

Kansas Department of Health and Environment
Bureau of Waste Management Policy 2000-P3
related to
Enforcement Settlements
Revised January 29, 2014

Background

The Kansas Department of Health and Environment (KDHE) has the statutory authority to issue penalties and administrative orders to any person (Respondent) who violates Kansas environmental statutes or regulations. The administrative order may direct the violator to take actions, pay penalties, or create procedures to lessen or eliminate the threat to human health and the environment caused by the violation(s). The Respondent has the right to appeal an administrative order. Alternatively, the Respondent may choose to reach a settlement agreement with KDHE. This document describes the settlement options available to the Respondent if the Respondent is required to pay a penalty.

Penalty Settlement Options

The following options may be utilized in developing an acceptable penalty settlement. Options 1 and 2 may be combined. Options 2 and 3 are described in greater detail in subsequent sections of this document.

1. Payment of the penalty in one lump sum or in incremental payments over a period not to exceed two years.
2. Performance of a Supplemental Environmental Project (SEP).
3. Demonstration of Continued Compliance (DCC) for qualifying Respondents. This option is available for hazardous waste settlements only.

Eligibility for SEPs and DCCs

KDHE will consider the following criteria to determine if the Respondent is eligible to use a SEP or a DCC as a settlement option.

- **Timeliness.**
 - The Respondent must propose the settlement at least four weeks before any scheduled hearing of the case. The proposal of a settlement cannot be used as a tactic to delay the commencement of a scheduled hearing.
 - KDHE and the Respondent must have a signed Consent Agreement and Final Order (CAO) in place within a year of the date KDHE first sends the facility notification of a pending Administrative Enforcement Action (through letter) or an Administrative Order. If no settlement is finalized within one year, KDHE may opt to discontinue settlement negotiations and demand full payment of the original penalty amount.
- **Compliance History.** Inspection records and regulatory compliance records with KDHE and/or other state or federal environmental agencies will be used to determine the

Respondent's compliance history. This may involve review and consideration of compliance with other environmental programs including air, water, remediation, etc. The review will not be limited to the site at which the violations occurred, but may include other locations in Kansas under the control or management of Respondent. This history will be used in determining the Respondent's eligibility for SEP and DCC settlements.

- Compliance Status. The Respondent must have corrected the violations cited during the inspection before KDHE will approve a SEP or a DCC settlement proposal. If the Respondent is in enforcement proceedings with another KDHE program, that program must agree to the settlement.
- Technical and Economic Capability. The Respondent must be technically and economically capable of completing the proposed settlement. Evidence demonstrating capability may be required and could include submission of company financial information. Evidence demonstrating technical capability may also be required as part of the settlement negotiations.
- Economic Benefit of Noncompliance. KDHE may deny a SEP proposal if it determines that the Respondent gained a significant economic benefit by violating the statutes and regulations. Alternatively, this economic benefit may be added to the total penalty amount and included as part of the settlement.
- Previous Enforcement Action. Any Respondent that has been penalized or has entered into a settlement with the KDHE Bureau of Waste Management for violations of environmental law in the previous five years is not eligible for a SEP unless the Respondent can demonstrate new company ownership and/or management since the date of the previous penalty. Enforcement actions older than five years may also be considered in KDHE's decision of whether or not to allow a SEP. Alternative criteria for specific SEPs may be available to Respondents that do not qualify due to previous enforcement actions. The alternative criteria are discussed where they are applicable.
- Previous Inspections. Any Respondent that has had a RCRA inspection by KDHE and/or EPA in the past 10 years is not eligible for a DCC unless the Respondent can demonstrate new company ownership and/or management since the last inspection.

Supplemental Environmental Projects (SEPs)

SEP Objectives and Monetary Value

- The primary objective and result of the proposed SEP should not be the improvement of the Respondent's economic self-interest.
- The proposed SEP must improve the damaged environment or reduce the total risk posed to human health and the environment caused by the Respondent's business or operations.
- The proposed SEP should, if at all possible, relate directly to improving waste management issues (solid or hazardous depending on violations) or waste handling problems within the industry in which the violation took place.

- Activities that may be required by statute or regulation or that may be obtained as injunctive relief by KDHE pursuant to applicable statutory or case law are not eligible as a SEP (i.e. the SEP must go above and beyond what is required by statute or regulation).
- The SEP cannot have been planned or budgeted for prior to the issuance of the subject violations and cannot be a part of the corrective actions for those violations.
- The SEP must have a monetary value higher than the penalty amount. Specific multipliers for the SEP will depend on the category of the SEP and whether or not the facility would qualify as a small business, defined as follows:

SMALL BUSINESS: A company that, on a corporate or company-wide basis, annually employs 100 or fewer full-time individuals or full-time equivalents. A permitted solid waste facility is considered a small business if the facility receives, stores, and/or processes not more than an annual average of 20 tons per day of solid waste, regardless of the number of employees.

SEP Proposals

- The proposal for the SEP must contain a detailed scope of work. The scope of work must include:
 - A description of each step of the project;
 - A timetable or schedule;
 - An itemized cost estimate (including labor if applicable); and
 - Identification of who will perform the work on the SEP.
- The results of the SEP must be verifiable and measurable (quantifiable). The Respondent must describe how the results of the SEP will be measured and documented as part of the SEP proposal. The SEP will be considered completed only after KDHE has reviewed and approved of the results of the SEP. In some cases, a third party audit or verification may be required as part of the settlement (the cost will be included in the CAO). If the results cannot be quantified, some other measure will be used as agreed upon by both parties.
- Each SEP should have a completion time of 24 months or less. However, KDHE will consider a SEP of longer duration if the complexity of the SEP, or other factors agreed upon by KDHE, require additional time.
- The SEP should not be started until a signed CAO is in place. A SEP that is initiated before the CAO is signed may be approved if all of the following factors are met:
 - The SEP fully complies with the requirements set out in the sections on “Eligibility for SEPs and DCCs” and “SEP Objectives” in this Policy.
 - The SEP was initiated solely as a result of the violations cited at Respondent’s most recent KDHE inspection.
 - The SEP results in significant and documented waste reduction for a period of at least three years.
 - The Respondent complies timely with any additional requirements KDHE imposes related to the SEP.

Categories of Eligible SEPs

The following will be considered eligible Supplemental Environmental Projects (SEPs).

- **Hazardous Waste or Solid Waste Clean-Up in Kansas (Site Clean-Up) and Significant Compliance.**

Funding all or part of a KDHE clean-up of a solid or hazardous waste site (depending on whether violations were solid or hazardous waste). The following criteria will be used:

1. Sites will be chosen from a list of solid waste sites or hazardous waste sites as appropriate for the violations found during the inspection (i.e. solid waste violations = solid waste clean-up; hazardous waste violations = hazardous waste clean-up).
2. Respondent may choose a facility from a list of sites requiring clean-up. Solid waste sites may be proposed by the local government or by KDHE, hazardous waste sites will be chosen from a list produced by KDHE. If no sites are available from an approved KDHE list, then this settlement option is not available.
3. Respondent will make payments in one lump sum, or according to an approved payment schedule as specified in the CAO. The payments will be deposited into a KDHE controlled fund that is also specified in the CAO and will be used only for the clean-up of a solid or hazardous waste site.
4. Clean-up will mean the removal of waste (solid and/or hazardous) as necessary, and any required remediation to return the site to its designated use and/or to remove or reduce hazards to public health and the environment.
 - A. Solid Waste clean-ups may be conducted in part or whole by the Respondent, his employees, or with Respondent's equipment. Alternatively, the Respondent may choose to hire a contractor to conduct the clean-up. The solid waste clean-ups will generally be available only to public entities such as city and county governments. KDHE may consider this option for other Respondent's on a case-by-case basis.
 - B. Hazardous Waste clean-ups will not be conducted by the Respondent and the Respondent will not be involved in the clean-up itself. The clean-up will be conducted under KDHE oversight by KDHE contractors using the Respondent's funds designated for that specific clean-up as part of the CAO. Any unused funds from the specified clean-up will remain in the specified fund and will be used by KDHE only for similar clean-ups at other sites. This will allow KDHE to combine funds from several CAOs in order to clean-up larger sites. Funds used for sites in KDHE's Voluntary Cleanup Program will be used to reimburse KDHE for work conducted under the Voluntary Cleanup and Property Redevelopment Act.
5. A Respondent that chooses the Site Clean-up option will be required to pay (or, for solid waste clean-ups only, provide in-kind services equal to) a minimum of three quarters (3/4) of the final penalty amount after applying the multiplier in section 7; the remaining penalty amount will be held in abeyance for a minimum of three years. During those three years, KDHE will conduct a minimum of one compliance inspection at the Respondent's facility. Should the Respondent fail to be in "significant compliance" during any such inspection, the remaining penalty amount will become immediately due to KDHE upon notice to the Respondent and the remaining penalty may not be appealed. "Significant compliance" includes A, B, and C as follows:
 - A. No more than 10 total (RCRA and Solid Waste) violations are cited.

- B. In the case of repeat violations, the Respondent must demonstrate substantial improvement in every area in which a violation was cited in the original inspection. Determination of the term “substantial” shall be at the sole discretion of KDHE.
 - C. Violations of K.S.A. 65-3441(a) or K.S.A. 65-3409(a) will be considered significant non-compliance, and KDHE may require payment of the remaining penalty amount. However, at KDHE’s sole discretion, continuation of the settlement with or without modification may be allowed.
6. At its discretion, KDHE may extend the three-year compliance period in paragraph 5, above, and the extension will be subject to all requirements in this subsection.
 7. If this option is chosen, 1.1 times the penalty amount will be required, regardless of the size of the facility.
 8. If a Respondent has had previous enforcement actions with KDHE, the facility may choose this option, but numbers 5 through 7 above do not apply. Instead, the facility will be required to pay (or, for solid waste clean-ups only, provide in-kind services equal to) the full penalty amount plus an additional percentage based on the number of previous enforcement actions. There will be no penalty reduction and no “significant compliance” requirement.
 - A. If there is one previous enforcement action, 1.1 times the penalty amount will be required.
 - B. If there are two previous enforcement actions, 1.25 times the penalty amount will be required.
- **Training (Training) and Demonstration of Continued Compliance.**

Due to budget cuts and decreased grant funding, KDHE has had to reduce the amount of training provided to the regulated community as well as to its compliance and enforcement staff. Choosing this option will help fund this necessary training and outreach effort, as designated by KDHE. The Respondent will not participate in the training or be responsible for any of the specifics of the training (set-up, site selection, etc.).

 1. The Respondent will make payment in one lump sum, or according to an approved payment schedule as specified in the CAO. The payment(s) will be sent directly to the organization chosen by the Respondent from the following list after approval by KDHE:
 - Kansas Small Business Environmental Assistance Program (SBEAP) – This organization is a 501(3)(c) organization that provides outreach and training to Kansas facilities to help maintain and improve compliance with solid and hazardous waste regulations. SBEAP has agreed that funds contributed through BWM settlements will be split 25:75 between SBEAP’s general training funds and joint BWM/SBEAP outreach activities including hazardous waste generator workshops, outreach materials, and environmental conferences.
 - Solid Waste Association of North America (SWANA) of Kansas – This organization has agreed that funds contributed through KDHE settlements will be split 25:75 between SWANA’s general training fund and joint SWANA/KDHE outreach activities including training conferences (this option is for **solid waste** only).
 2. A Respondent that chooses the Training option will be required to pay a minimum of three quarters (3/4) of the final penalty amount after applying the multiplier in section 4, and the remaining penalty amount will be held in abeyance for a minimum of three years. During those three years, KDHE will conduct a minimum of one compliance inspection

at the Respondent's facility. Should the Respondent fail to be in "significant compliance" during any such inspection, the remaining penalty amount will become immediately due to KDHE upon notice to the Respondent and the remaining penalty may not be appealed. "Significant compliance" includes A, B, and C as follows:

- A. No more than 10 total (RCRA and Solid Waste) violations are cited.
- B. In the case of repeat violations, Respondent must demonstrate substantial improvement in every area in which a violation was cited in the original inspection. Determination of the term "substantial" shall be at the sole discretion of KDHE.
- C. Violations of K.S.A. 65-3441(a) or K.S.A. 65-3409(a) will be considered significant non-compliance, and KDHE may require payment of the remaining penalty amount. However, at KDHE's sole discretion, continuation of the settlement with or without modification may be allowed.

- 3. At its discretion, KDHE may extend the three-year compliance period in paragraph 2, above, and such extension will be subject to all requirements in this subsection.
- 4. If this option is chosen, 1.1 times the penalty amount will be required, regardless of the size of the facility.
- 5. If a Respondent has had previous enforcement actions with KDHE, the facility may choose this option, but numbers 2 through 4 above do not apply. Instead, the facility will be required to pay the full penalty amount plus an additional percentage based on the number of previous enforcement actions. There will be no penalty reduction and no Demonstration of Significant Compliance requirement.
 - A. If there is one previous enforcement action, 1.1 times the penalty amount will be required.
 - B. If there are two previous enforcement actions, 1.25 times the penalty amount will be required.

- **Community Outreach.**

This project must be related to the violations issued (solid waste or hazardous waste) and can include a wide variety of off-site projects that benefit human health and the environment of the local community. This project must have direct and measurable benefit to the environment (or human health). Projects may include, but are not limited to:

- Purchasing necessary and specialized equipment for the local hazardous materials team to enable them to respond to local spills and other environmental emergencies (hazardous waste); or
- Purchasing necessary equipment or assisting with funding of local household hazardous waste programs (solid waste).

If this option is chosen, **2 times** the penalty amount will be required for any facility that does not meeting the definition of a small business, and **1.5 times** the penalty amount will be required for any facility that does meet the definition of a small business.

- **Waste Prevention and/or Reduction.**

A waste prevention SEP would prevent the generation or creation of pollution or hazardous waste at the Respondent's facility. A waste prevention SEP could also be a project that protects natural resources through conservation. Innovative technology or a change in manufacturing processes to eliminate production of a waste stream would be examples of a

waste prevention SEP. Waste prevention SEPs do not include projects that transfer pollution from one media to another. A waste reduction SEP would reduce the amount of hazardous waste and/or reduce the toxicity of that hazardous waste (or reduce the amount of solid waste generated for solid waste violations). Waste reduction should reduce or eliminate the amount of waste being generated and/or managed at a facility or should reduce the toxicity of that waste, and not simply reduce the volume of waste being shipped.

If this option is chosen, **2 times** the penalty amount will be required for any facility that does not meeting the definition of a small business, and **1.5 times** the penalty amount will be required for any facility that does meet the definition of a small business.

Demonstration of Continued Compliance (DCC)

The following criteria must be met in order to use the DCC settlement option.

1. Previous to the current inspection:
 - A. The Respondent has not had a state or federal RCRA inspection in the past 10 calendar years; or
 - B. The Respondent can demonstrate new company ownership and/or management since the date of the previous inspection.
2. The DCC will be allowed only at the discretion of KDHE and only if Respondent meets all of the following criteria:
 - A. The Respondent has no more than 300 employees at any one location in Kansas and has no more than 500 employees company-wide. "Company-wide" includes any affiliates, partners, parent companies, wholly-owned subsidiaries, or other related business entities.
 - B. No part of the Respondent's corporate structure is a Fortune 1000 company or a Global 500 company.
 - C. KDHE has not taken enforcement action against the Respondent or the Respondent's organization company-wide (unless the Respondent can demonstrate new company ownership and/or management since the date of the previous enforcement action). "Company-wide" includes any affiliates, partners, parent companies, wholly-owned subsidiaries, or other related business entities.
3. The Respondent must achieve and maintain RCRA compliance at all of its Kansas locations, except as stated in paragraph 4, below.
4. A Respondent that chooses the DCC option will be required to pay a minimum of one quarter (1/4) of the final penalty amount, and the remaining penalty amount will be held in abeyance for a minimum of three years. During those three years, KDHE will conduct a minimum of one RCRA compliance inspection at one or more of Respondent's Kansas locations. Should Respondent fail to be in "significant compliance" during any such inspection, the full penalty amount will become immediately due to KDHE upon notice to Respondent and the remaining penalty may not be appealed. "Significant compliance" includes A, B and C as follows:
 - A. No more than 10 total (RCRA and Solid Waste) violations are cited.
 - B. In the case of repeat violations, the Respondent must demonstrate substantial improvement in every area in which a violation was cited in the original inspection. Determination of the term "substantial" shall be at the sole discretion of KDHE.

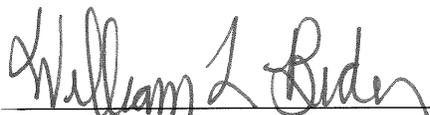
- C. Violations of K.S.A. 65-3441(a) or K.S.A. 65-3409(a) will be considered significant non-compliance, and KDHE may discontinue the DCC. However, at KDHE’s sole discretion, continuation of the settlement with or without modification may be allowed.
- 5. At its discretion, KDHE may extend the three-year compliance period in paragraph 4, above, and the extension will be subject to all requirements in this subsection.

General Settlement Conditions for All Settlement Options

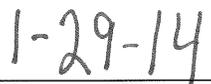
- The Respondent must sign a written CAO which contains the terms of the settlement. The CAO will contain language that make the terms enforceable pursuant to the Kansas Judicial Review Act if the settlement is not completed successfully and within the guidelines and timetables contained in the CAO.
- Failure to complete the settlement within the deadlines established in the CAO could result in the reinstatement of the original penalty as a final order.
- The Respondent must agree to maintain compliance with applicable RCRA and/or solid waste regulations at all of their Kansas facilities for a minimum of three years.
- All costs involved in third party oversight of a settlement, including a SEP, will be paid by the Respondent. KDHE reserves the right to require third party oversight or monitoring of any settlement if necessary. For example, periodic reports must be submitted to KDHE by any third party monitor as required in the CAO.
- The Respondent must provide all the necessary documents to substantiate the costs of each SEP. Documents that may need to be provided include: invoices, receipts, copies of canceled checks for purchases, and payroll and time accounting for employees participating in the project. In most settlements, quarterly reports will be required to be submitted to KDHE to document progress of the SEP.

Conclusion

This policy provides guidance in determining the feasibility of the creation and use of a settlement and is not intended to recognize or offer any statutory or due process right to any Respondent to obtain a settlement. SEPs are offered only as a settlement provision at the absolute discretion of KDHE. The terms of any particular settlement agreement are dependent upon the factual circumstances relating to that settlement. The use of this guidance by staff of KDHE does not create any binding conditions upon KDHE and is not enforceable by the Respondent or other members of the public.



 William L. Bider
 Director, Bureau of Waste Management



 Date