

CHAPTER EIGHT: ENVIRONMENTAL IMPROVEMENT PROJECTS ASSOCIATED WITH ENFORCEMENT ACTIONS

SECTION I. BACKGROUND

In settlements of environmental enforcement cases, DNREC will require the alleged violators to achieve and maintain compliance with state environmental laws and regulations and to pay an administrative or civil penalty. To further DNREC goals to protect and enhance public health and the environment, in certain instances environmentally beneficial projects, or Environmental Improvement Projects (EIPs), may be included in the settlement. This policy sets forth the types of projects that are permissible as EIPs, the penalty mitigation appropriate for a particular EIP and the terms and conditions under which they may become part of a settlement. The primary purpose of this policy is to encourage and obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by this policy.

In settling enforcement actions, DNREC requires alleged violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the violations. DNREC also seeks substantial monetary penalties in order to deter noncompliance. Without penalties, companies would have an incentive to delay compliance until they are caught and ordered to comply. Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and deterring violations by other members of the regulated community. Penalties help ensure a level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Penalties also encourage companies to adopt pollution prevention and recycling techniques, so that they minimize their pollutant discharges and reduce their potential liabilities.

Alleged violators are sometimes offered the option of funding an environmental improvement project in lieu of a portion of a monetary penalty. Environmental Improvement Projects are a method to achieve environmental benefit while inspiring environmental and community responsibility by parties subject to enforcement actions. DNREC encourages the use of EIPs. While penalties play an important role in environmental protection by deterring violations and creating a level playing field, EIPs can play an additional role in securing significant environmental or public health protection and improvements. EIPs may not be appropriate in settlement of all cases, but they are an important part of DNREC's enforcement program. EIPs may be particularly appropriate to further the objectives in the statutes DNREC administers and to achieve other policy goals, including promoting pollution prevention.

SECTION II. APPLICABILITY

This section applies to settlements of all civil judicial and administrative actions filed after the effective date of the CERG, and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the specific terms of an EIP.

This section applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations that DNREC administers. This section does not apply to settlements of claims for stipulated penalties for violations of consent decrees or other settlement agreement requirements.

This is a settlement guide and thus is not intended for use by DNREC defendants, respondents, or courts at a hearing or in a trial. Further, whether DNREC decides to accept a proposed EIP as part of a settlement is purely within DNREC's discretion. Even though a project appears to satisfy all of the provisions of the policy, DNREC may decide, for one or more reasons, that EIP is not appropriate (e.g., the cost of reviewing a EIP proposal is excessive, the oversight costs of the EIP may be too high, or the defendant/respondent may not have the ability or reliability to complete the proposed EIP).

This guidance establishes a framework for DNREC to use in exercising its enforcement discretion in determining appropriate settlements. In some cases, application of this section may not be appropriate, in whole or part.

SECTION III. DEFINITION AND KEY CHARACTERISTICS OF AN EIP

Environmental Improvement Projects are defined as environmentally beneficial projects which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform. The three-bolded key parts of this definition are elaborated on below.

“Environmentally beneficial” means a EIP must improve, protect, or reduce risks to public health, or the environment at large. While in some cases an EIP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health or the environment.

“In settlement of an enforcement action” means: 1) DNREC has the opportunity to help shape the scope of the project before it is implemented; and 2) the project is not commenced until after the Agency has identified a violation (e.g., issued a Notice of Violation, Administrative Order, or complaint).

“Not otherwise legally required to perform” means the EIP is not required by any federal, state or local law or regulation. Further, EIPs cannot include actions that the defendant/respondent may be required to perform: as injunctive relief in the instant case; as part of a settlement or order in another legal action; or by state or local requirements. EIPs may include activities that the defendant/respondent will become legally obligated to undertake two or more years in the future. Such “accelerated compliance” projects are not allowable, however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the defendant/respondent for early compliance.

Also, the performance of an EIP reduced neither the stringency nor timelines requirements of State environmental statutes and regulations. Of course, performance of an EIP does not alter the defendant/respondent's obligation to remedy a violation expeditiously and return to compliance.

SECTION IV. GUIDELINES

DNREC has broad discretion to settle cases, including the discretion to include EIPs as an appropriate part of the settlement. The following guidelines should be used in determining whether an EIP:

1. The Secretary may allow the alleged violator to undertake an environmental improvement project to reduce environmental impacts from the operation of facilities or activities under the control of the alleged violator.
2. The Secretary, in settling an administrative enforcement action, may allow the alleged violator the opportunity to fund or undertake an environmental improvement project. This project is above and beyond what the party is required to do to maintain compliance with the applicable regulatory standards and requirements.
3. Project must advance at least one of the declared objectives of the environmental statutes that are the basis of the enforcement action. Further, a project cannot be inconsistent with any provision of underlying statutes.
4. DNREC may provide oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the EIP is not adequately performed.
5. The type and scope of each project are determined in the signed settlement agreement. This means the “what, where and when” of a project are determined by the settlement agreement.
6. Settlements in which the defendant/respondent agrees to spend a certain sum of money on a project (to be determined later after DNREC or the Department of Justice signs the settlement agreement) are generally not allowed.

SECTION V. PENALTY ASSESSMENTS

1. Calculation of the final penalty is an important part of any settlement. A substantial penalty is generally necessary for legal and policy reasons. Without penalties there would be no deterrence as regulated entities would have little incentive to comply. Penalties are necessary as a matter of fairness to those companies that make the necessary expenditures to comply on time; violators should not be allowed to obtain an economic advantage over their competitors who complied. In cases involving government agencies or entities, such as municipalities or non-profit organizations, where the circumstances warrant, DNREC may determine, based on the nature of the EIPs being proposed, that an appropriate settlement could contain a cash penalty less than the economic benefit of non-compliance. The precise amount of the cash penalty will be determined by the applicable penalty policy. As a general rule, the costs to be incurred by a violator in performing an EIP may be considered in determining an appropriate settlement amount.

2. The Secretary shall not waive the entire monetary penalty assessed against an offending party in lieu of the party providing funding or undertaking an environmental improvement project.
3. Any administrative action taken against a party will ordinarily include a monetary penalty of at least 25 percent of the penalty assessed, and the cost of any environmental improvement project(s).
4. The payment of penalties shall be set forth in a clear schedule when possible including dates certain.
5. The Secretary shall not allow alleged violators to make only contributions to organizations in lieu of a monetary penalty assessment.

SECTION VI. COST RECOVERY

The Secretary will make reasonable efforts to recover the expenses that are associated with executing an enforcement action. Violators shall be liable for the following expenses of the investigation incurred by the State after the notice of violation is issued: direct costs of investigation; legal assistance including paralegal assistance; public hearings; all other costs expressly determined by the Secretary as reasonably related to the investigation of the incident; and the indirect costs related to all of the above. Costs collected under this section will be used to fund the Department's Enforcement Coordinator position pursuant to Section 199 of SB 434, FY 2003 Appropriations Act.

SECTION VII. USE OF A THIRD PARTY

7 Del. C. Title 29 §8003 prohibits the Secretary from directing that any person or entity pay monies to any entity other than the Department. This provision precludes the Department from directing that defendant/respondent subject to enforcement action pay monies to charities or other entities.

EIPs are generally performed either by the defendant/respondent itself (using its own employees) and/or by contractors or consultants. In the past, in a few cases, an EIP has been performed by someone else, commonly called a third party. Because of legal concerns and the difficulty of ensuring that a third party implements the project as required (since by definition a third party has no legal or contractual obligation to implement the project as specified in the settlement document), performance of an EIP by a third party is not allowed.

SECTION VIII. OVERSIGHT AND DRAFTING ENFORCEABLE ON-SITE EIPS

The settlement agreement should accurately and completely describe the EIP. It should describe the specific actions to be performed by the defendant/respondent and provide for a reliable and objective means to verify that the defendant/respondent has timely completed the project. This may require the defendant/respondent to submit periodic

reports to DNREC. If an outside auditor is necessary to conduct this oversight, the defendant/respondent should be made responsible for the cost of any such activities. The defendant/respondent remains responsible for the quality and timeliness of any actions performed or any reports prepared or submitted by the auditor. A final report certified by an appropriate corporate official and evidencing completion of the EIP should be required.

To the extent feasible, defendant/respondents should be required to quantify the benefits associated with the project and provide DNREC with a report setting forth how the benefits were measured or estimated. The defendant/respondent is prohibited from publicizing or being recognized for an EIP undertaken as the result of an enforcement agreement. The defendant/respondent should agree that whenever it makes public an EIP or the results of the EIP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.

SECTION IX. FAILURE OF AN EIP AND STIPULATED PENALTIES

If an EIP is not completed satisfactorily, the defendant/respondent should be required, pursuant to the terms of the settlement document, to pay stipulated penalties for its failure. Stipulated penalty liability should be established for each of the scenarios set forth below as appropriate to the individual case.

1. Except as provided in paragraph 2 immediately below, if the EIP is not completed satisfactorily, a substantial stipulated penalty should be required. Generally, a substantial stipulated penalty is between 50 and 100 percent of the amount by which the settlement penalty was mitigated on account of the EIP.
2. If the EIP is not completed satisfactorily, but the defendant/respondent: a) made good faith and timely efforts to complete the project; and b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the EIP, no stipulated penalty is necessary. The balance of the penalty offset by the EIP should be paid as a penalty.
3. If the EIP is satisfactorily completed, but the defendant/respondent spent less than 90 percent of the amount of money required to be spent for the project, a small stipulated penalty should be required. Generally, a small, stipulated penalty is between 10 and 25 percent of the amount by which the settlement penalty was mitigated on account of the EIP.
4. If the EIP is satisfactorily completed, and the defendant/respondent spent at least 90 percent of the amount of money required to be spent for the project, no stipulated penalty is necessary.

SECTION X. DNREC PROCEDURES

A. TIMING AND STAFF INVOLVEMENT

Any proposal to incorporate an EIP into a settlement should be made early in the settlement discussions in order to provide sufficient time for consideration and reasonable notice to the respondents regarding acceptance or rejection of the proposal. Department staff may suggest project concepts to respondents expressing an interest in performing an EIP and who request project ideas. Staff's role in assisting with EIP formulation should be limited appropriately in order to prevent an excessive time commitment and involvement in actual development of a project.

B. DETAILS OF PROPOSAL

A project proposal must be compiled and submitted in support of a respondent's EIP. Such proposal must include: a project description, name of the project implementor, the natural resources and geographic area benefited by the project, identification of the enforcement action, type of project, analysis of the feasibility and cost of the project, any regulatory requirements, expected project benefits to the public, environment and respondent; a schedule for implementation; certification that the project was not planned by the respondent prior to the enforcement action, and; otherwise meets the requirements of this section and the types of information that will be reported during the projects progress.

C. LEVEL OF APPROVAL

Although this section is intended to be used by all staff, an EIP may not be allowed without the specific approval of the Secretary.

Upon submission of an EIP proposal, the assigned staff should review the proposal considering the five steps below:

- a. Ensure that the project meets the basic definition of an EIP.
- b. Ensure that all guidelines are satisfied.
- c. Ensure that the project is within one (or more) of the designated categories of EIPs.
- d. Ensure that the project satisfied all of the implementation and other criteria.

The staff should then forward a recommendation through their Division Director to the Secretary for final approval.

SECTION XI. CATEGORIES OF ON-SITE ENVIRONMENTAL IMPROVEMENT PROJECTS (EIP)

On-site environmental improvement projects should be within the general geographic area where the violation occurred, within the media (air, water habitat, etc) that was affected by the violation. DNREC has identified seven categories of projects that may qualify as on-site EIPs. In order for a proposed project to be accepted as an on-site EIP, it must satisfy the requirements of at least one category as well as all the other requirements established in this section.

1. Public Health

A public health project provides diagnostic, preventative and/or remedial components of human health care that is related to the actual or potential damage to human health caused by the violation. This may include epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment and rehabilitation therapy.

Public health EIPs are acceptable only where the primary benefit of the project is the population that was harmed or put at risk by the violations.

2. Pollution Prevention

A pollution prevention project is one which 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. (After the pollutant or waste stream has been generated, pollution prevention is no longer possible and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods.)

Source reduction may include equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project that protects natural resources through conservation or increased efficiency in the use of energy, water or other materials. “In-process recycling” wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on site, is considered a pollution prevention project.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution released to the environment, not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency (conservation) in the use of energy, water or other materials.

3. Pollution Reduction

If the pollutant or waste stream already has been generated or released, a pollution reduction approach – which employs recycling, treatment, containment or disposal techniques – may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as “pollution prevention”. This may include the installation of more effective end-of-process control or treatment technology. This also includes “out-of-process recycling,” wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for production

off-site, reducing the need for treatment, disposal, consumption of energy or natural resources.

4. Environmental Restoration and Protection

An environmental restoration and protection project is one that goes beyond repairing the damage caused by the violation to enhance the condition of the ecosystem or immediate geographic area adversely affected. These projects may be used to restore or protect natural environments (such as ecosystems) and man-made environments, such as facilities and buildings. Also included is any project that protects the ecosystem from actual or potential damage resulting from the violation or improves the overall condition of the ecosystem. Examples of such projects include: reductions in discharges of pollutants which are not otherwise required are not the subject of the violation to an effected air basin or watershed; restoration of a wetland along the same avian flyway in which the facility is located; or purchase and management of a watershed area by the defendant/respondent to protect a drinking water supply where the violation, e.g., a reporting violation, did not directly damage the watershed but potentially could lead to damage due to unreported discharges. This category also includes projects that provide for the protection of endangered species (e.g., developing conservation programs or protecting habitat critical to the well-being of a species endangered by the violation). With regards to man-made environments, such projects may involve the remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos and leaded paint, which are a continuing source of releases and/or threat to individuals.

5. Assessments and Audits

Assessments and audits, if they are not otherwise available as injunctive relief, are potential EIPs under this category. There are four types of projects in this category: a. pollution prevention assessments; b. site assessments; c. environmental management system audits; and d. compliance audits.

- a. Pollution prevention assessments are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production, and generation of toxic and hazardous materials and other wastes. To be eligible for EIPs, such assessments must be conducted using a recognized pollution prevention assessment or waste minimization procedure to reduce the likelihood of future violations.
- b. Site assessments are investigations of the condition of the environment at a site or of the environment impacted by a site, and/or investigations of threats to human health or the environment relating to a site.
- c. An environmental management system audit is an independent evaluation of a party's environmental policies, practices and controls. Such evaluation may encompass the need for: (1) a formal corporate environmental compliance policy, and procedures for implementation of that policy; (2) educational and training programs for employees; (3) equipment purchase, operation and maintenance programs; (4) environmental compliance officer programs; (5) budgeting and planning

systems for environmental compliance; (6) monitoring, record keeping and reporting systems; (7) in-plant and community emergency plans; (8) internal communications and control systems; and (9) hazard identification, risk assessment.

- d. An environmental compliance audit is an independent evaluation of a defendant/respondent's compliance status with environmental requirements. Credit is only given for the costs associated with conducting the audit. These costs need to be quantified, in a monetary amount, reflecting the actual cost of the audit/EMS, in the agreement with the Department. While the EIP should require all violations discovered by the audit to be promptly corrected, no credit is given for remedying the violation since persons are required to achieve and maintain compliance with environmental requirements. In general, compliance audits are acceptable as EIPs only when the defendant/respondent is a small business.

These two types of assessments and environmental management system audits are allowable as EIPs without an implementation commitment by the defendant/respondent. Implementation is not required because drafting implementation requirements before the results of the study are known is difficult. Further, for pollution prevention assessments and environmental management systems audits, many of the implementation recommendations from these studies may constitute activities that are in the defendant/respondent's own economic interest.

These assessments and audits are acceptable where the primary impact of the project is at the same facility, at another facility owned by the operator, or at a different facility in the same ecosystem or within the immediate geographic area (e.g., a publicly owned wastewater treatment works and its users). These assessments and audits are only acceptable as EIPs when the defendant/respondent agrees to provide DNREC with a copy.

6. Environmental Compliance Promotion

An environmental compliance promotion project provides training or technical support to other members of the regulated community to: 1) identify, achieve and maintain compliance with applicable statutory and regulatory requirements; 2) avoid committing a violation with respect to such statutory and regulatory requirements; or 3) go beyond compliance by reducing the generation, release or disposal of pollutants beyond legal requirements. For these types of projects, the defendant/respondent may lack the experience, knowledge or ability to implement the project itself, and, if so, the defendant/respondent should be required to contract with an appropriate expert to develop and implement the compliance promotion project. Acceptable projects may include, for example, producing or sponsoring a seminar directly related to correcting widespread or prevalent violations within the defendant/respondent's economic sector.

Environmental compliance promotion EIPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements which were violated and where DNREC has reason to believe that

compliance in the sector would be significantly advanced by the proposed project. For example, if the alleged violations involved Clean Water Act pretreatment violations, the compliance promotion EIP must be directed at ensuring compliance with pretreatment requirements.

7. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance – such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training – to a responsible state or local emergency response or planning entity. This is to enable these organizations to fulfill their obligations under the Emergency Planning and Community Right-to Know Act (EPCRA) to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel and to better respond to chemical spills.

EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs) and Local Fire Departments (LFDs). This enables states and local communities to plan for and respond effectively to chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment or ecosystems which could be damaged by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

Emergency planning and preparedness EIPs are acceptable where the primary impact of the project is within the same emergency planning district or state affected by the violations. Further, this type of EIP is allowable only when the EIP involves non-cash assistance and there are violations of EPCRA or reporting violations under CERCLA §103 alleged in the complaint.

SECTION XII. OFF-SITE ENVIRONMENTAL IMPROVEMENT PROJECTS

Off-site environmental improvement projects contribute generally to the enhancement of Delaware's environment

A. ENVIRONMENTAL IMPROVEMENT PROJECT BANK

1. If a party is allowed to fund or undertake an environmental improvement project not relating to its own facility or operation, the party shall select, subject to the Department's approval, an environmental improvement project from the Environmental Improvement Project Bank.
2. DNREC, in consultation with the Governor's Advisory Council on Environmental Control, will develop an Environmental Improvement Project Bank. The Bank will be comprised of a listing of projects and corresponding descriptions that will be approved by the Council.
3. Projects may be submitted by private and public non-profit organizations or by the Department.
4. In order to be considered, projects must meet criteria developed by DNREC in consultation with the Council.
5. The cost of any single project in the Environmental Improvement Project Bank shall not exceed \$100,000.
6. The Bank will be organized according to: 1) the geographic location of the project; 2) by the media (air, water, habitat, etc.), and 3) general projects that result in environmental improvement when implemented.
7. Once the initial listing of projects is developed, the Council may add new projects to the list at any time after considering and approving such projects as part of its regular meetings.
8. The Department may request, at any time, any reasonable information pertaining to an Environmental Improvement Project from the party receiving funds.
9. The Council or Department will contact those organizations whose projects are in the bank pending funding at least once a year to determine if the project is still viable.

B. CRITERIA FOR OFF-SITE ENVIRONMENTAL IMPROVEMENT PROJECTS

The following criteria are intended to provide guidance to applicants considering submitting a project to the Environmental Improvement Project Bank and to the Governor's Council on Environmental Control in considering projects that should be included in the Bank. To be considered, projects must clearly and convincingly improve Delaware's environment and meet all of the following three criteria in Section A and at least one of the criteria in Section B:

Section A.

1. Projects must be fully implementable.
2. Projects must begin immediately and have a clearly defined end.
3. Projects must address an environmental priority as defined in DNREC's current Strategic Plan.

Section B.

1. Project is innovative or demonstrative.
2. Project is a public – private partnership and/or can be used to leverage additional public or private resources.
3. Project provides hands-on experiences for school children or the general public or environmental education.

Other factors that may be considered include:

Whether the applicant has received prior funding from DNREC for projects, and if so, the performance of the applicant in carrying out the project(s).