

STATE WATER RESOURCES CONTROL BOARD

**POLICY
ON
SUPPLEMENTAL
ENVIRONMENTAL PROJECTS**

February 3, 2009

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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INTRODUCTION

The State Water Board or Regional Water Board may allow a discharger to satisfy part of the monetary assessment imposed in an administrative civil liability (ACL) order by completing or funding one or more Supplemental Environmental Projects (SEPs.) SEPs are projects that enhance the beneficial uses of the waters of the State, that provide a benefit to the public at large and that, at the time they are included in the resolution of an ACL action, are not otherwise required of the discharger. California Water Code section 13385(i) allows limited use of SEPs associated with mandatory minimum penalties. California Water Code section 13399.35 also allows limited use of SEPs for up to 50 percent of a penalty assessed under section 13399.33. In the absence of other statutory authority in the Water Code regarding the use of SEPs, Government Code section 11415.60 has been interpreted by the Office of Chief Counsel to allow the imposition of SEPs as part of the settlement of an ACL.

The State Water Board supports the inclusion of SEPs in ACL actions, even when SEPs are not expressly authorized, so long as these projects meet the criteria specified below to ensure that the selected projects have environmental value, further the enforcement goals of the State Water Board and Regional Water Boards (Water Boards), and are subject to appropriate input and oversight by the Water Boards. These criteria should also be considered when the State Water Board or a Regional Water Board considers a SEP as part of the settlement of civil litigation.

SEPs are an adjunct to the Water Boards' enforcement program and are never the basis or reason for bringing an enforcement action. While SEPs can be useful in the facilitation of settlements, the funding of SEPs is not a primary goal of the Water Boards' enforcement program nor is it necessary that a SEP always be included in the settlement of an enforcement action that assesses a monetary liability or penalty.

A. Addressing the State Water Board's Interest in Supplemental Environmental Projects

While many other jurisdictions require that penalties and administrative liabilities be paid into a general fund, administrative civil liabilities and civil penalties assessed under the Water Code are paid into special funds for specific environmental purposes. The State Water Board has a strong interest in monitoring the use of funds for SEPs that would otherwise be paid into accounts for which it has statutory management and disbursement responsibilities. 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 discharger, absent compelling justification. The total adjusted monetary assessment is the total amount assessed, exclusive of a Water Board's investigative and enforcement costs.

If a Regional Water Board proposes an order containing a SEP that exceeds 50 percent of the total adjusted monetary assessment, that Regional Water Board shall affirmatively notify the Director of the Office of Enforcement of the State Water Board of that proposal. The notification shall describe in detail the proposed SEP, the settlement value of the SEP, the reasons why the Regional Water Board proposes to accept the SEP in lieu of a monetary liability payment, and the exceptional circumstances that justify exceeding the recommended percentage limit. If the Director of the Office of Enforcement of the State Water Board determines that there is no compelling justification, he or she shall notify the Regional Water Board of that determination and the Regional Water Board will be limited to the 50 percent limit.

B. General Considerations

1. Types of SEPs

There are two general categories of SEPs: (1) SEPs performed by the discharger; and (2) SEPs performed by third-parties paid by the discharger. Third-party entities that are paid to perform a SEP must be independent of both the discharger and the Water Board. Any actual or apparent conflict of interest must be avoided. A third-party is not independent if it is legally or organizationally related to the discharger or the Water Board. A contract between the discharger and the third-party for the performance of a SEP that allows the discharger to ensure that the SEP is completed pursuant to the terms of the contract, does not affect whether that third-party is otherwise independent of the discharger for the purposes of this Policy.

2. Accounting Treatment

The monetary value of a SEP will be treated as a suspended liability. Unless otherwise required by law, any order imposing a SEP shall state that, if the SEP is not fully implemented in accordance with the terms of the order and, if any costs of Water Board oversight or auditing are not paid, the Water Board is entitled to recover the full amount of the suspended penalty, less any amount that has been permanently suspended or excused based on the timely and successful completion of any interim milestone. Full payment of the penalty shall be in addition to any other applicable remedies for noncompliance with the terms of the order.

C. General SEP Qualification Criteria

Nothing in this policy restricts the Regional Water Boards from establishing additional, more stringent criteria for SEPs. All SEPs approved by a Water Board must, at a minimum, satisfy the following criteria:

1. A SEP shall only consist of measures that go above and beyond the otherwise applicable obligations of the discharger. The SEP shall not be an action, process, or product that is otherwise required of the discharger by any rule or regulation of any federal, state, or local entity or is proposed as mitigation to offset the impacts of a discharger's project(s). (Note: "Compliance Projects" as authorized by Water Code section 13385(k)(1) are not SEPs.)
2. The SEP shall directly benefit or study groundwater or surface water quality or quantity, and the beneficial uses of waters of the State. Examples include but are not limited to¹:
 - a. monitoring programs;
 - b. studies or investigations (e.g., pollutant impact characterization, pollutant source identification, etc.);
 - c. water or soil treatment;
 - d. habitat restoration or enhancement;
 - e. pollution prevention or reduction;
 - f. wetland, stream, or other waterbody protection, restoration or creation;
 - g. conservation easements;
 - h. stream augmentation;
 - i. reclamation;
 - j. watershed assessment (e.g., citizen monitoring, coordination and facilitation);
 - k. watershed management facilitation services;
 - l. compliance training, compliance education, and the development of educational materials;
 - m. enforcement projects, such as training for environmental compliance and enforcement personnel; and
 - n. non-point source program implementation.

¹ Nothing in this section is intended to affect the authority of the State Water Board to make disbursements from the State Water Pollution Cleanup and Abatement Account, including but not limited to, authorized disbursements for education projects.

3. A SEP shall never directly benefit, in a fiscal manner, a Water Board's functions, its members, its staff, or family of members and staff. Any indirect benefits provided to members, staff, or family shall be only those that are enjoyed by the public generally. A SEP shall not benefit or involve friends of members, staff, or family where there could be an appearance of undue influence, suggesting an actual or apparent conflict of interest for the Water Boards.
4. As contemplated by this policy, 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. The placement of settlement funds into an account or fund managed by a Regional 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 Regional Water Board wishes to establish any fund that is designed to receive money that is paid by a discharger to resolve a claim of liability under the Water Code, the Regional Water Board should obtain the express authorization of the State Water Board. Such authorization will be subject to conditions that the State Water Board may place on such a fund.

D. Additional SEP Qualification Criteria

The following additional criteria shall be evaluated by the Water Boards during final approval of SEPs:

1. Does the SEP, when appropriate, include documented support by other public agencies, public groups, and affected persons?
2. Does the SEP directly benefit the area where the harm occurred or provide a region-wide or statewide use or benefit?
3. Does the SEP proposal, considering the nature or the stage of development of the project, include documentation that the project complies with the California Environmental Quality Act?
4. Does the SEP proposal address whether it can be the basis for additional funding from other sources?
5. Does the entity identified as responsible for completing the SEP have the institutional stability and capacity to complete the SEP? Such consideration should include the ability of the entity to accomplish the work and provide the products and reports expected.
6. Does the SEP proposal include, where appropriate, success criteria and requirements for monitoring to track the long-term success of the project?

E. Nexus Criteria

There must be a nexus between the violation(s) and the SEP. In other words, there must be a relationship between the nature or location of the violation and the nature or location of the proposed SEP. A nexus exists if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future.

F. Project Selection

Each Regional Water Board will maintain a list of the SEPs that it has authorized pursuant to an order. The list of authorized SEPs shall be available on the Regional Water Board's web site. A Regional Water Board also may maintain and post on its web site a list of environmental projects that it has pre-approved for consideration as a potential SEP. Each Regional Water Board may determine when and how it wishes to consider an environmental project for placement on its list of potential SEPs.

G. Orders Allowing SEPs

When SEPs are appropriate, they are imposed as stipulated ACL orders, in settlement of an ACL complaint or some other order entered under the authority of a Water Board. There is no legal authority for an ACL complaint to contain a proposed SEP. Funding for SEPs is addressed as a suspended liability.

All orders that include a SEP must:

1. Include or reference a scope of work, including a budget.
2. Require periodic reporting (quarterly reporting at a minimum) on the performance of the SEP by the discharger to the Water Board to monitor the timely and successful completion of the SEP. Copies of the periodic reports must be provided to the Division of Financial Assistance of the State Water Board.
3. Include a time schedule for implementation with single or multiple milestones and that identifies the amount of liability that will be permanently suspended or excused upon the timely and successful completion of each milestone. 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.
4. Contain or reference performance standards and identified measures or indicators of performance in the scope of work.

5. Specify that the discharger is ultimately responsible for meeting these milestones, standards, and indicators.
6. Require that whenever the discharger, or any third party with whom the discharger contracts to perform a SEP, publicizes a SEP or the results of the SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of a Water Board enforcement action.

Any portion of the liability that is not suspended shall be paid to the CAA or other fund or account as authorized by statute. The order shall state that failure to pay any required monetary assessment on a timely basis will cancel the provisions for suspended penalties for SEPs and that the suspended amounts will become immediately due and payable.

It is the discharger's responsibility to pay the suspended amount(s) when due and payable, regardless of any agreements between the discharger and any third party contracted to implement or perform the project.

Upon completion of the SEP, the Water Board shall provide the discharger with a statement indicating that the SEP has been completed in satisfaction of the terms of the order and that any remaining suspended liability is waived.

H. Project Payment, Tracking, Reporting and Oversight Provisions

Except under unusual circumstances, ACL orders shall include the provisions for project payment, tracking, reporting, and oversight as follows:

1. For any SEP that requires oversight by the State Water Board or Regional Water Board, the full costs of such oversight must be covered by the discharger. Based on its resource constraints, the Water Board may require the discharger to select and hire an independent management company or other appropriate third party, which reports solely to the Water Board, to oversee implementation of the SEP in lieu of oversight by Water Board staff. If no arrangement for the payment for necessary oversight can be made, the SEP shall not be approved, except under extraordinary circumstances. As a general rule, such oversight costs are not costs that should be considered part of the direct cost of the SEP to the discharger for the purposes of determining the value of the SEP for settlement purposes unless the Regional Water Board or State Water Board expressly finds that such costs should be considered part of the SEP.

2. A written acknowledgment and other appropriate verification and enforceable representation to the Water Boards by each third-party performing the SEP that any SEP funds it receives from the discharger will be spent in accordance with the terms of the order. The third-party performing the SEP must agree to an audit of its SEP expenditures, if requested by the Water Board.
3. The discharger must provide the Water Board and the Division of Financial Assistance of the State Water Board with a final completion report, submitted under penalty of perjury, declaring the completion of the SEP and addressing how the expected outcome(s) or performance standard(s) for the project were met. Where a third-party performed the SEP, that entity may provide the report and the certification.
4. The discharger must provide the Water Board a final, certified, post-project accounting of expenditures, unless the Water Board determines such an audit is unduly onerous and the Water Board has other means to verify expenditures for the work. Such accounting must be paid for by the discharger and must be performed by an independent third-party acceptable to the Water Board.
5. The Water Board will 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.
6. The Water Board does not have authority to directly manage or administer the SEP.
7. Where appropriate, it is permissible for a SEP funding agreement between a discharger and a third-party to require pre-approval of invoices or confirmation of completed work by a Water Board before escrowed or set-aside funds are disbursed to the party performing the work.

I. Public Reporting of SEP Status Information

The State Water Board shall post on the State Water Board website, by March 1 of each year, a list, by Regional Water Board, of the completed SEPs for the prior calendar year, and shall post information on the status of SEPs that are in progress during that period.