



Furthering Environmental Justice In Air Quality Enforcement With Supplemental Environmental Projects

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PURPOSE OF THE REPORT

The Great Lakes Environmental Law Center is a Detroit-based nonprofit that offers community education, policy support, and a variety of legal services to address environmental, resource, and energy issues affecting communities in and around Detroit, all over Michigan, and throughout the Great Lakes region.

At the heart of the Center's mission is engaging with communities and their residents, and working with residents to implement educational, policy, and legal strategies that contribute to addressing the community's needs and desires.

This report would not be possible without the several other organizations and residents that have been demanding environmental justice for people throughout Michigan for decades. To that end, this report was prepared by the Center to serve as a resource for individuals, organizations, and government representatives that are interested in how air quality enforcement interacts with environmental justice. It is also meant to serve as a resource for the Michigan Department of Environmental Quality in particular. We hope that the report will increase public knowledge regarding air quality enforcement and environmental justice, and will contribute to policy changes that will facilitate the expanded use of supplemental environmental projects as a method to further environmental justice in Michigan.

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1 Executive Summary

Enforcement is a key linchpin to environmental regulation. Without diligent enforcement of environmental regulations, regulated industry will fail to realize the environmental and public health consequences of their violations and consequently will not be adequately deterred from committing additional violations of environmental regulations in the future.

Diligent enforcement is particularly important in the context of air quality standards regarding stationary sources. Many air quality violations due to excessive emissions from stationary sources primarily impact the health of the peoples that live and work near the facility. The public health risk presented by air quality violations is particularly concerning in communities that have a large number of major stationary sources in a concentrated area. Communities with a large number of facilities in a concentrated area are frequently communities of color and lower income, making the enforcement of air quality standards an important environmental justice issue.

Environmental justice has been defined in numerous ways. The U.S. Environmental Protection Agency (“EPA”) has defined environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, or national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”¹ Professor Bunyan Bryant has defined environmental justice as “...those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities where people can interact with confidence that the environment is safe, nurturing, and productive.”² However, it has also been acknowledged that the issues underlying environmental quality, race, and class and how to address those issues is difficult to distill into a simple definition.³ Given this difficulty, many environmental justice advocates refer to four distinct principles of environmental justice—distributive justice, procedural justice,

¹ U.S. Environmental Protection Agency, Environmental Justice, available at <https://www.epa.gov/environmentaljustice>

² Bunyan Bryant, *Environmental Justice: Issues, Policies, and Solutions*, Island Press (1995)

³ Robert Kuehn, *A Taxonomy of Environmental Justice* (2000), available at <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1137&context=aprci>

corrective justice, and social justice.⁴ While none of these principles in isolation represent the full concept of environmental justice, each represents an important component of the broader concept.

The principle of corrective justice is particularly relevant in the context of air quality enforcement. Corrective justice is the just administration of punishment for those responsible parties who have broken environmental laws in a manner that repairs the harm that they have caused. A common concern among residents in communities of color and lower income is that air quality enforcement fails to further corrective justice. This concern is two-fold, as residents in environmental justice communities frequently believe that many violations of air quality standards are under-enforced, and that enforcement actions fail to provide redress to community and its residents that have been impacted by the violation. While there are numerous ways for an enforcing agency to better promote corrective justice through air quality enforcement, this report focuses on how the Michigan Department of Environmental Quality can further the concept of corrective justice through improvements to its supplemental environmental projects policy.

Supplemental environmental projects (“SEPs”) are commonly defined as environmentally beneficial projects that a violator agrees to undertake as part of the terms of an enforcement action that was initiated due to a violation of some environmental quality standard. In states like Michigan, which direct any monetary penalty for air quality violations to the state’s general fund, SEPs provide a key opportunity to ensure that an enforcement action provides the community that has been impacted with some redress for the increased environmental risk that it has been subjected to. For example, an enforcement action could provide redress to a community that has been subjected to an increased level of environmental risk by requiring the violator to implement a SEP that involves the purchase and installation of a new, state-of-the-art air filtration system in a local school to improve air indoor air quality, or to replace or retrofit diesel engines in the community. Through a SEP, it is possible for an enforcement action to provide some measure of redress to the community that has been harmed.

⁴ Id.

Given their potential to promote environmental justice, many residents in environmental justice communities prefer that an enforcement action include a SEP as opposed to a monetary penalty that goes to a general fund. However, there are potential issues that may prevent SEPs from effectively promoting environmental justice.

First, since the MDEQ does not require an enforcement action to include a SEP under any circumstances, it must both proactively encourage the inclusion of SEPs in consent orders. Second, the MDEQ must develop policies and procedures aimed at furthering corrective justice by ensuring that the SEP will provide redress for the increased environmental risk to the community that has been impacted as well as an opportunity for residents of the community to meaningfully involve themselves in the process of developing the SEP.

This report will address the four main obstacles to developing a SEP that effectively implements corrective justice that currently exist in the MDEQ's SEP policy:

- Obstacle 1: The MDEQ's Policy actively disincentivizes SEPs because under no circumstances is a violator required to agree to a SEP as a condition of a consent order and it requires a violator that does voluntarily agree to conduct a SEP to pay more than they would otherwise be required to pay. As a result of MDEQ's SEP Policy, there is a strong financial disincentive for a violator to agree to engage in a SEP as part of a consent order.
- Obstacle 2: While the MDEQ's Policy does encourage violators interested in conducting a SEP to involve the community in developing the project, it is not a requirement and there is still the opportunity that a SEP will fail to reflect the desires and needs of the community harmed.
- Obstacle 3: While the MDEQ's Policy provides for a clear and transparent process for measuring the quality of a SEP via its SEP Quality Rating Procedure, the scoring criteria does not adequately further environmental justice.
- Obstacle 4: To ensure that enforcement actions with SEPs adequately deter future violations of air quality standards, the MDEQ must strictly limit the use of projects that are potentially profitable to the violator as a SEP.

2 The Basics of Air Quality Enforcement

The enforcement of air quality standards is primarily done by states as opposed to the United States Environmental Protection Agency (“EPA”). While the Clean Air Act invests the EPA with the responsibility of setting minimum air quality standards and gives it the authority to enforce those standards when they are violated, in general the EPA delegates much of its enforcement authority to states so long as the relevant state program meets specified minimum requirements. For example, the Clean Air Act requires the EPA to develop national ambient air quality standards (“NAAQS”) for certain pollutants, commonly referred to as “criteria pollutants.”⁵ These standards must be set to allow for an adequate margin of safety that is required to protect the public health.⁶ While the EPA bears the primary responsibility for setting NAAQS, states are required to submit a State Implementation Plan (“SIP”) to the EPA for its approval that details what enforceable emissions limitations and other control measures the state has adopted to ensure that NAAQS are not violated, how the state will monitor air quality to evaluate compliance with the NAAQS, and how the state will enforce the emissions limitations and other control measures it has developed.⁷ In short, while the EPA has the primary responsibility of developing NAAQS, each individual state has the primary responsibility to administer its own program to ensure there is compliance with the NAAQS, subject to EPA approval and oversight. Beyond criteria pollutants, the Clean Air Act also allows the EPA to delegate authority for the implementation and enforcement of hazardous air pollutant emissions standards,⁸ the implementation and enforcement of new source performance standards,⁹ and the implementation and enforcement of operating permits.¹⁰

⁵ Specifically, the EPA must develop national ambient air quality standards for each pollutant that causes or contributes “to air pollution which may reasonably be anticipated to endanger public health or welfare...” and “...the presence of which in the ambient air results from numerous or diverse mobile or stationary sources...” 42 U.S.C. § 7408(a)(1)

⁶ 42 U.S.C. § 7409(b)(1)

⁷ 42 U.S.C. § 7410(a)(2)(A)-(C)

⁸ 42 U.S.C. § 7412(l)

⁹ 42 U.S.C. § 7411(c)

¹⁰ See 40 C.F.R. Part 70

Once authority is delegated, the state possesses the primary responsibility to resolve instances of noncompliance through a variety of potential enforcement actions. However, the EPA still retains authority to undertake an enforcement action.¹¹ While each state's enforcement program must comply with minimum requirements to be approved by the EPA, these requirements are generally broad and leave states a significant amount of discretion.

The MDEQ has the primary responsibility to enforce air quality standards in the state of Michigan. In general, Michigan law provides the MDEQ with a variety of mechanisms to enforce violations of air quality standards, including consent orders, administrative penalties, civil lawsuits, and criminal lawsuits. Each of these enforcement mechanisms is described below.

- Consent Orders: If the MDEQ determines that a violation of air quality standards exists, it must provide the alleged violator with the opportunity to enter an agreement with the MDEQ to

Environmental Justice

Environmental justice is the counterpoint to environmental injustice, which is the fact that people of color and lower income have historically been and continue to be subjected to a disproportionately high level of environmental risk while also having an inequitable access to the benefits that may be associated with that risk.

Environmental justice has been defined multiple ways. The U.S. EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.”

Given the fact that communities of color and lower income have been subjected to disproportionately high levels of environmental risk, environmental justice often calls for laws, regulations, policies, and procedures aimed at protecting communities of color and lower income.

¹¹ For example, if the EPA is notified that a person has violated or is in violation of a state implementation plan, it may notify the person and the State and, after 30 days following its notice, the EPA may pursue an enforcement action. 42 U.S.C. § 7413(a)(1); Additionally, if the EPA determines that a state is not acting in compliance with requirements relating to the construction of new sources or the modification of existing sources, among other things, issue an order prohibiting the construction of the source at issue. 42 U.S.C. § 7413(a)(5).

correct the alleged violation.¹² The agreement may provide for monetary relief as well as other relief agreed to by the MDEQ and the violator.¹³ Consent orders are effective for a specified time period, which is generally 1 to 3 years. Prior to issuing a finalized consent order, the MDEQ must provide public notice and an opportunity for public comment on the terms and conditions of the consent order.¹⁴

- **Administrative Fine:** If the MDEQ determines that a person or company has violated or is in violation of air quality standards, it may assess an administrative fine of up to \$10,000 for each instance of violation and, if the violation continues, for each day of continued noncompliance.¹⁵ The total administrative fine sought by the MDEQ cannot be more than \$100,000 and the first alleged date of violation must have occurred within 12 months of the initiation of the administrative action.¹⁶
- **Civil Action:** The Attorney General may commence an action in the civil courts against a person or company for a violation of air quality standards.¹⁷ A court may impose a civil fine of not more than \$10,000 for each instance of violation, and, if the violation continues, for each day of continued violation.¹⁸ Unlike with administrative fines, the Attorney General is not limited in the total penalty amount it can obtain. The Attorney General may also, at the request of the MDEQ, file an action to recover the full value of the injuries done to the natural resources of the state.¹⁹
- **Criminal Action:** A person who knowingly violates an air quality standard may be prosecuted for a misdemeanor or a felony, depending on the circumstances of the violation.²⁰ In general, only knowing violations of hazardous air pollutant emissions

¹² MCL 324.5528(1)

¹³ Id.

¹⁴ MCL 324.5528(3)

¹⁵ MCL 324.5529(1)

¹⁶ MCL 324.5529(2)

¹⁷ MCL 324.5530(1)

¹⁸ MCL 324.5530(2)

¹⁹ MCL 324.5530(3)

²⁰ See MCL 324.5531

standards may be considered felonies, while knowing violations of other air quality standards may be considered misdemeanors.²¹

While the MDEQ has a variety of enforcement tools at its disposal, most of its enforcement actions take the form of consent orders negotiated with the violator. In 2016, approximately 87% of the air quality enforcement actions taken by the MDEQ were in the form of a consent order negotiated by the MDEQ and the owner or operator of the facility at issue.²² Specifically, in 2016 the MDEQ reported that it engaged in 49 enforcement actions against stationary sources of air pollution and that 43 were consent orders, 4 were administrative orders, and 2 were civil actions.²³ In 2017, the MDEQ reported that it engaged in 27 enforcement

Corrective Justice as Environmental Justice

The concept of environmental justice has been distilled by Robert Kuehn into four principles: distributive justice, procedural justice, corrective justice, and social justice.

Corrective justice is the just administration of punishment for those responsible parties who have broken environmental laws in a manner that repairs the harm that they have caused. This principle of environmental justice is furthered not only through the diligent enforcement of air quality standards that exist to protect human health in low-income communities and communities of color, but also requires that the enforcement be conducted in a manner that provides some redress to the community that was harmed.

²¹ Id.

²² Michigan Department of Environmental Quality, Air Quality Division Annual Program Report – Fiscal Year 2016 (Mar. 22, 2017), available at https://www.michigan.gov/documents/deq/deq-aqd-amu-2016_annual_air_quality_report_572304_7.pdf

²³ Id.; The MDEQ appears to utilize administrative orders when the violation at issue is fairly straightforward and the MDEQ only wants to pursue a monetary penalty. The monetary penalty amounts for the four administrative orders entered by the MDEQ in 2016 are \$10,000, \$2,500, \$500, and \$1,500. Regarding civil actions, the MDEQ appears to use this type of enforcement action when a violator is being unresponsive or overly antagonistic during enforcement proceedings. For example, one of the facilities that was the subject of a civil action was warned by the MDEQ because a representative of the facility created “hostile conditions” during an MDEQ inspection.

actions against stationary sources and that 26 were consent orders and 1 was a civil action.²⁴

3 Types of Relief Available In Enforcement Actions

In general, there are three types of relief that are available in enforcement actions: a monetary penalty assessed against the violator; a requirement that the facility undertake specified operational, maintenance, or air quality monitoring; and a requirement that the violator engage in a supplemental environmental project (SEP). Each of these types of relief have the potential to further environmental justice.

3.1 Monetary Penalty

One of the central pieces of most enforcement actions is the requirement that the violator pay the enforcing agency some amount of money as a penalty for its violation. In Michigan, penalties paid by a violator pursuant to an air quality enforcement action are paid to the state general fund. While Michigan law expressly describes the factors that must be considered in determining the appropriate monetary fine for a civil or criminal action,²⁵ Michigan law does not provide any guidance regarding how the MDEQ is to determine an appropriate monetary penalty for a consent order.

To guide its monetary penalty calculations for consent orders, penalty amounts are initially calculated using the EPA's Stationary Source Civil Penalty Policy ("EPA Penalty Policy").²⁶ While the EPA Penalty Policy has not been formally adopted by reference in either Michigan law, the Michigan Administrative Code, or as MDEQ policy, it has been regularly utilized by the MDEQ as a basis to calculate appropriate monetary penalties to be included in consent orders.

The purpose the EPA Penalty Policy is to ensure that penalties for violations of air quality standards serve as an effective deterrent by removing any potential economic

²⁴ Michigan Department of Environmental Quality, Air Quality Division Annual Program Report – Fiscal Year 2017 (Feb. 27, 2018), available at https://www.michigan.gov/documents/deq/deq-aqd-amu-2017_annual_air_quality_report_615783_7.pdf

²⁵ MCL 324.5532

²⁶ U.S. EPA, Clean Air Act Stationary Source Civil Penalty Policy, Oct. 25, 1991, available at: <https://www.epa.gov/sites/production/files/documents/penpol.pdf>

benefit of noncompliance and by reflecting the gravity of the violation.²⁷ To calculate the amount of a penalty that is necessary to remove the economic benefit of noncompliance, the EPA Penalty Policy instructs the enforcement agency to address costs that were delayed by noncompliance or costs that were avoided completely by noncompliance.²⁸ For example, if a facility was required to install more expensive pollution control technology but failed to do so, it could be subjected to penalties based on the economic benefit it derived from not installing the required pollution control technology.

Regarding the gravity of the violation, the policy instructs the enforcing agency to consider a variety of factors, including: the level of violation; toxicity of the pollutant; sensitivity of the environment; length of time of violation; importance of the regulatory scheme; size of the violator; the violators degree of willfulness or negligence, cooperation with the enforcing agency; its history of noncompliance; and the environmental damage.²⁹ However, it's important to emphasize that while the MDEQ generally uses the EPA's Penalty Policy, it is not required to do so by any law or regulation. As such, the MDEQ is free to deviate from the penalty calculation processes described in the EPA's Penalty Policy at its discretion.

3.2 Operational, Maintenance, and Monitoring Requirements

The MDEQ may also require a violator to make specified operational or maintenance improvements or to conduct additional monitoring to try to prevent repetition of violations. For example, if a violation was caused by a facility failing to conduct adequate maintenance, a consent order may require that the facility conduct more regular maintenance of the equipment that caused the violation. If a violation was caused by an operations error at the facility, then a consent order may require the violator to update its operational procedures to ensure that it is operating in a way that minimizes air pollution and avoids future violations of air quality standards. Lastly, if emissions from a particular source are not required to be monitored continuously, then the MDEQ may require the violator to conduct additional monitoring of air emissions

²⁷ Id. at 3.

²⁸ Id. at 4.

²⁹ Id. at 8-19.

beyond what is required by state and federal regulations. Additional monitoring can either take the form of a single emissions test or multiple emissions test over the course of a prolonged period of time.³⁰

4 Supplemental Environmental Projects

Beyond penalties and operational, maintenance, or monitoring requirements, the MDEQ may also require a violator to undertake a supplemental environmental project (“SEP”) in accordance with the terms specified in a consent order. A SEP is an environmentally beneficial project that a violator agrees to undertake as part of the terms of their consent order.³¹ Some examples of commonly used SEPs include requiring a violator to install a state-of-the-art air filtration system for nearby schools to improve indoor air quality, to replace or retrofit old diesel engines on school and transit

Supplemental Environmental Projects as a Method of Furthering Corrective Justice

Particularly in states such as Michigan where penalties from the enforcement of air quality violations go to the state general fund where it may be allocated for any use, a supplemental environmental project is the best method to further corrective justice in the context of air quality enforcement.

At their best, supplemental environmental projects reduce the public health risks that at least a subset of the population nearby a facility has been subjected to because of a violation of air quality standards. Without a supplemental environmental project, it is likely that the increased public health risk caused by an air quality violation would fail to be directly redressed by an agency’s enforcement action.

³⁰ The frequency and reporting of additional monitoring required as a term of an enforcement action vary based on the nature of the violation. In instances where has violated an emission standard that is only subject to sporadic testing, a consent order may require a facility to conduct more frequent testing and to submit results of those tests to the MDEQ. *See*, In the matter of administrative proceedings against United States Steel Corporation, Stipulation for Entry of Final Order By Consent, December 16, 2016, available at

http://www.deq.state.mi.us/aps/downloads/SRN/A7809/A7809_ACO_20161216.pdf (requiring U.S. Steel to submit a test plan for hydrochloric acid emissions from EG5-PICKLE-LINE the MDEQ on at least an annual basis, to conduct emissions tests in accordance with the plan, to submit a test report that includes the test data and results)

³¹ U.S. EPA, Supplemental Environmental Projects Policy, 2015 Update, (hereinafter “EPA Policy”) available at: <https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>

buses to reduce harmful air pollutants that accompany diesel emissions, or to install a vegetative buffer to block dust and noise that may be emitted from the facility. Many communities prefer SEPs because they can provide a permanent improvement to the directly impacted community that improves their quality of life and public health. In Michigan, many communities have expressed a strong preference for SEPs to the Great Lakes Environmental Law Center since penalties for violating air quality standards go to the state general fund rather than to the community that was directly impacted by the violation.

In 2015, the EPA updated its SEP Policy in an effort to facilitate and streamline the inclusion of SEPs in enforcement actions, where appropriate.³² The EPA's Policy applies to civil enforcement settlements between the EPA and the violator. However, as detailed above, most air quality enforcement is done by states rather than the EPA. As such, many state environmental protection agencies have created their own SEP policies. The MDEQ has created its own SEP Policy, which guides how SEPs are utilized in the enforcement context across all MDEQ divisions, including its air quality division.³³

[4.1 Summary of the Michigan Department of Environmental Quality Supplemental Environmental Project Policy](#)

The MDEQ's Policy sets forth, among other things: the process of developing a potential SEP in connection with an enforcement settlement; the types of projects that the MDEQ permits as SEPs; the eligibility criteria that must be met; the scoring criteria used by the MDEQ to determine the quality of a SEP; the corresponding amount of monetary penalty mitigation that may be provided; and the terms and conditions that must be included in a consent order or other negotiated settlement.

³² EPA Policy at 1.

³³ Michigan Department of Environmental Quality, Supplemental Environmental Projects for Penalty Mitigation, Revised April 15, 2005 (hereinafter, "MDEQ SEP Policy")

4.1.1 Process of Developing Potential SEPs

According to the MDEQ's Policy, SEPs are neither required nor prohibited by any law or regulation.³⁴ As such, the inclusion of a SEP in a consent order or other enforcement proceeding is discretionary. The MDEQ's SEP Policy grants the violator with the option to propose a SEP in lieu of payment of a portion of a monetary penalty and tasks the MDEQ with review of such proposals and either approval or disapproval of the proposed SEP.³⁵

At the outset, if a violator is interested in pursuing a SEP, it is instructed to notify the MDEQ of such an interest early in the settlement negotiation process and should submit a SEP proposal no later than 30 days following the MDEQ's proposal of a monetary fine in relation to a settlement agreement.³⁶ SEP proposals submitted by violators must include sufficient information to demonstrate that the proposal meets all applicable requirements described in MDEQ's SEP policy and includes all of the information contained in MDEQ's SEP Submittal Guideline.³⁷ Necessary information includes, among other things, a project description, expected environmental benefits, a project budget, and a project schedule.³⁸ If the MDEQ determines that the proposed SEP meets all of the applicable requirements, then it must determine the amount of penalty mitigation it will grant to the violator in consideration of the proposed SEP.³⁹ However, if SEP negotiations delay or threaten to delay the resolution of the alleged violations, the MDEQ may deny the SEP proposal.⁴⁰ Additionally, the MDEQ may deny any SEP proposal at any time during the negotiation process for any reason.⁴¹

³⁴ MDEQ SEP Policy, at 1.

³⁵ *See Id.* at 1, 2, 5, and 6.

³⁶ *Id.* at 5; *Id.* at Appendix B.

³⁷ *Id.*

³⁸ *Id.* at Appendix B.

³⁹ *Id.* at 6.

⁴⁰ *Id.*

⁴¹ *Id.*

4.1.2 SEP Eligibility Criteria

The MDEQ evaluates proposed SEPs in accordance with eight criteria. If the MDEQ determines that the proposed SEP does not meet any of the eight criteria described in the MDEQ SEP Policy, then the MDEQ will deny the proposal. The criteria are:⁴²

1. The proposed SEP cannot be inconsistent with any provision of any law.
2. The proposed SEP must advance at least one of the objectives of Michigan environmental laws and there must be an adequate relationship between the violation at issue and the proposed project. An adequate relationship exists if:
 - a. The proposed SEP is designed to reduce the likelihood that similar violations will occur in the future;
 - b. The proposed SEP reduces the adverse impact to public health or the environment to which the violation at issue contributes, *or*;
 - c. The proposed SEP reduces the overall risk to public health or the environment potentially affected by the violation at issue.
3. The proposed SEP must be environmentally beneficial in that the project will improve, protect, or reduce risks to public health and/or the environment at large.
4. The proposed SEP cannot be an activity or project that the alleged violator is otherwise legally required to perform pursuant to any local, state, or federal law or regulation or include actions that the alleged violator is likely to be legally required to perform.
5. Implementation of the project shall not have commenced prior to the MDEQ's identification of the alleged violations and the MDEQ review and approval of the project.
6. The proposed SEP must not fulfill any legal obligation or activity that the MDEQ is required to perform that is funded or expected to be funded by a state and/or federal appropriation.
7. The MDEQ may not manage the project nor control any funds that may be set aside or escrowed for the performance of a SEP unless specifically authorized by law.

⁴² Id. at 3-4.

8. The settlement agreement must identify the type and scope of each project and must identify what is to be performed, where, by when, and by whom.

In addition to the eight criteria described above, the MDEQ Policy also requires that a proposed SEP be consistent with one of the following eight SEP categories:⁴³

1. Pollution Prevention—A project that substantially reduces or prevents the generation or creation of pollutants through source reduction, alternative/renewable energy, energy efficiency, waste minimization, in-process recycling, innovative recycling technologies, or the conservation of natural resources. A pollution prevention project must cause an overall decrease in the amount and/or toxicity of pollution released to the environment.
2. Pollution Reduction—A project that goes substantially beyond compliance with permit or regulatory limitations to further reduce the amount of pollution discharged into the environment.
3. Environmental Restoration and Protection—A project to repair damage done to the environment beyond the need to remediate the damages done by the violation. Environmental restoration projects must be performed within the area affected by the alleged violations. For the purpose of air quality violations, the affected area is the air basin in which the alleged violation(s) occurred.
4. Public Health—A project that provides diagnostic, preventative, and/or remedial human health care related to actual or potential human health caused by the type of violation cited against the violator.
5. Environmental Assessments—There are two types of environmental assessment projects that are acceptable as SEPs
 - a. Pollution Prevention Assessments—Projects where essential and valuable tools are used to evaluate manufacturing processes, operational procedures, energy consumption, raw materials, toxins, waste streams, and disposal costs.
 - b. Comprehensive Environmental Management System—A project that includes the development of an environmental policy, including the identification of significant environmental impacts of operations, defined objectives and specific targets for reducing those impacts, reporting and

⁴³ Id. at 4-5; Id. at Appendix A.

record-keeping requirements, emergency preparedness and response, staff training, internal and external communication, and environmental compliance.

6. Environmental Awareness—Projects that consist of publications or seminars that underscore the importance of complying with environmental laws or disseminate technical information about the means of complying with environmental laws.
7. Emergency Planning and Preparedness—Projects that provide 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.
8. Other—Violators may propose other types of projects, which will be considered on a case-by-case basis.

In addition to specifying what types of SEPs may be acceptable, the MDEQ's SEP policy also specifies different projects that are not acceptable as SEPs:⁴⁴

1. General educational or public environmental awareness projects that do not address the specific regulations that were violated.
2. Conducting a project that, though beneficial to the community, is unrelated to environmental protection such as making a donation to a local charity or donating playground equipment.
3. Studies or assessments without a commitment to implement the results.
4. Projects that were commenced or the funding source was identified before the violation was identified.
5. Projects that are being funded in whole or part by low-interest local, state, or federal loans or grants.
6. Projects that may cause additional damage to the environment or public health if they are done poorly or left uncompleted at any time during implementation.

Additionally, the SEP policy expressly restricts the use of SEPs for any repeat violators, "fast track" settlements, or for mitigating stipulated penalties.⁴⁵ If a proposed SEP meets the eight minimum criteria, falls within one of the eight broad categories of acceptable

⁴⁴ Id. at Appendix A, 5-6.

⁴⁵ Id. at 5.

SEPs, and is not otherwise expressly restricted by the MDEQ's policy, then it may be allowable as a SEP. However, the MDEQ's review and approval of a SEP is entirely discretionary and it retains the ability to approve or deny SEP proposals for any reason, including proposals that otherwise meet the requirements of its policy.⁴⁶

4.1.3 Penalty Mitigation

Once it is determined that a SEP is allowable based on the requirements discussed above, the next step is to determine the degree to which a proposed SEP can mitigate the monetary penalty. Even though a consent order may contain a SEP, the SEP Policy still requires at least some monetary penalty.⁴⁷ According to the MDEQ, penalties are necessary as a method of deterrence for the violator and as a matter of fairness to those regulated entities that have complied with the law.⁴⁸ As such, the MDEQ's Policy establishes minimum monetary penalty amounts that are required when a SEP is included in a consent order. However, a violator can use a SEP to mitigate the total amount that it would otherwise have to pay via a monetary penalty. The amount of SEP mitigation is calculated through a five step analysis.

In step one, the MDEQ uses the EPA stationary source penalty guidelines to calculate the economic benefit of noncompliance and the gravity component. This total is the minimum penalty amount absent a SEP.⁴⁹

In step two, the MDEQ must calculate the minimum penalty amount that is allowable with a SEP. According to MDEQ Policy, the final monetary penalty must be equal to or exceed the greater of the economic benefit of noncompliance plus 10% of the gravity component of the monetary fine, or 25% of the gravity component of the monetary fine only.

In step three, the MDEQ must determine the net present after-tax cost of the SEP, commonly referred to as the SEP cost. There are three types of costs that may be associated with performance of a SEP: capital costs, one-time non-depreciable costs, and

⁴⁶ Id. at 2.

⁴⁷ Id. at 6

⁴⁸ Id.

⁴⁹ Id. at Appendix C, 1.

annual operation costs and savings.⁵⁰ These costs should be provided by the violator as part of its SEP proposal and should also include any savings due to factors such as energy efficiency gains.⁵¹

In step four, the MDEQ determines the mitigation percentage. The mitigation percentage is the percentage of the SEP cost that may be applied to mitigate the amount the violator would otherwise be required to pay as a penalty.⁵² The specific mitigation percentage that is allowed is based on the quality of the SEP, which is determined by utilizing the SEP Quality Rating Procedure.⁵³

The SEP Quality Rating Procedure consists of two matrixes, the purposes of which are to specifically determine the quality of a proposed SEP for the purposes of determining the amount of penalty mitigation that will be granted. The SEP Quality Factor Matrix considers six criteria to assess the overall quality of the SEP. For each criterion, a proposed SEP is scored on a sliding scale. Specifically, a proposed SEP may be given a high rating, an average rating, or no rating. The number of points that are available vary by criteria:⁵⁴

1. Clear benefit to the public at large
 - Description: Projects that provide a direct benefit to the general public that is measureable
 - Points Available: 7 points for high rating, 5 points for average rating
2. Innovative
 - Description: Projects that introduce new processes, technology, or methods to more effectively reduce the generation of pollutants, reduce the release or disposal of pollutants, conserve natural resources, restore and protect ecosystems, protect endangered species, and/or promote compliance
 - Points Available: 7 points for high rating, 5 points for average rating

⁵⁰ Id.

⁵¹ Id. at Appendix C, 2.

⁵² Id. at Appendix C, 3.

⁵³ MDEQ Policy, SEP Quality Rating Procedure (Apr. 15, 2005)

⁵⁴ Id. at 1-3.

3. Pollution prevention

- Description: Projects that result in waste elimination, waste reduction, or render a waste less hazardous or toxic
- Points Available: 7 points for high rating, 5 points for average rating

4. Multimedia impacts

- Description: Projects that reduce emissions to more than one medium (air, water, and land)
- Points Available: 5 points for high rating, 3 points for average rating

5. Environmental justice

- Description: Projects that mitigate damage or reduce risk to minority or low income populations that have been disproportionately exposed to pollution or are at environmental risk
- Points Available: 3 points for high rating, 3 points for average rating

6. Community input

- Description: Projects that were developed taking into consideration input received from the affected community
- Points Available: 5 points for high rating, 3 points for average rating

Once the score for a proposed SEP is computed using the SEP Quality Factor Matrix, the SEP Mitigation Matrix is used to determine the amount by which the monetary penalty may be reduced based on the SEP.

	MDEQ SEP Mitigation Matrix ⁵⁵			
	Exceptional	High	Average	Low

⁵⁵ Id. at 4.

Total SEP Quality Rating	34-32 points	32-25 points	24-14 points	13-9 points
Allowable SEP Mitigation	80%	75%	50%	25%

Once the SEP mitigation percentage is identified, the MDEQ multiplies the SEP cost by the mitigation percentage to obtain the SEP mitigation amount.⁵⁶ This is the amount of the SEP cost that may be used to mitigate the monetary fine that the violator is still required to pay. To determine the final monetary penalty amount, the SEP mitigation amount is subtracted from the total monetary penalty as it would be without a SEP.⁵⁷ The greater of the 25% of the total monetary penalty or difference between the SEP mitigation amount and the total monetary penalty is the minimum final monetary penalty that is allowable pursuant to the MDEQ's Policy.⁵⁸

Notably, this policy inevitably leads to a consent order that includes a SEP being more expensive for the violator than a consent order without a SEP. This is especially significant since no law or regulation ever requires a violator to agree to conduct a SEP. As such, the MDEQ's Policy strongly disincentivizes violators from agreeing to a consent order with a SEP. Below is a sample calculation to illustrate how SEPs increase the total amount of money that a violator owes as opposed to consent orders that only require the violator pay a monetary penalty:

⁵⁶ MDEQ SEP Policy, Appendix C, 4.

⁵⁷ Id.

⁵⁸ Id.

MDEQ Hypothetical Penalty Mitigation Calculation

A facility has violated applicable air quality standards and, in accordance with the EPA Stationary Source Penalty Policy, the MDEQ determines that \$150,000 represents the gravity of the harm of the violations. The facility has proposed a SEP that will cost \$75,000. The SEP has been classified as “exceptional” according to the MDEQ SEP Mitigation Matrix.

Determine SEP Mitigation Amount: $\$75,000 \times 80\% = \$60,000$

Minimum Penalty Amount (Select the Greater Figure)

- $\$150,000 - \$60,000 = \mathbf{\$90,000}$
- $\$150,000 \times 25\% = \$37,500$

Total Costs to Violator with SEP: $\$90,000 + \$75,000 = \$165,000$

Total Costs to Violator without SEP = \$150,000

There are a couple of important points to note regarding the MDEQ’s penalty calculation policy in regards to SEPs. First, the fact that SEPs are not legally required in any context and are more expensive works in tandem to strongly discourage a violator from agreeing to a consent order with a SEP. Additionally, it’s worth noting that beyond the increased monetary costs, the requirement that a violator develop a SEP proposal and then negotiate the terms of the consent order to provide for the implementation of the SEP increases the violator’s transaction costs as well.

4.2 Comparison of the MDEQ SEP Policy to Other SEP Policies

While the MDEQ has developed a SEP policy to guide its use of SEPs in the settlement of environmental enforcement actions, the U.S. EPA has also developed a SEP policy as have other states. While these policies are similar, they diverge in key areas in ways that better promote the use of SEPs.

4.2.1 U.S. EPA SEP Policy

In general, the EPA’s Policy largely mirrors the MDEQ’s Policy in regards to the eligibility criteria that it considers to determine whether a proposed SEP is allowable and the categories of projects that may qualify as SEPs. The MDEQ’s Policy has adopted

the EPA's nexus requirement, which requires a sufficient relationship between the violation and the SEP.⁵⁹ However, one key point of variation between the MDEQ and EPA policies is that the EPA Policy is more stringent than the MDEQ policy regarding SEPs that may be profitable to the violator. The MDEQ Policy does not expressly bar potentially profitable SEPS. Instead, it states that, "[i]n some cases, a SEP may provide an alleged violator with certain limited benefits; however in all cases the project must primarily benefit public health or the environment."⁶⁰ The EPA's Policy is more specific. It states that "[p]rojects that are expected to become profitable to the defendant within the first five years of implementation (within the first three years for SEPs implemented by defendants that are small businesses or small communities) are prohibited. After that time period, profitable projects where the environmental or public health benefit outweighs the potential profitability to the defendant may be allowable under certain circumstances."⁶¹

The scoring criteria provided for in the EPA's Policy and the MDEQ's Policy are largely identical. Additionally, both the EPA's Policy and the MDEQ's Policy provides that up to 80% of the estimated cost of the SEP can be used to mitigate the total monetary penalty amount. However, the MDEQ Policy uses the SEP Quality Factor Matrix in conjunction with the SEP Mitigation Matrix to more specifically rate proposed SEPs, which in turn determines the amount of the monetary penalty that may be mitigated by the SEP.

In regards to penalty calculation, the two policies are very similar. However, the EPA's SEP Policy provides a bit more flexibility which more effectively encourages the use of SEPs in specific situations. While both the EPA Policy and the MDEQ Policy include identical requirements as to minimum penalty amounts, the EPA Policy only requires

⁵⁹ Id. at 3; EPA Policy at 7-8.

⁶⁰ MDEQ SEP Policy at 4.

⁶¹ EPA Policy at 17-18; SEPs that meet the profitability requirement must still demonstrate a high degree of innovation with the potential for widespread application, the use of technology that is transferable to other facilities or industries with a violator that agrees to share information about the technology, extraordinary environmental benefits that are quantifiable, exceptional environmental and/or public health benefits to a community with environmental justice concerns, and a high degree of economic risk for the alleged violator. EPA Policy at 32-33.

that the minimum penalty be at least the greater of two figures: the economic benefit of noncompliance plus 10% of the gravity component or 25% of the gravity component. The MDEQ Policy contains a similar requirement, but includes a third figure for consideration: the difference between the SEP mitigation amount, which is the SEP cost multiplied by the mitigation percentage, and the settlement amount absent a SEP.⁶² According to the MDEQ's Policy, if the SEP mitigation amount is greater than the other two figures described above, then it is the minimum monetary penalty that must be sought by the EPA. As illustrated by the MDEQ sample calculation on page 16 provided above, the inclusion of this third figure will frequently require the violator to pay a higher monetary penalty than would be required under the EPA Policy.

In regards to community input, both the EPA's Policy and the MDEQ's Policy encourages the use of SEPs that were developed based in part on the consideration of input received from the community affected by the violation at issue. The MDEQ SEP Policy Quality Factor Matrix includes community input as one of its rating criteria. A SEP will receive a high rating if significant public input was sought in developing the SEP, such as the proposed SEP being shared at a public meeting with public input being received and addressed in the proposal.⁶³ A SEP will receive an average rating if limited public involvement was sought in the development of the SEP, such as publishing a public notice of the project in a local newspaper or obtaining a letter of support from local authorities.⁶⁴ While the EPA's Policy does not provide a Quality Factor Matrix similar to that provided by the MDEQ's Policy and therefore does not provide as much specificity as to what types of community input are preferred and how it factors into the agency's rating of the SEP, it does include community input as one of the evaluation criteria to be considered in evaluating the proposed SEP.⁶⁵

4.2.2 State SEP Policies

State SEP policies vary in a variety of respects, including the eligibility criteria required by a state for an approved SEP, how it calculates the amount of a monetary penalty that

⁶² MDEQ Policy, Appendix C, at 4.

⁶³ MDEQ Policy, SEP Quality Rating Procedure (Apr. 15, 2005), at 3

⁶⁴ Id.

⁶⁵ EPA Policy at 20.

may be mitigated by SEP costs, and its method of promoting environmental justice. Some of these variations have significant environmental justice impacts.

4.2.2.1 *The SEP-Violation Nexus*

Many states have incorporated the EPA Policy requirement that a proposed SEP have a sufficient nexus to the violation at issue. While the nexus requirement in the EPA's Policy is meant to uphold the separation of powers doctrine, it nonetheless is important for environmental justice. To ensure that SEPs further corrective justice, it is necessary to expressly include both a locational nexus requirement and a harm nexus requirement.

Some states, including Michigan, have adopted nexus criteria that are substantially similar to those described in the EPA's Policy.⁶⁶ While these nexus criteria will generally further corrective justice, the failure to expressly require a SEP to have a locational nexus to the community that has been maximally impacted by the violation may create situations in which a SEP fails to further corrective justice. Some states include a very generalized nexus criteria that only require that the SEP generally improve environmental quality⁶⁷ or broadly require that the SEP be located in the state to

SEP Nexus and Corrective Justice

A locational nexus requirement would ensure that a SEP benefit the community that is maximally impacted by the violation. Without the locational nexus requirement, it is possible that a SEP could environmentally benefit a community other than the one that was impacted by the violation or only produce widely dispersed environmental benefits that fail to redress the specific community that was harmed.

A harm nexus requirement would ensure that a SEP address the harm caused by the violation. Without the harm nexus requirement, it is possible that while a SEP provides an environmental benefit to the relevant community, it fails to redress the specific harm at issue.

⁶⁶ See, MDEQ SEP Policy at 3; New Jersey Department of Environmental Protection, Standard Operating Procedures for Incorporating Supplemental Environmental Projects Into Settlement Agreements, at 3 (Dec. 5, 2011) New Mexico Environment Department, Air Quality Bureau-Civil Penalty Policy, at 18 (Apr. 26, 2016)

⁶⁷ See, Minnesota Pollution Control Agency, Discussion of Supplemental Environmental Projects (SEPs) as a means to achieve Pollution Prevention or Other Environmental Gains; Kansas Department of Health and Environment, Division of Environment, Bureau of Air, Supplemental Environmental Project Policy, at 3 (Apr. 8, 2014); Louisiana

establish locational nexus.⁶⁸ These more generalized nexus criteria do not ensure that a SEP will further corrective justice.

4.2.2.2 Minimum Penalty Requirements and Calculating Penalty Mitigation Based on SEP Costs

While SEPs are never required for any air quality violation, both federal and state policies will generally attempt to encourage the use of SEPs by allowing the costs of the SEP to mitigate the monetary penalty that the violator would otherwise be required to pay. However, federal and state policies differ widely as to numerous points, including the minimum penalty amount that is required and the degree to which the costs of a SEP can mitigate the monetary penalty.

Generally, all states require that a violator pay some monetary penalty in addition to costs to implement a SEP. A variety of state SEP policies assert that penalties are necessary to ensure the violator is deterred from committing future violations and as a matter of fairness to regulated entities that have complied with the standards.⁶⁹ Many states will require that a violator pay 100% of the economic benefit component of the penalty calculation, but will only require a violator to pay anywhere from 15%⁷⁰ to 65%⁷¹ of the gravity component. Most commonly, state SEP policies will require a violator to pay either 20% or 25% of the gravity component as a minimum penalty.⁷²

Department of Environmental Quality BEP FAQ FAQs, available at <http://deq.louisiana.gov/faq/category/31>; Indiana Department of Environmental Management, Supplemental Environmental Project Policy (June 20, 2008)

⁶⁸ See, Iowa Department of Natural Resources, Supplemental Environmental Project Guidance, at 2 (Sept. 2006) (establishing that a SEP should be located within 50 miles of the location where the violation occurred); Minnesota Policy Control Agency, Discussion of Supplemental Environmental Projects as a means to achieve Pollution Prevention or Other Environmental Gains (establishes that a SEP must be within the boundaries of the state)

⁶⁹ See, e.g., MDEQ SEP Policy at 6.

⁷⁰ See, e.g., Kansas Department of Health and Environment Division of Environment Bureau of Air, at 4 (Apr. 8, 2014)

⁷¹ Arkansas Department of Environmental Quality, Supplemental Environmental Project and Proposal Guidelines

⁷² See, e.g., Colorado Department of Public Health and Environment, Agency-Wide Supplemental Environmental Projects Policy, at 12 (Revised Feb. 22, 2018); Montana

Once an agency determines the appropriate penalty amount for the violation, the next step is to determine the SEP costs and to what degree the SEP costs may mitigate the monetary penalty. In order to determine the quality of a SEP, many states will utilize scoring criteria.⁷³ As mentioned above, Michigan uses the detailed SEP Quality Factor Matrix to determine precise scores for SEPs based on a number of criteria. Ohio’s SEP Policy describes SEP criteria that are very similar to the criteria in the MDEQ SEP Quality Factor Matrix.⁷⁴ While Ohio’s policy does not utilize a detailed scoring system similar to the MDEQ’s policy to assess a numeric score for each criteria provided for in its SEP policy,⁷⁵ it does provide for a similar merit-based classification system that is similar to Michigan’s SEP Mitigation Matrix, which is used to determine the amount of a penalty offset that will be provided to a violator based on the overall quality of the SEP.

	Ohio SEP Offset Policy			
SEP Rating	Exceptional	High Quality	Medium Quality	Low Quality

Department of Environmental Quality, Supplemental Environmental Projects Policy, at 10 (Revised Mar. 2017); New Jersey Department of Environmental Protection, Standard Operating Procedures for Incorporating Supplemental Environmental Projects Into Settlement Agreements, at 3 (Dec. 5, 2011); New Mexico Environment Department, Air Quality Bureau, Civil Penalty Policy, at 22 (Revised Apr. 26, 2016)

⁷³ See, e.g., Iowa Department of Natural Resources, Supplemental Environmental Project Guidance, at 3-4 (Sept. 2006); Montana Department of Environmental Quality, Supplemental Environmental Projects Policy, at 11 (Revised Mar. 2017); New Mexico Environment Department, Air Quality Bureau Civil Penalty Policy, at 21-22 (Revised Apr. 26, 2016)

⁷⁴ Ohio Environmental Protection Agency, Supplemental Environmental Project Guidance, at 11-12 (Dec. 2006)

⁷⁵ Supra note 54.

Allowable SEP Offset	Offset will be \$1 for every \$1 in SEP cost (100%)	Offset will be \$1 for every \$1.20 in SEP Cost (83%)	Offset will be \$1 for every \$1.50 in SEP Cost (66%)	Offset will be \$1 for every \$2 in SEP Cost (50%)
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Notably, Ohio’s policy generally allows violators to obtain more significant offsets than Michigan’s policy. While MDEQ’s policy caps penalty mitigation at 80% of the total cost of the SEP, the Ohio’s policy allows SEPs that are deemed “exceptional” to fully mitigate the SEP costs from the monetary penalty amount. As such, it is possible for enforcement orders that include an “exceptional” SEP to be no more expensive than an enforcement order without a SEP. A sample calculation illustrating the operation of Ohio’s SEP mitigation policy is provided below:

Ohio EPA Hypothetical Penalty Mitigation Calculation

Ohio has determined that \$150,000 represents the gravity of the harm of the violations. The facility has proposed a SEP that will cost \$75,000. The SEP has been classified as “exceptional” according to the Ohio’s SEP Rating System.

Minimum Penalty Amount: $\$150,000 \times 25\% = \$37,500$

Mitigation Ratio for Exceptional SEP: \$1.00 for every \$1.00 in SEP Cost = \$75,000

Total Monetary Penalty: $\$150,000 - \$75,000 = \$75,000$

Total Costs to Violator with SEP: = \$150,000

Total Costs to Violator without SEP = \$150,000

Ohio’s SEP Policy is more facilitative of SEPs that it deems exceptional because it offers violators \$1.00 in monetary penalty mitigation for every \$1.00 in SEP costs. As a result, enforcement actions that include exceptional SEPs will be no less expensive than a consent order without a SEP.

In general, the vast majority of states will permit a 1:1 SEP mitigation ratio in certain circumstances. Some use a 1:1 ratio as common practice while others, such as Ohio, limit it to SEPs that meet specific criteria.

Table 1—State SEP Policies Allowing a 1:1 SEP Mitigation Ratio	
State	SEP Mitigation Ratio
Arkansas	1:1 SEP mitigation ratio is available for projects that directly remediate environmental contamination or reduce pollutants entering the environment ⁷⁶
California	Generally allows a 1:1 SEP mitigation ratio ⁷⁷
Colorado	1:1 SEP mitigation ratio if the violator selects an approved third party SEP from the SEP Idea Library ⁷⁸
Connecticut	1:1 SEP mitigation ratio is available at discretion of agency ⁷⁹
Delaware	1:1 SEP mitigation ratio is available at discretion of agency ⁸⁰

⁷⁶ Arkansas Department of Environmental Quality, Supplemental Environmental Project and Proposal Guidelines, available at <https://www.adeq.state.ar.us/legal/sep.aspx>

⁷⁷ California Air Resources Board, Supplemental Environmental Projects Policy, at 2 (Dec. 8, 2016)

⁷⁸ Colorado Department of Public Health and Environment, Final Agency-Wide Supplemental Environmental Projects Policy, at 12 (Revised Feb. 22, 2018)

⁷⁹ Connecticut Department of Environmental Protection, Policy on Supplemental Environmental Projects, at 3 (Feb. 15, 1996)

⁸⁰ Delaware Department of Natural Resources and Environmental Control, Policy On Penalty Assessments Associated with Administrative Enforcement Actions (Mar. 31, 2003)

Indiana	1:1 SEP mitigation ratio is available for specified violators ⁸¹
Maine	Generally allows a 1:1 SEP mitigation ratio ⁸²
Montana	1:1 SEP mitigation ratio is available if the violator does not have a history of noncompliance and the proposed SEP constitutes a pollution prevention or pollution reduction project and is exceptional ⁸³
New Jersey	Generally allows for a 1:1 SEP mitigation ratio ⁸⁴
New York	1:1 SEP mitigation ratio is available at discretion of agency ⁸⁵
Ohio	1:1 SEP mitigation ratio is available for exceptional SEPs ⁸⁶
Oregon	Generally allows a 1:1 SEP mitigation ratio ⁸⁷

⁸¹ Indiana Department of Environmental Management, Supplemental Environmental Project Policy, at 6 (Revised Jun. 20, 2008)

⁸² Maine Department of Environmental Protection, Supplemental Environmental Projects Policy (Aug. 18, 2017)

⁸³ Montana Department of Environmental Quality Enforcement Division, Supplemental Environmental Projects Policy, at 11 (Revised Mar. 2017)

⁸⁴ New Jersey Department of Environmental Protection, Standard Operating Procedures for Incorporating Supplemental Environmental Projects into Settlement Agreements, at 3 (Dec. 5, 2011)

⁸⁵ New York Department of Environmental Conservation, Environmental Benefits Project Policy, available at <http://www.dec.ny.gov/regulations/64596.html>

⁸⁶ Ohio Environmental Protection Agency, Supplemental Environmental Project Guidance, at 10 (Dec. 2006)

⁸⁷ Oregon Department of Environmental Quality, Evaluating and Approving Supplemental Environmental Projects, at 4 (Jan. 10, 2013)

Rhode Island	Generally allows a 1:1 SEP mitigation ratio ⁸⁸
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As illustrated by the table above, the MDEQ’s policy of providing, at maximum, a 4:5 SEP mitigation ratio is out of line with the common practice of other states. In general, most states offer a 1:1 SEP mitigation ratio at least in some specific context. Several states, such as California, Oregon, Rhode Island, New Jersey, and Maine, generally allow a 1:1 SEP mitigation ratio.

4.2.2.3 *Promotion of Procedural Justice*

While SEPs can be a powerful tool to promote environmental justice, in order to do so the development of the SEP itself must reflect environmental justice principles, and in particular the principle of procedural justice. The confidential nature of settlement discussions can present a barrier for agencies seeking to promote procedural justice, as details of the negotiations cannot be shared with third parties, including community members. However, there are two ways that state SEP policies have attempted to promote procedural justice despite this limitation.

First, many states have described a preference for SEPs that were developed with community input. However, the extent to which these stated preferences for community input effectively further procedural justice vary widely. Many SEP policies do not specify what form of community outreach is appropriate. Additionally, while many policies express a preference for SEPs that were developed with community input, many do not specify how that preference is incorporated into either approving the SEP or determining the appropriate SEP mitigation amount.

⁸⁸ Rhode Island Department of Environmental Management, Policy on Supplemental Environmental Projects, at 8 (Jul 15, 2004)

Second, many states have created a “SEP Bank,” which is a compilation of project ideas submitted to the enforcing agency by environmental nonprofit organizations, community organizations, and residents. Once submitted, project ideas are then pre-approved by the agency and published online. Any violator that is subsequently the subject of an enforcement action can refer to a state’s SEP Bank to determine if there is an appropriate SEP that has been proposed by a resident or organization in the community that has been impacted by its violation. Additionally, many states that have developed SEP Banks also allow a violator to engage in third-party SEPs, which entail a violator agreeing to pay a specified amount of money to a third-party to administer the implementation of the SEP. The SEP Bank frequently serves as a way to connect violators to local environmental organizations that specialize in the type of work that is typically involved in implementing a SEP. Additionally, a SEP Bank can help to overcome confidentiality issues that commonly foreclose robust community involvement in settlement negotiations and further procedural justice.

Procedural Justice and the Development of Supplemental Environmental Projects

Procedural justice is the act of ensuring the opportunity for meaningful involvement and giving equal concern and respect to people of color and lower incomes with respect to decisions that will impact their health and quality of life.

In the context of supplemental environmental projects, the principle of procedural justice requires residents to have the opportunity to meaningfully involve themselves in the development of a project that will be implemented in their community.

5 Supplemental Environmental Projects in Wayne County

SEPs have the potential to be a strong environmental justice tool. One of the principle components of environmental justice is the concept of corrective justice, which involves not only the diligent enforcement of air quality standards in communities of color and low-income communities, but also the requirement that those responsible for the harm caused by their violations repair that harm.⁸⁹ If the development and implementation of a SEP is done properly, it may serve as an important tool to further the goals of corrective justice.

⁸⁹ Robert Kuehn, A Taxonomy of Environmental Justice (2000)

In developing SEPs, it is important for violators and the MDEQ to not only consider the desires of the people that have been impacted by the air quality violations at issue, but to incorporate that input into the finalized SEP. While Michigan's policy does encourage violators to receive community input and to incorporate that input into its SEP proposal, it is only one of six scoring criteria and a proposal can only receive five points for its community input efforts as opposed to the seven points available for other scoring criteria. Additionally, it can often be difficult for community members to have an active, participatory role in the SEP planning process considering that SEP proposals are part of confidential enforcement settlement discussions.

Despite this obstacle, it is very important for the MDEQ to be aware of the basic desires of the community nearby a facility that is proposing a SEP as part of an air quality consent order. It is also important for the MDEQ to consider some basic characteristics of the neighborhood nearby the facility at issue, such as the number of vulnerable land uses, including schools and parks.

Below are examples of preferred SEPs that different environmental organizations and residents have requested in a variety of enforcement and permitting decisions for facilities in Wayne county.

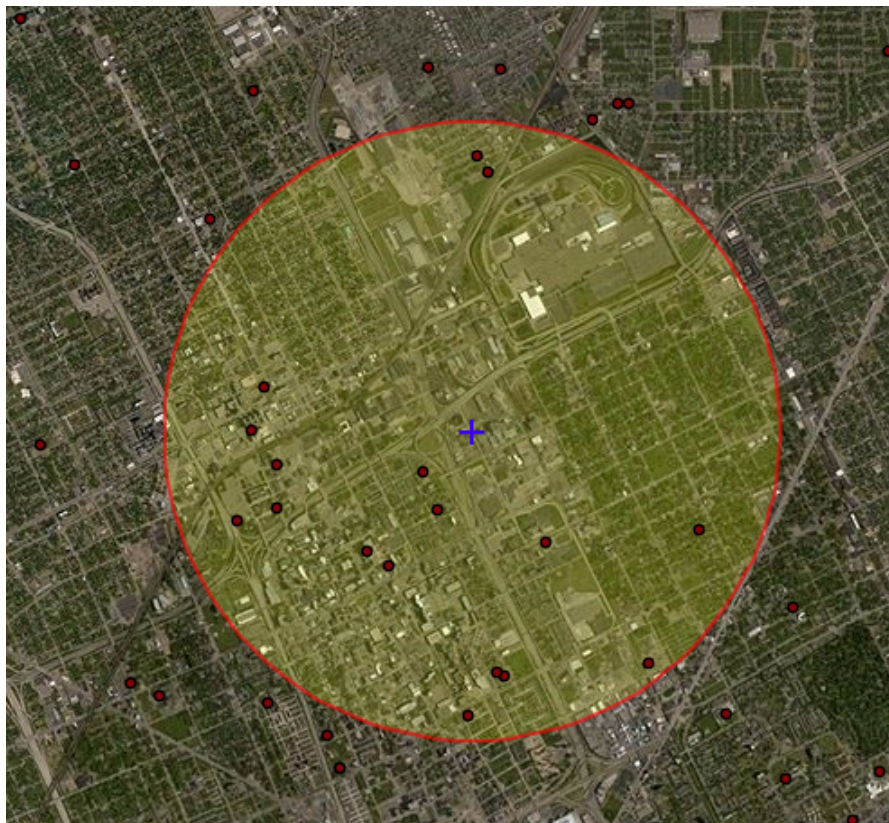
5.1 Detroit Renewable Power Incinerator

In 2017, the MDEQ negotiated and entered into a consent order with Detroit Renewable Power regarding numerous violations of a variety of air quality standards that occurred at its municipal solid waste incinerator located at 5700 Russell Street in Detroit, Michigan. The consent order did not include a SEP.

Leading up to the consent order, community members discussed numerous potential SEPs that could be used to address the health impacts caused by the violations. Potential SEPs that were discussed included the installation of air filters at schools and homes of nearby residents, increased air monitoring requirements, street sweeping in the neighborhood surrounding the facility, and the installation of vegetative buffers along high traffic roadways. Many environmental organizations and residents in the area have expressed concerns about the impact that the air quality violations at issue had on school children. Others identified public health assessments to analyze potential hazards to human health in the neighborhood surrounding the facility due to air

pollution. SEPs that would involve the planting of vegetative buffers along high traffic roadways or the purchase and use of a street sweeper in the surrounding neighborhood were not supported.

The desired SEPs for the community reflect the current state of air quality in the neighborhood and the presence of several schools in close proximity to the facility. According to EJSCREEN, the community within a 1.5-mile radius of the facility is subjected to exceptionally high air toxics cancer risk according to the National Air Toxics Assessment. Additionally, as shown by the map provided below, there are numerous schools in the 1.5-mile radius of the facility.



Map 1—Schools (represented by red dots) within a 1.5-mile radius of the Detroit Renewable Power Incinerator

5.2 Delray

In 2017, the MDEQ negotiated and entered into a consent order with the Great Lakes Water Authority regarding repeated violations of a sulfur dioxide standard at the waste water treatment plant's biosolid drying facility. The consent order did not include a SEP.

Leading up to the consent order, community members discussed numerous potential SEPs that could be used to address the health impacts caused by the violations. Many community residents expressed a preference for a SEP that involved the violator purchasing a street sweeper for use in the neighborhood surrounding the facility. Given the heavy amount of truck traffic in the neighborhood and the lack of street sweeping, dust and particulate matter pollution caused by the resuspension of roadside debris is a significant quality of life issue for many Delray residents.



Map 2— Schools (represented by red dots) within a 1.5-mile radius of Detroit Waste Water Treatment Plant

5.3 South Dearborn

In 2015, the EPA and the MDEQ negotiated a settlement agreement with AK Steel regarding several air quality standard violations. The consent order did include a SEP, which required AK Steel to spend \$337,000 for the Salina Schools Air Filtration SEP. The SEP required AK Steel to purchase and install dynamic air filtration systems for both Salina Elementary and Salina Intermediate schools, which are nearby the facility. Prior to approval of the proposed SEP, environmental organizations in the area were consulted about what SEP would be preferable for nearby residents. The Salina Schools Air Filtration SEP was identified based on that community input.



Map 3—Schools (represented with red dots) within a 1.5-mile radius of AK Steel

5.4 Zip Code 48217

There are multiple major stationary sources of air pollution in 48217 zip code in Southwest Detroit, including the Marathon Oil Refinery. In 2016, the MDEQ negotiated and entered into a consent order with Marathon Petroleum Company LP regarding repeated violations of the particulate matter standards from specific emissions units at its facility. The consent order did not include a SEP.



Map 4— Schools (represented with red dots) within a 1.5-mile radius of Marathon Petroleum Company LP

6 Legal Basis and Potential Pitfalls of SEPs

Much of this report focuses on the potential obstacles regarding the implementation of a SEP that furthers corrective justice. However, there are additional concerns such as the legal basis for including a SEP in a consent order, whether or not the SEP will produce a

benefit, either financially or through good publicity, for the violator, and whether the SEP will serve as an effective deterrent for future violations.

6.1 Legal Basis for SEPs

As mentioned above, the vast majority of air quality violations that occur in Michigan are resolved by the MDEQ through a consent order.⁹⁰ Part 55 of the Natural Resources and Environmental Protection Act states that a consent order "...may provide for monetary relief or other relief as agreed upon by the parties."⁹¹ This broad language affords the MDEQ with a significant amount of discretion in crafting consent orders. While nothing in Michigan law or regulations expressly authorizes the use of SEPs, the broad authority to include relief as agreed upon by the parties can be interpreted as authorizing the MDEQ to include SEPs as relief in consent orders.⁹²

6.2 SEPs and Private Benefit

One of the main concerns of environmental enforcement agencies regarding the use of SEPs is that a violator will receive some financial or non-financial benefit from the SEP. For example, a SEP that makes operations at a facility more efficient may cut down on air pollution, but it may also decrease the operating costs of the facility. The EPA refers to these types of SEPs as "profitable SEPs" in that, with enough time, they will produce some profit for the facility.⁹³ This is problematic given that SEPs are intended to be a method to enforce violations of air quality standards and therefore are intended to be projects that would not have occurred "but for" the settlement of the enforcement action.⁹⁴ The underlying concern is that if profitable SEPs are permitted, it would undermine the deterrent value of the enforcement action and would grant an unfair advantage to facilities that air quality standards as opposed to their compliant competitors.⁹⁵ To address this issue, federal and state SEP policies have incorporated

⁹⁰ Supra note 22-24.

⁹¹ MCL 324.5528(1)

⁹² The inclusion of SEPs as a condition to any enforcement action, including consent orders, has not been challenged in Michigan.

⁹³ EPA Policy at 32.

⁹⁴ Id.

⁹⁵ Id.

requirements to restrict the use of SEPs when it may be profitable to the violator. The extent to which the different policies restrict the use of profitable SEPs varies.

Table 2—Policies Regarding Potentially Profitable SEPs	
State	Policy
U.S. EPA	<ul style="list-style-type: none"> • Projects that are expected to become profitable to the defendant within five years of implementation are prohibited.⁹⁶ • For projects that are expected to become profitable to the defendant after five years, the project will only be allowable as a SEP if the environmental or public health benefit clearly outweighs the potential for profitability.⁹⁷
Indiana	<ul style="list-style-type: none"> • Projects that represent capital expenditures or management improvements for which the agency may reasonably conclude that the regulated entity, rather than the public, is likely to receive the substantial share of the benefits which accrue from it, are not appropriate as SEPs.⁹⁸
California	<ul style="list-style-type: none"> • Does not allow a SEP that benefits the violator.⁹⁹
Connecticut/ Montana/ Rhode Island	<ul style="list-style-type: none"> • If the agency believes that a violator may get a significant economic benefit from a proposed SEP, the violator must demonstrate to the agency’s satisfaction that (1) he or she would not be undertaking the project without the additional incentive of

⁹⁶ Id. at 17.

⁹⁷ Id. at 17-18.

⁹⁸ Indiana Department of Environmental Management, Supplemental Environmental Project Policy, at 4 (Revised Jun. 20, 2008)

⁹⁹ California Air Resource Board, Supplemental Environmental Project Policy, at 2 (Reviewed Dec. 8, 2016)

	including it in the enforcement’s settlement and (2) the public health and environmental benefits are substantial and that the public interest would be best served by providing this additional incentive. ¹⁰⁰
Oregon	<ul style="list-style-type: none"> • In cases where the violator will likely gain an economic benefit from a SEP, the agency may reduce the value of the SEP accordingly for the purposes of determining penalty mitigation.¹⁰¹
Michigan	<ul style="list-style-type: none"> • Projects may provide the violator with certain limited benefits; however, in all cases, the project must primarily benefit the public health or the environment.¹⁰²

As illustrated above, there are numerous ways for a SEP policy to limit profitable SEPs. Many policies, such as Indiana’s and Michigan’s, include a general test that weighs the public and private benefits. However, the general nature of this test does not require the detailed accounting that may be necessary to assess whether a SEP is overly profitable for the violator and thus erodes the deterrent effect of the enforcement action as a whole. Other state policies and the federal policy require a more detailed accounting of public and private benefits. Lastly, California’s policy wholly bars SEPs that benefit the violator.

6.3 SEPs and the Deterrence of Future Violations

One of the goals of any enforcement action is to deter future violations both by the violator at issue and other similarly situated facilities. SEPs present a number of unique

¹⁰⁰ See, Montana Department of Environmental Quality, Supplemental Environmental Projects Policy, at 5 (Revised Mar. 2017); Connecticut Department of Environmental Protection, Policy on Supplemental Environmental Projects, at 6 (Rev. Feb. 15, 1996); Rhode Island Department of Environmental Management, Policy on Supplemental Environmental Projects, at 10 (Jul. 15, 2004)

¹⁰¹ Oregon Department of Environmental Quality, Evaluating and Approving Supplemental Environmental Projects, at 4 (Rev. Jan. 10, 2013)

¹⁰² MDEQ SEP Policy at 4.

concerns: as discussed above, a SEP may provide both a public benefit to the community and a private benefit to the violator itself. Additionally, the costs of the SEP may be tax deductible to the violator, which may reduce the intended deterrent effect of the underlying enforcement action, and a violator may attempt to publicize its contributions to a SEP in an attempt to garner good publicity. While these concerns present unique obstacles for enforcement actions that include a SEP, these concerns are adequately addressed in existing federal and state SEP policies.

One common concern regarding SEPs is that a violator will attempt to deduct the cost of the SEP as an ordinary and necessary expense paid or incurred during the course of trade or business pursuant to the Internal Revenue Code.¹⁰³ While the Internal Revenue Code expressly prohibits any deduction for any amount paid as a fine or penalty to a government or government entity in relation to the violation of any law, questions have been raised as to whether this applies to SEP costs incurred by a violator pursuant to an enforcement action.¹⁰⁴ The IRS has interpreted the Internal Revenue Code as classifying costs paid towards a SEP pursuant to a settlement agreement between the violator and a state regulatory agency as a fine or penalty making them ineligible for deduction as a business expense.¹⁰⁵ Nonetheless, some states have taken additional steps to restrict the violator from realizing any tax benefit due to a SEP. These policies frequently require the terms of the enforcement action to specify that the violator is not permitted to seek any tax benefit associated with the SEP.¹⁰⁶

Additionally, there is a concern that even if the violator cannot obtain any financial benefit from a SEP either through improvements to its operations or through a tax deduction, it may still benefit from a consent order through any positive publicity that the SEP generates. However, to address this concern many SEP policies will require that the settlement agreement include a condition which specifies that whenever the alleged violator publicizes the SEP or the results of the SEP, that it include a prominent

¹⁰³ 26 U.S.C. § 162(a)

¹⁰⁴ 26 U.S.C. § 162(f)

¹⁰⁵ Internal Revenue Service, National Office Technical Advice Memorandum (Mar. 31, 2006), available at <https://www.irs.gov/pub/irs-wd/0629030.pdf>

¹⁰⁶ Id.

statement that the project is being undertaken as part of a settlement of an environmental enforcement action.¹⁰⁷

7 Recommendations

Based on our review of the MDEQ's Policy as well as both federal and state SEP policies, we believe that SEPs can serve as a more robust tool to promote environmental justice with a few tweaks to the current MDEQ Policy.

- *The MDEQ's Supplemental Environmental Project Policy regarding allowable SEP mitigation inevitably requires a violator to pay more in a consent order that includes a SEP as opposed to a consent order that does not contain a SEP. The MDEQ should amend its policy to allow for a maximum penalty mitigation ratio of 1:1 so that a consent order with a SEP is equal in cost to a consent order without a SEP.*

The MDEQ SEP Policy is strong in many ways. Its scoring system, including the SEP Quality Factor Matrix and the SEP Mitigation Matrix, is clear and transparent and incentivizes violators that are conducting a SEP to host a public meeting to receive input from the community regarding the proposed SEP. Unfortunately, these strengths are only relevant when violators engage in the development and implementation of a SEP pursuant to an enforcement action, and this rarely happens because the MDEQ policy actively disincentivizes violators from agreeing to a consent order with a SEP because it will inevitably be more expensive than a consent order without a SEP.

As described in Table 1, the MDEQ's policy in this regard is outside of the norm when compared to the SEP policies of several other states. While the MDEQ's policy allows a maximum penalty mitigation ratio of 4:5, or 80%, a majority of the state SEP policies surveyed offer a penalty mitigation ratio of 1:1, or 100%, either as a general practice or at least in specific circumstances. By offering a penalty mitigation ratio of 1:1, these policies are ensuring that an enforcement action with a SEP is not more expensive than an enforcement action without a SEP. Given that no state, including Michigan, requires a SEP in any context, this is necessary in order to incentivize a violator to agree to a SEP.

- *While the MDEQ's Policy incentivizes community input through its SEP Quality Factor Matrix, that incentive should be increased by increasing the points available for community*

¹⁰⁷ MDEQ SEP Policy at 5; EPA Policy at 26.

input from five to seven and adding a requirement that the finalized SEP reflects the input that was received from the community. Additionally, considering that confidentiality concerns may inhibit meaningful community participation in the development of SEPs, the MDEQ should follow the lead of other states and develop a SEP Bank to enable community organizations and residents to submit projects that they prefer and to connect industry with community residents and organizations.

While the SEP Quality Rating Matrix does a good job of describing the form of community input that is preferred, it only provides five maximum points for SEP proposals that received a high rating for their community input while seven points are available for three other scoring criteria. As discussed above, procedural justice is one of the four principles of environmental justice. To further procedural justice, the MDEQ should grant seven points to SEPs that provided the community with an opportunity for meaningful involvement in the development of the SEP. However, the MDEQ should retain its policy of only granting three points to SEPs that present a SEP to the public via a public notice in a local newspaper or that has received a public letter of support from local authorities because these methods alone do not ensure meaningful community involvement in the development of the SEP. Additionally, the MDEQ should amend its requirements for receiving a high rating regarding community input to include a requirement that the finalized SEP reflect in the input received from the community in some manner. Lastly, while the SEP Quality Rating Matrix incentivizes community input, the MDEQ should also develop an online SEP Bank that allows community organizations and residents to submit SEP proposals to the MDEQ via an online form, which the MDEQ can then use to develop a list of pre-approved SEPs in a variety of communities. A SEP Bank has the potential to increase procedural justice by ensuring that SEPs are reflective of community desires and it has the potential to decrease transactional costs for both the MDEQ and a facility in their consent order negotiations.

- *The SEP Quality Rating procedure is too general and fails to ensure that corrective justice will be furthered by a SEP. Specifically, the SEP Quality Rating Procedure considers whether a SEP will produce environmental and public health benefits for the general public. In order to ensure that a SEP furthers corrective justice, the MDEQ should amend its SEP Quality Rating Procedure to incentivize projects that provide an environmental or public health benefit to the community that has been maximally impacted by the violation.*

Corrective justice relies not only on the just administration of punishment for those responsible parties who have broken environmental laws, but also on that punishment being administered in a manner that repairs the harm that has been caused. With air quality violations, the harm caused is generally concentrated in the communities in close proximity to the facility rather than the public as a whole. Therefore, in order to implement corrective justice, we recommend that the MDEQ amend its SEP Quality Rating Procedure to incentivize projects that provide a direct benefit to the community that has been maximally impacted, rather than the general public.

- *Potentially profitable SEPs are a concern because if a SEP provides a benefit to the violator it may undercut the deterrent effect of the enforcement action. The MDEQ's current policy is too vague to ensure that profitable SEPs are avoided. As illustrated by Table 2, SEP policies have taken a variety of approaches to limit the use of profitable SEPs. We recommend that the MDEQ amend its policy to prohibit any SEP that will be conducted on the site of the violator unless the SEP will result in a significant and permanent reduction in air pollution from the facility itself.*

Profitable SEPs can undermine the deterrent effect of an enforcement action. While the MDEQ's Policy includes a generalized restriction that requires SEPs to primarily benefit the public rather than the violator, this restriction does not require the detailed accounting of public and private benefits that is necessary to determine whether a SEP is overly profitable for a violator. By prohibiting any SEP that will be conducted on the site of the violator unless the SEP will result in a significant and permanent reduction in air pollution from the facility itself, the MDEQ can effectively ensure that a profitable SEP will not undercut the deterrent effect of the enforcement action.

- *While one component of the SEP Quality Rating Procedure is environmental justice, a violator can receive a maximum of 3 points for a SEP that benefits an environmental justice community, while it can receive a maximum of 7 points three other factors and a maximum of 5 points for two other factors. We recommend that the MDEQ further incentivize environmental justice by awarding at least 5 points to SEPs that primarily and significantly benefit environmental justice communities.*