



REGION 4. LOS ANGELES
COMMENTS ON THE DRAFT JANUARY 8, 2008 ENFORCEMENT POLICY

Region 4 staffs comments on the Draft January 8, 2008 Enforcement Policy are listed below. Excerpts from the Enforcement Policy are in italics followed by Regional Board staff's comments.

Page 21, paragraph 2 (under Section 10. Mandatory Minimum Penalties for NPDES Violations) states: *The intent of these portions of the California Water Code is to assist in bringing the State's permitted facilities into compliance with WDRs. Water Boards should issue mandatory minimum penalties within seven months of the time that they became aware of the violations. This will encourage the discharger to correct the violation in a timely manner.*

We concur that timely issuance of MMPs is of value in bringing a discharger into compliance and in providing a deterrence effect to others. However, Region 4, for example, has about 600 NPDES permits, resulting in a significant effort needed to determine and address MMP violations. No consideration is given to how Regions can be expected to achieve this without providing the required resources.

Page 42, paragraph 2 (under Section 5. Project Credit) states: *There is no requirement that a SEP be given a dollar-for-dollar credit against what would be the assessed penalty. Under certain circumstances, the Water Boards could find that the money spent on a SEP should be discounted because the value of the project is limited. A similar approach is taken by USEPA where the credit that a SEP is entitled to receive could be no more than 80% of the value of the SEP unless the SEP is of outstanding quality. USEPA places this general limitation on the amount of project credit based on the fact that acceptable SEPs vary in quality in terms of the environmental benefits provided. The Water Boards may similarly determine that while a SEP meets the criteria for acceptance, its costs should not qualify for a full credit against the otherwise assessed penalty.*

This policy will be difficult to follow without further clarification and guidance on how staff should determine how much, if any a SEP should be discounted. Please provide instructions or guidance on how to accomplish this.

Page 46, (under Section E. Process for SEP selection) states that: *"Each Water Board will maintain a list of approved SEPs that satisfy the general criteria. The list of approved SEPs will be made available on the Internet. When a Regional Water Board is considering allowing a discharger to perform a SEP, in lieu of payment of some portion of a civil liability assessment, the Regional Water Board should direct the discharger to the list of candidate SEPs. The discharger may select a SEP from the list of candidate SEPs, provided that the nexus requirement is satisfied, or may propose a different SEP that satisfies the general criteria for SEPs."*

Please clarify whether the SEP List must be approved by the SB. Also clarify if, and under what criteria, Regions must seek SB approval prior to finalizing Orders/Settlements where a discharger is allowed to fund a SEP on the SEP List.

Pages 46 and 47 (under F. Addressing the State Water Board's Interest in Supplemental Environmental Projects) states that: "As such, the State Water Board must have the option to review SEPs which are greater than 25% of the total monetary assessment against a discharger. If a Regional Water Board accepts a SEP that exceeds 25% of the total monetary assessment, that Regional Water Board shall affirmatively notify the State Water Board of that acceptance and the State Water Board may review the Regional Water Board's action on its own motion. The Regional Water Board shall ensure that such a SEP will not be commenced until Regional Board advises the discharger that the State Water Board has not exercised its opportunity to review the SEP or the State Water Board has viewed the SEP and made no modifications. The notification shall be by the Regional Board to the Executive Director of the State Water Board and shall describe in detail the proposed SEP, the settlement value of the SEP, the reasons why the Regional Water Board accepted the SEP in lieu of monetary penalties, and the reasons why the SEP amount exceeds the limits on percentage set forth in this section. If the State Water Board chooses to review the settlement, it shall notify the Regional Water Board within thirty (30) days of receipt of the completed notice. The State Water Board will review the SEP after public notice..."

This requirement implies that all Orders incorporating SEPs (greater than 25% of the assessment) are essentially put on hold until the SB has opportunity to review the SEP, i.e. the Board Order is not final or in effect until a decision is made by the SB? Will the cash payment to the CAA also be on hold until the SB hears the issue? Will template language addressing this be made available to the Regions? Please clarify this process.