

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2019-0011**

TO AUTHORIZE USE OF SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP) FUNDS
FOR SACRAMENTO-SAN JOAQUIN DELTA REGIONAL MONITORING PROGRAM (RMP)
PROJECTS

WHEREAS:

1. The State Water Resources Control Board (State Water Board) adopted a revised *Policy on Supplemental Environmental Projects* (Policy) on December 5, 2017, and it became effective on May 3, 2018. The Policy authorizes the State Water Board and nine Regional Water Quality Control Boards to allow dischargers to satisfy part of any monetary assessment imposed through administrative civil liability orders arising out of settlements by completing or funding one or more supplemental environmental projects (SEPs).
2. The Central Valley Regional Water Quality Control Board (Regional Water Board) formed the Delta Regional Monitoring Program (Delta RMP) to develop water quality data necessary for improving our understanding of Sacramento-San Joaquin Delta (Delta) water quality issues. The goal of this effort is to better coordinate and design current and future monitoring activities in and around the Delta to create a cost-effective approach for providing critically needed water quality information and analysis to better inform policy and regulatory decisions of the Regional Water Board and other Federal, State and local agencies and organizations.
3. The Delta RMP conducts broad-scale monitoring in the Delta to inform water quality management decisions. Current monitoring activities include mercury in water and fish tissue, pesticides and toxicity, and special studies for pathogens and nutrients. Annually, detailed workplans are developed to describe sampling parameters, locations, and frequencies. Final data and reports are made publicly available.
4. The Delta RMP employs a stakeholder-driven process that prioritizes key management questions and associated scientific investigations. The Delta RMP governance structure is comprised of a Steering Committee, Technical Review Committee, and workgroups. Committees and workgroups meet regularly and work toward consensus to focus on the highest priority issues and to ensure that Delta RMP science is sound.
5. Currently, the Aquatic Science Center, a joint powers agency created on July 1, 2007, by a Joint Powers Agreement between the Bay Area Clean Water Agencies and the State Water Board for the purpose of assisting with the efficient delivery of financial, scientific, monitoring, and information management support functions, is the agency that manages the Delta RMP.
6. In accordance with the Joint Powers Agreement, the San Francisco Estuary Institute (SFEI) serves as the administrative agency for the Aquatic Science Center. SFEI is responsible for implementing the Delta RMP activities and is the fiduciary agent for Delta RMP funds.

7. Delta RMP participants pay annual fees to monitor the Delta. The Delta RMP Steering Committee allocates core funds to projects and programmatic expenses through an annual workplan. Core funds cover monitoring far more robust than could be required through individual permits; however, core funds are insufficient to cover all priority projects vetted and approved by the Technical Review Committee. The Delta RMP has recurrent needs for additional funds to cover unfunded priority projects that dischargers are not otherwise legally required to perform.
8. As set forth in findings 9 through 14, below, the Policy acknowledges that strict application of every Policy requirement may be inappropriate in some circumstances. The Policy requires a Regional Water Board to obtain State Water Board authorization to establish an account to receive SEP funds paid by settling parties to resolve liabilities. It also requires (a) Office of Enforcement Director approval for SEPs that fund studies or monitoring programs without a commitment to address the findings; (b) SEPs that fund environmental organizations to be directed toward specific, identified projects; and (c) SEPs to contain detailed scopes of work, budgets, and time schedules, including performance measures and final SEP completion dates. Furthermore, the Policy requires settling parties to provide proof of SEP completion before a Regional Water Board may waive suspended liabilities.
9. Policy section I.A states:

In some cases, strict application of every requirement of this Policy may not be appropriate. In such cases, the Director of the State Water Board's Office of Enforcement ... may approve an alternative or modified approach, so long as it substantially complies with the Policy.

10. Policy section VIII.H states:

... a SEP is a project or group of projects, the scope of which is defined at the time the SEP is authorized by a Water Board in a stipulated order. The placement of settlement funds into an account or fund managed by a Water Board that is not an account or fund authorized by statute, or otherwise allowed by the State Water Board, is not permissible. If a Water Board wishes to establish any fund that is designed to receive money that is paid by a settling party to resolve a claim of liability under the Water Code, the appropriate Water Board should obtain the express authorization of the State Water Board. Such authorization will be subject to any conditions that the State Water Board may place on such a fund.

The Water Boards shall not manage or control funds that may be set aside or escrowed for performance of a SEP, unless placed in an account authorized by statute or permitted by the State Water Board. The State Water Board may authorize an account and SEP program that does not strictly comply with the "specific project" requirements of Sections V.E., VI(2), VI.(3) or IX.A of this Policy, including, but not limited to, those that fund regional monitoring programs.

11. Policy section V.E states:

Assessment and audit projects may include ... environmental quality assessments, ... or studies and monitoring programs. ...

- Environmental quality assessments and studies are investigations of: the condition of the environment at a site or sites not owned or operated by the settling party; the environment impacted by a site or facility regardless if owned or operated by the settling party; or threats to human health or the environment relating to a site or facility regardless if owned or operated by the settling party. ...

The Water Boards may not approve an assessment, study, monitoring program or audit SEP performed by a settling party relating to that party's facility or facilities and not primarily having a broader, Water Board program-based benefit without also requiring the settling party to address the problems identified in the assessment, study, monitoring program or audit. An assessment or monitoring project without a commitment to address the findings of the assessment is permissible where the Director of OE determines that the SEP delivers other benefits worthy of SEP credit. ...

12. Policy section VI states:

The following are examples of the types of projects that are not allowable as Water Boards' SEPs. This list is not exhaustive. ...

- (3) General cash donations to community groups, environmental organizations, state/local/federal entities, or any other third party that are not directed towards a specific, approved project defined in the stipulated order and that otherwise complies with this Policy. ...

13. Policy section IX.A states:

Unless otherwise authorized by the State Water Board pursuant to Section VIII.H., the stipulated order must indicate a specific project, which includes or references a detailed scope of work and a budget. The order must also include a time schedule for implementation and may include multiple milestones that identify the amount of liability that will be permanently suspended or excused upon the timely and successful completion of each milestone. Milestones that allow for a portion of the liability to be permanently suspended must have an identifiable, or "stand alone," environmental benefit. Where a SEP will only have an identifiable environmental benefit after full completion, milestones that allow for permanent suspension of a portion of the liability are not allowed. Except for the final milestone, the amount of the liability suspended for any portion of a SEP cannot exceed the projected cost of performing that portion of the SEP. A final SEP completion date must be indicated in the order. The order must also contain or reference performance standards and identified measures or indicators of performance in the scope of work.

The settling party is ultimately responsible for meeting these milestones, standards, and indicators, regardless of whether the project is a first party, third party, or a third party administered SEP. ...

14. Policy section VIII.E states:

... any order imposing a SEP shall state that if the SEP is not fully implemented in accordance with the terms of the order ..., the Water Board is entitled to recover the full amount of the suspended monetary assessment, less any amount that has been permanently suspended or excused based on the timely and successful completion of any interim milestone. ...

Upon completion of the SEP, the settling party (or the third party administrator) shall notify the appropriate Water Board and provide proof of project completion and use of funds The appropriate Water Board shall review the SEP documentation and shall provide the settling party with a statement indicating that the SEP has been completed in accordance with the terms of the stipulated order and that any remaining suspended liability is waived

15. In accordance with Policy section VIII.H, an RMP account and RMP SEP program does not strictly comply with the “specific project” requirements of Policy sections V.E., VI(2), VI(3), or IX.A; however, consistent with Policy section I.A, strict application of these Policy requirements is not appropriate under these circumstances because an RMP account and RMP SEP program substantively achieves the intent of the Policy.

16. Approving Delta RMP SEPs under Policy section V.E without commitments to address study findings is warranted because Delta RMP projects have broad programmatic benefits and do not involve investigating discharge-specific problems that might require cleanup. By design, Delta RMP studies answer overarching water quality management questions, and subsequent management decisions and implementation actions reflect study findings.

17. Authorizing Delta RMP SEPs that do not strictly comply with the “specific project” requirements of Policy sections VI(3) and IX.A is appropriate when the payments are associated with discretionary penalties under \$100,000 or mandatory minimum penalties (MMPs) under California Water Code section 13385, subdivisions (h) and (i), and the alleged violation(s) occurred in the legal Delta (as defined by California Water Code section 12220) or in a surface water connected to the Delta where adverse impacts to Delta water quality are reasonably foreseeable. Often, these penalties are too small to fund meaningful “specific projects” on their own. Allowing funds from one settlement to aggregate with funds from other settlements will facilitate larger, more meaningful scientific work.

18. Allowing the Regional Water Board to release a settling party's obligation to complete a Delta RMP SEP upon proof of payment to the Delta RMP pursuant to Policy section VIII.E may simplify SEP administration and remove a barrier to timely settlement. Retaining the ability to recover suspended liabilities if Delta RMP SEPs are not completed is unnecessary because the Delta RMP has a well-established record of reliably completing all funded projects. The Delta RMP also maintains contingency funds to address the possibility that some projects may run over budget.
19. The adoption of this resolution is categorically exempt from the California Environmental Quality Act under California Code of Regulations, title 14, section 15308.

THEREFORE BE IT RESOLVED THAT:

The State Water Board:


1. Authorizes the Regional Water Board to set up an account and SEP program that funds Delta RMP projects, subject to the following conditions:
 - a. The Regional Water Board shall require SEP funds directed to the Delta RMP account to be used only for fully vetted, but otherwise unfunded, Delta RMP projects that dischargers are not otherwise legally required to perform.
 - b. All Delta RMP projects funded with SEP funds shall have a geographic nexus with the alleged violation(s) resolved through settlement. A geographic nexus exists if the alleged violation(s) occurred in the legal Delta (as defined by California Water Code section 12220) or in a surface water connected to the Delta where adverse impacts to Delta water quality are reasonably foreseeable.
 - c. For settlements imposing discretionary administrative civil liability of \$100,000 or more, the Regional Water Board shall require SEP funds directed to the Delta RMP account to fund specific studies with a geographic nexus. The administrative civil liability order imposing the liability shall indicate the specific project, and include or reference a detailed scope of work, budget, and timeline for implementation. The Regional Water Board shall ensure that any SEP funds not used for the identified specific studies will be deposited in the appropriate account pursuant to Water Code section 13385, subdivision (n).
 - d. For settlements imposing discretionary administrative civil liability under \$100,000 or MMPs under California Water Code section 13385, subdivisions (h) and (i), the Regional Water Board may allow SEP funds to aggregate to fund a Delta RMP project with a geographic nexus as funds become available.
 - e. The Regional Water Board shall ensure that the Delta RMP tracks all SEP fund contributions and expenditures separately from its base participant funds, and itemizes SEP funds and expenditures by each SEP funder and project in its financial reports. The Delta RMP need not maintain SEP funds in segregated accounts.

- f. The Regional Water Board shall ensure that the Delta RMP provides the Regional Water Board with copies of all relevant reports and makes all study results available to the public, and indicates on its website and in its reports when Delta RMP projects received funding as part of a settlement of a Regional Water Board enforcement action.
2. Approves Delta RMP SEPs under Policy section V.E without commitments to address study findings.
3. Authorizes Delta RMP SEPs that do not strictly comply with the “specific project” requirements of Policy sections VI(3) and IX.A when the payments are associated with discretionary penalties under \$100,000 and MMPs under California Water Code section 13385, subdivisions (h) and (i).
4. Authorizes the Regional Water Board to release a settling party’s obligation to complete a Delta RMP SEP upon proof of payment to the Delta RMP pursuant to Policy section VIII.E.
5. Directs the Regional Water Board to continue considering a range of SEPs in addition to those that fund Delta RMP projects, particularly SEPs that further the human right to water, ensure environmental justice, benefit disadvantage communities, and address climate change.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 2, 2019.

- AYE: Chair E. Joaquin Esquivel
Board Member Sean Maguire
Board Member Laurel Firestone
- NAY: None
- ABSENT: Vice Chair Dorene D’Adamo
Board Member Tam M. Doduc
- ABSTAIN: None



Jeanine Townsend
Clerk to the Board