

## **IX. Supplemental Environmental Projects (SEPs)**

The SWRCB or RWQCB may allow a discharger to satisfy some or all of the monetary assessment imposed in an ACL Complaint or Order completing or funding one or more SEPs. SEPs are projects that enhance the beneficial uses of the waters of the State, provide a benefit to the public at large, and that, at the time they are included in an ACL action, are not otherwise required of the discharger. California Water Code section 13385(h)(3) 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 addition, the SWRCB supports the inclusion of SEPs in other ACL actions, so long as these projects meet the criteria specified in this section. These criteria should also be considered when the SWRCB or RWQCB is negotiating SEPs as part of the settlement of civil actions brought in court.

### **A. Process for Project Selection**

Any public or private entity may submit a proposal to the SWRCB (or to the RWQCB for transmittal to the SWRCB) for an SEP that they propose to fund through this process. Staff at the SWRCB shall evaluate each proposal and maintain a list of candidate SEPs that satisfy the general criteria in subsection C of this section. The list of candidate SEPs shall be made available on the Internet along with information on completed SEPs and SEPs that are in-progress. When a RWQCB is considering allowing a discharger to perform an SEP in lieu of some or all of a monetary assessment, the RWQCB should direct the discharger to the list of candidate SEPs. The discharger may select a SEP from the list of candidate SEPs or may propose a different SEP that satisfies the general criteria for SEPs. When the discharger submits a proposal to the RWQCB for a SEP, it should include draft provisions (i.e., details of the specific activities that will be conducted, and of the estimated budget for each activity in the SEP) for a contract to be executed between the discharger(s) who will be funding the project and the entity performing the SEP if different from the discharger. The discharger should be requested to provide information regarding the additional selection criteria in subsection D of this section and shall demonstrate to the satisfaction of the Board that the selected or proposed SEP also satisfies the Nexus requirements in subsection E of this section.

### **B. ACL Complaints and ACL Orders allowing SEPs**

All ACL Complaints and Orders that include suspended liabilities for SEPs shall include or reference detailed specifications for evaluating the timely and successful completion of the SEP. The ACL Complaint or Order shall contain or reference specific performance standards, and identified measures or indicators of performance. The ACL Complaint or Order shall specify that the discharger is required to meet these standards and indicators.

Any portion of the liability that is not suspended must be paid to the State Cleanup and Abatement Account or other fund or account as authorized by statute. The ACL Complaint or Order shall state that failure to pay any required monetary assessment on a

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timely basis will cancel the provisions for suspended penalties for SEPs and the suspended amounts will become immediately due and payable.

The ACL Complaint or Order shall either include a time schedule or reference a TSO with a single or multiple milestones and the amount of liability that will be permanently suspended 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. The Complaint or Order should state that, if the final total cost of the successfully completed SEP is less than the amount suspended for completion of the SEP, the discharger must remit the difference to the State Cleanup and Abatement Account or other fund or account as authorized by statute. The Complaint or Order should state that if any SEP milestone is not completed to the satisfaction of the Executive Officer by the date of that milestone, the previously suspended liability associated with that milestone shall be immediately due and payable to the State Cleanup and Abatement Account or other fund or account as authorized by statute. It is the discharger's responsibility to pay the amount(s) due, regardless of any agreements between the discharger and any third party contracted to implement the project. Therefore, the discharger may want to consider a third party performance bond or the inclusion of a penalty clause in their contract.

Since ACL Orders are final upon adoption and cannot be reconsidered by the RWQCB, the RWQCB may want to include provisions in the ACL Order to extend the deadline for any milestone if it, or its Executive Officer, determines that the delay was beyond the reasonable control of the discharger. If the RWQCB fails to reserve jurisdiction for this purpose, the time schedule in the ACL Order can only be modified by the SWRCB pursuant to California Water Code section 13320.

The ACL Complaint or Order shall include provisions for project tracking, reporting, and oversight:

- (a) The ACL Complaint or Order shall require the discharger to provide the SWRCB or RWQCB progress reports, as appropriate, and shall require a final report, certifying the completion of the SEP.
- (b) The ACL Complaint or Order shall require the discharger to provide the SWRCB or RWQCB a post-project accounting of expenditures.
- (c) The SWRCB or RWQCB shall not manage or control funds that may be set aside or escrowed for performance of a SEP. Nor may the SWRCB or RWQCB retain authority to manage or administer the SEP. The SWRCB or RWQCB may require the discharger to select and hire an independent management company or other appropriate third party, which reports solely to the SWRCB or RWQCB, to audit implementation of the SEP. The company should evaluate compliance with performance measures and report to the SWRCB or RWQCB about the timely and successful completion of the SEP. Alternatively, as a condition of the SEP, the SWRCB or RWQCB may require the discharger to pay into the Cleanup and Abatement Account or other fund or account as authorized by statute an amount equal to the estimated cost for oversight of the SEP by the SWRCB or RWQCB.

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The RWQCB or third party auditor shall track the implementation of the SEP (e.g., through progress reports, meetings with the discharger, etc.) to ensure that the implemented SEP reasonably follows the approved project and achieves the original objectives.

- (d) The ACL Complaint or Order should require that, whenever the discharger publicizes an 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 an enforcement action.

### **C. General SEP Qualification Criteria**

All SEPs approved by the SWRCB or RWQCB must satisfy the following general criteria:

- (a) An SEP shall only consist of measures that go above and beyond the obligation of the discharger. For example, sewage pump stations should have appropriate reliability features to minimize the occurrence of sewage spills in that particular collection system. The installation of these reliability features following a pump station spill would not qualify as an SEP.
- (b) The SEP should 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 to:
  - (i) monitoring programs;
  - (ii) studies or investigations (e.g., pollutant impact characterization, pollutant source identification, etc.);
  - (iii) water or soil treatment;
  - (iv) habitat restoration or enhancement;
  - (v) pollution prevention or reduction;
  - (vi) wetland, stream, or other waterbody protection, restoration or creation;
  - (vii) conservation easements;
  - (viii) stream augmentation;
  - (ix) reclamation;
  - (x) public awareness projects (e.g., industry specific, public-awareness activity, or community environmental education projects such as watershed curriculum, brochures, television public service announcements, etc.);
  - (xi) watershed assessment (e.g., citizen monitoring, coordination and facilitation);
  - (xii) watershed management facilitation services; and
  - (xiii) non-point source program implementation.
- (c) The SEP shall not directly benefit the SWRCB or RWQCB functions or staff. For example, SEPs shall not be gifts of computers, equipment, etc. to the SWRCB or RWQCB.

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- (d) The SEP shall not be an action, process or product that is otherwise required of the discharger by any rule or regulation of any entity (e.g., local government, California Coastal Commission, United States Environmental Protection Agency, United States Army Corps of Engineers, etc.) or proposed as mitigation to offset the impacts of a discharger's project(s).

### **D. Additional SEP Qualification Criteria**

The following additional criteria should be evaluated by the SWRCB and RWQCB during final approval of SEPs proposed by the discharger:

- (a) The SEP should, when appropriate, include documented support by other resource agencies, public groups and affected persons.
- (b) The SEP should, when appropriate, document that the project complies with the California Environmental Quality Act.
- (c) Regionwide use/benefit - Some projects may benefit the specific watershed yet still provide added value regionwide or even statewide. For example, development of a spill prevention course could benefit not just the local watershed but the whole region or state if properly packaged and utilized. Likewise, a monitoring program for a particular water body could also provide information that staff could use in assessing other discharges, spills, 401 certifications or flood control activities in a river. Projects, which provide the SWRCB or RWQCB with added value, are encouraged.
- (d) Combined funding - Some projects use seed money to create a much greater or leveraged impact. Often other agencies will contribute staff time, laboratory services, boat use, or other services as part of a monitoring project. While the applicant may propose to spend hard money on equipment or materials, they may be donating expertise and labor to accomplish a much larger project. Matching funds, in kind services and leveraged projects are encouraged.
- (e) Institutional stability and capacity - The RWQCB shall consider the ability of the discharger or third party contractor to accomplish the work and provide the products and reports expected. This criterion is especially important when a Board receives money as the result of a settlement and must then select and fund projects proposed from many sources.
- (f) Projects that involve environmental protection, restoration, enhancement or creation of waterbodies should include requirements for monitoring to track the long-term success of the project.

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### **E. Nexus Criteria**

An SEP must have a nexus (connection or link) between the violation(s) and the SEP. Nexus is the relationship between the violation and the proposed project. This relationship exists only 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. An SEP must meet one or more of the following criteria. SEP approval is more likely for projects meeting more criteria.

**Geographic Nexus** - The proposed project should have a geographic link or nexus with the area where the water quality problem or violation occurred. For example, a spill to a river might require a plan to improve habitat or fish populations in the river in the general area of the spill. Work in a tributary watershed might be appropriate depending on the circumstances, however, work in a far different part of the region or state would likely not meet the geographic nexus criteria.

**Spill Type or Violation** - The proposed project should be related to the specific spill type or violation. For example, an SEP for a sewage spill ACL could include holding spill prevention workshops for other dischargers in the general area (both a geographic and violation type nexus). The workshops should go beyond what is necessary just to address mandatory work, equipment, and improvements required to correct the nature of the violation.

**Beneficial use protection** - Where specific beneficial uses were affected by the violation, it is appropriate to design SEPs that address protection and improvement of those uses. Where fish populations and habitats are affected, efforts to improve habitats and populations would be ideal, especially in the same watershed. Water quality monitoring, including flows, channel morphology, and habitat characteristics would be appropriate projects. In this case, the nexus is between the type of violation and the specific beneficial uses impacted. It is also important to keep endangered species issues in focus and to consult with the Department of Fish and Game, the National Marine Fisheries Service, and US Fish and Wildlife Service about impacts of violations on these species and possible SEPs.