COMMONWEALTH OF VIRGINIA
Department of Environmental Quality

Subject: Enforcement Guidance Memorandum No. 3-2006
Supplemental Environmental Projects (SEPs)

To: Regional Directors, Division Directors

From: Amy T. Owens, Director
Division of Enforcement

Date: September 19, 2006

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I. Introduction[1]

In settling enforcement actions, the Department of Environmental Quality (DEQ) requires parties to comply with environmental laws and regulations, remediate environmental damage, and, as appropriate, pay civil charges or civil penalties (civil charges). In some cases, settlement may include the party's performance of an environmentally beneficial project, called a Supplemental Environmental Project (SEP), that goes beyond compliance. At DEQ's discretion, performance of an approved SEP can mitigate a portion of a civil charge.

DEQ uses this guidance (on behalf of the applicable Board or the Director) in evaluating proposals to include SEPs in administrative or judicial orders.[2] DEQ also uses this guidance to calculate the resulting mitigation of civil charges and to review and document the performance of the SEP.[3]

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[1] Disclaimer: Guidance documents are developed as guidance and, as such, set forth presumptive operating procedures. *See* Va. Code (Code) § 2.2-4001. Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts. This guidance supersedes Chapter Five of the December 1999 Department of Environmental Quality Enforcement Manual.

[2] For purposes of this guidance, the term "judicial order" includes a judicial consent decree.

[3] This guidance establishes a framework for DEQ to exercise its discretion in determining appropriate settlements of enforcement actions. It is not intended for use at a hearing or in trial. Nothing in this guidance shall be interpreted or applied in a manner inconsistent with applicable federal law or with any applicable requirement for the Commonwealth to obtain or maintain federal delegation or approval of any regulatory program. *See* Code § 10.1-1186.2 (F).

II. Statutory Definition and Requirements

Virginia Code (Code) § 10.1-1186.2 provides authority to include SEPs in administrative and judicial orders.[4] An order with a SEP must be entered "with the consent of the person subject to the order."[5] The Code defines a SEP as:

> an environmentally beneficial project undertaken as partial settlement of a civil enforcement action and not otherwise required by law.

The Code requires that SEPs have a "reasonable geographic nexus to the violation or, 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." The elements of the SEP definition and the requirement for nexus are discussed in Section IV, below.

The Code also provides that the following categories of projects may qualify as SEPs, if they meet all other requirements: public health, pollution prevention, pollution reduction, environmental restoration and protection, environmental compliance promotion, and emergency planning and preparedness. The categories of projects that may qualify as SEPs are discussed in Section V, below.

In determining the appropriateness and value of a proposed SEP, the statute requires consideration of all of the following factors: net project costs, benefits to the public or the environment, innovation, impact on minority or low income populations, multimedia impact, and pollution prevention. Statutory factors for evaluating SEP proposals are discussed in Section VI, below.

Any decision whether or not to agree to a proposed SEP is within the sole discretion of the applicable 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."[6]

III. Coordination within and outside DEQ; Using this Guidance

Once a civil charge amount has been negotiated, it is the responsibility of the party subject to the order, if it so chooses, to submit a complete SEP proposal in an expeditious manner, so that the proposal can be fully considered as part of the settlement process. In no event should a SEP proposal be allowed to slow or unduly burden the

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[4] The authority extends to orders of the Director or any of the three citizens' boards - the State Air Pollution Control Board, the State Water Control Board, or the Virginia Waste Management Board.

[5] "Person" may include an individual, corporation, partnership, association, governmental body, municipal corporation, or any other legal entity. This guidance uses "person" and "party" interchangeably.

[6] SEPs do not alter a party's obligation to return to compliance and remedy any violations expeditiously. Furthermore, a SEP does not reduce the stringency or timeliness of any applicable environmental statutes, regulations, orders, or permits.

settlement process. Informal communications concerning possible SEPs may begin earlier. When a SEP is proposed, regional enforcement staff should consult with staff from the Central Office (CO) Division of Enforcement (DE). If the SEP is proposed by a facility participating in the Virginia Environmental Excellence Program (VEEP), or if the SEP is a pollution prevention (P2) project, staff should also consult with the Office of Pollution Prevention to ensure that the proposal is appropriately categorized as P2 and/or is not otherwise required in an existing VEEP agreement. If the proposed SEP is intended to restore impaired waters, staff should consult with staff in the Total Maximum Daily Load (TMDL) Program to confirm that the SEP appropriately addresses the pollutant(s) of concern. Staff may consult with specialists in any Regional Office (RO), the CO, or federal, state, or local agencies, as needed, when evaluating a proposed SEP. If a SEP impacts more than the originating Region, the RO should send documentation of the SEP proposal to each region that may be impacted and invite its comments prior to giving approval.

Attachment 1 is a form entitled "Analysis of Proposed Supplemental Environmental Project" (SEP Analysis Addendum) for reviewing a proposed SEP under the Virginia statutory requirements. It functions as an addendum to the Enforcement Recommendation and Plan (ERP). The SEP Analysis Addendum includes a calculation of the civil charge mitigation (see Section VII, below) and a recommendation by staff whether or not to approve the SEP. A regulated party may prepare a draft SEP Analysis Addendum and send it to DEQ electronically, but DEQ staff remain responsible for its contents, completeness, and accuracy. Staff should forward the completed Addendum, together with documentation of the SEP projected net project costs, to DE for concurrence and then to RO management for approval.

IV. Elements of the SEP Definition and Nexus

Staff should ensure that any proposed SEP meets the statutory definition or a SEP and the requirement for nexus, as follows:

A. Environmentally Beneficial

"Environmentally beneficial" means a SEP should improve, protect, or reduce risks to public health and/or the environment. While in some cases a SEP may provide the violator with certain benefits, there should be no doubt that the project primarily benefits the public health and/or the environment.

B. As Partial Settlement of a Civil Enforcement Action

"As partial settlement of a civil enforcement action" means that the SEP is a direct and sole result of a civil settlement of an alleged violation in a consent order. In other words, the party has not begun the project before DEQ: (1) identifies an alleged violation; (2) approves the SEP as part of the settlement of that violation; and (3) authorizes the facility to begin implementation of the SEP through the issuance of an order. DEQ should have the opportunity to review and

approve, and in some cases help shape the scope of the project, before it is implemented.

A SEP is independent of any corrective action that may be required, and it can offset only a portion of the civil charge. The net project cost of the SEP and the consequent mitigation of civil charges are described below in Sections VI.A. and VII., respectively.

C. Not Otherwise Required by Law

"Not otherwise required by law" means the project is not required to be performed by the party to the order or by another party, under any federal, state, or local statute, regulation, ordinance, order, or permit condition. In particular, the SEP cannot include actions that the party to the order or another party may be required to perform:

- As injunctive relief in the instant case;
- As part of a settlement or order in another legal action;
- By other federal, state, or local requirements;
- As part of a permit, including TMDL implementation required by a permit; or
- As part of activities pledged under VEEP or similar agreements.

SEPs may not include activities that any party will become legally obligated to undertake within two years of the date of the order (*e.g.*, adopt a more stringent emission or discharge limit). A SEP will not be invalidated after the fact, however, if a regulatory requirement that is unknown at the time of SEP approval comes into effect within two years of the date of the order.

D. Nexus

SEPs must have "a reasonable geographic nexus to the violation," except as allowed by statute. For geographic nexus to be reasonable, the project should benefit the "general area" in which the underlying violation occurred (*e.g.*, immediate geographic area, same river basin, same air quality control region, 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 and the environment within the Commonwealth.

Under the Code, if no project is available within the geographical area, the project may still be acceptable if it "advances at least one of the declared objectives of the environmental law or regulation that is the basis of the

enforcement action." Even when the geographical nexus is met, DEQ prefers projects that also meet this standard.[7]

V. Categories of Projects that May Qualify as SEPs

Code § 10.1-1186.2 (C) lists the categories of projects that may qualify as SEPs. For a proposed project to be approved as a SEP, it should satisfy the requirements of at least one category plus all of the other requirements established in the statute and this guidance. The lists of examples in this section do not constitute an endorsement, recommendation, favoring, or pre-approval of any specific project or type of project. A list of the types of projects that would not qualify as SEPs is included at the end of the section.

A. Public Health

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

Examples of potential public health projects include:

- Epidemiological data collection and analysis;
- Medical examinations of potentially affected persons;
- Collection and analysis of blood/fluid/tissue samples; and
- Medical treatment and rehabilitation therapy.

B. Pollution Prevention

A pollution prevention project reduces the generation of pollution through "source reduction," *i.e.*, any practice which reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise 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" - where waste materials produced during a manufacturing process are returned 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 and/or toxicity of pollution released to the environment, not merely a transfer of pollution among media. Once the pollutant

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[7] Federal guidance requires a similar nexus for all SEPs. *See* http://www.epa.gov/compliance/resources/policies/civil/seps/sepnexus-mem.pdf.

or waste stream is generated, pollution prevention is no longer possible and the waste should be handled by appropriate recycling, treatment, containment, or disposal methods.

Examples of potential pollution prevention projects include:

- Implementation of an Environmental Management System (EMS) with a pollution prevention component by a facility, provided the EMS conforms to the criteria described in the VEEP or in a comparable standard, such as International Organization for Standardization (ISO) 14001;
- Training programs that result in specified improved efficiency in the use of natural resources or energy, or in reductions in wastes;
- Substitution of raw materials with less toxic ones, such as eliminating the use of chlorinated solvents in cleaning operations;
- Process or procedure modifications, such as installing a powder coating paint system to replace traditional spray painting operations, when the result is lower emissions;
- Installation of a recovery system such as a distillation unit to purify unreacted materials and by-products for reuse in the process;
- Installing pollution control equipment that allows businesses, particularly small businesses, to implement voluntary pollution prevention measures; and
- Improved inventory control systems that demonstrably reduce the amounts of waste generated from the disposal of out-of-date materials.

Pollution prevention studies without a commitment to implement the results are not acceptable as SEPs. There may be an opportunity for the party to conduct a pollution prevention study, however, during the negotiation process to determine if an acceptable SEP can be identified.

C. Pollution Reduction

If the pollutant or waste stream has already been generated or released, a pollution reduction approach - which employs recycling, treatment, containment, or disposal techniques - may qualify as a SEP. A pollution reduction project decreases the amount and/or toxicity of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise being released into the environment by means that do not qualify as pollution prevention. "Out-of-process recycling" is a pollution reduction approach where industrial wastes collected after the manufacturing process and/or consumer wastes are used as raw materials for production off-site, reducing the need for treatment, disposal, or consumption of energy or natural resources. In addition, pollution reduction can be achieved by installing more effective end-of-process control or treatment technology.

Examples of potential reduction projects include:

- Installation of "polishing equipment," such as an ion-exchange unit, at the end of a facility's wastewater pretreatment system that removes the final traces of toxic elements from its effluent; and
- Installation of a wet electrostatic precipitator to capture and remove particulate matter from the exhaust stream of a process equipment stack.

D. Environmental Restoration and Protection

Environmental restoration and protection projects include those that go beyond repairing the damage caused by the violation, i.e., the damage that can be corrected through injunctive relief. Environmental restoration and protection SEPs may also be used for enhancing a site to "better-than-baseline" conditions. Such SEPs may be used to restore or protect natural environments (*i.e.*, ecosystems), man-made environments (*i.e.*, facilities and buildings), or endangered species.

Examples of potential environmental restoration and protection projects include:

- Remediating abandoned waste sites or brownfields areas;
- Installing or funding Best Management Practices (BMPs) such as septic system replacements, stream restoration, or livestock exclusion in watersheds with TMDL implementation plans, TMDLs, or water quality impairments;
- Implementing voluntary agricultural best management practices at businesses, particularly small businesses;
- Installing water lines or sewer lateral lines for private homeowners where no other party has responsibility for connecting homes;
- Protection or preservation of ground water quality, especially in Ground Water Management Areas;
- Conducting nonregulatory conservation projects under the auspices of the Foundation for Virginia's Natural Resources, Code § 10.1-2135;
- Conducting fish tissue studies in the watershed that was adversely affected or in a study area of statewide importance;
- Restoring a wetland along the same avian flyway in which the facility is located;
- Purchasing and managing a watershed area to protect a drinking water supply;
- Removing or mitigating contaminated materials at facilities or buildings, such as contaminated soils, asbestos, and leaded paint,

which are a continuing source of releases and/or threat to individuals; and

- Establishing conservation easements to protect, in perpetuity, sensitive or critical ecosystems.

In some projects where the party has agreed to restore and protect certain lands, the question arises whether the project 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 they do not impair the environmentally beneficial purposes of the project, and provided they constitute only an incidental portion of the total resources spent on the project.

E. Environmental Compliance Promotion

An environmental compliance promotion project provides training or technical support to other members of the regulated community and/or the general public to:

- Monitor, identify, report, achieve, and maintain compliance with applicable statutory and regulatory requirements (but not if the training or level of proficiency is required as part of a regulation, permit or order);
- Avoid committing a violation with respect to such statutory and regulatory requirements; and
- Go beyond compliance by reducing the generation, release, or disposal of pollutants beyond legal requirements.

Environmental compliance promotion SEPs should focus on the same regulatory program requirements that were violated, and DEQ should have reason to believe compliance in the sector would be substantively advanced by the project. 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:

- Producing or sponsoring a seminar directly related to correcting widespread or prevalent violations within the facility's economic sector;
- Producing or sponsoring a workshop directly related to BMP implementation in watersheds with TMDL implementation plans, TMDLs, or water quality impairments; and
- Educational programs as part of identifiable initiatives with targeted audiences and specified goals to benefit the environment, such as anti-litter campaigns (*e.g.*, "Adopt-a-Highway" and "International Coastal

CleanUp"), training to encourage citizens to reduce water pollution (*e.g.*, "Bay Storm Drain Stenciling" and "Bayscapes"), BMP benefits campaign aimed at residential and agricultural audiences near impaired waters, and training for developers on low-impact development.

F. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance to a responsible state or local emergency response or planning entity. These projects enable these 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.

The need addressed by the project should be identified in an approved emergency response plan as an additional 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:

- 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.

G. Unacceptable Projects

Unless the project also meets the requirements of one or more of the categories above, the following types of projects are not acceptable SEPs:

- 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);
- 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;
- Conducting a project, which, though beneficial to a community, is unrelated to a discrete advancing of environmental compliance,

restoration, or protection (*e.g.*, making a contribution to charity for a non-specific purpose, or donating playground equipment);

- Studies (except fish tissue studies, as described above) undertaken without a commitment to implement the results and/or address specific environmental problems;
- Any project that will otherwise be performed by the Commonwealth, a local government, or the federal government, or that is legally required of another party;
- Any project that would be required as part of a TMDL allocation being implemented pursuant to a permit; and
- Settlements in which the facility agrees to spend a certain sum of money on a project(s) to be determined later (*i.e.,* after the Consent Order is issued).

VI. Statutory Factors for Evaluating SEP Proposals

In determining the appropriateness and value of a SEP, Code § 10.1-1186.2 (C) requires DEQ to consider all of the following factors.

A. Net Project Costs

The party should provide an accounting of the net present 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. The statute provides that the costs of those 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.

Unless DEQ specifies the accounting documentation, the facility may provide an accounting of the net project cost of the SEP to DEQ in one of several forms:

- The facility may submit an itemized cost statement or spreadsheet, accompanied by a certification from a Certified Public Accountant (CPA), that the cost statement represents net project costs, as described above;
- The facility may provide 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

- The facility may provide detailed, documented cost estimates (by spreadsheet or otherwise) to DEQ for analysis 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 performance of a SEP. If the PROJECT model reveals that a project has a negative cost, it means that the SEP represents a positive cash flow to the party and, as a profitable project, is generally not acceptable as a SEP.

B. 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 species habitats), and/or facilitate compliance. Community involvement in the development or performance of a SEP increases the benefits to the public.

A SEP should be at least as beneficial to the environment as a clean-up DEQ could perform with the civil charges deposited to the Virginia Environmental Emergency Response Fund (VEERF). *See* Code § 10.1-2500.

C. Innovation

This factor evaluates the extent to which a proposed SEP further develops and implements innovative processes, technologies, or methods - including "technology forcing" techniques which may establish new regulatory "benchmarks" - that more effectively:

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

D. 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 are at environmental risk.

E. Multimedia Impact

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

F. Pollution Prevention

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

VII. Calculating the Civil Charge Mitigation

DEQ should not approve a SEP until after it calculates a civil charge using the appropriate procedures. The amount of any civil charge mitigation that may be given for a particular SEP is wholly within the discretion of the applicable Board or the Director. Generally, if an order includes a SEP, the DEQ should recover, as a cash civil charge payment, the greater of:

- The ascertainable economic benefit of noncompliance plus 10 percent of the gravity-based portion of the civil charge (*i.e.,* the total civil charge excluding the economic benefit), or
- 25 percent of the gravity component of the civil charge matrix/table amount.

The remainder of the calculated civil charge may be mitigated by a SEP, at the discretion of the appropriate Board or the Director.

In cases involving government entities or quasi-government entities, such as authorities, or non-profit organizations, where the circumstances warrant; or where the proposed SEP provides outstanding environmental benefits (e.g., pollution prevention projects, voluntary non-point source BMP implementation for impaired waters, land conservation and preservation, or diesel school bus retrofits), the Board or the Director may determine that a SEP may offset a greater percentage of the civil charge than is described above. Civil charge mitigation in these special cases, however, should not exceed 90% of the total civil charge (economic benefit plus gravity), absent specific prior approval from senior management. By statute, a SEP can only be a *partial* settlement.

VIII. Approval or Disapproval of the SEP

The Code provides: "Any decision whether or not to agree to a SEP is within the sole discretion of the applicable board, official, or court and shall not be subject to appeal." Code § 10.1-1186.2 (E). Even though a project appears to satisfy all of the provisions of the statute and this guidance, the Board, the Director, or his designee may decide, for one or more reasons, that a SEP is not appropriate (*e.g.*, the cost of reviewing a SEP proposal may be disproportionate or excessive, the oversight costs of the SEP may be too high, or, in DEQ's judgment, the party may not have the ability or reliability to complete the proposed SEP, etc.).

IX. Incorporation into a Consent Order

To ensure enforceability and conform to the statute, DEQ includes the requirements of SEP projects in administrative consent orders or judicial orders. Any public notice should indicate that the order includes a SEP and the nature of the SEP.

The order should accurately and completely describe the SEP, including specific actions to be taken, the timing of such actions, and the result to be achieved. It should also contain a means for verifying both compliance and the final overall cost of the project, including periodic reports, if necessary. A final report certified by an appropriate corporate official, acceptable to DEQ, evidencing completion of the SEP and documenting SEP expenditures, should also be required. Model language for an order is included as Attachment 2.

DEQ prefers that SEPs be performed by the party subject to the order. However, if a third party performs the SEP (for example, a contribution is made to an organization to fund a specific project), the order should state that the party subject to the order remains responsible for satisfactory completion of the project, that failure to perform the SEP by the third party shall trigger the obligation to pay the original civil charge sum within a required period of time, and that the mere transfer of funds to a third party does not discharge the SEP obligation.

Performance of a SEP should be stated in the order in terms of a partial settlement of the civil charge. Failure to perform or complete the SEP will trigger the party's obligation to pay the portion of the civil charge intended to be settled by the SEP, unless there is an alternate or additional SEP. The order should provide a time period for paying the remainder of the civil charge in the case of failure to perform or complete the SEP.

If a SEP involves performing an environmental assessment or environmental audit, the order should require the submission of the report and reporting and correction of any violations discovered as a result of the assessment or audit. *See* "Enforcement Guidance Memorandum No. 1-2006, Voluntary Environmental Assessments."

Orders containing SEPs should contain a provision that, whenever publicizing a SEP or the results of the SEP, the party will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.

X. Enforceability; SEP Performance and Completion

Once the administrative or judicial order is executed, the SEP is "enforceable in the same manner as any other provision of the order." It is the party's responsibility to perform the SEP.

Occasionally when a third party performs 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, DEQ should note this fact in the SEP Analysis Addendum and any public notice and comment materials.

The party should verify to DEQ 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 DEQ, which applies a standard of reasonableness in making its determination.

If the final cost of the SEP is less than the amount of the penalty agreed to be mitigated, the difference is not offset and is to 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. However, 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 his designee.

XI. Case Files and Database Documentation

Code § 10.1-1186.2 (C) states: "In each case in which a supplemental environmental project 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." The explanation should include a completed and approved SEP Analysis Addendum and documentation of net project costs (including the PROJECT Model printout, where applicable). The documentation would also include the SEP proposal and any periodic and final reports. This information and other documentation and explanations of a particular SEP are public information.

The statute also provides, however, that "[n]othing in this section shall require the disclosure of documents exempt from disclosure pursuant to the Virginia Freedom of Information Act (§ 2.2-3700, *et seq.*)." Therefore, trade secrets (*see* Code § 59.1-336) and other information that is otherwise exempt from the Freedom of Information Act should be redacted (removed) 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 DEQ.

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/.

Attachment 1

Analysis of Proposed Supplemental Environmental Project
Va. Code § 10.1-1186.2

Source/Facility/Regulated Party

Project Description:

1. Explain how the project is environmentally beneficial:

2. A SEP may only be a partial settlement: show what initial civil charge was computed, along with the appropriate SEP amount and final civil charge figure:

Civil Charge/Penalty without a SEP	$_____
Minimum Payment Amount with a SEP (see Section VII)	$_____
Projected Net Project Costs (see No. 6, below)	$_____
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. Is there reasonable geographic nexus? If YES, explain:

   If NO, then does the SEP advance one of the declared objectives of the law or regulation that is the basis of the enforcement action (always preferred)? Explain:

5. Check all the qualifying categories that may apply (at least one must be checked):

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

6. Each of the following factors MUST be considered. Respond to each:

o 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). Explain:

o Benefits to the Public or the Environment (should exceed VEERF value; include any Community Involvement). Explain:

o Innovation. Explain:

o Impact on Minority or Low-Income Populations. Explain:

o Multimedia Impact. Explain:

o Pollution Prevention. Explain:

☐ Division of Enforcement, Other RO, Program – Concurrence/Consultation

Recommended/Not Recommended _____
(DEQ Regional Staff)

SEP Approved/Disapproved
(Subject to Execution of the Order) _____
(DEQ Regional Director)

Attachment 2

Model Language for Consent Orders

If a Supplemental Environmental Project is included as part of the Order, replace Section D with the following language and add Appendix B.

SECTION D: Agreement and Order

By virtue of the authority granted it pursuant to Va. Code [§§ 10.1-1309 and 10.1-1316 (Air), § 10.1-1455 (Waste), §62.1-44.15 (Water, UST, or Wetlands) § 62.1-44.34:20 (Oil), § 62.1-44.17:1 (Animal Feeding Operation), § 62.1-44.17:1.1 (Poultry Waste), § 62.1-270 (Ground Water)] and upon consideration of Va. Code § 10.1-1186.2, the Board orders [Facility Name/Party], and [Facility Name/Party] agrees, to perform the actions described below and in [Appendix A, or Appendices A and B] of this Order. In addition, the Board orders [Facility Name/Party], and [Facility Name/Party] voluntarily agrees, to a civil charge of $_____ in settlement of the violations cited in this Order, to be paid as follows:

1. [Facility Name/Party] shall pay $_____ of the civil charge within 30 days of the effective date of this Order. Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," delivered to:

   Receipts Control
   Department of Environmental Quality
   Post Office Box 1104
   Richmond, Virginia 23218

   The payment shall include [Facility Name's/Party's] Federal ID number [or Social Security Number] and shall identify that payment is being made as a result of this Order.

2. [Facility Name/Party] shall satisfy $_____ of the civil charge by satisfactorily completing the Supplemental Environmental Project (SEP) described in Appendix B of this Order.

3. The net project cost of the SEP to [Facility Name/Party] shall not be less than the amount set forth in Paragraph D.2. If it is, [Facility Name/Party] shall pay the remaining amount in accordance with Paragraph D. 1 of this Order, unless otherwise agreed to by the Department. "Net project costs" means the net present 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 net project cost shall be reduced by those amounts. The costs of those portions of SEPs that are funded by state or federal low-interest loans, contracts, or grants shall be deducted.

4. By signing this Order [Facility Name/Party] certifies that it has not commenced performance of the SEP.

5. [Facility Name/Party] acknowledges that it is solely responsible for completing the SEP project. Any transfer of funds, tasks, or otherwise by [Facility Name/Party] to a third party, shall not relieve [Facility Name/Party] of its responsibility to complete the SEP as described in this Order.

6. [if the SEP involves performing an environmental assessment or environmental audit] [Facility Name/Party] shall submit any resulting report, shall report any violations discovered as a result of the [environmental assessment or environmental audit] to DEQ immediately and shall correct those violations, including any required remedial actions.

7. In the event it publicizes the SEP or the SEP results, [Facility Name/Party] shall state in a prominent manner that the project is part of a settlement of an enforcement action.

8. The Department has the sole discretion to:

   a. Authorize any alternate, equivalent SEP proposed by the Facility; and

   b. Determine whether the SEP, or alternate SEP, has been completed in a satisfactory manner.

9. Should the Department determine that [Facility Name/Party] has not completed the SEP, or alternate SEP, in a satisfactory manner, the Department shall so notify [Facility Name/Party] in writing. Within 30 days of being notified, [Facility Name/Party] shall pay the amount specified in Paragraph D.2., above, as provided in Paragraph D.1., above.

APPENDIX B

[Facility Name/Party] shall perform the SEP identified below in the manner specified in this Appendix.

1. The SEP to be performed by [Facility Name/Party] is [description of SEP, including specific actions to be taken and results to be achieved].

2. The SEP shall be completed by [date] OR [specify schedule including SEP completion].

3. [[Facility Name/Party] shall submit progress reports on the SEP on a monthly/quarterly basis, due the 10th day of each month/quarter.]

4. [Facility Name/Party] shall submit a written final report on the SEP, verifying that the SEP has been completed in accordance with the terms of this Order, and certified either by a Certified Public Accountant or by a responsible corporate officer or owner. [Facility Name/Party] shall submit the final report and certification to the Department within _____ days from the effective date of the Order.

5. If the SEP has not or cannot be completed as described in the Order, [Facility Name/Party] shall notify DEQ in writing no later than [Date]. Such notification shall include:
   a. an alternate SEP proposal, or
   b. payment of the amount specified in Paragraph D.2 as described in Paragraph D.1.

6. [Facility Name/Party] hereby consents to reasonable access by DEQ or its staff to property or documents under the party's control, for verifying progress or completion of the SEP.

7. [Facility Name/Party] shall submit to the Department written verification of the final overall and net project cost of the SEP in the form of [a certified statement itemizing costs, invoices and proof of payment, or similar documentation] within ___ days of the project completion date. For the purposes of this submittal, net project costs can be either the actual, final net project costs or the projected net project costs if such projected net project costs statement is accompanied by a CPA certification or certification from [Facility Name's/Party's] Chief Financial Officer concerning the projected tax savings, grants or first-year operation cost reductions or other efficiencies.

8. Documents to be submitted to the Department, other than the civil charge payment described in Section D of the Order, shall be sent to:

   Regional Contact
   Region Address