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## State Water Resources Control Board

**TO:** Regional Board Executive Officers  
Regional Board Assistant Executive Officers  
Regional Board Enforcement Coordinators  
Chief Deputy Director, Division of Water Rights  
Chief Deputy Director, Division of Water Quality  
Chief Deputy Director, Division of Drinking Water

**FROM:** Yvonne West, Director  
**Office of Enforcement**

**DATE:** April 30, 2021, Revised August 8, 2023

**SUBJECT:** OE Director's approval of DAC/EJ SEPs greater than 50% of a total monetary liability

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The Policy on Supplemental Environmental Projects (SEP Policy) provides guidance to the Regional Boards, the Division of Water Rights, the Division of Water Quality and the Division of Drinking Water and its Districts on how to include Supplemental Environmental Projects (SEPs) in settlement agreements. Generally, the SEP Policy limits the value of a SEP to 50 percent of the total monetary liability. (State Water Board, Policy on Supplemental Environmental Projects (2017), p. 9.) However, the SEP Policy creates an exception that allows certain kinds of SEPs to exceed the 50 percent limit. This exception applies to both discretionary enforcement actions and mandatory minimum penalties (MMPs) imposed pursuant to Water Code section 13385, subdivisions (h) and (i). Specifically, the Policy provides:

The Director of OE may approve a proposed settlement to fund a SEP in an amount greater than 50 percent of the total adjusted monetary liability assessment after making evidence and/or policy-based findings that:

- (1) There is a compelling justification to do so due to exceptional circumstances; or
- (2) In cases where the SEP is located in or benefits a DAC (Disadvantaged Community), an EJ (Environmental Justice) Community, or a community that has a financial hardship, or where the SEP substantially furthers the human right to water. (*Id.* at p.10.)

This memo shall serve as a blanket approval from the Director of OE to exceed the 50 percent limit for SEPs located in or benefitting a DAC, an EJ Community, or a community that has a financial hardship, or where the SEP substantially furthers the human right to water. It is sufficient for the prosecution team to e-mail the Director of OE with a basic description of the proposed SEP and an explanation about how it falls into one of the specific listed categories. Prosecution team staff, in coordination with their counsel, should provide written notice by e-mail to the Director of OE at least 10 days before posting the settlement agreement for public comment. If the SEP does not fit within one of the specific categories, I will inform the prosecution team in writing that the blanket approval does not apply. In that case, the prosecution team may request approval of the SEP based on a compelling justification due to exceptional circumstances, in accordance with the notification process provided on page 9 of the SEP Policy:

If a Regional Board or Division proposes an order containing a SEP that exceeds 50 percent of the total adjusted monetary assessment, it shall affirmatively notify the Director of OE of that proposal. The notification shall describe in detail the proposed SEP, the settlement value of the SEP, the reasons why it proposes to accept the SEP in lieu of a monetary liability payment, and the specific facts regarding why exceptional circumstances that constitute compelling justification exist to justify exceeding the 50 percent limit.

Requests for approval of SEPs exceeding 50 percent limit pursuant to the exceptional circumstances exception should also be submitted via e-mail by the prosecution team. Determinations as to whether exceptional circumstances constitute

compelling justification for exceeding the 50 percent limit will be made on a case-by-case basis.

The SEP Policy allows for a settlement agreement to include one or more SEPs. If a settlement agreement includes two or more SEPs which in totality exceed 50% of the total liability, each of those SEPs must independently satisfy the criteria to exceed 50% of the total liability in order to be approved pursuant to this memo. Even if an individual SEP comprises less than 50% of the total liability, when the total amount of all SEPs contemplated in the settlement agreement exceeds 50% of the total liability, each SEP must be located in or benefit a DAC, EJ community, community with a financial hardship, substantially further the human right to water, or have been approved by the Director of OE based on a compelling justification. The table below sets forth several scenarios to illustrate this guidance.

<b>SEP or Combination of SEPS</b>	<b>Approvals</b>	<b>Example</b>
Single EJ/DAC/HRTW SEP up to 100%	Approved by this memo.	Example – one 100% SEP located in or benefiting an EJ community
Two or more EJ/DAC/HRTW SEPs, combined up to 100%	Approved by this memo.	Example – one 75% SEP located in or benefiting an EJ community and one 25% SEP located in or benefiting a DAC
One or more EJ SEP combined with one or more Non-EJ/DAC/HRTW SEP	Not approved by this memo, but non-DAC SEP(s) may be approved to exceed more than 50% of total liability subject to separate “compelling justification” finding from OE director.	Example – One 60% EJ SEP combined with one 40% Non-EJ/DAC/HRTW SEP
One or more non-EJ/DAC/HRTW SEP	Not approved by this memo but may be approved to exceed more than 50% of total liability subject to separate “compelling justification” finding from OE director.	Example – Two non-EJ/DAC/HRTW SEPs totaling 65% of the liability.