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BRIEFING DOCUMENT REGARDING POLICY ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

The Policy was adopted by the State Water Resources Control Board on February 3, 2009

DATE: 2/26/09 **PREPARED BY:** The Office of Enforcement

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Goal of the Revisions:

To allow the Regional Water Boards to continue to utilize SEPs as a means of resolving enforcement actions but retaining a structure to guarantee a reasonable portion of monetary liability assessments from every civil liability enforcement action is available for statutorily-authorized purposes and priorities under the control of the State Water Board. It also provides for greater accountability for those engaged in SEPs so that the Water Boards and the public can have confidence that the SEPs resulted in an actual project with actual environmental benefit.

Summary of the Revisions:

1. Limits the amount of a SEP relative to the overall monetary assessment – current policy had no limitation.

“Soft” ceiling of 50% (after repayment of enforcement costs). The 50% limit can be exceeded with approval of the Director of the Office of Enforcement of the State Water Board. There are no express criteria in this Policy to describe when the Director of the Office of Enforcement might approve projects which exceed the 50% limit except that this would be done where there is “compelling justification”.

2. Requires that SEPs be **fully completed** before discharger satisfies its obligation.

Under the former policy, some regions permitted the payment of funds to a third party in full satisfaction of the discharger’s SEP obligation. In those cases, the third-party promised to undertake environmentally beneficial work but the discharger’s obligations to the Region Board are satisfied before that work is actually implemented or completed. That arrangement is no longer permissible.

3. Prevents Regional Boards from establishing SEP accounts which they manage independently of the State Water Board without express approval. The Policy would not prevent state accounts, such as the CAA, to be used as an “escrow account” in certain circumstances.
4. Creates annual reporting obligations for the Water Boards regarding the status of SEPs to improve transparency and public tracking of SEPs.
5. The cost of Water Board oversight, if any, of the SEP **is not** included in the value of the SEP for the purposes of the SEP credit (unless expressly agreed to by a Regional Water Board), but discharger will be required to pay for **all** such oversight.

Comment: This requirement may discourage a discharger from proposing or agreeing to a SEP that may have the potential for substantial oversight costs unless a Regional Board agrees that such costs can be included in the overall value of the SEP.

6. Provides amendments including: provisions for making certain that SEPs can be audited; that the costs of the Water Board’s oversight will be borne by the settling discharger; and other technical amendments to ease the burden on Water Board staff resulting from the acceptance of SEPs.
7. Eliminates general education SEPs from the list of acceptable SEPs to emphasize the nexus requirements for a SEP. The limitation is consistent with Cal/EPA SEP Policy. Compliance education, compliance training, and the development of educational materials are expressly identified as acceptable SEPs.
8. Requires the Regional Boards to list all SEPs that they approve via an Order affirming the use of a SEP to resolve an ACL complaint. The policy does not prevent a Regional Board from using a pre-approved list of SEPs. Even if a SEP is pre-approved, it still must have a nexus to the violation before it can be utilized in a specific enforcement case.
9. Eliminates the maintenance of a list of acceptable SEPs by the State Water Board. The State Water Board never created such a list.
10. Requires recovery of economic benefit enjoyed by discharger from its noncompliance in the penalty portion of any settlement in which a SEP is utilized.

11. Has no impact on a Region's ability to advocate for funding of a particular project from the Cleanup and Abatement Account or Waste Discharger Permit Fund consistent with the limitations on the use of those funds.

Standard Settlement Language and Templates:

The Office of Enforcement will develop standard language and forms to be used in Settlement Agreements and Orders which memorialize the use of a SEP in settlement of an administrative civil liability enforcement action. We anticipate that the language will be applicable to judicial settlements which incorporate SEPs as well.

How Will the New SEP Policy Work?

Example: Administrative civil liability (ACL) complaint issued for \$115,000 for a discretionary ACL, which includes \$15,000 for staff costs incurred in bringing the enforcement action.

The resolution of the ACL complaint can be addressed with an SEP as follows:

\$115,000 liability is assessed. \$15,000 is available for reimbursement of staff enforcement costs leading up to the resolution of the ACL complaint.

Of the remaining \$100,000, no more than 50% can be assessed for an authorized supplemental environmental project (SEP) determined by the regional board and agreed to by the settling discharger. The 50% limit can be exceeded with approval by the Director, Office of Enforcement, State Water Board where there is compelling justification.

Any supplemental environmental project will be overseen by the regional board staff and, therefore, as a condition of settlement, the discharger must agree to pay the regional board's reasonable oversight costs, if any, in monitoring the SEP. Those costs would be assessed pursuant to the terms of the Order implementing the SEP. These oversight costs are not included in the value of the SEP unless expressed approved by the Regional Board. Staff should note that the estimation of oversight costs may be difficult, especially where the SEP is implemented over a long period of time, for the purposes of including such costs in the potential value of the SEP.

Assuming that a 50% SEP is proposed by the Prosecution Team and adopted by a Regional Board, then the value of the SEP is \$50,000 (\$100,000 x .50), the case resolution is recorded as a \$115,000 total liability assessment with \$65,000 paid liability (\$15,000 for staff costs and \$50,000 for SWRCB-authorized CAA projects), and a \$50,000 liability suspended pending completion of the SEP.

Assuming that a 40% SEP is adopted, then the value of the SEP is \$40,000 (\$100,000 x .4). The case resolution is recorded as a \$115,000 total liability assessment with a \$75,000 paid liability and a \$40,000 liability suspended pending completion of the SEP.

If the Regional Water Board incurs any oversight costs related to the implementation of the SEP, the settlement agreement and Order will require the discharger to pay for all reasonable oversight costs. The discharger will also be required to pay for any independent audit of the project if such an audit is sought by a Regional Water Board.

Attachment: Adopted Policy