considered. Examples include, but are not limited to, the following types of projects:

- Funding the installation of a reverse 911 system for the local emergency responders to be able to warn residents at risk in case of an imminent dam failure; and
- Funding the installation of an Integrated Flood Observing and Warning System (IFLOWS) on the dam to be able to determine remotely if the rainfall exceeds the threshold of the dam to safely pass the storm and provide an early warning of a potential dam failure.

### **C. Unacceptable Projects**

Projects that are not acceptable SEPs (unless meeting the requirements of one or more of the categories above) include, but are not limited to, the following types of projects:

1. General educational projects with little or no discernable environmental benefit (e.g., conducting tours of environmental controls at a facility, donating museum equipment, and educating the public on steps taken by industry to reduce pollution);
2. Contributions toward environmental research to a college or university without ensuring that the subject of the research will have an appropriate nexus to the impacted community or ecosystem, or the underlying violation;
3. Conducting a project, which, though beneficial to a community, is unrelated to a discrete advancement of environmental compliance, restoration, or protection (e.g., making a contribution to charity for a non-specific purpose, or donating playground equipment);
4. Studies undertaken without a commitment to implement the results or address specific environmental problems;
5. Any project that otherwise will be undertaken by the Commonwealth, a local government, or the federal government, or that is legally required of another party;
6. Any project that would be required as part of a TMDL allocation being implemented pursuant to a permit; and
7. A project or projects, to be identified later, for which the regulated party agrees to spend a certain sum of money (i.e., after the order or decree is issued).

#### **D. Statutory Factors for Evaluating SEP Proposals**

In determining the appropriateness and value of a proposed SEP, the Board, the Director, or the court should consider the net project costs, the benefits to the public or the environment, the impact on minority or low income populations, the multimedia impact, whether the project is innovative, and whether the project incorporates and implements pollution prevention measures.

##### **1. Net Project Costs**

The regulated party should provide an accounting of the net present value after-tax cost of the SEP, including tax savings, grants, and first-year cost reductions and other efficiencies realized by virtue of project implementation. If the proposed SEP is for a project for which the party will receive an identifiable tax savings (e.g., tax credits for pollution control or recycling equipment), grants, or first-year operation cost reductions or other efficiencies, the value of the SEP should be reduced by those amounts.<sup>5</sup>

---

<sup>5</sup> The costs of the portions of SEPs that are funded by state or federal low-interest loans, contracts, or grants shall be deducted from the net project cost in evaluating the project. (VA CODE ANN. § 10.1-104.5.C.)

Unless the Board, Director, or court specifies the accounting documentation, the regulated party may provide an accounting of the SEP's net project cost in one of several ways, including but not limited to, the following forms:

- An itemized cost statement or spreadsheet, accompanied by a certification from a certified public accountant, that the cost statement represents net project costs, as described above;
- An itemized cost statement or spreadsheet, including invoices or similar documentation, accompanied by a certification by a responsible corporate officer that the total cost represents the net project costs, as described above;  
or
- Detailed, documented cost estimates using the EPA computer model PROJECT to calculate the net project costs.

A copy of the PROJECT software and the user's manual can be downloaded from EPA's financial analysis computer models web page at <http://www.epa.gov/compliance/civil/econmodels/index.html>. To employ PROJECT, the user needs reliable estimates of the costs and savings associated with the SEP's performance. If the PROJECT model reveals that a project would have a negative cost, the SEP would represent a positive cash flow for the regulated party and, as a profitable project, such a project generally would not be acceptable as a SEP.

## **2. Benefits to the Public or the Environment**

This factor evaluates the extent to which a proposed SEP will significantly and quantifiably reduce discharges of pollutants to the environment, reduce risk to the general public, provide measurable progress in protecting and restoring ecosystems, including wetlands and endangered or rare species or communities, and facilitate compliance. Community involvement in SEP development or performance increases the benefits to the public.

## **3. Impact on Minority or Low-Income Populations**

This factor evaluates the extent to which a proposed SEP mitigates damage or reduces risk to minority or low-income populations that may have been disproportionately exposed to pollution or that are at environmental risk.

## **4. Multimedia Impact**

This factor evaluates the extent to which a proposed SEP provides environmental benefits in more than one medium.

## **5. Innovation**

This factor evaluates the extent to which a proposed SEP further develops and implements innovative processes, technologies, or methods, including, but not limited to, "technology forcing" techniques that may establish new regulatory

"benchmarks" that would be more effective, and include, but are not limited to, projects that:

- Reduce the generation, release, or disposal of pollutants;
- Conserve natural resources;
- Restore and protect ecosystems;
- Protect endangered or rare species or communities; or
- Promote compliance.

#### **6. Pollution Prevention**

This factor evaluates the extent to which a proposed SEP incorporates and implements pollution prevention techniques and practices.

#### **E. Calculating the Civil Charge Mitigation**

No SEP should be approved until after the civil charge or penalty is calculated. The mitigation amount for a particular SEP is wholly within the discretion of the Board, Director, or court. Generally, if an order includes a SEP, DCR should recover, as a civil charge or penalty, the greater of the ascertainable economic benefit of noncompliance plus 10 percent of the gravity-based portion of the civil charge or 25 percent of the gravity component of the civil charge. The remainder of the calculated civil charge may be mitigated by a SEP, at the discretion of the Board, Director or court.<sup>6</sup> Additional details regarding the calculation of such charges or penalties may be found in the Stormwater Management Enforcement Manual which may be found at [http://www.dcr.virginia.gov/stormwater\\_management/stormwat.shtml](http://www.dcr.virginia.gov/stormwater_management/stormwat.shtml).

#### **F. Approval or Disapproval of the SEP**

Pursuant to VA. CODE ANN. §10.1-104.5.E, any decision whether or not to agree to a supplemental environmental project is within the sole discretion of the Virginia Soil and Water Conservation Board, Director, or court and shall not be subject to appeal.<sup>7</sup>

#### **G. SEP Incorporation into a Consent Special Order**

The terms of the SEP are enforced through incorporation into an administrative consent special order or court-ordered consent decree. The order or decree should include a thorough description of the SEP's specific requirements, a schedule for completing the requirements, and the intended benefits to be achieved. In addition, the order or decree

---

<sup>6</sup> In cases involving government entities or quasi-government entities (e.g., authorities), if circumstances otherwise warrant; or if the proposed SEP would be expected to provide outstanding environmental benefits (e.g., pollution prevention projects, voluntary non-point source BMP implementation for impaired waters, or land conservation and preservation), the Board or the Director may allow for a greater percentage of the civil charge or penalty to be offset.

<sup>7</sup> For example, the Board or the Director may choose not to approve a SEP under circumstances where the cost of DCR's review of the proposed SEP or the oversight costs are disproportionately high with respect to the anticipated benefits of the SEP.

should require a final report certified by an officer of the company documenting that the SEP is completed and the SEP's final costs.

A third party may perform the work under certain circumstances (i.e., a contribution is made to a business or other organization to fund a specific project).<sup>8</sup> The order or decree should require that the regulated party subject to its terms remain responsible for satisfactory completion of the SEP and that a third party's failure to complete the SEP shall trigger the regulated party's obligation to pay the full amount of the original civil charge or penalty.<sup>9</sup>

Finally, the order or decree should require that the regulated party clearly state that the SEP is being undertaken as part of the settlement of the enforcement action, if the regulated party publishes information related to the SEP.

The SEP is advertised for public notice and comment with the proposed formal enforcement action (e.g., administrative consent order or court-ordered decree). The advertisement is placed in a local newspaper (i.e., within the jurisdiction where the alleged violation or violations that are the subject of the enforcement action occurred) and the Virginia Register. The public notice and comment period is 30 days.

#### **H. Enforceability**

Once the administrative or judicial order is executed, the SEP is enforceable in the same manner as any other provision of the order. The regulated party is responsible for the SEP. If a third party is responsible for performing the work on the SEP, an officer or other official of the party subject to the order may also be a current officer of the third party performing the SEP. In such a case, DCR should note this fact in the SEP Analysis Addendum (see Attachment 1) and any public notice and comment materials.

The party should verify to the Board or the Director, as applicable, the completion of the project and the final net project costs, along with proof of payment. The final verification may be in the form of a CPA certification or certification from a responsible corporate officer or owner. Once the party has submitted its final report, the determination of whether the SEP has been satisfactorily completed is in the sole discretion of the Board, the Director, or the court.

If the final cost of the SEP is less than the mitigation amount, the difference that is not offset must be paid to the Commonwealth, unless an alternate or additional SEP is agreed to, including any modifications to the order and any required public notice.<sup>10</sup>

---

<sup>8</sup> It is preferable that the regulated party subject to the order perform the work on the SEP.

<sup>9</sup> The order or decree should provide a schedule for payment of the additional civil charge or penalty under circumstances where the SEP is either not undertaken or is not completed.

<sup>10</sup> If the SEP is satisfactorily completed and the party has spent at least 90 percent of the projected net project costs on the project, payment of the difference may be waived upon receipt of written approval from the Board, the Director, or the court.

**I. Case Files and Database Documentation**

VA CODE ANN. §10.1-104:C provides that (“...an explanation of the project with any appropriate supporting documentation shall be included as part of the case file.” The explanation should include a completed and approved SEP Analysis Addendum and documentation of net project costs (including the PROJECT Model printout, if applicable). The documentation also should include the SEP proposal and any periodic and final reports.<sup>11</sup>

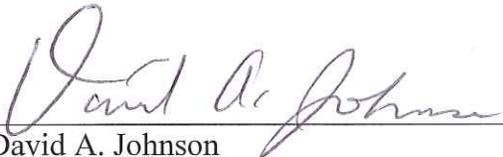
All SEPs should be entered into the appropriate state and/or federal databases, in accordance with the instructions for those systems. EPA guidance and project ideas for SEPs may be found at: <http://cfpub.epa.gov/compliance/resources/policies/civil/seps/>.

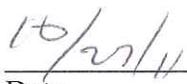
**J. Disclosure**

If the SEP project is publicized by the party being enforced against, it must be disclosed that this project is part of an environmental enforcement action.

**V. Adoption, Amendments, and Repeal:**

This guidance document shall remain in effect until rescinded, amended or superseded.

  
\_\_\_\_\_  
David A. Johnson  
Director, Virginia Department of Conservation and Recreation

  
\_\_\_\_\_  
Date

---

<sup>11</sup> This information and other documentation and explanations of a particular SEP are public information. Nevertheless, documents exempt from disclosure pursuant to the Virginia Freedom of Information Act (§ 2.2-3700, et seq.) need not be disclosed; thus, trade secrets (*see* VA CODE ANN. §59.1-336) and other information that is exempt from FOIA should be redacted prior to document production. The party should satisfy the requirements for withholding trade secrets from disclosure and assert the trade secret privilege at the time the material is provided to DCR.

**Attachment 1**

Analysis of Proposed Supplemental Environmental Project  
(For official use only)

Project Description:

1. Explain how the project is environmentally beneficial:
  
2. Explain how the SEP is only a partial settlement by providing the information listed below:  
Civil Charge/Penalty without a SEP \$ \_\_\_\_\_  
Minimum Payment Amount with a SEP \$ \_\_\_\_\_  
Projected Net Project Costs \$ \_\_\_\_\_  
SEP Mitigation Amount \$ \_\_\_\_\_  
Final Monetary Civil Charge/Penalty \$ \_\_\_\_\_
  
3. Explain how the SEP is not otherwise required by law and is solely the result of the settlement of an alleged violation:
  
4. Explain the reasonable geographic nexus or, if there is none, explain how the SEP advances one of the declared objectives of the law or regulation that is the basis of the enforcement action:
  
5. Check all the qualifying categories listed below that may apply to the SEP:

Public Health		Environmental Restoration and Protection	
Pollution Prevention		Environmental Compliance Promotion	
Pollution Reduction		Emergency Planning and Preparedness	

6. Explain how each of the following factors applies to the SEP:
  - Net Project Costs (zero out all State or Federal government loans, grants, tax credits for project) (net cash flow to party should not be positive):
  
  - Benefits to the Public or the Environment:
  
  - Impact on Minority or Low-Income Populations:

- Multimedia Impact:

- Innovation:

- Pollution Prevention:

7. Recommendation: