

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2021-0015**

TO AUTHORIZE USE OF SAN DIEGO WATER BOARD SUPPLEMENTAL
ENVIRONMENTAL PROJECT FUNDS FOR SOUTHERN CALIFORNIA COASTAL
WATER RESEARCH PROJECT REGIONAL MONITORING PROGRAMS

WHEREAS:

1. The State Water Resources Control Board (State Water Board) adopted a revised *Policy on Supplemental Environmental Projects* (Policy) on December 5, 2017, and it became effective on May 3, 2018. The Policy authorizes the State Water Board and nine Regional Water Quality Control Boards (Regional Water Boards) (collectively, Water Boards) to allow dischargers to satisfy part of any monetary assessment imposed through administrative civil liability orders arising out of settlements by completing or funding one or more supplemental environmental projects (SEPs).
2. The Southern California Coastal Water Research Project (SCCWRP) is a public research and development agency that applies science to improve management of aquatic ecosystems in Southern California and beyond. SCCWRP develops strategies, tools, and technologies that the Southern California water quality management community relies on to more effectively protect and enhance the ecological health of its coastal ocean and watersheds.
3. SCCWRP was formed in 1969 as a Joint Powers Authority, governed by a Commission, to study the effects of wastewater discharges on the marine environment in the Southern California Bight (Bight) for Southern California's biggest metropolitan wastewater agencies. In 1990, the wastewater agencies invited state and federal regulators, including the Water Boards, to participate in SCCWRP as Commissioners. The SCCWRP Commission is currently comprised of 14 agencies, including wastewater treatment agencies, stormwater management agencies, and water quality regulatory agencies, that pool their knowledge and resources to support SCCWRP's mission.
4. SCCWRP facilitates the Southern California Bight Regional Monitoring Program (Bight RMP) and the Southern California Stormwater Monitoring Coalition Regional Watershed Monitoring Program (SMC RMP) (collectively, SCCWRP RMPs).
5. The Bight RMP is an ongoing marine monitoring collaboration that examines how human activities have affected the health of more than 1,500 square miles of Southern California's coastal waters. Monitoring objectives are designed to answer questions like "Is it safe to swim?" and "Are fish and shellfish safe to eat?" As administrator, SCCWRP facilitates Bight RMP planning discussions, drafts monitoring workplans, coordinates monitoring efforts, tracks cost, implements quality assurance and quality controls, and compiles, analyzes, and disseminates data and conclusions.

6. The SMC RMP assesses the health of Southern California's streams in its 17 coastal watersheds (from Ventura to the Tijuana River). The Stormwater Monitoring Coalition is a separate coalition that consists of SCCWRP researchers, Southern California local government agencies, and their respective Water Boards. The SMC RMP collects data annually on water quality, physical habitat and riparian conditions, and biological communities to answer questions like "What is the extent and magnitude of impact in Southern California's streams?", "How is this changing over time?", and "What are the stressors responsible for the impacts observed?" As administrator, SCCWRP develops the SMC RMP monitoring plan and leads agency coordination, inter-lab calibration, data compilation, analysis, and dissemination. Monitoring is conducted by SCCWRP, its contractor(s), and/or other SMC agencies.
7. SCCWRP manages separate accounts for the Bight RMP and SMC RMP (RMP Accounts), which are individually funded by participating agencies. The SCCWRP RMPs are administered through distinct budgets and all revenues and costs associated with the programs are tracked separately. Core funds cover monitoring that is well beyond what could be required through individual permits; however, core funds are insufficient to cover all projects vetted and included in workplans for the SCCWRP RMPs. Both SCCWRP RMPs maintain a workplan of desired activities that will be implemented if funds become available.
8. As set forth in findings 9 through 19, below, the Policy acknowledges that strict application of every Policy requirement may be inappropriate in some circumstances. The Policy requires a Regional Water Board to obtain State Water Board authorization to establish an account to receive SEP funds paid by settling parties to resolve liabilities. It also requires (a) Office of Enforcement Director approval for SEPs that fund studies or monitoring programs without a commitment to address the findings; (b) SEPs that fund environmental organizations to be directed toward specific, identified projects; and (c) SEPs to contain detailed scopes of work, budgets, and time schedules, including performance measures and final SEP completion dates. Furthermore, the Policy requires settling parties to provide proof of SEP completion before a Regional Water Board may waive suspended liabilities.
9. Policy section I.A states:

In some cases, strict application of every requirement of this Policy may not be appropriate. In such cases, the Director of the State Water Board's Office of Enforcement ... may approve an alternative or modified approach, so long as it substantially complies with the Policy.

10. Policy section VIII.H states:

... a SEP is a project or group of projects, the scope of which is defined at the time the SEP is authorized by a Water Board in a stipulated order. The placement of settlement funds into an account or fund managed by a Water Board that is not an account or fund authorized by statute, or otherwise allowed by the State Water Board, is not permissible. If a Water Board wishes to establish any fund that is designed to receive money that is paid by a settling party to resolve a claim of liability under the Water Code, the appropriate Water Board should obtain the express authorization of the State Water Board. Such authorization will be subject to any conditions that the State Water Board may place on such a fund.

The Water Boards shall not manage or control funds that may be set aside or escrowed for performance of a SEP, unless placed in an account authorized by statute or permitted by the State Water Board. The State Water Board may authorize an account and SEP program that does not strictly comply with the "specific project" requirements of Sections V.E., VI(2), VI.(3) or IX.A of this Policy, including, but not limited to, those that fund regional monitoring programs.

11. Policy section V.E states:

Assessment and audit projects may include ... environmental quality assessments, ... or studies and monitoring programs. ...

- Environmental quality assessments and studies are investigations of: the condition of the environment at a site or sites not owned or operated by the settling party; the environment impacted by a site or facility regardless if owned or operated by the settling party; or threats to human health or the environment relating to a site or facility regardless if owned or operated by the settling party. ...

The Water Boards may not approve an assessment, study, monitoring program or audit SEP performed by a settling party relating to that party's facility or facilities and not primarily having a broader, Water Board program-based benefit without also requiring the settling party to address the problems identified in the assessment, study, monitoring program or audit. An assessment or monitoring project without a commitment to address the findings of the assessment is permissible where the Director of OE determines that the SEP delivers other benefits worthy of SEP credit. ...

12. Policy section VI states:

The following are examples of the types of projects that are not allowable as Water Boards' SEPs. This list is not exhaustive. ...

(3) General cash donations to community groups, environmental organizations, state/local/federal entities, or any other third party that are not directed towards a specific, approved project defined in the stipulated order and that otherwise complies with this Policy. ...

13. Policy section IX.A states:

Unless otherwise authorized by the State Water Board pursuant to Section VIII.H., the stipulated order must indicate a specific project, which includes or references a detailed scope of work and a budget. The order must also include a time schedule for implementation and may include multiple milestones 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. A final SEP completion date must be indicated in the order. The order must also contain or reference performance standards and identified measures or indicators of performance in the scope of work.

The settling party is ultimately responsible for meeting these milestones, standards, and indicators, regardless of whether the project is a first party, third party, or a third party administered SEP. ...

14. Policy section VIII.E states:

... any order imposing a SEP shall state that if the SEP is not fully implemented in accordance with the terms of the order ..., the Water Board is entitled to recover the full amount of the suspended monetary assessment, less any amount that has been permanently suspended or excused based on the timely and successful completion of any interim milestone. ...

Upon completion of the SEP, the settling party (or the third-party administrator) shall notify the appropriate Water Board and provide proof of project completion and use of funds The appropriate Water Board shall review the SEP documentation and shall provide the settling party with a statement indicating that the SEP has been completed in accordance with the terms of the stipulated order and that any remaining suspended liability is waived

15. In accordance with Policy section VIII.H, placing SEP funds in the RMP Accounts for use in a SEP program that funds the SCCWRP RMPs (SCCWRP SEP Program) does not strictly comply with the “specific project” requirements of Policy sections V.E., VI(2), VI(3), or IX.A; however, consistent with Policy section I.A, strict application of these Policy requirements is not appropriate under these circumstances because the RMP Accounts and SCCWRP SEP Program substantively achieve the intent of the Policy.
16. Approving monitoring for the SCCWRP RMPs as SEPs (RMP SEPs) under Policy section V.E without commitments to address study findings is warranted because monitoring conducted for the SCCWRP RMPs have broad programmatic benefits and do not involve investigating discharge-specific problems that might require cleanup. By design, the SCCWRP RMPs answer overarching water quality management questions, and subsequent management decisions and implementation actions reflect study findings.
17. Authorizing RMP SEPs that do not strictly comply with the “specific project” requirements of Policy sections VI(3) and IX.A is appropriate when the payments are associated with settlements imposing mandatory minimum penalties (MMPs) under California Water Code (Water Code) section 13385, subdivisions (h) and (i), the minimum administrative civil liability (ACL) under Water Code section 13399.33, or discretionary ACLs under \$100,000, and the monitoring is conducted in a receiving water with a nexus to the alleged violation(s) (i.e. coastal watershed or Pacific Ocean). Often, these penalties are too small to fund meaningful “specific projects” on their own. Allowing funds from one settlement to aggregate with funds from other settlements will facilitate larger, more meaningful scientific work.
18. Allowing the San Diego Water Board to release a settling party’s obligation to complete an RMP SEP upon proof of payment to SCCWRP pursuant to Policy section VIII.E may simplify SEP administration and remove a barrier to timely settlement. Retaining the ability to recover suspended liabilities from the settling party if the RMP SEPs are not completed is unnecessary because SCCWRP has a well-established record of reliably completing all funded projects.
19. The requirement to submit quarterly monitoring reports is not necessary because monitoring for the SCCWRP RMPs occurs no more frequently than annually. Monitoring results are provided to the participating agencies, including the San Diego Water Board, on an annual basis.
20. The adoption of this resolution is categorically exempt from the California Environmental Quality Act under California Code of Regulations, title 14, section 15308.

THEREFORE BE IT RESOLVED THAT:

The State Water Board:

1. Authorizes the San Diego Water Board to oversee a SEP program that funds SCCWRP RMP SEPs, subject to the following conditions:
 - a. Unless explicitly addressed by this Resolution, all Policy requirements continue to apply to all settlement agreements containing SEPs.
 - b. The San Diego Water Board shall require SEP funds directed to the RMP Accounts be used only for monitoring that dischargers are not otherwise legally required to perform.
 - c. All RMP SEPs shall have a nexus with the alleged violation(s) resolved through settlement. A nexus to the Bight RMP exists if the alleged violation(s) involved a discharge to the Pacific Ocean in the San Diego Region. A nexus to the SMC RMP exists if the alleged violation(s) involved a discharge to inland surface waters in the San Diego Region.
 - d. For settlements imposing MMPs under Water Code section 13385, subdivisions (h) and (i), the minimum ACL under Water Code section 13399.33, or discretionary ACLs under \$100,000, the San Diego Water Board may allow SEP funds to aggregate to fund RMP SEPs with a nexus to the alleged violation(s) as funds become available. However, SCCWRP shall return any SEP funds not expended within 36 months of the applicable settlement agreement's effective date to the appropriate State Water Board account or fund (e.g., State Water Pollution Cleanup and Abatement Account or Waste Discharge Permit Fund).
 - e. The San Diego Water Board shall ensure that SCCWRP tracks all SEP fund contributions and expenditures separately from its base participant funds and itemizes SEP funds and expenditures by each SEP funder and project in its financial reports. SCCWRP need not maintain SEP funds in segregated accounts.
 - f. The San Diego Water Board shall ensure that SCCWRP provides the San Diego Water Board with copies of all relevant results and reports annually, makes all study results available to the public, and indicates in its reports when the SCCWRP RMPs received funding as part of a settlement of a San Diego Water Board enforcement action. Annual reports shall contain an accounting of SEP fund accruals and expenditures.
2. Approves SCCWRP RMP SEPs under Policy section V.E without commitments to address study findings.

3. Authorizes SCCWRP RMP SEPs that do not strictly comply with the “specific project” requirements of Policy sections VI(3) and IX.A when the payments are associated with MMPs under Water Code section 13385, subdivisions (h) and (i), the minimum ACL under Water Code section 13399.33, or discretionary ACL under \$100,000.
4. Authorizes the San Diego Water Board to release a settling party’s obligation to complete a SCCWRP RMP SEP upon proof of payment to SCCWRP pursuant to Policy section VIII.E.
5. Directs the San Diego Water Board to continue considering a range of SEPs in addition to SCCWRP RMP SEPs, particularly SEPs that further the human right to water, ensure environmental justice, benefit disadvantaged communities, and address climate change.

CERTIFICATION


The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 4, 2021.

AYE: Chair E. Joaquin Esquivel
Vice Chair Dorene D’Adamo
Board Member Tam M. Doduc
Board Member Sean Maguire
Board Member Laurel Firestone

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board