



# Central Valley Clean Water Association

*Representing Over Fifty Wastewater Agencies*



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September 25, 2017

*Via Electronic Mail*

Jeannine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814  
[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

**SUBJECT:** Comment Letter – SEP Policy Amendments

Dear Ms. Townsend:

The Central Valley Clean Water Association (CVCWA) appreciates the opportunity to submit comments on the Draft Policy on Supplemental Environmental Projects (Draft Policy). CVCWA has joined the California Association of Sanitation Agencies (CASA), and other organizations representing Publically Owned Treatment Works (POTWs) in their comments, and requests amendments consistent with those comments. In addition to joining CASA, CVCWA submits these additional comments to identify certain issues that are critical for implementation of Supplemental Environmental Projects (SEPs) in the Central Valley region.

CVCWA is a nonprofit association of POTWs throughout the Central Valley of California whose primary mission is to represent wastewater agencies in regulatory matters while balancing environmental and economic interests. CVCWA members have a strong commitment to the protection of all beneficial uses in Central Valley waters. CVCWA's specific comments on the Draft Policy are provided here.

## **I. Use of the Term “Responsible Parties” Is Misleading**

CVCWA appreciates that the State Water Resources Control Board (State Water Board) is seeking to find a term that refers broadly to various classes of parties. However, the term “responsible parties” is a legal term of art often used to identify parties that are found liable and responsible for some sort of environmental contamination. With respect to the Draft Policy, SEPs are typically part of settlement agreements whereby alleged violators agree to the settlement of a matter without admitting to any liability. Further, in such cases, alleged violators have waived their rights to hearing and actual responsibility and liability has not been determined. Rather, the alleged violator has agreed to settle the matter for multiple reasons, including in the interest of judicial economy. To properly characterize parties that seek to settle alleged violations through implementation of an SEP, we recommend that the State Water Board refer to such interests as “alleged violators” rather than “responsible parties.”

## **II. Definition of “In Settlement of an Enforcement Action”**

Provision III.(3)c of the Draft Policy defines the term “in settlement of an enforcement action” to mean, in part, that “the project is not commenced until after the Water Board has identified a violation and the stipulated order is in effect.” This provision appears to be narrowing, in that some projects have multiple components or phases, and it may be appropriate for a later phase of a project that is otherwise discretionary to be the subject of an SEP. Further, as the Central Valley Regional Water Quality Control Board (Central Valley Water Board) seeks to implement its Salt and Nitrate Management Plan (SNMP) for the Central Valley, it may be appropriate for certain projects to be funded through SEPs, and this language could prohibit such projects from receiving SEP funds.

## **III. Clarify Reference to the Term “Violation”**

Throughout, the Draft Policy refers to the term “violation.” Whenever this term is used, it needs to be preceded by the term “alleged” to properly note that SEPs are used to settle matters where there are “alleged violations.” For example, Provision V.A. states: “[d]rinking water-related SEPs are acceptable where the primary beneficiary of the project is the population that was harmed or put at risk by the violation(s).” As indicated previously, SEPs are part of settlement agreements whereby violations have not been proven, but have been alleged. Accordingly, reference to the term “violations” needs to include the modifier “alleged” to accurately capture the nature of the violation.

#### **IV. Clarify Certain Exclusions**

As expressed in the Draft Policy Board Workshop on August 16, 2017, and in the CASA letter, the Draft Policy contains exclusions that are problematic, especially considering the Central Valley's need to combine SEPs to use for multi-phased and collaborative projects. As stated in the CASA letter, this section is not necessary, but at a minimum, needs to be amended to allow flexibility.

The Draft Policy would exclude "projects for which the responsible party does not retain full responsibility to ensure satisfactory completion." (Provisions VI.(4) and VI.(10).) This exclusion is confusing, and would appear to exclude projects that are fully administered by a third party. For example, in the Central Valley, the Rose Foundation puts forward various projects for SEPs, and the Central Valley Water Board encourages dischargers to consider such projects for SEP purposes. With the Rose Foundation, the discharger pays the agreed-upon amount and an administrative fee to the Foundation. It is then the Foundation's responsibility to see that the project is completed by the grantee that received the funding. If this responsibility is left to the party seeking the SEP, this would likely discourage use of the Rose Foundation and other third party entities from SEPs because such parties have little control over such projects once funding is provided to the Rose Foundation.

In another exclusion, the Draft Policy appears to exclude monitoring programs. (Provision VI.(7).) This exclusion is inconsistent with the *Pollution Reduction* category, which specifically identifies regional monitoring programs as eligible SEPs. Additionally, the Central Valley Water Board is strongly considering the use of SEP funding to support the implementation of the Delta Regional Monitoring Program (RMP). The exclusion should be revised to include monitoring programs as eligible SEPs.

Next, Provision VI.(12) would likely be detrimental to use of SEPs to implement the Central Valley's SNMP. As indicated, implementation of the SNMP will take considerable time, money, and effort from all in the Central Valley, as well as from the public in general. Use of SEPs will be important to assist in implementing this comprehensive management plan; however, completion of the plan will require actions and contributions from many individuals working collectively and collaboratively. This exclusion would appear to prevent the use of SEPs for such purposes because projects need to be implemented by many. Further, for small Central Valley agencies, pooling together is necessary considering the small size and nature of potential actions against small agencies.

## **V. Third Party Financial Audits**

The Draft Policy proposes to require a third-party financial audit for any SEP with a direct cost of over \$1 million. This requirement is arbitrary in that it is based on the value of the SEP only. It is feasible that some SEPs will exceed the \$1 million threshold, but will be funds directed to third-party administered SEPs. In such cases, it is unnecessary and inappropriate for the responsible party, or “alleged violator,” to pay for a financial audit when the funds have been directly paid to a third party for administration of an SEP from a pre-approved State or Regional Water Board list.

## **VI. Conclusion**

In closing, CVCWA encourages the State Water Board to carefully consider the above requested modifications to the SEP policy and those in the CASA letter in light of the Central Valley Water Board’s need to implement its comprehensive Salt and Nitrate Management Plan and establish the Draft Policy in a manner that will allow the use of SEPs to assist in implementation of this comprehensive plan. Additionally, the Draft Policy should be established to allow for a potentially significant funding source for the Delta RMP and other projects that provide public and environmental benefit. If you have any questions, or if CVCWA can be of further assistance, please contact me at (530) 268-1338 or [eofficer@cvcwa.org](mailto:eofficer@cvcwa.org).

Sincerely,



Debbie Webster,  
Executive Officer