

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

RESOLUTION R5-2016-0009

SUPPLEMENTAL ENVIRONMENTAL PROJECTS PROGRAM TO BENEFIT THE
DELTA REGIONAL MONITORING PROGRAM

The California Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board) finds:

1. The Sacramento-San Joaquin Delta (Delta) is an important water supply for municipal, industrial and agricultural use for much of the State, and is a critical ecosystem for fish and wildlife, including many rare and endangered species.
2. The Delta Regional Monitoring Program (RMP) is a stakeholder-directed program formed to develop water quality data necessary for improving our understanding of 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 Central Valley Regional Water Quality Control Board and other Federal, State and local agencies and organizations.
3. The Central Valley Water Board is an agency of the State of California with the mission of preserving, protecting, enhancing, and restoring water quality within the Central Valley of California. In support of that mission, the Central Valley Water Board has the authority to enforce permit conditions and provisions of its Water Quality Control Plans by issuing Administrative Civil Liability Orders (ACL Orders).
4. Dischargers who wish to settle alleged water quality violations may offer to complete Supplemental Environmental Projects (SEPs) that offset the financial liability that may otherwise be imposed by the Central Valley Water Board; dischargers may fund SEPs in lieu of submitting payments to the State Water Resources Control Board's (State Water Board) Water Pollution Cleanup and Abatement Account and/or Waste Discharge Permit Fund. SEP settlements are memorialized in Stipulated ACL Orders.
5. The State Water Board has adopted a Water Quality Enforcement Policy (dated 17 November 2009) and a Statewide Policy on Supplemental Environmental Projects (SEP Policy) (dated 3 February 2009) that together regulate the use of SEPs statewide.
6. The SEP Policy defines SEPs as, "... 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. ... SEPs are an adjunct to the State and Regional Water Quality Control Boards' enforcement program and are never the basis or reason for bringing an enforcement action."

7. As a general rule, the SEP Policy states that no settlements shall be approved by the State and Regional 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 Regional Water Board's investigative and enforcement costs.

DELTA RMP PROPOSAL

8. Understanding the current conditions within the Delta (water quality and beneficial uses) and the potential impacts to those conditions is important in order to preserve and enhance the Delta and provide for corresponding regulatory and management decisions, which must be based upon sound science.
9. Currently, many agencies and organizations are conducting monitoring and data evaluation in the Delta, but there has been an overall lack of coordinated monitoring and data evaluation for a variety of reasons. The coordinated approach employed by the Delta RMP enhances the understanding of contaminant distribution in the Delta to better inform management and policy decisions.
10. The Delta RMP is an identified priority in the State Water Resource Control Board's and Central Valley Water Board's Delta Strategic Plan, and a Delta RMP is recommended in the Delta Plan adopted by the Delta Stewardship Council.
11. The Delta RMP is a stakeholder effort led by a steering committee. The steering committee consists of representatives from publicly owned treatment works, municipal storm water permittees, irrigated agriculture, coordinated monitoring groups, water supply, federal regulators, resource agencies, and staff from the Central Valley Water Board and State Water Board.
12. The Delta RMP has a monitoring design plan for pathogens, mercury, pesticides/toxicity, and nutrients. The monitoring design includes monitoring locations, constituents, and studies. The Delta RMP steering committee has approved plans for reporting data and findings to the public and how the RMP sampling will be coordinated with existing sampling efforts in the Delta by other entities. Annually, the steering committee establishes monitoring priorities, a detailed workplan, and budget.
13. The Delta RMP needs to secure sources of funding to provide timely and consistent data to make informed decisions. The exchange of current and future individual monitoring efforts to the Delta RMP and redirection of funding from those individual efforts has been the major source of funding for the Delta RMP. However, the Delta RMP is currently underfunded and only the minimum monitoring design is being implemented. Additional funding is required to implement the full monitoring design and address other management priorities in the future.
14. It is the intent of the Central Valley Water Board that all waste dischargers with the potential to impact Delta water quality will be encouraged to, and have the flexibility to, participate in the Delta RMP.

15. A viable source of funding for the RMP is from minimum mandatory penalties and discretionary administrative civil liabilities.
16. Currently, the Aquatic Science Center, a joint powers agency created on 1 July 2007 by a Joint Powers Agreement between the Bay Area Clean Water Agencies and the State Water Resources Control 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. However, since the overseeing agency may be subject to change, this Resolution—as well as future iterations—will refer to the *Implementing Agency* to mean the agency managing the Delta RMP.

COMPLIANCE WITH THE ENFORCEMENT AND SEP POLICIES

17. In accordance with the Enforcement Policy, funding a SEP results in the permanent suspension of the portion of the liability in exchange for the performance of the project. To facilitate the Delta RMP SEP Program, the Central Valley Water Board shall consider “performance of the project” to mean actual payment of the amount agreed to by the discharger in the ACL Order to the Implementing Agency, along with a written acknowledgement and any other appropriate verification and enforceable representation to the Central Valley Water Board from the Implementing Agency that any SEP funds it receives from the discharger has been spent in accordance with the terms of the ACL Order that approves the SEP.
18. The Implementing Agency shall confirm the SEP funds received and expended in an annual report to the Central Valley Water Board, due by 31 January each year.
19. Upon receipt of SEP funds the Implementing Agency will publicly notice (e.g., on their website) and make clear that funds were received as part of a settlement agreement stemming from an enforcement action issued by the Central Valley Water Board.
20. The SEP Policy lays out the following general qualification criteria:
 - a. The SEP shall only consist of measures that go above and beyond¹ the otherwise applicable obligations of the discharger and the Implementing Agency.
 - b. The SEP shall directly benefit or study groundwater or surface water quality.
 - c. A SEP shall never directly benefit, in a fiscal manner, a Water Board’s functions, its members, staff, or family of members or staff.

¹ Currently Dischargers are reducing some of their receiving water monitoring requirements by contributing equivalent resources to the RMP. This reduction in individual monitoring consists of many parameters at one or several locations in the vicinity of discharge locations. Conversely, the Delta RMP is an intensive data collection effort at many locations in and around the Delta currently focusing on: pesticides/toxicity, pathogens, nutrients, and mercury. Dischargers are not individually required to conduct these broad studies. Additionally, any SEP funds would go towards assisting an already underfunded program (e.g., monitoring mercury in fish and water).

- d. Unless express authorization is granted to a Regional Water Board by the State Water Board, a Regional Water Board may not manage settlement funds placed into an account for the purposes of completing a SEP.
21. Actions conducted by the Implementing Agency shall adhere to the above criteria and any other applicable criteria of the SEP Policy.
 22. The SEP Policy states that, “there must be a nexus between the violation(s) and the SEP ... 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.” For this initiative, the nexus will be evaluated on a case-by-case basis and requiring, at a minimum, the discharge to have the potential to negatively impact the water quality of the Delta.
 23. The SEPs funded under the Delta RMP SEP Program are considered third-party SEPs, which means that the third-party entities that are paid to perform a SEP must be independent of both the discharger and the Central Valley Water Board.
 24. By agreeing to participate in this project, the Implementing Agency agrees to subject all of its accounting and project-tracking materials related to the Delta RMP SEP Program to any audit at any time that one is deemed necessary by the Central Valley Water Board or by any other state or federal agency that requires such auditing.
 25. It is the policy of the State Water Board that all ACL Settlements must be posted for a 30-day public comment period before they are finalized. In addition, this Resolution will be posted for 30 days to allow the public to provide input as to the merits of the Delta RMP SEP Program. As stated above, the Central Valley Water Board is committed to providing the public the opportunity to comment on revisions to the Delta RMP SEP Program when it is updated each year.
 26. The Central Valley Water Board’s approval of this Resolution is not considered subject to the provisions of the California Environmental Quality Act (CEQA) as it will not result in a direct or reasonably foreseeable indirect physical change in the environment and is not considered a “project.” (Pub. Resources Code § 21065; Cal. Code Regs., tit 14, §§ 15060(c)(2),(3); 15378(a).) At the time Administrative Civil Liability Orders approving the funding of Delta RMP SEPs are approved, the Central Valley Water Board must consider whether CEQA applies to the issuance of the Board’s Order, and whether additional CEQA work is required.

THEREFORE BE IT RESOLVED, the Central Valley Water Board, after considering the entire record, including written and oral testimony at the hearing:

1. Approves the 2015 Delta RMP SEP Program.
2. Directs Board staff to work with the Implementing Agency to publicize the Delta RMP SEP Program on the Central Valley Water Board’s website, and to give serious consideration to

all proposals that would include these SEPs as a part of the settlement of a discharger's potential civil liability.

3. Instructs the Implementing Agency to report back to the Central Valley Water Board by 31 January of each year, providing information regarding the receipt and expenditure of SEP funds during the preceding calendar year. Copies of this report shall be available to all dischargers that have contributed to the Delta RMP in the prior year. The Implementing Agency shall also submit this report to the Division of Financial Assistance at the State Water Board under penalty of perjury, declaring that the funds submitted to the Implementing Agency have been expended during the preceding year on the Delta RMP SEP Program. Funds expended over multiple years will be reported on as many yearly reports as necessary until they are fully spent. These reports shall be considered a final post-project accounting of expenditures, as additional reporting on individual projects would be unduly onerous.
4. Dischargers that direct funds to the Implementing Agency for use in a SEP for the Delta RMP SEP Program will have an equivalent amount of administrative civil liability suspended at the time they make actual payment of the amount agreed to in the ACL Order to the Implementing Agency, provided that the ACL Order also states that the Central Valley Water Board is entitled to recover any funds that are not expended in accordance with the terms of the ACL Order.

I, PAMELA C. CREEDON, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of a Resolution adopted by the California Regional Water Quality Control Board, Central Valley Region on 19 February 2016.

Original Signed By

PAMELA C. CREEDON, Executive Officer