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SECRETARY FOR
ENVIRONMENTAL PROTECTION

San Francisco Bay Regional Water Quality Control Board

Public Comment
SEP Policy Amendment
Deadline: 9/25/17 by 12 noon

TO: Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
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Sent via email to: commentletters@waterboards.ca.gov



FROM: Thomas Mumley
Assistant Executive Officer
**California Regional Water Quality Control Board
San Francisco Bay Region**

DATE: September 20, 2017

SUBJECT: Comments on the Draft Policy on Supplemental Environmental Projects

Thank you for the opportunity to review the draft Policy on Supplemental Environmental Projects (SEPs). We appreciate the Office of Enforcement’s efforts to revise the Policy. We support additions to the Water Boards’ mission covering the human right to water, environmental justice, and climate change. We offer a few recommendations to improve the July 21, 2017, draft. For each recommendation, we discuss our reasons for revising the draft Policy and propose text additions (underlined text) and deletions (strikethrough text).

Section III – Definition and Characteristics of a SEP [Last Paragraph]

We recommend expanding the description of an unacceptable SEP to more generally cover work required to be performed, not just what is needed to remedy a violation or is reflective of industry practices. We also suggest revising the double negative construction of the last sentence.

Recommended Change:

“The Water Boards may never agree to compromise the stringency or timeliness of a regulatory requirement in exchange for a SEP. Performance of a SEP does not alter a responsible party’s obligation to remedy a violation expeditiously and return to compliance. Projects or actions already required by law or regulation are not acceptable as SEPs or CEAs, and projects that are not required, but that reflect standard industry practices, are generally not acceptable either ~~as SEPs or CEAs.~~”

Section VI – Projects Not Acceptable As SEPs

We support the proposed list in the draft policy of types of projects that are not allowable as SEPs except example (5) as it may pertain to SEPs allowed by settlement of a mandatory

minimum penalty (MMP). Example (5) would not allow a project implemented by a third party managed fund unless the project is clearly defined at the time of a stipulated order effective date. The stated purpose is to ensure adequate nexus and transparency of the use of public funds.

This constraint conflicts with and undermines our current efficient process for expediting settlement of MMPs. It will be problematic to define the SEP project in our stipulated orders for MMPs, which allow use of a portion of the MMP for an environmental assessment project identified by the San Francisco Bay Regional Monitoring Program (RMP) administered by the San Francisco Estuary Institute. We issue stipulated orders for MMPs on an ongoing basis, but because the amount of each MMP is smaller than available RMP projects, we do not specify the project in the stipulated order. Alternatively, the RMP, through a transparent process, accounts for the MMP SEP funds and associates them with specific projects and reports the designation in a timely manner. We request the proposed policy be modified to allow an exception to Example (5) for MMP SEP projects administered by a third party that maintains a recognized process that ensures adequate nexus and transparency of the use of the SEP funds.

Recommended Change:

“(5) Projects for which the responsible party pays a third party-managed fund to implement, but for which the project is not clearly defined at the time of the stipulated order effective date to ensure adequate nexus and transparency of the use of public funds. A project which is not defined at the time of a stipulated order associated with a mandatory minimum penalty (MMP) may be allowed if the project is identified and managed by a third party through a transparent process approved by the Regional Water Board that issues the order.”

Section VII.B – SEP Evaluation Criteria and Potential SEP Lists [Paragraph 2]

We recommend three changes to this section based on our experience with compiling and maintaining a list of SEP proposals.

- (1) Remove the reference to the enforcement coordinator to be consistent with other references to Regional Water Board or Division responsibilities. Each region should determine how to allocate its resources to maintain a potential SEP list. For example, Region 2 partners with a third party (the San Francisco Estuary Partnership).
- (2) Expand the potential SEP list to projects and interested parties. We have had more success in tracking a list of organizations interested in implementing SEPs in particular areas. These organizations can efficiently submit a timely SEP proposal. Specific projects on a compiled list quickly become dated or otherwise unviable.
- (3) Remove responsibility for evaluating and responding to SEP proposals to be consistent with paragraph 3 (item 3), which allows for potential SEPs to be on a list without pre-approval or prioritization. The draft language conflicts with our practice, where a third party, the San Francisco Estuary Partnership, with its connections to restoration groups, maintains a list of potentially viable projects and interested parties for our Region.

Recommended Change:

“~~Each Regional Water Board’s enforcement coordinator or Division shall maintain a list of is responsible for evaluating and responding to~~ SEP proposals and parties interested in submitting SEP proposals that are within its jurisdiction, to be

updated on an annual basis, at minimum, and may choose to create its own set of SEP evaluation criteria to be posted on its respective website. Regional Water Boards or the Divisions may, for example, give preference to SEP proposals that will be located in or benefit a DAC, EJ community, or a community that as financial hardship. Water Boards shall inform interested parties within 30 days of updating their potential SEP list. ~~that have submitted SEP proposals within 30 days of the determination and updating of the potential SEP list.”~~

Section VIII.B - Amount of SEP [Paragraph 1]

We recommend revising the policy so it is clear and consistent with Water Code section 13385(l)(1). The current and proposed policy impose a 50 percent limit on the amount of a penalty that may be directed to a SEP, unless a Water Board provides a compelling justification, subject to approval by the Director of the Office of Enforcement. Water Code section 13385(l)(1) states that, if a mandatory minimum penalty (MMP) exceeds \$15,000, the portion of the penalty that may be directed to a SEP is \$15,000 plus 50 percent of the penalty that exceeds \$15,000. The Water Code is silent regarding MMPs less than \$15,000, but it is reasonable to assume that the intention of section 13385(l)(1) was to allow 100 percent of penalties less than or equal to \$15,000 to be directed to a SEP, particularly since the cost of overseeing SEPs less than \$15,000 could be wholly disproportional to the SEP cost.

We acknowledge that the current and proposed policy allows the Director of the Office of Enforcement to approve a proposed settlement to fund a SEP in an amount greater than 50 percent of the total adjusted monetary assessment after making evidence and/or policy-based findings that there is compelling justification to do so. However, there is a timing and administrative burden with seeking and obtaining such an approval for settlement of MMPs. Hence, we request the policy explicitly recognize allowance of a SEP for greater than 50 percent of a MMP consistent with Water Code section 13385(l)(1), and preclude need approval by the Director of the Office of Enforcement for every such proposed settlement.

Recommended Change:

“ ... As a general rule, unless otherwise permitted by statute, no settlements shall be approved by the Water Boards that fund a SEP in an amount greater than 50 percent of the total adjusted monetary assessment against the responsible party, absent compelling justification. For mandatory minimum penalties assessed under Water Code section 13385(l)(1), 100 percent of the first \$15,000 in penalties may be directed to a SEP, provided the SEP meets all the requirements in this Policy. ...”

Section VIII.D - Third Party-Administered SEPs [Paragraph 1]

For consistency with our comment and proposed revision above under “Section VI – Projects Not Acceptable As SEPs” for Example (5) pertaining to defining a SEP for a mandatory minimum penalty (MMP) at the effective date of the stipulated order for the MMP, we request revision of the proposed language in the draft policy for third party-administered SEPs when the SEP is associated with a MMP.

Recommended Change:

“Third party-administered SEPs are paid for by the responsible party and shall also either be proposed by the responsible party or chosen from the statewide potential

SEP list and memorialized in a stipulated order. A project need not be memorialized in a stipulated order for a MMP if the project is identified and managed by a third party through a transparent process approved by the Regional Water Board that issues the order. Similar to responsible party-performed SEPs, in either case, the stipulated order shall satisfy all the requirements of this Policy prior to implementation of the SEP.”

Section VIII.D - Third Party-Administered SEPs [Paragraph 3]

We recommend eliminating or modifying the policy revision that imposes a 24-month timeframe for completing SEPs. The current policy does not limit the time schedule for completing a SEP administered by a third party. We recognize and support the implied interest in completing a SEP in a timely manner, but there is no justification provided for the 24-month timeframe requirement. From our experience, a 24-month timeframe will be problematic for many SEPs. For example, permits may be required from multiple agencies, which can take several months to obtain, for environmental restoration projects, and the construction phase can take two or more years to complete, followed by a year or more of post-construction monitoring to demonstrate attainment of project specifications. Also, environmental quality assessment projects often need start-up time prior to conducting necessary investigations over two complete dry and/or wet seasons, and additional time is needed to evaluate and report results.

Although the proposed policy would allow a Water Board Executive Officer to grant an extension for good cause, this imposes an unnecessary administrative burden when a realistic and justifiable timeframe for completing a SEP in a timely manner can be established in the stipulated order adopted by the Water Board allowing the SEP. If a timeframe cap is desired, 48 months is more appropriate than the proposed 24 months. Also, if a policy cap is included in the policy, we request revision of the proposed language in the draft policy for third party-administered SEPs when the SEP is associated with a MMP to be consistent with our previous comments and requested revisions associated with third party-administered SEPs for MMPs

Recommended Change:

~~“All SEP funds must be expended on the SEP project specifically defined in the stipulated order within 24 months of the order’s adoption, unless the Executive Officer or Deputy Director of the appropriate Water Board grants an extension for good cause based on an adequate explanation for the project delay as to why the project has been delayed.”~~

Or if a timeframe is kept in the policy,

“All SEP funds must be expended on the ~~SEP~~ project specifically defined in the stipulated order, or defined through a transparent process approved by the Regional Water Board for a stipulated order for a MMP within ~~24~~ 48 months of the order’s adoption, unless the Executive Officer or Deputy Director of the appropriate Water Board grants an extension for good cause based on an adequate explanation for the project delay as to why the project has been delayed.”

Section VIII.H – Accounting

For the same reasons expressed in our comments above under Section VIII.D - Third Party-Administered SEPs regarding a 24-month timeframe for completing SEPs we recommend removing the 24-month timeframe proposed in the draft policy in this section as well.

Recommended Change:

“In some cases, a Water Board may choose to direct monies paid by the responsible party intended for a SEP to go into a third party-administered account (also referred to as settlement accounts) for disbursement to various approved projects. In these cases, the Water Board shall ensure that the third party uses the monies on the specific approved SEP indicated in the stipulated order ~~within 24 months~~, and that a nexus to each violation is maintained when implementing projects.”

Section VIII.K - Public Reporting of SEP Information

We recommend removing layers of reporting that are unnecessary based on other draft Policy requirements. We suggest keeping the requirement to report on SEP audits. The draft Policy, however, already requires Regional Water Boards to maintain lists of potential SEPs (see Section VII.B) and to track active and historical projects. Reporting to the Office of Enforcement what is already posted and publically available through a State Water Board SEP website is unnecessary and inefficient. Also, there is no value gained from compiling a statewide list of SEPs in addition to the lists for each region. SEPs can only be applied in a regional context due to the requirement for a nexus to the specific violations.

Recommended Change:

~~“By March 31 of each year, for the prior calendar year, or at its request, each Water Board with settlement agreements that include SEPs shall provide OE with the following:~~

- ~~• Summary reports of each SEP completed in that calendar year in a format specified by OE;~~
- ~~• Results of any third part financial audits; and~~
- ~~• An annual update to the list of potential SEPs.~~

~~OE shall compile a report on potential SEPs and all completed SEPs statewide for the prior calendar year to be posted on the State Water Board’s SEP webpage and included in the State Water Board’s Annual Performance Report. The A State Water Board SEP webpage will contain live links shall also contain a live link to query the appropriate Water Board databases for lists of potential SEPs and the most current information on active and completed SEPs in each region. Each Regional Water Board or Division shall report to OE the results of any audits of an SEP for its Annual Performance Report, by March 31 each year.~~

~~OE shall also compile, based on information from the Regional Water Boards and State Water Board Divisions, a statewide list of potential SEPs to be posted on the State Water Board’s SEP webpage. The statewide potential SEP list shall be updated on an annual basis, at a minimum, and reported to CalEPA on an annual basis or at its request.”~~