



September 25, 2017

Submitted via e-mail to commentletters@waterboards.ca.gov

Chair Felicia Marcus and Members,
State Water Resources Control Board
P.O. Box 100, Sacramento, CA 95812
1001 I Street, 24th Floor, Sacramento, CA 95814

Re: CASA and Coalition Comments on Proposed Amendments to the Policy on Supplemental Environmental Projects (SEPs)

Chair Marcus and Board Members,

The California Association of Sanitation Agencies (CASA) appreciates the opportunity to comment on the Proposed Amendment to the Policy on Supplemental Environmental Projects (SEPs) ("Proposed Policy"). For 60 years, CASA has been the leading voice for public wastewater agencies on regulatory, legislative and legal issues. We are an association of local agencies, engaged in advancing the recycling of wastewater into usable water, generation of renewable energy, and other valuable resources. Through these efforts we help create a clean and sustainable environment for Californians.

The Association of California Water Agencies (ACWA), Southern California Alliance of POTWs (SCAP), Bay Area Clean Water Agencies (BACWA), and Central Valley Clean Water Association (CVCWA) concur with the comments submitted by CASA. ACWA represents over 430 public water agencies that collectively supply approximately 90% of the water delivered in California for domestic, agricultural and industrial uses. SCAP is currently comprised of over 80 wastewater treatment, water treatment, recycled water treatment, and collection systems organizations. BACWA is a joint powers agency whose members own and operate publicly-owned treatment works (POTWs) and sanitary sewer systems that collectively provide sanitary services to over 7.1 million people in the nine-county San Francisco Bay (SF Bay) Area. CVCWA represents over 50 publicly-owned treatment works (POTWs) that provide wastewater collection, treatment, and disposal for over 7 million people in the Central Valley.

SEPS are environmentally beneficial projects funded and/or performed by dischargers to satisfy part of a monetary assessment imposed in an administrative civil liability (ACL). These projects must have some nexus to the subject of the violation or region, and typically provide great benefit. In addition, as noted by several Board Members at the August 16, 2017 workshop to discuss the Proposed Policy, SEPs can help build beneficial relationships within the local community and allocate scarce resources in an effective and targeted manner.

Overall, the Proposed Policy reflects much of the current practice for approval and oversight of SEPs, yet unfortunately, the Proposed Policy now also includes provisions that would have the

effect of preventing or discouraging the use of SEPs generally, and may eliminate implementation of virtually all large or complex SEPs. This will have adverse impacts on local communities and the water environment, and in particular may cause hardship for some non-governmental organizations, some of which have only been able to do valuable local environmental improvement projects because of the availability of funding from SEPs.

We do, however, very much appreciate the option not included in the text of the Proposed Policy, but suggested by Office of Enforcement staff at the August 2017 workshop (and again at the September 20, 2017 hearing), that entities be allowed to combine related, smaller penalties to contribute to a larger SEP. This is particularly important in the Central Valley and other regions of the state where alleged violations and assessed penalties may be small, but the regional issues that could benefit from SEPs require a more comprehensive and coordinated solution.

Our primary concern with the Proposed Policy is related to the list of projects described as not acceptable as SEPs (Section VI). The Water Boards need maximum flexibility to allow SEPs that would benefit water quality, beneficial uses and local communities. Many important SEPs approved in the past would have been excluded if this restrictive list were in place, and important projects that are attractive to the community might not happen in the future because the project falls under one of these specified categories. Modification of this section as requested will not limit the Water Board's existing ability to deny a particular proposed SEP if it does not meet the broader criteria for acceptability. This concern is discussed in greater detail below.

CASA also identified several other issues and language provisions within the Proposed Policy that are problematic or appear internally inconsistent, and we suggest specific modifications to clarify the Water Boards' intent. For the most part, these are provisions that would promote consistency in application of the SEP policy in the future. All Page references refer to the redline version of the Proposed Policy.

We initially submitted a draft of these comments to staff and are working with the Office of Enforcement to address some of our more specific concerns. Staff was receptive to many of these comments and committed to addressing several issues in an updated draft of the Proposed Policy. Where we may have reached consensus on an issue, we have highlighted it in red text below. Because these comments are in response to the original draft language (which remains unchanged to date), we have opted to include the full suite of comments herein, however we very much appreciate staff's willingness to work with us on those issues identified below.

Specific Recommendations

Page 2: The revised policy states that “[t]he Water Boards reserve the right to change this Policy, at any time, without prior notice.” (SEP Redlines, Page 2) However, the staff report specifies that “The State Water Board must comply with all state and federal public participation requirements and state laws governing environmental and peer review when amending the Policy.” These seem like fundamentally inconsistent statements. Language is needed to clarify that in the future, should the State Water Board seek to amend the SEP Policy, such amendment should be processed through the same stakeholder engagement, public notice, and comment phases as these amendments to Policy have undergone. **Staff has committed to addressing this language so that future amendments are subject to the public process.**

Page 2: Similarly, the Proposed Policy states that “nothing in this Policy restricts Water Boards from establishing additional, more stringent criteria for SEPs” (SEP Redlines, Page 2) and that the Water Boards may create their own guidance documents to be posted on their own respective websites. (SEP Redlines, Page 7) While Water Boards may have the discretion to develop additional criteria for SEPs, we believe that the Policy must state that if the Water Boards develop additional criteria, provisions, policies or guidance documents for SEPs, that these should be adopted through the formal notice and comment process.

Page 4: The last paragraph of Section III states that “[t]he Water Boards may never agree to compromise the stringency or timeliness of a regulatory requirement in exchange for a SEP... Projects or actions that are not required, but that reflect standard industry practices, are generally not acceptable as SEPs or ECAs.” (SEP Redlines, Page 4) Two elements of this paragraph are potentially problematic. First, the first phrase regarding the stringency or timeliness regulatory requirements could be interpreted too broadly. There are circumstances where regulatory requirements may be modified, or compliance deadlines extended, for a particular agency subject to an ACL action for independent regulatory or factual reasons, yet a SEP would nonetheless be appropriate and preferable for all parties in the resolution of the ACL. We would hope this language would not be used broadly to deny a SEP in such a circumstance. To avoid confusion, we suggest eliminating this language entirely (the Water Boards still retain the flexibility to reject a SEP proposal that might compromise the stringency or timeliness of a regulatory requirement in a given situation).

Second, the term “standard industry practices” as used in the last sentence of this paragraph is far too vague and could encompass a wide variety of otherwise acceptable SEPs or ECAs not intended to be captured by this language. The idea of a “standard industry practice” varies by region, facility type, discharger type and a variety of other factors (including but not limited to large/small agency, coastal/inland agency, disadvantaged community, etc.), and interpretation of the undefined term by different Water Boards could create significant statewide inconsistency in application. This language should simply be eliminated (again, the Water Boards retain the discretion and flexibility to reject a SEP or ECA if they believe the project reflects a regulatory standard or requirement).

Finally, the Proposed Policy states that SEPs cannot include actions which the responsible party, or any other third party, is “likely to be required” to perform; this phrase should be changed to “are required to perform,” since it is difficult to know what might “likely” be required in the future. Likewise, sub-item (b) states that examples include “injunctive relief in another legal action the Water Boards, or another regulatory agency, could bring.” Instead of “could bring,” this item should be changed to “that is pending or was brought.” Injunctive relief that “could” be brought is an overly broad standard that could seriously threaten the implementation of worthy SEPs.

Page 6/7: One of CASA’s primary concerns with the Proposed Policy is the list of projects identified to be not acceptable as SEPs (Section VI). In general, it is unnecessary to specifically list these out given the flexibility and discretion that rests with the Water Boards to deny a proposed SEP. However, if the Water Boards feel the need to specify certain types of projects, this list should be more narrowly tailored than the current proposal and consistent with the rest of the Proposed Policy. The following exclusion are the most problematic from our perspective:

- Item (2): Contributions to environmental research at a college or university.
 - Valuable SEPs can be led by or include prominent colleges or universities, and the broad prohibition language included in the Proposed Policy could negatively impact the ability to perform such SEPs. This restriction should be eliminated, or in the alternative, amended to clarify that what is intended is to prevent simple cash contributions to a college or university, while still allowing SEPs that fund specific research or other “on the ground” projects with a nexus to the violation or region. **Staff has committed to including clarifying language specifying that if a SEP meets the remainder of the conditions (e.g. being a project with deadlines, a budget, an identifiable benefit, etc.) the proposed project would not be excluded by this language. We believe this may address our underlying concerns, and we will continue to work with staff on this issue.**
- Item (3): Cash donations to community groups, environmental organizations, state/local/federal entities, or any other third party.
 - This language could prohibit projects that have been approved by Regional Boards in the past, including the use of third party nonprofit organizations who might receive funds to implement a project. Similar to the comment immediately above, we believe what is intended is to prohibit simple cash donations without any defined purpose or project goal with a nexus to the alleged violation. If that is the case, the language here needs to be more narrowly tailored to reflect that intent. **Staff has committed to including clarifying language specifying that if a SEP meets the remainder of the conditions (e.g. being a project with deadlines, a budget, an identifiable benefit, etc.) the proposed project would not be excluded by this language. We believe this may address our underlying concerns, and we will continue to work with staff on this issue.**

- Item (7): Studies, assessments, or monitoring programs without a requirement to address the problems identified in the study.
 - In some cases, the goal of an important SEP project is to monitor and better identify an environmental issue, whereby the very act of gathering necessary data (even without subsequent correction of the issue) is valuable. Important research (for example, monitoring or testing for constituents of emerging concern (CECs)) that may not ultimately include a specific action that addresses the problems identified in the study may nonetheless be important as a SEP and lead to water quality improvements in the future. This restriction will have a significant chilling effect on performing these types of SEPs, because the responsible party funding the SEP may not be responsible at all (or solely responsible) for the condition studied, and cannot reasonably accept a requirement to address or remedy the issue studied (and what of studies that may investigate natural or historical conditions integral to understanding the environment but that may not have a “problem” to address?). Additionally, until the problem is characterized, the solution may be unknown, and therefore the cost of addressing the problem would also be unknown. No responsible party could reasonably be expected to commit to implement an unknown solution for an unknown cost. Further, this restriction would negate the Water Board’s desire as expressed at the August 2017 workshop to allow smaller SEPs to be aggregated towards regional SEPs that might tackle basin-wide issues, such as in the Central Valley (CV-Salts, etc.). Additional examples of such SEPs include the Southern California Coastal Water Research Project’s Endocrine Disruption in Southern California Coastal Fish study and the Model Program for Bacterial Source Identification and Abatement Plan – Redondo Beach Pier Pilot Project¹. This restriction should be eliminated or far more narrowly tailored, if that is possible, to address a specific concern. **Staff has committed to making some changes to the studies, assessments and monitoring exclusion for SEPs by referencing section V.E, where there is some qualifying language about such a SEP not primarily benefitting the responsible party, but having a broader program-based benefit. It is not clear whether this will fully address the concerns articulated here. We will continue to work with staff on this issue. We note that at the September 20, 2017 hearing, State Water Board members were supportive of modifying this provision to remove the requirement to “accept responsibility for the issues identified” in the study to ensure greater flexibility and allow valuable investigatory or monitoring-related SEPs.**
- Item (8): Projects which the responsible party, SEP recipient, or SEP implementer will undertake, in whole or in part, with federal or state loans, contracts, grants, or other forms of financial assistance or non-financial assistance

¹ Both funded as SEPs by the Sanitation Districts of Los Angeles County.

- This provision will severely narrow the types of projects that an entity might undertake as a SEP. Any project of significant scope may require multiple funding sources, virtually all of which may be banned by this language. In the wastewater agency context, even if the project is funded solely by the agency itself, other funds used by the agency for the project may be (and likely are) derived from federal or state loans or grants. This provision should be eliminated in its entirety. **Staff has committed to taking out “in part” from Section VI.8. We believe this addresses our concern with this language.**
- Item (11): Projects that are not complete, discrete actions with tangible water-related environmental or public health benefits
 - It is not clear what is meant by use of the word “tangible” in this context. Clarity is needed to ensure that this provision does not interfere with approval of an otherwise valid SEP, including those described in Item 7. Further, SEPs may be one complete action within a larger effort/project, and we seek confirmation that this restriction would not prohibit such a SEP because the larger project would not “completed” by the SEP.
- Item (12): Projects for which completion depends on the actions or contributions of individuals or entities that are neither party to the settlement nor hired by the responsible party as an implementer.
 - This provision could be construed to prevent virtually all SEPS of any significance from being proposed or approved. Modernly, almost all projects require some form of permitting and approvals from other entities, none of whom would be a party, or hired by the responsible party as an implementer. These include CEQA approvals, federal approvals, and other local approvals. This provision should be eliminated. **This issue was discussed in depth at the hearing on September 20, 2017, and we appreciate State Water Board members’ comments and suggestions to address the concerns regarding this provision While we would still advocate for elimination of this language, we now understand the types of projects that staff is trying to exclude here, and can work to develop mutually agreeable language that addresses a more specific circumstance.**

Page 10: The Proposed Policy states that “The Director of [Office of Enforcement] may approve a proposed settlement to fund a SEP in an amount greater than 50 percent of the total adjusted monetary assessment after making evidence and/or policy-based findings that there is compelling justification to do so...” (SEP Redlines, Page 10) While we support providing the Director with the flexibility to approve a proposed settlement that involves funding a SEP in a greater than 50 percent amount, we also request that a designated member of the State Water Board be assigned the role of resolving whether additional SEP funding can be awarded in the event of a request being denied by the Director and the project proponent seeks reconsideration; this member can recuse him or herself from future hearings on the proposed enforcement action in the event it is ultimately contested via petition for review before the State Water Board.

Page 11: The Proposed Policy states “All SEP funds must be expended on the SEP project specifically defined in the stipulated order within 24 months of the order’s adoption, unless the Executive Officer or Deputy Director of the appropriate Water Board grants an extension for good cause shown as to why the project has been delayed.” (SEP Redlines, Page 11)

Necessary permitting for a number of potential SEPs (including but not limited to Water Board approval of a SEP workplan, CEQA approvals, federal approvals, and local approvals) can often take considerable time. For some projects, planning, purchasing and implementation can itself extend beyond the 24 month window. There are a wide variety of circumstances where all funds may not be expended within 24 months of settlement order adoption. Including this provision will create reluctance on the part of some entities to pursue SEPs, knowing that if they do not finish on time, their liability would not be suspended and they could end up paying both the monetary penalty and the costs of the SEP up to that to date. This provision should be deleted, or in the alternative very narrowly tailored to encourage funds to be spent in a timely manner while acknowledging the reality that some projects will take longer than 24 months to complete. **This issue was also discussed in depth at the hearing on September 20, 2017, and we appreciate State Water Board members’ comments and suggestions to address the concerns regarding this provision. We would appreciate continued collaboration with staff to develop mutually agreeable language that provides additional project timeline flexibility while also promoting the efficient implementation of SEPs.**

Page 13: The Proposed Policy states “Oversight costs allowed under this section may never exceed ten percent of the total cost of the SEP” (SEP Redlines, Page 13). A 10% oversight cost is unusually high for most SEPs. However, we understand that for some complex projects, up to a 10% oversight cost may be warranted. Thus, we suggest that this provision be modified to generally provide for no greater than 5% of the total cost of the SEP to be paid for oversight, except in unusually complex or extraordinary circumstances, where oversight can be up to (but no greater than) 10% of the total cost of the SEP. **Staff concurred with this proposed change and will develop language consistent with the above.**

Page 16: The Proposed Policy states “The order must also include a time schedule and may include multiple milestones and that identify the amount of liability that will be permanently suspended or excused upon the timely and successful completion of each milestone. Milestones that allow for a portion of the liability to be permanently suspended must have an identifiable, or “stand alone,” environmental benefit. Where a SEP will only have an identifiable environmental benefit after full completion, milestones that allow for permanent suspension of a portion of the liability are not allowed. 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.” Many SEPs may be multi-stage endeavors whose individual components may not have a “stand alone” environmental benefit, even though the project as a whole would significantly benefit the environment and/or local community. This provision will make it less likely that dischargers will propose such SEPs given the resources required to reach milestones without any corresponding suspension of any portion of the underlying liability.

Page 18: The Policy requires a Certificate of Completion when a SEP has been finished, yet in the SEP Acceptance section, the Policy states that the Water Board shall provide a statement indicating the SEP has been completed in satisfaction of the terms of the order and that any remaining suspended liability is permanently suspended “only ‘if warranted’” (SEP Redlines, Page 18). We cannot think of a circumstance where it would not be warranted for the Water Boards to provide the responsible party with a simple statement indicating that the SEP has been completed in satisfaction of the terms of the order. We propose simply eliminating the language “if warranted” at the beginning of the sentence. **Staff has committed to eliminating the “if warranted” qualifier from the language in Section IX.E.**

Thank you for your consideration of CASA’s comments on the Proposed SEP Policy, and we look forward to working with you to address these issues in the coming months.

Sincerely,



Adam Link
Director of Government Affairs, CASA



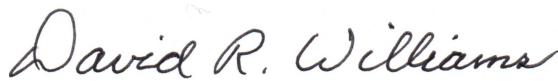
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