

**Examination Of Current Practices For Allowing, Developing,
Selecting, Funding And Managing Seeps Derived From
Administrative Civil Liability Actions**

**By
Mark Alpert
Compliance Assurance unit**

The purpose of this analysis is to discuss and evaluate the current Supplemental Environmental Project (SEP) process, and to provide recommendations for the Regional Board to consider in developing a more consistent process in:

1. Soliciting and selecting projects for funding SEPs;
2. Determining a discharger's ongoing responsibility for SEPs; and
3. Determining an appropriate level of Regional Board staff involvement in the selection, review, and oversight of projects that are funded.

Clarification of parameters and limitations will greatly assist Regional Board members, dischargers subject to liability, and interested persons when considering SEP funding and state costs.

I. Background

At its June 14, 2006 meeting, the Regional Board considered funding \$50,000 worth of SEPs proposed by a discharger as a component of a settlement of an Administrative Civil Liability (ACL). During deliberations, Regional Board members raised a number of questions on the process to select, fund, and manage SEPs. The discharger also objected to having any responsibility for the success of the SEPs once they paid the project proponents to implement the proposal. Ultimately, these issues were not resolved, and the funding of the SEPs was postponed.

II. Existing Policy / Authority to approve SEPs

The Water Code establishes the Regional Boards authority to issue administrative civil liability (ACL) complaints, and to assess liability against dischargers and responsible parties for violations of waste discharge requirements, prohibitions, and other Orders of the Regional Board. Administrative Civil Liabilities are required to be deposited into the Cleanup and Abatement Account (CAA) administered by the State Water Resources Control Board (State Board). The State Board funds cleanup and abatement activities to restore and/or improve water quality throughout the state. Public agencies can request the State Board fund specific projects related to clean up or abate the effects of a waste in accordance with criteria established in Water Code Section 13440.

In some instances, dischargers choose to settle potential civil liability by proposing the Regional Board consider suspending or diverting a portion of a liability for the successful completion of SEPs. The State Board Enforcement Policy (adopted February 2002), (Document 1: excerpt of enforcement policy regarding SEPs, pgs 43-47) requires that a SEP is a project that will:

1. Contribute to the enhancement, protection or restoration of water quality and beneficial uses;
2. Exceeds environmental regulatory requirements;
3. Does not involve an existing obligation created by any order or prohibition issued by the Regional Board; and
4. Does not qualify to be funded or implemented through an existing program.

The Enforcement Policy also establishes the criteria for a project to qualify in order to be funded as a SEP. Key elements are: 1) a demonstration that projects directly benefit groundwater or surface water quality or quantity, and the beneficial uses of waters of the State; 2) a demonstration that project has a nexus between the violation(s) and the SEP; and 3) establishes that a discharger retains all accountability and responsibility and to track, audit, and ultimately to ensure the success of the SEPs at the risk of paying the State the amount of liability that was diverted to fund the SEP.

III. SEP selection Process

The State Board's Enforcement Policy establishes a SEP selection process where SEP proposals are submitted to the State Board on a standardized application form for evaluation. Under this process, the State Board would maintain a list of SEP candidates that satisfy the general criteria. A discharger allowed by the Regional Board to fund a SEP in lieu of some or all of an assessment of liability could select a SEP from the candidate list, or propose a different SEP that satisfies the general criteria. Unfortunately, the State Board has yet to establish a statewide SEP candidate list. At this time, the State Board has not implemented the SEP selection process specified in the Enforcement Policy.

San Diego Regional Board Experience

In June 2000, in advance of the State Board's current SEP policy, the Regional Board issued guidance to facilitate the evaluation and acceptance of SEPs. Proposals for SEPs are submitted to the Regional Board on a SEP application form and evaluated by the Regional Board using an evaluation checklist (Document 2: Regional Board SEP application form). Evaluations and ranking are based on the project's potential for enhancement of water quality, beneficial uses, monitoring/data gathering, public education and/or outreach. If other aspects of the settlement offer are acceptable, the final SEP selections are made by Regional Board and incorporated into an order formally approving the settlement of civil liability. The Regional Board's process closely matches that of the Enforcement Policy adopted in February 2002.

Since issuing its guidance in 2000, the Regional Board has assessed civil liability in 140 instances, for which it collected and deposited \$6.1 million into the CAA. In 10 of these enforcement cases, the Regional Board settled the civil liability by allowing the dischargers to fund 24 SEPs valued at \$3.7 million.

These SEPs included both payment to third party to carry out the terms of the SEP and work performed by the discharger as 'in-kind' services (Document 3: list of SEPs approved by the San Diego Region 2000-2006).

Initially, the Regional Board did establish a library of a number of projects that were received but not funded as part of settlement of a large ACL. Updating the list, however, was discontinued as it became clear that maintaining a list of potential projects was not viable without a well funded program to support periodic public solicitations, and the ongoing reviews, evaluations, and ranking that would be needed to keep the list of projects fresh. This hurdle must be overcome if the Regional Board is going to maintain a current and effective list of SEPs. Other difficulties of maintaining a SEP candidate list include:

1. A candidate SEP may not satisfy the nexus requirement (i.e., that the SEP occurs within the watershed where the violation occurred);
2. Project proponents may seek funding by other mechanisms due to the sporadic timing of enforcement actions imposing liability;
3. Projects may become outdated; and
4. Project proponents may not have sufficient time to have their SEP processed and considered by the Regional Board in time for a specific enforcement action.

Case by Case Consideration of SEP

From the Regional Board staff's perspective, if a SEP or SEPs are to be part of a discharger settlement offer, it is the responsibility of the discharger propose the SEPs in sufficient detail for the Regional Boards consideration. With this in mind, third party SEP proponents must first win the approval of the discharger for their SEP to be included in the settlement offer.

The following is a summary of the Regional Board SEP selection process:

If there are multiple SEPs, the Regional Board staff reviews and rank SEPs submitted by the discharger. The ranked list of projects is provided to the Regional Board as part of the consideration of the settlement offer. The Regional Board can ultimately reject any settlement offer it does not feel takes adequate consideration of SEP proposals. To ensure third party SEP proponents have adequate opportunity, the Regional Board can allow a discharger a short extension of the hearing date, 60 days or less. This extension may

allow the discharger and the third party SEP proponent an opportunity to coordinate on and agree on the terms of the SEP proposal.

For projects selected for funding, the Regional Board adopts an order or resolution, which includes criteria to measure a project's status through completion. Regional Board has received few if any complaints from the public regarding this process its selection of SEPs.

The discharger's desire to reduce liability amount and/or maximize the dollar amount set aside for SEPs must be weighed against to the cost of extended negotiations, and the delay in resolution of the liability.

IV. SEP Administrative Oversight Costs

The Regional Board budget does not provide for oversight of SEPs. This inadequacy can prevent the Regional Board from expending additional time to solicit, evaluate, and otherwise scrutinize proposals and to track approved SEPs. Any solution that extends that time spent on establishing and maintaining a list of SEP projects may reduce staff resources to pursue other enforcement actions.

Therefore, a discharger proposing a SEP should be required to pay an additional amount above the cost of the SEP to reimburse the State for the cost of the selection, approval, and oversight of the SEPs. This amount should range from 15% to perhaps as high as 50 % of the amount allocated for SEPs depending on the complexity of the project.

V. Summary and Conclusion

1. The Regional Board, with concurrence of a discharger, may suspend or divert a portion of a liability for the successful completion of SEPs.
2. A SEP is a project that will contribute to the enhancement, protection or restoration of water quality and beneficial uses; exceeds environmental regulatory requirements; does not involve an existing obligation created by any order or prohibition issued by the Regional Board; and does not qualify to be funded or implemented through an existing program.
3. The State Board Enforcement Policy establishes the criteria for a project to qualify in order to be funded as a SEP:
 - a) Project complies with water quality criteria;
 - b) Complies with a geographic or violation type nexus criteria; and
 - c) Discharger retains all accountability and responsibility for SEP.
4. State Board does not maintain a list of candidate SEPs as envisioned by Enforcement Policy.

5. San Diego Regional Board considers SEPs on a case by case basis as part of settlement of administrative civil liability actions.
6. Criteria for completion of an approved SEP are incorporated into an order reflecting the settlement of civil liability.
7. Administrative costs of the selection, approval, and oversight of the SEPs should be born by the discharger.

Attachments:

- 1: Excerpt of enforcement policy regarding SEPs (pgs 43-47)
- 2: 2000 Regional Board SEP application and evaluation checklist
- 3: SEPs approved by the San Diego Region 2000-2006