

10. Supplemental Environmental Projects

During the settlement negotiation process, responsible parties may propose to conduct additional environmental work as a part of the settlement agreement. This work may be related to the responsible party's operations or provide environmental benefit outside of the responsible party's regulatory responsibilities. The department may consider such offers if they are consistent with furthering the department's mission, provide an additional opportunity to reach a settlement and do not conflict with other department or state needs.

The Attorney General's Office has issued the attached policy related to supplemental environmental projects. The department, however, may include in a settlement, projects that do not meet all of the criteria in the Attorney General's Office policy in a settlement. Each project proposal will receive individual consideration before it is or is not included in a specific settlement agreement.

Supplemental environmental projects, or SEPs, can provide significant environmental benefits when included with enforcement actions. These benefits are in addition to other relief the state may receive. Supplemental environmental projects may allow the resolution of some violations to improve the local environment and the well-being of its population, as well as improve the environmental performance of the violator. This chapter describes the training that will be provided to enforcement staff so they recognize opportunities to include supplemental environmental projects into settlements. Supplemental environmental projects are a fundamental tool in improving or enhancing the environmental quality of Missouri.

SEPs may have tax implications for responsible parties. While the decision whether to propose a SEP remains the responsible party's decision, any settlement offer should include a note indicating potential tax obligations that accompany the performance of a SEP through a settlement agreement. See IRS Attachment II to IDD on Government Settlements Directive #1 at <http://www.irs.gov/businesses/article/0,,id=171049,00.html>. EPA has also issued a memorandum on the topic, appended here.

Implementing supplemental environmental projects involve several actions to ensure these opportunities are recognized and facilitated. In addition to training, the following actions will provide a framework for encouraging the consideration of these projects in routine enforcement work.

1. Each of the environmental quality programs will maintain a list of desired supplemental environmental projects based on their knowledge of environmental needs across the state. The lists will be maintained by the Enforcement Coordination Committee with input from the programs represented. The committee will update the list periodically and ensure it is readily available to all enforcement staff members, managers, attorneys or others as needed.
2. Other divisions may add projects to the lists. The Division of Geology and Land Survey and Division of State Parks may also have opportunities to initiate with supplemental environmental projects and discuss these projects with environmental quality staff as needed.
3. Programs will consider supplemental environmental projects for all cases involving penalties. Criteria for eligibility include:
 - A penalty amount that makes consideration of a supplemental environmental project worth its effort. There is not a set amount given the effort needed to accomplish possible supplemental environmental projects varies. In general, however, supplemental environmental projects should be considered for violations with penalties \$1,000 or greater.

- A violator who is capable of completing supplemental environmental projects.
 - The absence of factors that may make a supplemental environmental project a complicating factor in future work. For example, a habitual violator may attempt to use a supplemental environmental project as a reason for delaying other compliance related work.
 - Other factors that would support or oppose a violator conducting a supplemental environmental projects.
4. Close coordination with the Attorney General’s Office on supplemental environmental projects is expected, particularly when a new or innovative project is considered. This will ensure the final project meets the requirements and can be accepted.
 5. Settlement offers will inform violators that a supplemental environmental project may be an option for the violator to consider. The following statement should be included in the offer of settlement letters to eligible responsible parties:

“To further the department’s legal mandate and overall goals of protecting and enhancing public health and the environment, the settlement of an enforcement case may include a supplemental environmental project. A supplemental environmental project is a new environmental project that a violator voluntarily agrees to perform. It would provide additional protection for human health or environmental resources beyond what is required by law, and may also involve pollution prevention, energy efficiency, renewable energy, conservation, environmental justice or other related beneficial purposes. Although a violator is not legally required to perform a supplemental environmental project, the cash penalty may be lower if an acceptable project is proposed, approved and completed. Any economic gain for noncompliance will be addressed in the cash penalty. The department is willing to consider a supplemental environmental project as part of the resolution of the violations described in this letter.”

Please be advised there may be tax implications for conducting a SEP, as it would not be a normal business expense, and the department can provide further information on this as needed.
 6. The Enforcement Coordination Committee will maintain a list of supplemental environmental projects that are incorporated into settlements, as well as similar beneficial projects that are not.

Attorney General’s Office Policy: MOSEPP Policy

(taken from the Attorney General’s Official Policy)

ATTORNEY GENERAL’S OFFICE POLICY: MISSOURI SUPPLEMENTAL ENVIRONMENTAL PERFORMANCE PROJECTS (“MOSEPP”) POLICY

I. INTRODUCTION

A. **Background**

Missouri’s environmental statutes provide for a variety of sanctions in the event of legal or regulatory violations. The Department of Natural Resources or its commissions, (hereinafter “Department”), routinely pursues such violations and occasionally the matters are referred to the Missouri Attorney General’s Office, (“AGO”). In resolution of resulting environmental enforcement cases, the AGO routinely requires violators to submit to a court order, to achieve and maintain compliance with environmental laws and regulations to address any environmental harm caused by the violations, and to pay a monetary civil penalty. To further Missouri’s goal of protecting and enhancing public health and the environment, and acknowledging that regulatory compliance alone may not fully protect those interests in many instances, environmental performance beyond regulatory minimums may be part of a resolution between the AGO, the Department and the regulated party. This Policy sets forth the types of such projects that are permissible - known as Missouri Supplemental Environmental Performance Projects (MOSEPPs) - and the terms and conditions under which they may become part of a settlement between the AGO, the Department and a regulated party.

The primary purpose of this Policy is to enhance environmental performance that may not otherwise have occurred without the settlement incentives provided by this Policy, and to provide responsible entities the opportunity for leadership and innovation in environmental protection.

It is understood and appreciated that EPA's Supplemental Environmental Project policy has guided our thinking in regard to this matter, and to the extent that it is consistent with this policy, the guidance promulgated by EPA in support of its SEP policy should be helpful in understanding how the AGO MOSEPP policy operates. However, the range of acceptable projects under Missouri law far more limited than that available to EPA under its SEP policy and federal law. In general, unlike SEPs, MOSEPPs must materially improve the environment by enhanced environmental performance in the responsible parties' actual operations.

B. Role of Penalties

In resolving enforcement actions, the AGO requires violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the illegal conduct. The AGO also seeks substantial monetary penalties in order to deter noncompliance by the violator and all those similarly situated, as well as to recover the economic benefit obtained through the noncompliance. Without imposition of penalties against violators, regulated parties would have financial incentive to delay compliance. A failure to obtain an appropriate penalty from violators is therefore unfair to those responsible parties who bear the additional costs of timely regulatory compliance. Appropriate penalty sums help secure a level playing field by ensuring that violators do not obtain an unfair economic advantage over their more responsible competitors.

In the context of a settlement, the AGO generally embraces accepted EPA - issued criteria in exercising its discretion to establish an appropriate penalty demand. In so doing, the AGO considers such factors as the economic benefit associated with the violations, the gravity or seriousness of the violations, and prior compliance history of the responsible facility. The AGO considers lowering a penalty demand if a violator shows an exceptional commitment to quickly and thoroughly achieve compliance and commit to necessary remediation. We now propose to go further by potentially mitigating penalty demands for violators who agree to perform a suitable MOSEPP.

The AGO encourages the use of MOSEPPs that are consistent with this Policy. MOSEPPs may not be appropriate in settlement of all cases, but they are intended to become important part of the state's environmental enforcement program. While penalties will continue to play an important role in environmental protection by punishing non-compliance and deterring future violations, MOSEPPs can play an additional role in securing significant environmental or public health protection and improvements for Missouri. This policy does not affect the resolution of criminal cases, cases filed in federal courts, or in cases filed jointly with the United States or another state.

C. Pollution Prevention and Fundamental Values

The Pollution Prevention Act of 1990 (42 U.S.C. § 13101 *et seq.*, November 5, 1990) identifies an environmental management hierarchy in which pollution "should be prevented or reduced whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort. . ." (42 U.S.C. § 13101(b)). Selection and evaluation of proposed MOSEPPs should be conducted generally in accordance with this hierarchy of environmental values, i.e., MOSEPPs involving pollution prevention processes are preferred over other types of reduction or control strategies, and this will be reflected in the degree of a final penalty demand mitigation.

D. Applicability

This Policy applies to settlements of all civil judicial actions filed after the effective date of this Policy, and to all pending or future environmental enforcement cases referred to the AGO. This Policy applies to all actions taken under the authority of the environmental statutes and regulations that the AGO enforces. It establishes a framework for the AGO to use in exercising its enforcement discretion in determining appropriate settlements.

This is a settlement Policy and thus is not intended for use by the AGO, defendants, respondents, courts or administrative law judges at a hearing or in a trial. Further, this policy is intended to provide a settlement guidance and policy of the AGO and is not intended to be a rule or regulation under the Missouri Administrative Procedure Act, Chapter 536, RSMo 2000 nor is it intended to create any rights or obligations of the AGO, the Department, the defendant, or any third parties.

II. DEFINITION AND KEY CHARACTERISTICS OF AN MOSEPP

A MOSEPP is defined as a readily verifiable **environmentally beneficial** project with an **acceptable MOSEPP purpose** and **nexus to the violation**. An alleged violator/defendant agrees to undertake a MOSEPP in **resolution of an AGO enforcement action in mitigation of a civil penalty demand**, even though the alleged violator/defendant is **not otherwise legally required to perform the MOSEPP**. The MOSEPP is secured in a **court enforceable agreement** between the AGO, the Department and the alleged violator/defendant. The bolded key parts of this definition are elaborated below.

A. "**Environmentally beneficial**" means a MOSEPP must materially improve, protect, or reduce existing harm or potential for harm to Missouri's environment through improvements to the entities' actual operations. While in some cases a MOSEPP may provide the alleged violator with certain benefits, such as some cost savings, there must be no doubt that the project primarily benefit the environment of Missouri.

Any cost savings or other economic benefit accruing to the violator may be accounted for in the development of the MOSEPP and/or the monetary penalty paid as part of the resolution.

B. "**Acceptable MOSEPP purposes**" include:

1. 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 which 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 a decreased in the use of energy, water or other materials.

2. Pollution Recycling, Treatment or Containment. If the pollutant or waste stream already has been generated or released, a pollution control approach — which employs recycling, treatment, containment or disposal techniques — may be appropriate. A pollution control 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, or improved containment, or safer disposal of an existing pollutant source. Pollution control 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.

3. Environmental Restoration An environmental restoration project is one which enhances the condition of the ecosystem or immediate geographic area adversely affected. These projects may be used to restore natural environments - however, an environmental restoration project is only an acceptable MOSEPP when the underlying environmental violation caused or contributed to the specific damage addressed by the project. The above condition does not prohibit the state from acquiring property, where appropriate, in satisfaction of a natural resource damage or similar claim.

With regard to manmade 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 lead paint, which are a continuing source of releases and/or threat to individuals.

4. Public Health A public health project provides diagnostic and preventative and/or remedial components of human health care which is related to the actual or potential damage to human health caused by the violation. This may include epidemiological data collection and analysis, but only when accompanied by follow-up care, medical examinations of potentially affected persons, collection and analysis of blood/fluid/tissue samples. Medical treatment and rehabilitation therapy may be involved, but only for those who do not have reasonable access to such services through other public or private means.

Public health MOSEPPs are acceptable in the truly rare instances where the primary benefit of the project is a population harmed or put at risk by the violations committed.

5. Other Types of Projects Projects determined by the AGO to have environmental merit which do not fit within at least one of the categories above but that are otherwise fully consistent with all other provisions of this Policy, may be acceptable.

C. **“Unacceptable MOSEPP purposes”** include:

1. Assessments and Audits Assessments and audits, if they are not otherwise available as injunctive relief, are not potential MOSEPPs under this category as they do not satisfy the definition of an MOSEPP. While audits may assist companies in acknowledging environmental obligations, they do not, standing alone, assure that less pollution will enter the environment. An audit or assessment may be useful in determining an appropriate MOSEPP project. Reasonable expenditures for technical and engineering assessment and design of an otherwise acceptable MOSEPP and reasonable expenditures to track, document and report the performance and environmental benefits of an otherwise acceptable MOSEPP may be included in accounting for a party's total expenditure for a MOSEPP.

2. 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 or 2) go beyond compliance by reducing the generation, release or disposal of pollutants beyond legal requirements. As these projects do not necessarily produce material improvements in any given firm's environmental performance or the overall sustainability of operations, they are not appropriate MOSEPPS.

3. Emergency Planning and Preparedness Response An emergency planning and preparedness project provides assistance — equipment — to a responsible state or local emergency response or planning entity. While the AGO welcomes the opportunity to pursue claims for the response costs of state and local emergency response agencies, a payment to such agencies does not satisfy the definition of an MOSEPP nor should they mitigate a civil penalty. Of course, such payment may appropriately satisfy a claim for response costs or similar damages.

4. Other Projects Which Are Not Acceptable as MOSEPPS. The following are examples of the types of projects that are not allowable as MOSEPPS:

- i. General public educational or public environmental awareness projects, e.g., sponsoring public seminars, conducting tours of environmental controls at a facility, promoting recycling in a community;
- ii Contributions or payments to any third parties, including any state agency;
- iii Conducting a project, which, though beneficial to a community, is unrelated to environmental protection, e.g., making a contribution to a non-profit, public interest, environmental, or other charitable organization (i.e. donating playground equipment);
- iv Projects which the alleged violator/defendant was already planning or considering conducting previous to the violations alleged in the enforcement action.

D. **“Nexus to the violation”** means the relationship between the violation and the proposed MOSEPP. This relationship exists only if:

1. The MOSEPP is designed to all but eliminate the likelihood that similar violations will occur in the future; or
2. The MOSEPP reduces the adverse impact to public health or the environment to which the violation at issue contributed; or
3. The MOSEPP reduces the overall risk to public health or the environment potentially affected by the violation at issue.

Nexus is easier to establish if the primary impact of the MOSEPP is at the site where the alleged violation occurred or within the immediate geographic area. The cost of the MOSEPP is not relevant to whether there is an adequate nexus.

E. **“Resolution of an AGO enforcement action”** means: 1) the Department or its commissions has referred and/or the AGO has commenced formal environmental enforcement activity and 2) the need for necessary and appropriate legal relief - injunctive relief, penalties and any monetary damages - has been resolved satisfactorily and 3) the MOSEPP is appropriately part of a final court enforceable order containing all elements of the resolution.

F. **“Not otherwise legally required to perform”** means the MOSEPP activity is not required by any federal, state or local law or regulation. Further, MOSEPPs cannot include actions which the alleged violator/defendant is likely to be required to perform:

1. as injunctive relief in the current enforcement action,
2. as injunctive relief in another legal action the AGO, or another regulatory agency could bring, or
3. as part of an existing settlement or order in another legal action.

MOSEPPs may include activities which the alleged violator/defendant would have become obligated to undertake two or more years in the future, if the project will result in the facility coming into compliance earlier than the deadline. Such “accelerated compliance” projects are not allowable, however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the alleged violator/defendant for early compliance.

G. “**Court enforceable agreement**” means that the alleged violator/defendant must enter into a court enforceable consent judgment resolving all outstanding enforcement and MOSEPP related issues.

H. “**Readily verifiable**” refers to the capability to verifiably track, document and report MOSEPP activities and to measure or estimate accompanying environmental benefits through an acceptable methodology.

III. LEGAL GUIDELINES

The AGO has broad discretion to settle environmental enforcement cases, including the discretion to include MOSEPPs as an appropriate part of the resolution. Further, whether the AGO decides to accept a proposed MOSEPP as part of a settlement, and the amount of any penalty mitigation that may be given for a particular MOSEPP, is also purely within the AGO’s discretion, which will be exercised in close consultation with the Department. Even though a proposed MOSEPP appears to satisfy all of the provisions of this Policy, the AGO may decide, for one or more reasons within its sole discretion, that a MOSEPP is not appropriate (e.g., the cost of reviewing a MOSEPP proposal is excessive, the oversight costs of the MOSEPP may be too high, the defendant/respondent may not have the ability or reliability to complete the proposed MOSEPP, the deterrent value of the higher penalty amount outweighs the benefits of the proposed MOSEPP or the nature of the violations mitigate against allowing any form of penalty relief or other reasons.).

The legal evaluation of whether a proposed MOSEPP is within the AGO’s authority and consistent with all statutory and Constitutional requirements may require some attention. Any proposed MOSEPP cannot be inconsistent with any provision of the underlying statutes or constitutional provision, but must instead advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action.

Clearly, any sums collected by the AGO in prosecution of environmental penalty claims will be sent to the school fund as per MO Const. Art. IX § 7. (See *State v. Williams*, 872 S.W.2d 669 (Mo. App. 1994) citing *Reorganized School Dist. No. 7 v. Douthit*, 799 S.W.2d 591, 594 (Mo. banc. 1990)). Any stipulated penalties for failure to perform an MOSEPP will also, if collected, be forwarded to the appropriate school fund. Any and all other sums collected in litigation (i.e., damages, response costs) will be forwarded to the appropriate statutorily created fund and be subject to the appropriations process.

IV. CALCULATION OF THE FINAL PENALTY

If a MOSEPP is approved by the AGO in consultation with the Department, then the civil penalty demand for the violations that occurred in the enforcement action may be reduced. The amount of reduction of the civil penalty demand in any given enforcement action will be determined by the AGO in consultation with the Department on a case by case basis through negotiation with the alleged violator/defendant. Factors used to make the determination of the percentage of reduction to occur include, but are not limited to: the cost expended by the alleged violator/defendant of implementing the MOSEPP, the environmental benefit that will result from the implementation of the MOSEPP where the MOSEPP ranks on the pollution prevention hierarchy, benefits accruing to the environment and local community and the “innovativeness” of the MOSEPP. However, a MOSEPP project must always be a greater cost to the violator than the original penalty. Also, the final penalty amounts must address the economic benefit to a violator.

V. LIABILITY FOR PERFORMANCE

The alleged violator/defendant is solely responsible and legally liable for ensuring that an MOSEPP is completed satisfactorily. An alleged violator/defendant may not transfer this responsibility and liability to a third party, although the alleged violator/defendant may use contractors or consultants to assist it in implementing a MOSEPP. A party conducting an MOSEPP project will be required, likely through an independent third-party to track, document and report the project’s performance and the accompanying environmental benefit to the Department and the AGO. Cost of such tracking, documentation, and reporting shall be at the violator/defendant’s sole expense. To assure verifiability, the settlement agreement should completely and accurately describe the MOSEPP, describe the specific actions to be performed by the alleged violator/defendant and provide for a reliable and objective means to verify that the alleged violator/defendant has timely completed the project. The resolution should also require the

alleged violator/defendant to measure or estimate the environmental benefits of the MOSEPP and describe how the benefits were measured or estimated. No agreement approving a MOSEPP shall constitute a permit or authorization to undertake any activity for which any environmental permit or authorization is required from the federal, state or local government. Approval of a MOSEPP shall not relieve the alleged violator/defendant of any responsibility for complying with state or federal law.

VI. FAILURE OF A MOSEPP

As the AGO will have compromised the state's penalty claims in exchange for the implementation of an MOSEPP, it is appropriate that the failure to fully perform the project will merit the imposition of stipulated penalties in at least the amount originally deferred.