
State Water Resources Control Board

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DATE: May 29, 2018

SUBJECT: 2017 SEP Policy Effective Date

This memorandum addresses the effective date of the Policy on Supplemental Environmental Projects (2017 SEP Policy) and provides guidance to enforcement staff on how the 2017 SEP Policy should be applied.

Background

The 2017 SEP Policy provides guidance on the requirements for supplemental environmental projects (SEPs) when they are incorporated as components of settlement agreements. The 2017 SEP Policy fulfills several statutory and policy objectives of the State Water Board by prioritizing the human right to water, harmonizing the SEP Policy with the 2017 Enforcement Policy, expanding the application of the SEP Policy to enforcement actions prosecuted by the Division of Drinking Water and the Division of Water Rights, as well as providing clarification and transparency. (State Water Board, Proposed Amendment to the Policy on Supplemental Environmental Projects, Draft Staff Report.)

The 2017 SEP Policy replaces the previous SEP Policy which was adopted by the State Water Resources Control Board (State Water Board) in 2009 (2009 SEP Policy). On December

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5, 2017 the State Water Board adopted the 2017 SEP Policy. The Office of Administrative Law (OAL) approved the 2017 SEP Policy on May 3, 2018.

1. The 2017 SEP Policy's effective date is May 3, 2018, the date of OAL approval.

The 2017 SEP Policy's effective date is May 3, 2017, the date of OAL Approval. (See Gov. Code §11353.). As a general rule, the 2017 SEP Policy, once approved by OAL, will apply to settlements of all administrative enforcement actions filed on or after the effective date, i.e. settlements considered by a regional board or the State Water Board (collectively Water Boards) at a board meeting, or their respective delegates, on or after May 3, 2018. The 2017 SEP Policy also applies to all pending cases in which the Water Boards have not reached agreement in principle with the settling party on the specific terms of a SEP on or after May 3, 2018. (State Water Resources Control Board, 2017 Supplemental Environmental Projects Policy, 2.) However, in circumstances where the Water Boards and the settling party reach an agreement in principle on the specific terms of the SEP prior to May 3, 2018, the 2009 SEP Policy will continue to apply, even if the settlement is considered by the Water Boards or their respective delegates on or after May 3, 2018.

2. The 2017 SEP Policy applies to all settlements filed on or after May 3, 2018, and to all pending cases that have not reached an agreement in principle regarding a SEP prior to that date.

The 2017 SEP Policy does not enhance liability for dischargers and consists entirely of procedural changes and clarifications. The 2017 SEP Policy is effective immediately as of OAL approval on May 3, 2018.

The 2017 SEP Policy should be applied to all settlements, including ongoing settlement negotiations, on or after its effective date. Without a specific agreement regarding a SEP in place before this date, the 2017 SEP Policy should be applied to all ongoing and new settlement negotiations after May 3, 2018. However, if an agreement in principle is reached that

specifically includes a SEP as a settlement component prior to May 3, 2018, the 2009 SEP Policy will remain the controlling policy, even if the settlement agreement is considered by a regional board or the State Water Board (collectively Water Boards) at a board meeting, or their respective delegates, on or after May 3, 2018.

The following chart outlines which SEP Policy to apply:

| 2009 SEP Policy | 2017 SEP Policy |
|---|--|
| All settlements considered by a board or its delegate for approval before May 3, 2018, the effective date of 2017 SEP Policy. | All settlements considered by a board or its delegate on or after May 3, 2018, the effective date of the 2017 SEP Policy. |
| All pending settlements in which parties have reached an agreement in principle regarding a SEP under the 2009 SEP Policy before May 3, 2018. | All pending settlements in which parties have <u>not</u> reached an agreement in principle regarding a SEP under the 2009 SEP Policy on or after May 3, 2018. |

CONCLUSION

The 2017 SEP Policy should be applied to new and ongoing settlements on or after May 3, 2018. Any specific questions about the application of the 2017 SEP policy to a particular case should be directed to your OE attorney.