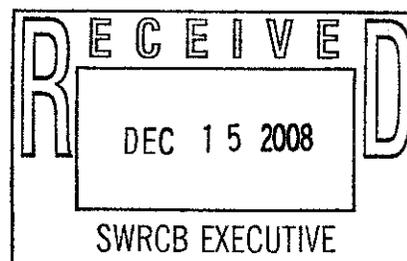




December 15, 2008

Via Electronic and U.S. Mail

Tam Doduc, Chair, and Members  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814



ATTN: Jeanine Townsend, Clerk to the Board  
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SUBJECT: **COMMENT LETTER—POLICIES ON SEPS AND USE OF THE  
CAA FOR REGIONAL WATER QUALITY IMPROVEMENT  
PROJECTS**

Dear Chair Doduc and Members of the Board:

The California Association of Sanitation Agencies, Tri-TAC, the Bay Area Clean Water Agencies, the California Water Environment Association, the Central Valley Clean Water Association and the Southern California Alliance of POTWs appreciate the opportunity to provide comments on the proposed policies addressing Supplemental Environmental projects (SEPs) and the use of the Cleanup and Abatement Account (CAA) for regional water quality improvement projects (RWQIPs). Our associations represent more than 90 percent of municipal wastewater collection, treatment and water recycling agencies, as well as thousands of wastewater professionals, throughout the State.

In February of this year, our associations submitted detailed comments on the proposed revisions to the Water Quality Enforcement Policy (WQEP). A number of our comments focused on the provisions of the WQEP that addressed the availability of, and the criteria for approving, SEPs. In general, we find the proposed SEP policy to be an improvement over the prior proposal. We appreciate the affirmative statement of State Water Board support for the use of SEPs that appears on page 1 of the proposed SEP policy. We remain concerned, however, that some provisions of the proposed policy and the accompanying CAA policy will operate to discourage use of SEPS. These are discussed in greater detail below.

**I. Proposed Policy on Supplemental Environmental Projects**

It is apparent from the proposed revisions to the SEP-related provisions that the State Water Board and staff gave careful consideration to the comments received. We believe the policy as proposed is more workable and appropriate than the previously proposed WQEP revisions. In particular, we support the proposed SEP qualification criteria and nexus criteria. We continue to be concerned, however, about the limitations proposed on the portion of ACLs that can be directed to SEPs and the exclusion of education and outreach projects from SEP eligibility.

**A. The Policy Should Not Arbitrarily Limit SEPs for Other Than Mandatory Minimum Penalties to a Percentage of the Total ACL Amount.**

Our associations strongly objected to the prior proposal to arbitrarily limit SEPs to 25 percent of the total amount of an administrative civil liability (ACL). While the proposed SEP policy is improved, in that both alternatives now allow up to 50 percent of the ACL amount to be directed to a SEP, we continue to have a fundamental objection to a one-size-fits-all limit on SEP eligibility. As we discussed in our February 7, 2008 comments on the WQEP, not all violations, nor all violators, are created equal. Regional Water Boards should be able to take into account the specific facts giving rise to the enforcement action, the discharger's conduct subsequent to the violation (including voluntary cleanup efforts), and the importance and value of the proposed SEP in determining the appropriate amount of the total administrative civil liability (ACL) to be directed to a SEP. We do not believe it is necessary or appropriate to establish a set cap on the SEP amount, as all ACL settlements are subject to public review and comment, as well as the State Water Board petition process.

While we recognize that Alternative 2 would allow greater than 50 percent to be expended on SEPs in "exceptional" circumstances, the proposed process for the State Water Board to review SEPs greater than 50 percent is problematic, from a due process point of view. It is inappropriate for the State Water Board staff (or the Board) to review a SEP that is part of a proposed settlement of an enforcement action before that settlement is approved by a Regional Water Board. Settlement negotiations are confidential between the parties, thus precluding State Board review during the settlement negotiation process. If the negotiations prove unsuccessful at the Regional Water Board level, the ACL may be appealed to the State Water Board, which is expected to review the matter objectively. Moreover, the inclusion of a provision placing a heavy burden on the Regional Water Boards to justify departures from the 50 percent "general rule" will have a significant chilling effect on acceptance of SEPs that exceed the 50 percent threshold.

B. The Proposed Policy Will Further Limit the Availability of Funding for SEPs by Excluding Staff Costs and Monitoring Expenses from the SEP Amount.

The proposed policy calls for further reducing the funds available for SEPs by excluding the Water Board's investigation and enforcement costs from the amount available for SEPs. This has not been the Board's policy historically, and will simply function to further ratchet down the ability to conduct SEPs at all. Moreover, this provision bears no relationship to the way in which investigation and enforcement costs are collected and tracked by the Board. With the exception of cleanup and abatement orders, investigation and enforcement costs are not actually collected separately from the overall penalty amount for use in staffing the enforcement program. In other words, while recouping staff costs is part of the calculation of the amount of administrative civil liability, these funds are not provided to the Regional Water Boards to cover their program costs. Thus, there does not appear to be any need or justification for this provision.

Similarly, the proposed policy excludes oversight and tracking costs from the SEP amount. The policy provides no rationale or justification for the assertion that these costs are not legitimately part of the SEP. To the contrary, reasonable administration and oversight costs should generally be included in SEP amounts, because the project cannot proceed without them.

These constraints are troubling, given that the proposed policy already specifies restrictive nexus and other criteria. If the State Water Board truly does support SEPs as part of its enforcement program, it is critical that the program requirements not create unnecessary hurdles and disincentives to fund worthy projects.

C. The Policy Should Explicitly Allow SEPs for Education and Outreach Programs.

We do not understand the motivation for eliminating education and outreach programs from eligibility for SEPs. Many of today's water quality problems will only be addressed through changing individual and group behavior, and public education and understanding are often of greater importance and value in protecting water quality than capital improvements, studies, monitoring and treatment. Indeed, the policy itself acknowledges the potential water quality value of these types of programs by expressly allowing the use of CAA funds for "education projects." (Proposed SEP policy at p. 3, footnote 1.) Moreover, there is no statutory prohibition against allowing SEPs that are educational in nature, and it is within the Water Board's discretion to decide whether particular projects proposed as SEPs are worthy or not. We recommend that education and outreach programs be added to the list of examples of eligible SEPs on pages 3-4 of the proposed policy. Perhaps an alternative approach would be to allow only public

agencies that are the subject of an enforcement action to pursue SEPs for education and outreach projects, as this will limit the universe of SEPs that would potentially fall into this category.

**D. The Limitations Regarding SEPs that Benefit Regional Water Boards Should be Clarified.**

The proposed policy specifies that SEPs shall “never directly benefit a Water Board’s functions, its members, staff or family of members and staff.” (Proposed SEP Policy at p. 4.) While we concur that it is not appropriate for individual Board members, staff or their families to profit from SEPs, we are concerned that the prohibition on benefits to the Regional Water Board’s “functions” could be problematic. For example, the proposed policy allows monitoring projects, and it is conceivable that data from these SEPs might be useful to a Regional Water Board for establishing water quality objectives or developing total maximum daily loads. The Boards should not be precluded from making use of much-needed data simply because its collection was paid for in total or in part by a SEP. Therefore, we recommend deleting the word “functions” from paragraph 3 on page 4 of the proposed policy.

**E. The Requirements Regarding SEP Implementation, Reporting, Tracking and Oversight Should Differentiate Between Projects Performed by the Discharger and Those Performed by Third Parties.**

The proposed policy would hold dischargers responsible not only for submitting a scope of work, budget, schedule, and quarterly reports, but also specifies that dischargers are “ultimately responsible for meeting [the specified] milestones, standards, and indicators” and for providing a final completion report, certified under penalty of perjury, “declaring the completion of the SEP and addressing how the expected outcome(s) or performance standard(s) for the project were met.” (Proposed SEP Policy at pp. 6-7.) A better approach would be to require that the entity responsible for actually conducting the SEP be responsible for meeting the milestones, standards, and indicators of the project, completing and submitting a final report, and for complying with the audit requirements. If a discharger is merely providing funding to a third party which proposed and will conduct the SEP project, the discharger is unlikely to be privy to the information necessary to prepare a final completion report, much less make certifications under penalty of perjury as to the how the project performance standards were met. Nor can a discharger “order” an unrelated third party to allow its financial records to be audited. In those instances, the party receiving the funds should be held responsible for those duties, and should be made aware of, and should agree to carry out, these responsibilities before receiving SEP funds. During the process of creating a preapproved SEP list pursuant to section F (p. 5), the Regional Water Board should determine if the party proposing to do a project has the institutional capacity to manage the funds properly and implement the project.

F. The Full Cost of Water Board Oversight Should Not be the Discharger's Responsibility in Every Instance.

The proposed policy requires that dischargers cover the full costs of State or Regional Water Board oversight, for any SEP that requires water board oversight. (Proposed SEP Policy at p. 7.) However, this provision is inconsistent with the Water Code, which states that CAA funds may be provided to Regional Water Boards if they are overseeing and tracking the implementation of a SEP and the Regional Water Board does not have adequate resources. (Cal. Water Code § 13443.) This provision of law was added in 2001 in a bill sponsored by the State Water Board (AB 1664, Chapter 869, Stats. of 2001), and it is unclear why the State Water Board is proposing to depart from a statutory provision it expressly sought to allow use of CAA funds for SEP oversight costs. Accordingly, we recommend that paragraph 1 of Section H be modified to allow the State or Regional Water Boards to require that the discharger cover oversight costs only if other sources of funding, such as the CAA, are not available.

II. Proposed Policy on the Use of the CAA for Regional Water Quality Improvement Projects

We agree that worthy projects within the nine Regional Water Boards lack adequate funding, and we also understand that the CAA is a potential source of revenues for these projects. However, these projects are already eligible for funding through the CAA. Water Code section 13442 already provides that funds may be disbursed by the State Water Board to "a public agency with authority to clean up waste." Thus, it would be more useful to use the policy to provide greater transparency regarding the types of projects that can be funded through the CAA and set forth the process for applying for funds. More importantly, we believe that several aspects of the proposed policy will have undesirable consequences.

A. The Proposed CAA Policy Will Discourage SEPs by Taking SEP Funds from the Regional Projects.

As discussed above, several provisions of the proposed SEP policy will operate to discourage performance of SEPs. The same is true of the proposed policy on use of the CAA. The proposed CAA policy would deduct the amount of any approved SEP from the Regional Water Board's share of the total penalty amount. This places the Regional Water Board in the position of having to reduce the funding available for needed RWQIPs in order to allow a SEP that also has water quality benefits. The consequence of this requirement will inevitably be fewer SEPs allowed.

We see no reason to penalize Regional Water Boards for approving SEPs, something the companion SEP Policy is intended to encourage. Therefore, we recommend that the proposed CAA policy be revised to specify that the amount of a SEP

shall be deducted from the total ACL amount, and the remaining amount to be paid as a penalty divided equally between the amount reserved for Regional Water Board RWQIPs and the CAA.

**B. The Proposed Policies, Taken Together, Will Discourage SEPs by Establishing Rigorous Eligibility and Administration Criteria for SEPs and Very Simple Criteria for RWQIPs.**

Yet another aspect of the proposed policies that will result in fewer SEPs is the disparity in the criteria for approval of SEPs as opposed to RWQIPs. The proposed SEP policy sets forth more than five pages of detailed criteria, specifications and procedures that must be followed for every SEP. In contrast, Regional Water Boards may obtain funds for RWQIPs by providing "minimum information" to the State Water Board Division of Financial Assistance, including a workplan, budget and scope of work. (Proposed CAA Policy at p. 3.) The proposed CAA policy appears to be setting up essentially a grant program for Regional Water Boards without anything remotely resembling the scrutiny and rigor required for SEPs.

To address this imbalance, we recommend that the CAA policy be revised to specify substantive criteria for RWQIPs and to require that each Regional Water Board adopt its list of RWQIPs only after an opportunity for public review and comment.

**C. The Proposed CAA Policy Should Specify the Categories of Projects and Eligible Applicants for RWQIPs.**

Under Water Code Sections 13442 and 13443, Cleanup and Abatement Account funds may be paid to public agencies with authority to clean up a waste or abate the effects thereof or to Regional Water Boards that "is attempting to remedy a significant unforeseen water pollution problem, posing an actual or potential public health threat." These provisions appear to limit the scope of what types of projects and applicants may qualify for RWQIPs, and the proposed CAA policy should be modified to reflect the scope that is consistent with state law.

**D. The Proposed Policy May Create a Disproportionate Incentive for Higher Penalties.**

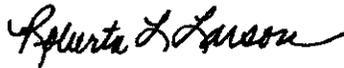
In our February 7, 2008 letter, we stressed the importance of SEPs in ensuring that penalty revenues would be used to address water quality issues within the region where the funds were generated. The proposed CAA policy attempts to be responsive to this, in part, by expressly setting aside a portion of ACLs to be available for RWQIPs. While our associations are generally supportive of the proposal to reserve some of the penalty amounts for regional projects, we are concerned that in the absence of additional enforcement guidance, the availability of these monies may create a disproportionate

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incentive in which ACL amounts are driven higher in order to fund regional projects. It is very important that ACL amounts be established consistently across the regions to serve the goals of mitigation and deterrence, and not primarily to generate revenues. Therefore, we urge the State Water Board to ensure, through revisions to the WQEP or other clear policy, that enforcement is fair, firm and consistent and that ACL amounts reflect the seriousness of the underlying violations and the conduct of the violator.

Thank you for your consideration of our comments.

Sincerely,



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