



Maricopa County Air Quality Department
Substantive Policy Statement: SPS-2019-001
Supplemental Environmental Projects (SEPs)
Issue Date: August 26, 2019

Approved by:

A handwritten signature in blue ink, appearing to read "Philip A. McNeely".

Philip A. McNeely, Director

A substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the county and does not impose additional requirements or penalties on regulated parties or include confidential information or rules or ordinances adopted pursuant to Arizona Revised Statutes (A.R.S.) Title 49 (The Environment), Chapter 3 (Air Quality). [A.R.S. §§ 11-1601(8), 49-471(17)]

If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties, you may petition the agency under A.R.S. § 41-1033 for a review of the statement. [A.R.S. § 41-1033]

An applicant for a license subject to A.R.S. Title 11 (Counties), Chapter 11 (County Regulations), Article 1 (General Provisions) may request a county to clarify its interpretation or application of a statute, ordinance, regulation, delegation agreement or authorized substantive policy statement affecting the procurement of that license by providing the county with a written request that satisfies the requirements of A.R.S. § 11-1609(A). [A.R.S. § 11-1609]

I. Purpose

This substantive policy statement (SPS) establishes a framework within which proposals for Supplemental Environmental Projects (SEPs) may be considered and accepted in lieu of penalties assessed through an enforcement action.

This SPS complements the compliance assurance program being implemented by the Maricopa County Air Quality Department (MCAQD). The MCAQD pursues a comprehensive, multi-faceted program to protect air quality in Maricopa County, which includes clearly written and enforceable rules and permits together with community outreach and education. However, where these efforts alone do not result in compliance, the MCAQD addresses instances of non-compliance in a manner that is consistent with state statutes and policies established in the U.S. Environmental Protection Agency's (EPA's) "Policy on Civil Penalties".

II. Applicability

This SPS applies to proposals for SEPs that may be considered and accepted in lieu of penalties assessed through an enforcement action.

III. Definitions

- A. Business Day/Working Day** – For the purposes of this SPS, any day during which the MCAQD is open for business, which is typically Monday through Friday but not on Maricopa County-recognized holidays that fall on any of the days Monday through Friday.
- B. Enforcement Action** – Order of abatement by consent, order of abatement, injunctive relief, civil or criminal complaint.
- C. Nexus** - A clear linkage between two or more ideas or concepts. A nexus exists only if any of the following apply. The proposed project:
1. Is designed to reduce the likelihood that similar violations will occur in the future.
 2. Reduces the adverse impact to public health or the environment to which the violation contributes.
 3. Reduces the overall risk to public health or the environment potentially affected by the violation.
- D. Order of Abatement by Consent (OAC)** – A legal agreement between the responsible party and the MCAQD, which includes negotiated terms which may include monetary payments. The OAC may also include possible actions the responsible party must take to achieve compliance and supplemental environmental project (SEP) requirements.
- E. Responsible Party** – The individual or entity identified by air quality control statutes, rules and/or permits (i.e., the permit holder), who is legally responsible to bind the facility and liable for ensuring compliance.
- F. Small Business** – A concern including its affiliates, which is independently owned and operated, which is not dominant in its field and which employs fewer than one hundred full-time employees or which has gross annual receipts of less than four million dollars in its last fiscal year (A.R.S. § 41-1001(21)).
- G. Supplemental Environmental Project (SEP)** – An environmentally beneficial project, i.e., improves, protects or reduces risks to public health or the environment, a responsible party agrees to undertake as part of a settlement of an enforcement action that the responsible party is not otherwise legally required to perform. A SEP must fall into at least one of the following five SEP categories:
1. Pollution Prevention: A pollution prevention project reduces or eliminates pollution before generation. This includes any practice that reduces the amount of any pollutant being released into the ambient air, prior to pollution control.
 2. Pollution Reduction: A pollution reduction project reduces or eliminates pollution after generation through an approach that applies containment techniques or pollution control.

3. Environmental Compliance Promotion/Research: An environmental compliance promotion/research project helps identify new ways to achieve or maintain compliance with applicable statutory and regulatory requirements or to go beyond current legal requirements for reducing the generation or release of pollutants. These SEPs should, but are not required to address the same pollutant(s) involved in the violation, and where compliance by other members of the regulated community would be advanced by the proposed project. Categories include:
 - a. Environmental compliance promotion provides training, outreach, technical support or information to other members of the regulated community.
 - b. Environmental research collects baseline environmental data to be used in research directed at reducing risks to public health and the environment, or develops new pollution control technologies that could be used to reduce the generation or release of air pollutants beyond legal requirements. Any research that results in the development of an invention or other potential property right, e.g., a patent, or copyrightable materials, shall be the sole property of MCAQD and shall be made available to the public free of charge.
4. Public Health: A public health project provides diagnostic, preventative or remedial health care related to the actual or potential damage to human health to which the violation may have contributed. Public health SEPs primarily benefit the population that was harmed or put at risk by the violation.
5. Assessments and Environmental Management Systems: Assessments identify opportunities to significantly reduce emissions and improve environmental performance at a facility. Pollution prevention assessments may be acceptable as SEPs if they are not otherwise required as injunctive relief and the responsible party agrees to provide the MCAQD with a copy of the report documenting the assessment.
 - a. Pollution prevention assessments are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the generation of air pollutants being released into the ambient air, prior to treatment, regardless of whether the pollutants are emitted from, or upstream or downstream of, the source at which the assessment is being conducted.
 - b. Environmental Management Systems (EMS) are documented procedures for cataloging all applicable environmental requirements and assuring compliance with those requirements. An EMS provides schedules for regular review of operations that compare practices, procedures and documentation against applicable regulatory requirements and alert staff and managers of regulatory deadlines, e.g., reporting, permit renewal, control requirements. It should also document reporting requirements and provide methods for verifying compliance with those requirements. It may be a manual, computer software, or both. If implemented for the responsible party, the EMS shall include standards and procedures that address environmental stewardship beyond compliance appropriate for the size and level of sophistication of the responsible party. Language describing the EMS

development or improvement approach shall be incorporated in the settlement agreement.

H. Third-Party SEP Proposal – A SEP that is proposed by a qualified tax-exempt 501(c)(3) non-profit or government organization to be funded by a responsible party.

IV. Discussion

The MCAQD will, where appropriate and feasible, accept SEPs in lieu of penalties assessed through an enforcement action. The MCAQD's position is that it is in the public interest for SEPs to be an option in enforcement settlements and that they may be funded, in whole or in part, by responsible parties. This policy does not alter procedures or other requirements following approval of an enforcement settlement by the Control Officer.

V. Statutory Authority

A. A.R.S. § 49-117 [Title 49-The Environment, Chapter 1-General Provisions, Article 1-Department of Environmental Quality, Section 117-Supplemental Environmental Projects; Requirements; Nexus]

VI. Procedures

A. Responsible Party: SEP Proposal and Submittal

1. **SEP Proposal:** The responsible party should notify the MCAQD of any interest in pursuing a SEP no later than 30 business days/working days following the issuance of the MCAQD's initial settlement offer.
 - a. A SEP may be developed by:
 - (1) The responsible party to an enforcement action
 - (2) A qualified tax-exempt 501(c)(3) non-profit or government organization for a responsible party to an enforcement action
 - b. All proposed SEPs must provide sufficient information to demonstrate that the project meets all applicable requirements listed in this policy.
 - c. A SEP will be restricted to not more than 80% of the agreed upon penalty and a penalty must be at least \$5,000 to be eligible for a SEP. Penalty payment shall be for the total of the penalty less estimated cash payments for implementation of the SEP, e.g., no penalty mitigation may be taken for in-kind costs borne by the responsible party.
2. **SEP Submittal:** The responsible party interested in pursuing a SEP must submit a completed Responsible Party SEP application no later than 30 business days/working days following the issuance of the MCAQD's initial settlement offer.
 - a. A detailed estimate of project costs shall be required.

- (1) The following costs may be considered:
 - (a) Capital costs, e.g., purchase of equipment or buildings
 - (b) One-time non-depreciable costs, e.g., purchasing new portable gas cans for a replacement program or developing a compliance promotion seminar
 - (c) Annual operation costs minus annual savings, e.g., labor, water, raw materials, and power
 - (2) In order to maintain transparency in financial transactions, a separate account is required and SEP funds cannot be comingled with other funds.
 - (3) No funds will be provided from the MCAQD.
 - (4) All SEP funds will be paid directly to the SEP provider from the responsible party to an enforcement action issued by the MCAQD that elects to participate in a SEP.
 - (5) Administrative costs to perform the SEP are allowed but may not exceed 5% of total project costs.
 - (6) All specific expenditures for the SEP will be itemized in the pre-approved budget contained in the SEP proposal. No variance from the pre-approved SEP proposal budget is allowed.
- b. Only contracted labor or overtime labor by the responsible party's employees will be allowed in project costs.
 - c. No credit will be given for volunteer labor, labor by employees during normal work hours or for administrative costs accrued by the responsible party.

3. SEP Review Process:

- a. After receipt of a SEP application, the MCAQD will review the application for completeness and determine whether the proposed SEP meets all applicable requirements contained in this policy. Approval of SEP proposals shall be based on:
 - (1) Strength of the proposal:
 - (a) Clarity of the proposal's objectives
 - (b) Detail of the project description and work plan
 - (c) Discussion of involvement of stakeholders and participants
 - (d) Technical and economic feasibility
 - (e) Identification of potential obstacles and how they will be handled

- (2) Capacity of the implementing organization:
 - (a) Experience implementing similar projects
 - (b) Experience managing grant finances and reporting
 - (c) Demonstration of available resources to comply with the project schedule and bring it to a successful conclusion
 - (3) Rigor and feasibility of the schedule:
 - (a) Sufficiently detailed schedule
 - (b) Adequate staging and timing of tasks
 - (4) Adequacy of funding and detail of the budget:
 - (a) Project cost matches project scope
 - (b) Budget is appropriately itemized
 - (5) Rigor of the benefits estimations:
 - (a) Appropriate metrics for gauging success are identified
 - (b) Calculation methods are documented and reproducible
 - (c) Both metrics and methods are backed by citations to authoritative sources; benchmarking with similar projects is encouraged where possible
 - (6) Compliance with A.R.S. § 49-117: Clearly describe how the proposed project meets the nexus requirement of the statute
 - (7) Community Input:
 - (a) Actively solicit and incorporate public input into the SEP proposal
 - (b) Include a plan for soliciting and incorporating affected communities' input into the SEP proposal, e.g., health assessments
- b. The MCAQD will consider the following factors to determine if a proposed SEP is appropriate and feasible:
- (1) Information detailing the responsible party's compliance history and demonstrating the capacity to successfully and promptly complete the project.
 - (2) The proposed SEP meets the definition of "Nexus".
 - (3) The proposed SEP fits under at least one of the five SEP categories identified in the definition of "SEP" in this policy.

- (4) The proposed SEP cannot include any activity or project that the responsible party is otherwise legally required to perform.
 - (5) The proposed SEP will be performed within Maricopa County.
 - (6) Implementation of the specific proposal has not commenced prior to the MCAQD review and approval to proceed. The proposal, however, may be a discrete project or part of a phased or ongoing project or program.
 - (7) The proposed SEP is not designed primarily to satisfy a statutory obligation of the MCAQD or that of any other regulatory agency.
 - (8) State statute does not prohibit the expenditure of county resources on a particular activity. A proposal that appears to circumvent statutory prohibitions will be rejected.
 - (9) A proposed SEP may not provide funds to support the regulatory operational activities of the MCAQD. However, funds may be directed to related programs such as educational outreach products, e.g., development and printing of educational brochures or production of educational videos.
- c. The MCAQD may also request financial or other documentation verifying the responsible party's ability to complete the SEP or any other additional information deemed necessary to evaluate the SEP proposal.

4. SEP Approval or Denial: It is the discretion of the MCAQD to approve or deny a SEP.

- a. Approval: The MCAQD will notify the responsible party that the proposed SEP has been approved.
- (1) The MCAQD will identify the amount of the penalty mitigation that may be granted in consideration of performance of the SEP.
 - (2) The MCAQD will identify the provisions required to be included in the OAC.
 - (a) Explicit description of the type and scope of the SEP
 - (b) SEP start and end dates;
 - (c) Deliverables;
 - (d) Name, title and contact information for the representative of the responsible party managing and reporting on the SEP;
 - (e) Name, title and contact information for the MCAQD contact for receiving reports and all other matters related to the SEP and its implementation; and

- (f) Other terms of agreement and performance standards.
- (3) The MCAQD will include the following in the OAC:
- (a) Description of the specific actions to be performed by the responsible party and provide for a reliable and objective means to verify that the responsible party has completed the project in a timely manner.
 - (b) Requirement that the responsible party submit periodic progress reports and a final report to the MCAQD.
 - (c) Stipulation that publications or results of a SEP must state in a legible and prominent manner that the project is being undertaken as part of the settlement of an enforcement action.
 - (d) Explicit description of stipulated penalties and the conditions under which those penalties shall be assessed, e.g., failure to perform, report, or meet deadlines.
- (4) Approved SEP proposals will be listed in a SEP Idea Library, which will be posted on the MCAQD website.

b. Denial:

- (1) A SEP may be disapproved where the MCAQD determines that the time and resources it must dedicate to project oversight are overly burdensome. The factors that shall be considered in determining whether a SEP is overly burdensome are:
- (a) Time required
 - (b) Staff workload
 - (c) Length of the proposed project
 - (d) Technical complexity of the project
 - (e) Complexity of MCAQD oversight
- (2) The MCAQD will provide written notification to the responsible party that the proposed SEP has been denied. The notification will identify the reasons for the denial:
- (a) Failed to meet the SEP criteria; or
 - (b) Failed to provide adequate supporting data.

5. Progress and Final Reports:

- a. Progress reports will provide the status of project milestones and deliverables and itemize all costs with supporting documentation such as receipts and photographs.
- b. Progress reports may be monthly or quarterly and the schedule of reporting will be determined at the time the SEP is formally incorporated within an OAC.
- c. No later than 30 business days/working days after completion of the SEP (as defined in the SEP schedule), the responsible party shall submit a final report to the MCAQD documenting completion of project milestones and deliverables. The report shall include the following:
 - (1) A detailed description of actual expenses incurred by the responsible party in performing the SEP. Documentation required may include, but is not limited to, invoices, contracts, contract proposals or bids, mileage records, billing records, telephone bills and other documentation that verifies the expenditure amount and appropriateness to the SEP.
 - (2) Actual quantified benefits to the environment achieved from the project using the same methods employed in the SEP proposal or, if alternative methods are used, a discussion of why those methods were employed and citing authoritative sources for them.
 - (3) A written certification of completion of the SEP demonstrating that all SEP activities specified in the OAC have been completed in accordance with the terms and conditions of the OAC. The certification must be signed by the responsible party's highest-ranking local official.

6. SEP Compliance:

- a. The responsible party maintains full responsibility for completing the SEP regardless of the role of the third-party. The MCAQD, in its sole discretion, will determine whether the SEP has been satisfactorily completed, i.e., pursuant to the terms contained in the OAC, and whether the responsible party has made good faith, and timely efforts to implement the SEP.
- b. If the responsible party fails to expend all the SEP costs as described in the approved SEP proposal attached to the OAC, the remaining balance shall be paid to the MCAQD as a penalty amount.
- c. If the responsible party does not comply satisfactorily with the terms of the SEP, the responsible party shall be liable for stipulated penalties. Stipulated penalties shall be:
 - (1) Identified for both failure to complete the project and for missed deadlines to ensure the SEP is performed as required and in a timely manner;

- (2) Due within 30 business days/working days upon request in writing from the MCAQD; and
- (3) Established as follows:
 - (a) If the SEP is not completed to the satisfaction of the MCAQD for any reason other than a force majeure event, a stipulated penalty between 75 and 150 percent of the amount by which the penalty was mitigated on account of the SEP shall be required.
 - (b) Penalties for missed deadlines, including submittal of required reports, shall be assessed at an amount less than or equal to \$100 per day for each day beyond the approved completion date until the requirement is met.

B. Third-Party: SEP Proposal and Submittal

1. SEP Proposal:

- a. Only qualified tax-exempt 501(c)(3) non-profit or government organizations are eligible to propose, receive and administer SEP funds for third-party SEPs.
- b. A qualified tax-exempt 501(c)(3) non-profit or government organization making application for a third-party SEP is not allowed to solicit recipients of MCAQD enforcement actions. Contact unsolicited by the enforcement action recipient with the intent to encourage selection of a SEP proposal will result in denial of the SEP proposal.
- c. A qualified tax-exempt 501(c)(3) non-profit or government organization must clearly demonstrate in the application that it has the capability to implement and complete the SEP project, if funded.
- d. Third-party SEPs may be structured as phased or modular projects, allowing multiple responsible parties to fund part or all the SEP.

2. SEP Submittal: A qualified tax-exempt 501(c)(3) non-profit or government organization interested in pursuing a SEP must submit a completed Third-Party SEP Idea Library application.

- a. A qualified tax-exempt 501(c)(3) non-profit or government organization must provide basic information about the proposing organization and a description of previous history in administering SEP or grant funds (in any jurisdiction).
- b. A detailed estimate of project costs shall be required. The following costs may be considered:
 - (1) Capital costs, e.g., purchase of equipment or buildings
 - (2) One-time non-depreciable costs, e.g., purchasing new portable gas cans for a replacement program or developing a compliance promotion seminar

- (3) Annual operation costs minus annual savings, e.g., labor, water, raw materials, and power
- c. Only contracted labor or overtime labor by the third-party's employees will be allowed in project costs.
- d. No credit will be given for volunteer labor, labor by employees during normal work hours or for administrative costs accrued by the responsible party.

3. SEP Review Process:

- a. After receipt of a SEP application, the MCAQD will review the application for completeness and determine whether the proposed SEP meets all applicable requirements contained in this policy. Approval of SEP proposals shall be based on:
 - (1) Strength of the proposal:
 - (a) Clarity of the proposal's objectives
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 - (2) Capacity of the implementing organization:
 - (a) Experience implementing similar projects
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 - (3) Rigor and feasibility of the schedule:
 - (a) Sufficiently detailed schedule
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 - (b) Include a plan for soliciting and incorporating affected communities' input into the SEP proposal, e.g., health assessments
- b. The MCAQD will consider the following factors to determine if a proposed SEP is appropriate and feasible:
- (1) Information detailing the responsible party's compliance history and demonstrating the capacity to successfully and promptly complete the project.
 - (2) The proposed SEP meets the definition of "Nexus".
 - (3) The proposed SEP fits under at least one of the five SEP categories identified in the definition of "SEP" in this policy.
 - (4) The proposed SEP cannot include any activity or project that the responsible party is otherwise legally required to perform.
 - (5) The proposed SEP will be performed within Maricopa County.
 - (6) Implementation of the specific proposal has not commenced prior to the MCAQD review and approval to proceed. The proposal, however, may be a discrete project or part of a phased or ongoing project or program.
 - (7) The proposed SEP is not designed primarily to satisfy a statutory obligation of the MCAQD or that of any other regulatory agency.
 - (8) State statute does not prohibit the expenditure of county resources on a particular activity. A proposal that appears to circumvent statutory prohibitions will be rejected.
 - (9) A proposed SEP may not provide funds to support the regulatory operational activities of the MCAQD. However, funds may be directed to related programs such as educational outreach products, e.g., development and printing of educational brochures or production of educational videos.

- c. The MCAQD may also request financial or other documentation verifying the responsible party's ability to complete the SEP or any other additional information deemed necessary to evaluate the SEP proposal.

4. SEP Approval or Denial:

a. Approval:

- (1) The MCAQD will notify the third-party that the proposed SEP has been approved.
- (2) If a third-party SEP is selected and funded, the third-party/implementing agency must enter into a contractual agreement with the responsible party to an enforcement action wishing to fund the SEP. The agreement will outline, among other things, the terms of the SEP, such as the requirements for separate accounting and reporting, and where and how the project will be performed, including a project plan, schedule and reporting milestones.
 - (a) Upon reaching agreement, the responsible party to an enforcement action shall submit a copy of the signed contract to the MCAQD for review and inclusion of description and performance criteria in the settlement agreement.
 - (b) The MCAQD will not issue an approval to the third-party/implementing agency to initiate implementation of the project until a copy of the signed contract has been received.
- (3) Approved third-party SEP proposals will be listed in a SEP Idea Library, which will be posted on the MCAQD website.

- ##### **b. Denial:** For SEP proposals that are denied, the MCAQD shall provide written notification to the third-party identifying the reasons for denial and shall explain additional information needed for reconsideration and a deadline for resubmission.

C. Limitations on Involvement by the MCAQD

- 1. Neither the MCAQD nor any other division of county government shall play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP.
- 2. The MCAQD shall not manage or administer the SEP. However, the MCAQD shall conduct oversight to ensure that a project is implemented pursuant to the provisions of the Order of Abatement by Consent (OAC) and must have legal recourse if the SEP is not adequately performed.

D. SEP Idea Library

1. Approved third-party SEP proposals will be listed in a SEP Idea Library, which will be posted on the MCAQD website.
2. Modifications to the SEP Library will be noted in the SEP Idea Library on the MCAQD website.

VII. Divisions Affected

- A. Compliance and Enforcement
- B. Travel Reduction Program and Outreach

VIII. References

- A. “Policy on Civil Penalties”, EPA General Enforcement Policy #GM-21, February 16, 1984
- B. “A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’s Policy on Civil Penalties, EPA General Enforcement Policy #GM-22, February 16, 1984
- C. Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy, March 10, 2015

IX. Revision History

Version	Date	Description
1.	10-19-2012	Initial version numbered “PP-2012-003” and titled “Supplemental Environmental Projects”
2.	12-10-2013	Revised
3.	08-26-2019	Changed format, clarified SEP application process and SEP Idea Library, removed review committee for third-party SEPs; combines and supersedes PP-2012-003
4.		