

Consent Agreements for Supplemental Environmental Projects (SEPs) – C. Moses (1/14)

SEPs can be negotiated with violators of EPA and state environmental statutes. A violator may seek a reduction in a monetary fine, in return for performing a SEP that is consistent with EPA and/or state guidance. The Pesticide Safety Education Program (PSEP) Federal Workgroup is exploring the potential for SEPs as funding mechanisms for PSEPs who commit to conduct compliance promotion training/education programs. This opportunity is available on both the state and federal level, although states are much more flexible in the type of SEPs that will be accepted as part of a penalty settlement.

Discussions were held with a Special Project Analyst at EPA to determine if the agency would be willing to consider funding a PSEP compliance promotion project as part of a settlement agreement. It appeared that this may be possible. Below is the written correspondence with Beth Cavalier, Analyst, EPA Office of Civil Enforcement, Special Litigation and Projects Division. Her responses are in red. Comments are welcome.

1) How could a consent agreement be drafted to include a compliance promotion project that would meet the SEP guidelines? Is there an existing template or a similar (existing) case file that can be referenced which includes a compliance promotion SEP as part of an enforcement action? **EPA has a draft model SEP Consent Agreement that can be used as a guide (attached), but this is somewhat dated and we are working on a revised version. A state-only enforcement settlement would presumably follow your state format.**

2) Fiscal law principals are mentioned as one of the guiding factors when establishing SEP policy. Could you give an example of what those are? **This refers to the restriction on augmentation of appropriations, and compliance with the Miscellaneous Receipts Act. EPA cannot accept a SEP that provides additional resources to a federally managed project or one funded by federal money through a grant, cooperative agreement, etc. In addition, EPA must ensure that a SEP is a discrete project for which penalty mitigation is appropriate. I think it would be helpful for us to have a call to discuss the fiscal law principles. What is applicable in a federal settlement may not be the same as in a state-only settlement. My partner, Jeanne Duros, is particularly knowledgeable in these issues and I believe a phone conversation would be helpful.**

3) I agree that category 6 would be the best fit for a compliance promotion project. Could a compliance promotion project also be considered in category 2 (pollution prevention) or 7 (other)? **Generally, a compliance promotion SEP would fall into the Compliance Promotion category. As these projects are intended to inform and educate other members of the regulated community, there is not likely to be actual pollution prevention as a result of the project.**

4) Can a violator contract out a compliance promotion project or do they have to conduct/complete it themselves? **Violators may use a third party to assist them in the implementation of a SEP, however the violator remains responsible for the satisfactory completion of the SEP, generally through stipulated penalties.**

5) Do you have examples of “other members” of a regulated community that a compliance promotion project could be directed? If we are speaking of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) violations, would we be speaking of pesticide applicators as “other members” (not including the violator) if we are talking about a pesticide use violation? **Pesticide applicators and pesticide producers may be considered members of the regulated community.**

6) Speaking of FIFRA, what kind of activities might be prohibited which might already be required by this federal statute? A demonstration of competency is the only requirement for restricted use pesticide applicators (testing or continuing education credits) in FIFRA. Training is not required. Since training is not required, would an activity that includes FIFRA training be prohibited? **I’m not certain what you mean by this question. Anything required by the FIFRA statute or associated regulations would not be acceptable as a SEP. Any action or activity required under any federal, state or local law would not be acceptable as a SEP under EPA’s SEP Policy.** Competency demonstration is not required for persons who use general use pesticides. It is my opinion that this kind of training wouldn’t be prohibited under the current guidelines. I would consider training, education and outreach as compliance assistance. **General education and outreach projects are not usually acceptable as SEPs under EPA’s SEP Policy. Targeted enforcement compliance projects may be acceptable, depending on the nature and content of the project.**

7) In the SEP policy, there is a section (section 1) on community input which stated that a pamphlet was being constructed. Has that pamphlet been completed? If so, could you send a copy of that pamphlet to me? **OECA issued an Interim Community Guidance. That document is attached.**

8) I tried to come up with a fictional FIFRA project that would be consistent with SEP policy. Here is a scenario: Six farm workers experience health effects and are hospitalized because of workplace pesticide exposure. The employer did not give them training, notification, or the necessary personal protection equipment required by the Federal Worker Protection Standard (40 CFR part 170). An investigation was conducted and the case was forwarded to the EPA for review and enforcement action. Numerous violation counts were documented. The EPA proposed a penalty of \$40,000. The entity in violation of this regulation employs a compliance specialist who offers to give training to other employers in the county on how to comply with this regulation in exchange for a penalty reduction. Or, better yet, the entity in violation would like to contract with the local university cooperative extension office to conduct outreach (a series of educational/training programs), to assist farmers and ranchers with compliance. **Every SEP proposal is evaluated individually, in the context of the enforcement settlement and the violations from which it arose. The scenario that is described in # 8 may be acceptable, but would depend upon the specific facts of the enforcement case and settlement. Please note that I have answered all questions in the context of EPA’s SEP Policy. In a state only enforcement settlement, state regulations relating to environmental enforcement actions would guide the settlement. States are not required to follow EPA’s SEP Policy in state settlements.**