

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Policy Office

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TITLE: Policy for the Consideration of Community Environmental Projects in Conjunction with Assessment of Civil Penalty

EFFECTIVE DATE: April 19, 2014

AUTHORITY: The Administrative Code 4 Pa. Code § 1.151, et seq.

POLICY: The Department of Environmental Protection (department or DEP) staff will consider the performance of a Community Environmental Project (CEP), in appropriate situations, in lieu of a portion of the amount of civil penalty it will accept as a settlement.

PURPOSE: The department may, in determining the amount of civil penalty to collect, consider projects that have substantial public health or environmental benefits. The department may consider CEPs in situations it decides are appropriate, as an exercise of its enforcement discretion. Additional consideration may be given to CEPs proposed in areas that are susceptible to disproportionate environmental impacts and projects that will benefit conditions in an environmental justice area.

APPLICABILITY: The policy applies to all department enforcement actions under the statutes administered by the department pursued after the effective date of this policy. This guidance does not create any rights, duties or obligations for any party.

This policy is not intended to alter existing mining, and oil and gas program policies that allow operators to reclaim abandoned mine land or plug abandoned wells in lieu of penalties. However, all other programs are covered by the policy.

Furthermore, this policy is not intended to alter the obligations of the department under the Air Pollution Control Act, 35 P.S. § 4009.2(a.1), which requires that upon “the imposition of a fine or civil penalty of at least fifty thousand dollars (\$50,000), twenty-five per centum (25%) of the fine or civil penalty collected shall be returned by the department to the municipality in which the violation occurred to be used for projects that eliminate or reduce air pollution or for parks, recreation projects, trails or open space.”

For cases that the department has referred to the Office of Attorney General (OAG) the decision to accept a CEP as part of a sentence or plea bargain rests with OAG. However, to the extent the department is asked for recommendations on such matters, this policy may apply to the

department's recommendations to OAG. Similarly, in cases handled by other jurisdictions (e.g. the federal government, other states or local governments), the department will be guided by this policy in making recommendations to those jurisdictions.

DISCLAIMER:

The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements.

The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of the department to give this policy statement that weight or deference. This document establishes the framework within which DEP will exercise its administrative discretion in the future. The department reserves the discretion to deviate from this policy statement if circumstances warrant.

PAGE LENGTH:

4 pages

I. DEFINITIONS

Community Environmental Project (CEP) — A project which substantially improves, protects, restores or remediates the environment, or which improves, protects or reduces risks to the public health or safety.

Environmental Justice — The fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.

Not otherwise legally required — A project or activity is not required by any federal, state or local law or regulation.

II. GUIDANCE

The department may, in determining the amount of civil penalty to collect, consider projects that have substantial public health or environmental benefits. The department may consider a CEP in situations it decides are appropriate, as an exercise of its enforcement discretion. A CEP will not alter the party's obligation to remedy any violation and return to compliance or substitute for any requirement to remediate any harm caused by the violation. Additional consideration may be given to CEPs proposed in areas that are susceptible to disproportionate environmental impacts and projects that will benefit environmental conditions in an environmental justice area.

The department will give preference to projects that have long-term rather than temporary or short-term benefits. Projects should be performed in the same geographic area, airshed or watershed where the violation occurred unless the project is intended to have a regional or statewide benefit. If appropriate, projects should also benefit the environmental medium (air, water or land) related to the violation. The person or regulated entity proposing the CEP is responsible for quantifying the expected benefits and may utilize available resources, such as consultation with DEP, during the assessment process.

The person or regulated entity is also encouraged to communicate and coordinate with members of the public, local non-profits (i.e., watershed group) or governmental bodies (i.e., County Conservation Districts) to help identify "shovel-ready" projects for consideration. The department makes no commitment that any potential project will be considered or selected as a CEP.

A. Acceptable Projects

Acceptable projects include, but are not limited to:

1. Remediation of contaminated sites;
2. Restoration of land or water resources not owned by the person or regulated entity;
3. Purchase or donation of land for a local park, state park or forest land or for some other public environmental purpose;
4. Programs that advance the department's environmental education goals;
5. Assistance to a municipality in the establishment or implementation of a household hazardous waste or small quantity generator collection program;

6. Assistance to a municipality or non-profit organization for the cleanup of illegal road side dumping sites of solid wastes; or
7. Assistance to the local emergency response agency for a specific need.

The benefits of a CEP must flow to a community or the general public rather than the person or regulated entity.

B. Unacceptable Projects

Unacceptable projects include:

1. Projects on property owned by the person or regulated entity;
2. Contributions to an organization that does not focus on environmental, public health or community development issues;
3. Performance of projects not directly related to public health and safety or the environment;
4. Payments to an environmental organization for general purposes as opposed to a specific project;
5. Projects that are necessary for compliance; and
6. General educational or public environmental awareness projects that are not an integral part of a specific project otherwise acceptable under this guidance.

Further, CEPs cannot include actions that the party is required to perform as a condition of a federal, state or local permit, or that the party may be required to do as remediation, corrective action, or injunctive relief. The CEP may not be part of an existing settlement or order in another legal action by the department or any other federal, state or local entity.

C. CEP Proposal

The department will not actively solicit or compel the person or regulated entity to perform a CEP, but may inform the person or regulated entity that a CEP may be an option.

A written proposal that provides a detailed description of a project must be submitted to the appropriate DEP regional office. The formal written request for consideration of a CEP must come directly from the person or regulated entity, and not from an intermediary. The proposal should include, at a minimum, the following:

1. Identification of person or regulated entity subject to enforcement action (including contact information)
2. Description of violation(s)
3. Project description
 - a. Overall project proposal
 - b. Location (county, municipality, watershed, etc.)
 - c. Implementation and monitoring plan
 - d. Costs and resource allocation
 - e. Proposed benefit(s) to public health and safety or the environment
4. Partners and outreach activities

D. CEP Consideration

The department will generally not consider a CEP if the violation was intentional, willful, or the result of gross negligence; the harm to the environment or public health was unusually extreme; or, the person or regulated entity has a poor compliance history or a pattern of violations similar to the current violation. Exceptions may be made if the benefit to the community is sufficient to outweigh other concerns.

The department will decide whether a civil penalty is appropriate in any particular matter and will calculate the initial proposed penalty without regard to consideration of a CEP.

The department will review the written proposal to ensure the project provides public health and safety or environmental benefits; documents the costs associated with the project; outlines a project schedule and feasibility; and identifies the resources that will be necessary to ensure project completion. This review should take place within 10 business days of submittal. The program taking the enforcement action should undertake the initial review, including the regional Environmental Advocate when appropriate.

Following the review of the proposed CEP, department staff will review their recommendation with senior staff. This recommendation will contain the following: (a) the initial proposed penalty without regard to a CEP, (b) an evaluation of the proposed CEP and (c) recommendation regarding final penalty amount taking into consideration the CEP, if deemed to be acceptable. DEP staff advisement of the proposed CEP is needed before it can be included as part of a legally enforceable document.

E. CEP Implementation

The type, scope and schedule for each CEP will be set forth in a signed Consent Order and Agreement, Consent Decree, or other legally enforceable document. In appropriate cases, the enforceable document should include stipulated penalties for failure to carry out the CEP. The department will provide oversight, or may arrange for third party oversight, to determine whether the CEP is performed to the agreed upon standards. The enforceable document should also require the party undertaking the CEP to submit regular reports documenting the progress of implementing the CEP.

The department will not manage or hold funds set aside or held in escrow for performance of a CEP. The department is not authorized to open escrow accounts or otherwise hold monies except in funds specifically authorized by law.

The person or regulated entity must agree, as part of the settlement, to verify that no costs associated with the project have been deducted as a business expense or charitable deduction for the purpose of federal, state, or local taxes. A CEP may provide the person or regulated entity with certain ancillary benefits, like media publicity, provided that the project primarily and substantially benefits the public health or environment. Further, the party must agree that if it publicizes the CEP, it will state that the project is being undertaken as part of the settlement of an enforcement action.

The department will not bank or accumulate penalties due from a party to be applied to a future CEP, nor will the department accept a CEP as “credit” against future penalties, even if the cost of the project exceeds the amount of the current penalty.

F. Public Access to Information

Prior to settlement, documents relating to a proposed CEP may not be subject to disclosure except as required under the Right-To-Know Law. If a CEP is included as part of a settlement, the documentation will be available to the public as part of the public file except for information that is otherwise exempt from being disclosed.