



# California Regional Water Quality Control Board

## Colorado River Basin Region



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Edmund G. Brown Jr.  
Governor

February 9, 2012

Hazem Gabr  
Water Quality Section Manager  
Southern California Edison  
1218 S. Fifth Avenue  
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**SUBJECT:** AMENDED ORDER FOR TECHNICALLY-CONDITIONED CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION FOR DISCHARGE OF DREDGED AND/OR FILL MATERIALS

**PROJECT:** Southern California Edison - Leatherneck Substation and Electrical System Upgrade Project for the Marine Corps Air Ground Combat Center, WDID No.7A333121001

**APPLICANT:** Southern California Edison

**ACTION:** Amendment of Technically-Conditioned Certification, dated January 5, 2012

The Clean Water Act Section 401 Water Quality Certification (WQC), dated January 5, 2012, is hereby amended at the Applicant's request due to the recent jurisdictional determination made by the U.S. Army Corps of Engineers (Corps) pertaining to the water bodies into which proposed discharges of fill materials would occur in the Project area, which is described in the 401 WQC application submitted to the Regional Water Board office. The Corps determined that the water bodies are deemed to be outside of the Corps' jurisdiction. Thus, they are not considered by the Corps to be "Waters of the United States."

Although the ephemeral streams and other water bodies in the Project area are not "Waters of the U.S.", they are still considered "Waters of the State," which are more broadly defined to include both jurisdictional and non-jurisdictional surface waters as well as ground waters and other water bodies not subject to Corps jurisdiction (Wat. Code, § 13050(e)). Because the proposed Project contemplates discharging fill materials that would cause permanent impacts of 0.10 acre (262 linear feet) and temporary impacts of 3.23 acres (3,789 linear feet) to "Waters of the State", the discharge constitutes a waste that is subject to regulation pursuant to Water Code Section 13260. Consequently, even though these waters are non-jurisdictional waters for the Corps' purposes, they remain subject to protection under California law. Accordingly, the Regional Water Board is statutorily required to evaluate whether waste discharge requirements need to be prescribed.

In recognition of the need to prescribe Waste Discharge Requirements for such discharges, the State Water Resources Control Board adopted a Statewide General Waste Discharge Requirements Order that operates to automatically provide permit coverage for discharges of dredged or fill material that have received 401 WQC, titled "Statewide General Waste Discharge Requirements for Dredged or Fill Discharges that Have Received State Water Quality Certification (General WDRs)," Water Quality Order No. 2003-0017-DWQ. A copy of this Order is enclosed and is hereby incorporated by this reference and made an enforceable condition of the subject 401 WQC that was issued to the Applicant.

In its Findings, the State Water Board explains its reasoning for adopting this Board Order. In relevant part, Finding 3 states that Section 404 of the federal Clean Water Act establishes a permit program under which the Corps regulates the discharge of dredged or fill material into Waters of the United States.

Finding 4 describes the Federal Clean Water Act requirement in Section 401 that every applicant for a federal permit or license for an activity that may result in a discharge of pollutants to a Water of the United States is required to obtain certification that the proposed activity will comply with state water quality standards. The Finding then explains that such certifications are issued by the Regional Water Board or the State Water Board before the Corps may issue the Clean Water Act Section 404 permit.

Finding 7 states that even though the U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) called into question the extent to which certain "isolated" waters are subject to federal jurisdiction, it expresses the State Water Board's belief that a 401 WQC is a valid and enforceable order of the State Water Board or Regional Water Quality Control Boards irrespective of whether the water body in question is subsequently determined not to be federally jurisdictional. Based on this statement, the Finding continues by stating: "Nonetheless, it is the intent of the SWRCB [State Water Resources Control Board] that all Certification conditions be incorporated into these General WDRs and enforceable hereunder even if the federal permit is subsequently deemed invalid because the water is not deemed subject to federal jurisdiction."

The State Water Board Order "ordered" provisions reflect these Findings as follows:

In relevant part, the first paragraph of the "ordered" provisions makes clear that the State Water Board's adoption of the Statewide General WDRs constitutes WDRs issued to all persons proposing to discharge dredged or fill material to Waters of the U.S. where such discharge is also subject to the 401 WQC requirements, and such certification has been issued by the applicable Regional Water Board or State Water Board.

The Order also states that in order to meet the requirements that such discharges be properly regulated pursuant to the relevant provisions of the Water Code (Division 7, commencing with Section 13000) and regulations adopted thereunder, dischargers must comply with the following two requirements:

- “1. Dischargers shall implement all the terms and conditions of the applicable CWA section 401 Certification issued for the discharge. This provision shall apply irrespective of whether the federal license or permit for which the Certification was obtained is subsequently deemed invalid because the water body subject to the discharge has been deemed outside of federal jurisdiction.”
- “2. Dischargers are prohibited from discharging dredged or [sic] fill material to waters of the United States without first obtaining Certification from the applicable RWQCB or SWRCB.”

Because the Applicant was issued a 401 WQC and the Corps subsequently determined that the water body subject to the discharge was deemed outside of its federal jurisdiction; i.e., that the discharge was not to a “Waters of the U.S.”, the first requirement describes the Applicant's current situation. The Applicant was informed by the Corps in 2011, when it sought a CWA Section 404 permit from the Corps, that the Applicant would need a 401 WQC from the Regional Water Board, among other agency approvals. As a consequence, the applicant timely applied for and received the then-required subject 401 WQC from our Regional Water Board. The Corps then subsequently informed the Applicant in 2012 that the waters at issue were outside of its federal jurisdiction. Thus, the State Water Board Order applies to the Applicant's proposed discharges of fill material. Accordingly, the 401 WQC issued by the Regional Water Board retains its legal effect, and the Applicant is still required to implement all of the terms and conditions of the 401 WQC, except as amended and supplemented below.

The Applicant also meets the second requirement in that the Applicant has obtained a 401 WQC from the Regional Water Board prior to discharging any fill material.

The 401 WQC, dated January 5, 2012, is hereby amended and supplemented as follows:

**Additional Condition 21:**

Based on the information provided in the application and December 30, 2011 supplement, the Applicant proposes to provide compensatory mitigation for the unavoidable permanent impacts caused by the Project that will result in a loss of approximately 0.10 acres (262 linear feet) and temporary impacts of 3.23 acres (3,789 linear feet) to Waters of the State. Second, the Applicant proposes to fund the acquisition of non-wetland, unvegetated or vegetated waters of the State at a compensatory mitigation to impact ratio of 2:1 for the permanent losses and 1:1 for the temporary impacts. Third, the Applicant proposes to formalize this proposal in a Project-specific Mitigation Plan that will be prepared upon issuance of this Water Quality Certification and submitted for Regional Water Board and California Department of Fish and Game approval. Finally, the Applicant proposes to prepare and enter into a Memorandum of Agreement (MOA) with a mutually-agreed upon mitigation bank (or equivalent in-lieu fee program) regarding acquisition of mitigation lands. Following agency approvals of the Mitigation Plan and MOA by the Regional Water Board, the Applicant has agreed to transmit the negotiated funds to the mitigation bank (or equivalent) entity, and to provide



the Regional Water Board with receipt of that transaction. The Regional Water Board agrees with the Applicant's proposals. Accordingly, upon issuance of this Water Quality Certification and as an "Additional Condition" of this Certification, the Applicant shall prepare and submit for Regional Water Board approval the Project-specific Mitigation Plan and MOA. The preparation of proposed mitigation areas shall be concurrent with (or prior to) the discharge of fill material into waters of the State. Implementation of the Project-specific Mitigation Plan shall be completed within 18 months of the effective date of this Water Quality Certification.

**REGIONAL WATER QUALITY CONTROL BOARD CONTACT PERSON:**

If you have any questions, please contact Jay Mirpour, Water Resources Control Engineer, at (760) 776-8981 or [jmirpour@waterboards.ca.gov](mailto:jmirpour@waterboards.ca.gov).

**WATER QUALITY CERTIFICATION:**

I hereby issue an amended order, as set forth in amended Additional Condition 21 above, certifying that any discharge from the referenced Project will comply with the applicable provisions of Sections 301 (Effluent Limitations), 302 (Water Quality Related Effluent Limitations), 303 (Water Quality Standards and Implementation Plans), 306 (National Standards of Performance), and 307 (Toxic and Pretreatment Effluent Standards) of the Clean Water Act, and with other applicable requirements of State law.

Except insofar as may be further modified by any preceding conditions, all certification actions are contingent on (a) the discharge being limited and all proposed mitigation being completed in strict compliance with the Applicants' Project description, as amended, and the attached Project Information Sheet, and (b) compliance with all applicable requirements of the Regional Water Quality Control Board's Water Quality Control Plan (Basin Plan).

Sincerely,



Robert Perdue  
Executive Officer  
Colorado River Basin  
Regional Water Quality Control Board

RP/tab

Enclosure: Water Quality Order No. 2003-0017-DWQ

cc: Shanti Abichandani Santulli, Los Angeles District Office  
Bill Orme, SWRCB, Division of Water Quality, Water Quality Certification Unit  
Elizabeth Goldmann, U.S. Environmental Protection Agency, Region 9  
Thomas A. Vandenberg, Office of Chief Counsel, SWRCB  
Shirin Tolle, Southern California Edison, 1218 S. Fifth Avenue, Monrovia, CA 91016

File: WDID No.7A333121001, Southern California Edison - Leatherneck Substation and Electrical System Upgrade Project for the Marine Corps Air Ground Combat Center

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**STATE WATER RESOURCES CONTROL BOARD**

**WATER QUALITY ORDER NO. 2003 - 0017 - DWQ**

**STATEWIDE GENERAL WASTE DISCHARGE REQUIREMENTS FOR  
DREDGED OR FILL DISCHARGES THAT HAVE RECEIVED  
STATE WATER QUALITY CERTIFICATION (GENERAL WDRs)**

The State Water Resources Control Board (SWRCB) finds that:

1. Discharges eligible for coverage under these General WDRs are discharges of dredged or fill material that have received State Water Quality Certification (Certification) pursuant to federal Clean Water Act (CWA) section 401.
2. Discharges of dredged or fill material are commonly associated with port development, stream channelization, utility crossing land development, transportation water resource, and flood control projects. Other activities, such as land clearing, may also involve discharges of dredged or fill materials (e.g., soil) into waters of the United States.
3. CWA section 404 establishes a permit program under which the U.S. Army Corps of Engineers (ACOE) regulates the discharge of dredged or fill material into waters of the United States.
4. CWA section 401 requires every applicant for a federal permit or license for an activity that may result in a discharge of pollutants to a water of the United States (including permits under section 404) to obtain Certification that the proposed activity will comply with State water quality standards. In California, Certifications are issued by the Regional Water Quality Control Boards (RWQCB) or for multi-Region discharges, the SWRCB, in accordance with the requirements of California Code of Regulations (CCR) section 3830 et seq. The SWRCB's water quality regulations do not authorize the SWRCB or RWQCBs to waive certification, and therefore, these General WDRs do not apply to any discharge authorized by federal license or permit that was issued based on a determination by the issuing agency that certification has been waived. Certifications are issued by the RWQCB or SWRCB before the ACOE may issue CWA section 404 permits. Any conditions set forth in a Certification become conditions of the federal permit or license if and when it is ultimately issued.
5. Article 4, of Chapter 4 of Division 7 of the California Water Code (CWC), commencing with section 13260(a), requires that any person discharging or proposing to discharge waste, other than to a community sewer system, that could affect the quality of the waters of the State,<sup>1</sup> file a report of waste discharge (ROWD). Pursuant to Article 4, the RWQCBs are required to prescribe waste discharge requirements (WDRs) for any proposed or existing discharge unless WDRs are waived pursuant to CWC section 13269. These General WDRs fulfill the requirements of Article 4 for proposed dredge or fill discharges to waters of the United States that are regulated under the State's CWA section 401 authority.

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<sup>1</sup> "Waters of the State" as defined in CWC Section 13050(e)

6. These General WDRs require compliance with all conditions of Certification orders to ensure that water quality standards are met.
7. The U.S. Supreme Court decision of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (the *SWANCC* decision) called into question the extent to which certain “isolated” waters are subject to federal jurisdiction. The SWRCB believes that a Certification is a valid and enforceable order of the SWRCB or RWQCBs irrespective of whether the water body in question is subsequently determined not to be federally jurisdictional. Nonetheless, it is the intent of the SWRCB that all Certification conditions be incorporated into these General WDRs and enforceable hereunder even if the federal permit is subsequently deemed invalid because the water is not deemed subject to federal jurisdiction.
8. The beneficial uses for the waters of the State include, but are not limited to, domestic and municipal supply, agricultural and industrial supply, power generation, recreation, aesthetic enjoyment, navigation, and preservation and enhancement of fish, wildlife, and other aquatic resources.
9. Projects covered by these General WDRs shall be assessed a fee pursuant to Title 23, CCR section 3833.
10. These General WDRs are exempt from the California Environmental Quality Act (CEQA) because (a) they are not a “project” within the meaning of CEQA, since a “project” results in a direct or indirect physical change in the environment (Title 14, CCR section 15378); and (b) the term “project” does not mean each separate governmental approval (Title 14, CCR section 15378(c)). These WDRs do not authorize any specific project. They recognize that dredge and fill discharges that need a federal license or permit must be regulated under CWA section 401 Certification, pursuant to CWA section 401 and Title 23, CCR section 3855, et seq. Certification and issuance of waste discharge requirements are overlapping regulatory processes, which are both administered by the SWRCB and RWQCBs. Each project subject to Certification requires independent compliance with CEQA and is regulated through the Certification process in the context of its specific characteristics. Any effects on the environment will therefore be as a result of the certification process, not from these General WDRs. (Title 14, CCR section 15061(b)(3)).
11. Potential dischargers and other known interested parties have been notified of the intent to adopt these General WDRs by public hearing notice.
12. All comments pertaining to the proposed discharges have been heard and considered at the November 4, 2003 SWRCB Workshop Session.
13. The RWQCBs retain discretion to impose individual or General WDRs or waivers of WDRs in lieu of these General WDRs whenever they deem it appropriate. Furthermore, these General WDRs are not intended to supersede any existing WDRs or waivers of WDRs issued by a RWQCB.

IT IS HEREBY ORDERED that WDRs are issued to all persons proposing to discharge dredged or fill material to waters of the United States where such discharge is also subject to the water quality certification requirements of CWA section 401 of the federal Clean Water Act (Title 33 United States Code section 1341), and such certification has been issued by the applicable RWQCB or the SWRCB, unless the applicable RWQCB notifies the applicant that its discharge will be regulated through WDRs or waivers of WDRs issued by the RWQCB. In order to meet the provisions contained in Division 7 of CWC and regulations adopted thereunder, dischargers shall comply with the following:

1. Dischargers shall implement all the terms and conditions of the applicable CWA section 401 Certification issued for the discharge. This provision shall apply irrespective of whether the federal license or permit for which the Certification was obtained is subsequently deemed invalid because the water body subject to the discharge has been deemed outside of federal jurisdiction.
2. Dischargers are prohibited from discharging dredged or fill material to waters of the United States without first obtaining Certification from the applicable RWQCB or SWRCB.

#### CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 19, 2003.

AYE: Arthur G. Baggett, Jr.  
Peter S. Silva  
Richard Katz  
Gary M. Carlton  
Nancy H. Sutley

NO: None.

ABSENT: None.

ABSTAIN: None.

  
Debbie Irvin  
Clerk to the Board