



Linda S. Adams
Secretary for
Environmental Protection

California Regional Water Quality Control Board

San Diego Region

Over 50 Years Serving San Diego, Orange, and Riverside Counties

Recipient of the 2004 Environmental Award for Outstanding Achievement from USEPA



Arnold Schwarzenegger
Governor

9174 Sky Park Court, Suite 100, San Diego, California 92123-4353
(858) 467-2952 • Fax (858) 571-6972
<http://www.waterboards.ca.gov/sandiego>

August 11, 2008

Ms. Lisa Hildabrand
City of Carlsbad
1200 Carlsbad Village Drive
Carlsbad, CA 92008

CERTIFIED MAIL
7007 1490 0003 8753 5452

In reply refer to:
CWU:R920080099:bjames

CIWQS Place ID: 224166;
629552

RE: NOTICE OF VIOLATION NO. R9-2008-0099

Subject Sites:

1. Faraday Avenue Extension and Carlsbad Oaks North Business Park
2. Agua Hedionda Channel Dredging Project

Dear Ms. Hildabrand,

Enclosed is **Notice of Violation (NOV) No. R9-2008-0099** for the subject sites in the City of Carlsbad, San Diego County, CA. The Faraday Avenue Extension and Carlsbad Oaks North Business Park project was issued Clean Water Act Section 401 Certification No. 02C-093 (Certification) on July 19, 2004. The Agua Hedionda Channel Dredging Project was issued Clean Water Act Section 401 Certification No. 06C-007 (Certification) on March 2, 2006. Violations specified in the NOV were identified during a site inspection on July 2, 2008 and during review of the California Regional Water Quality Control Board, San Diego Region files for the projects. Failure to comply with the directives/conditions of the certification are serious and subject you to potential liability that accrues for each day of violation. Therefore, I urge you to take immediate steps to achieve compliance.

Questions pertaining to the enclosed Notice of Violation should be directed to Benjamin James at 858-467-2968 or bjames@waterboards.ca.gov.

David Barker
Supervising Engineer

Attachments: Notice of Violation R9-2008-0099; July 2, 2008 Inspection Report

Ms. Hildabrand

- 2 -

August 11, 2008

cc by e-mail:

Kari Coler, U.S. Army Corps of Engineers, Kari.Coler@usace.army.mil

Tamara Spear, California Department of Fish and Game, tspear@dfg.ca.gov

Glenn Prui, City of Carlsbad, gprui@ci.carlsbad.ca.us

Grant Clavier, City of Carlsbad, gclav@ci.carlsbad.ca.us

CIWQS: NOV – 350121; Place No. – 224166, 629552; Violations – 778594, 778603;
401 Certification – 214323, 298102



California Regional Water Quality Control Board San Diego Region

Item 10 Doc. 5



Linda S. Adams
Secretary for
Environmental Protection

Over 50 Years Serving San Diego, Orange, and Riverside Counties
Recipient of the 2004 Environmental Award for Outstanding Achievement from U.S. EPA

Arnold Schwarzenegger
Governor

9174 Sky Park Court, Suite 100, San Diego, California 92123-4353
(858) 467-2952 • Fax (858) 571-6972
<http://www.waterboards.ca.gov/sandiego>

IN THE MATTER OF:)
)
 Ms. Lisa Hildabrand)
 City of Carlsbad)
 1200 Cralsbad Village Drive)
 Carlsbad, CA 92008)
)
 Subject Sites:)
 Faraday Avenue Extension and Carlsbad Oaks)
 North Business Park; and)
 Agua Hedionda Channel Dredging Project)
)
 CIWQS:)
 Place IDs: 224166; 629552)
 Regulatory Measure IDs: 214323; 298102)
)
)
)
)

**NOTICE OF VIOLATION
NO. R9-2008-0099**

August 11, 2008

**In reply refer to:
CWU:R920080099:bjames**

You are Hereby Notified of Violations of Clean Water Act Section 401 Water Quality Certification (§401 Certification) for the following projects:

- 1. Faraday Avenue Extension and Carlsbad Oaks North Business Park (§401 Certification 02C-093)**
- 2. Agua Hedionda Channel Dredging Project (§401 Certification 06C-007)**

Such violations subject you to possible enforcement action by the California Regional Water Quality Control Board, San Diego Region (Regional Board), including administrative enforcement orders requiring you to cease and desist from violations, or to clean up waste and abate existing or threatened conditions of pollution or nuisance; administrative civil liability in amounts of up to \$10,000 per day per violation; referral to the State Attorney General for injunctive relief; and, referral to the District Attorney for criminal prosecution.

The violations described below were identified from a site inspection on July 2, 2008 and during review of the Regional Board files for the projects.

Pages 2 through 5 of the Notice of Violation (related to the Faraday site) have been omitted because they are not relevant to this matter.

California Environmental Protection Agency

Recycled Paper



B. Agua Hedionda Dredging Project (\$401 Certification 06C-007)**1. FAILURE TO SUBMIT A FINAL WETLANDS MITIGATION AND MONITORING PLAN****➤ Pursuant to Certification Condition C.3**

- Within 120 days of the issuance of this certification, the City of Carlsbad shall develop and submit a Final Wetlands Mitigation and Monitoring Plan for SDRWQCB approval, that shall be consistent with Conditions C.1 and C.2 above, and shall achieve the following performance standards:
 - a. Created wetlands that are installed to compensate for impacts to jurisdictional wetland areas must possess the three criteria (wetland hydrology, hydrophytic vegetation, and hydric soils) necessary to be delineated as a Corps jurisdictional area;
 - b. All mitigation sites shall be maintained 95 percent free of exotic/nonnative plant species;
 - c. All mitigation sites must be self-sustaining; and
 - d. All mitigation sites must exhibit evidence of natural recruitment of native wetland and/or riparian species.

Observation: The certification was issued on March 2, 2006. Therefore, a final mitigation plan was due by July 1, 2006. The *Draft 1 Compensatory Habitat Mitigation and Monitoring Plan* was received on July 11, 2006 and comments about the inadequacy of the plan were sent via e-mail by Christopher Means on July 18, 2006. A revised and final mitigation plan was not received by the Regional Board. The City of Carlsbad requested an amendment from the Regional Board in a letter dated June 20, 2006 to replace the requirement of a final mitigation plan due within 120 days of certification issuance with an extension for a draft mitigation plan to be due within 210 days. The amendment was never granted because the requested supporting information was never received.

2. FAILURE TO SUBMIT A COMPLETED PRESERVATION MECHANISM OVER THE MITIGATION AREA**➤ Pursuant to Certification Condition C.7**

- No Later than 90 days after SDRWQCB acceptance of the Final Mitigation Plan, the City of Carlsbad shall provide a draft preservation mechanism (e.g. deed restriction, conservation easement, etc.) that will protect all mitigation areas and their buffers in perpetuity. The conservation easement or other legal limitation on the mitigation property shall be adequate to demonstrate that the site will be maintained without future development or encroachment on the site or which could otherwise reduce the functions and values of the site for the variety of beneficial uses of waters of the U.S. that it supports. The conservation easement or other appropriate legal limitation shall prohibit, without exception, all residential,

commercial, industrial, institutional, and transportation development, and any other infrastructure development that would not maintain or enhance the wetland functions and values of the site. Other infrastructure development to be prohibited includes, but is not limited to, additional utility lines, paved maintenance roads, and areas of maintained landscaping for recreation. The City of Carlsbad shall submit proof of a completed preservation mechanism within one year of the submittal of the draft preservation mechanism.

Observation: Failure to submit a final mitigation plan has resulted in a violation of Condition C.7 of the certification which requires a draft preservation mechanism for the mitigation area be submitted to the Regional Board within 90 days of acceptance of the final mitigation plan and proof of a completed mechanism within one year of the submittal of the draft plan.

3. FAILURE TO CONSTRUCT TIMELY HABITAT MITIGATION

➤ Pursuant to Certification Condition C.9

- The construction of proposed mitigation shall be completed within the same calendar year as impacts occur, or at least no later than 9 months following the close of the calendar year in which impacts first occur (e.g., if impacts occur in June 2006, construction of mitigation for all impacts must be completed no later than September 2007).

➤ Pursuant to Certification Condition C.8

- The City of Carlsbad shall submit a report (including topography maps and planting locations) to the SDRWQCB within 90 days of completion of mitigation site preparation and planting, describing as-built status of the mitigation project. If the site grading and planting are not completed within six weeks of each other, separate reports will be submitted describing those specific as-built conditions.

➤ Pursuant to Certification Condition C.12

- Mitigation monitoring reports shall be submitted annually until mitigation has been deemed successful. Monitoring reports shall be submitted no later than 30 days following the end of the monitoring period. Monitoring reports shall include, but not be limited to, the following:
 - a. Names, qualifications, and affiliations of the persons contributing to the report;
 - b. Tables presenting the raw data collected in the field as well as analyses of the physical and biological data;
 - c. Qualitative and quantitative comparisons of current mitigation conditions with pre-construction conditions and previous mitigation monitoring results;
 - d. Photodocumentation from established reference points;
 - e. Survey report documenting boundaries of mitigation area; and

- f. Other items specified in the draft and final Wetland and Riparian Mitigation and Monitoring Plan.

Observation: The project was initiated on March 6, 2006 and was completed on March 25, 2006. No evidence of the proposed compensatory mitigation work being conducted was observed during the site inspection conducted by the Regional Board on July 2, 2008. The lack of the compensatory mitigation work being conducted is supported by the violations in the lack of reporting of the 90 day completion of mitigation site preparation report per Condition C.8 of the certification and the annual mitigation and monitoring reports per Condition C.12 of the certification. Failure to construct the mitigation area has also resulted in a violation of Condition D.4 of the certification, which requires the City of Carlsbad to conduct a five-year Bioassessment Monitoring Program and report the results concurrently with the habitat mitigation and monitoring plan required in Condition C.12 of the certification.

4. FAILURE TO DEVELOP A FIVE-YEAR BIOASSESSMENT MONITORING PROGRAM

➤ Pursuant to Certification Condition D.1

- The City of Carlsbad shall develop and implement a five-year Bioassessment Monitoring program to evaluate changes in the benthic macroinvertebrate community in Agua Hedionda Creek resulting from impacts of the dredging project and future planned flood control projects.

➤ Pursuant to Certification Condition D.4

- The five-year Bioassessment Monitoring Program will begin concurrently with the habitat mitigation program pursuant to Section C. of this certification. The bioassessment data and analysis shall be submitted as part of the required habitat mitigation monitoring reports pursuant to Condition C.12 of this certification.

Observation: The five-year Bioassessment Monitoring Program has not been received by the Regional Board. The Regional Board has also not received any results of the five-year Bioassessment Monitoring Program either. The monitoring program was required to begin concurrently with the habitat mitigation monitoring and the results are to be reported per Condition D.4 of the certification with the annual mitigation monitoring reports per Condition C.12 of the certification.

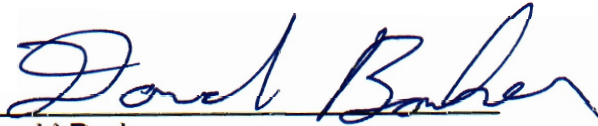
Ms. Lisa Hildabrand
R9-2008-0099

Page 9

August 11, 2008

Questions pertaining to the issuance of this Notice of Violation should be directed to Benjamin James at 858-467-2968 or bjames@waterboards.ca.gov. Written correspondence pertaining to this Notice of Violation should be directed to the following address:

David Barker
Attn: Benjamin James
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340



David Barker
Supervising Engineer

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

FACILITY INSPECTION REPORT

DATE: July 2, 2008, July 11, 2008, & July 15, 2008

FACILITY: City of Carlsbad 401 Certification Compliance Review

1. Faraday Avenue Extension and Carlsbad Oaks North Business Park (401 Cert 02C-093)
2. Agua Hedionda Channel Dredging Project (401 Cert 06C-007)
3. North Agua Hedionda Interceptor – Western Segment (401 Cert 04C-089)

**PLACE IDs: 224166 (Faraday Avenue Extension and Carlsbad Oaks North Business Park)
629552 (Agua Hedionda Channel Dredging Project)
243797 (North Agua Hedionda Interceptor – Western Segment)**

**REGULATORY MEASURES: 214323 (Faraday Avenue Extension and Carlsbad Oaks North Business Park)
298102 (Agua Hedionda Channel Dredging Project)
214364 (North Agua Hedionda Interceptor – Western Segment)**

APPLICABLE WATER QUALITY LICENSING REQUIREMENTS

- MS4 URBAN RUNOFF REQUIREMENTS NPDES NOS. CAS0108758, CAS0108740 or CAS0108766
- GENERAL PERMIT ORDER NO. 99-08-DWQ, NPDES NO. CAS000002 – CONSTRUCTION
- GENERAL PERMIT ORDER NO. 99-06-DWQ, NPDES NO. CAS000003 - CALTRANS
- GENERAL OR INDIVIDUAL WASTE DISCHARGE REQUIREMENTS
- GENERAL OR INDIVIDUAL WAIVER OF WASTE DISCHARGE REQUIREMENTS
- SECTION 401 WATER QUALITY CERTIFICATION
- CWC SECTION 13264

INSPECTION TYPE



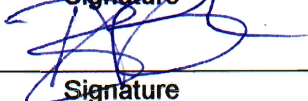
B1 X "B" type compliance—A routine nonsampling inspection. (EPA Type C)

INSPECTION FINDINGS

Y Were violations noted during this inspection? (Yes/No/Pending Sample Results)

N Were samples taken? (N=no) If YES then, G= grab or C= Composite and attach a copy of the sample results/chain of custody form

STAFF INSPECTOR(S)

Benjamin James		8/4/08
Name	Signature	Date
Lowell Thomson		8/6/2008
Name	Signature	Date
Bree Bourassa		8/6/08
Name	Signature	Date

Pages 2 through 10 (related to the Faraday inspection) and pages 15 through 18 (related to the North Agua Hedionda Interceptor) of the inspection report have been omitted because they are not relevant to this matter.

II. Agua Hedionda Dredging Project (401 Cert 06C-007)**A. Background**

1. **Issued To:** City of Carlsbad
2. **Date Cert. Issued:** 3/2/2006.
3. **Project Summary:** Dredge work will include the removal of 30,000 to 40,000 cubic yards of accumulated sediment in Agua Hedionda Creek and Calavera Creek, located within and adjacent to the Rancho Carlsbad Mobile Park Home.
4. **Project commenced:** 3/6/2006.
5. **Project Completion:** 3/25/2006.
6. **Certified Impacts:** 0.8 acre of permanent impacts to wetland, and 4.2 acres of temporary impacts to streambed.
7. **Required Mitigation:** Mitigation for permanent impacts to 0.8 acre of vegetated waters of the U.S. will be achieved at a 3:1 ratio, consisting of the creation of 1.6 acres of wetlands within the Carlsbad Hydrologic Unit, and the enhancement or restoration of 0.8 acre of wetlands within the Carlsbad Hydrologic Unit. Mitigation for temporary impacts to 4.2 acres will be achieved at a 1:1 ratio, by the enhancement of 4.2 acres of waters of the U.S./State within the Carlsbad Hydrologic Unit.
8. **Benthic Macroinvertebrate Community Analysis:** The City of Carlsbad shall develop and implement a five-year Bioassessment Monitoring program to evaluate changes in the benthic macroinvertebrate community in Agua Hedionda Creek resulting from impacts of the dredging project and future planned flood control projects, and report the data to the Regional Board.

B. Status of Compliance with Cert. Conditions:**Condition C.3**

Within 120 days of the issuance of this certification, the City of Carlsbad shall develop and submit a Final Wetlands Mitigation and Monitoring Plan for SDRWQCB approval, that shall be consistent with Conditions C.1 and C.2 above, and shall achieve the following performance standards:

- a. Created wetlands that are installed to compensate for impacts to jurisdictional wetland areas must possess the three criteria (wetland hydrology, hydrophytic vegetation, and hydric soils) necessary to be delineated as a Corps jurisdictional area;
- b. All mitigation sites shall be maintained 95 percent free of exotic/nonnative plant species;
- c. All mitigation sites must be self-sustaining; and
- d. All mitigation sites must exhibit evidence of natural recruitment of native wetland and/or riparian species.

Status: A final mitigation plan was due by July 1, 2006. *Draft 1 Compensatory Habitat Mitigation and Monitoring Plan* was received on July 11, 2006. Comments about the inadequacy of the plan were sent via e-mail by Christopher Means on July 18, 2006. A revised plan was never received. The City of Carlsbad requested an amendment from the Regional Board in a letter dated June 20, 2006 to replace the requirement of a final mitigation plan due within 120 days of certification issuance with an extension for a draft mitigation plan to be due within 210 days. The amendment was never granted because the requested supporting information was never received.

Condition C.7

No Later than 90 days after SDRWQCB acceptance of the Final Mitigation Plan, the City of Carlsbad shall provide a draft preservation mechanism (e.g. deed restriction, conservation easement, etc.) that will protect all mitigation areas and their buffers in perpetuity. The conservation easement or other legal limitation on the mitigation property shall be adequate to demonstrate that the site will be maintained without future development or encroachment on the site or which could otherwise reduce the functions and values of the site for the variety of beneficial uses of waters of the U.S. that it supports. The conservation easement or other appropriate legal limitation shall prohibit, without exception, all residential, commercial, industrial, institutional, and transportation development, and any other infrastructure development that would not maintain or enhance the wetland functions and values of the site. Other infrastructure development to be prohibited includes, but is not limited to, additional utility lines, paved maintenance roads, and areas of maintained landscaping for recreation. The City of Carlsbad shall submit proof of a completed preservation mechanism within one year of the submittal of the draft preservation mechanism.

Status: Neither a draft or final preservation mechanism has been received by the Regional Board.

Condition C.8

The City of Carlsbad shall submit a report (including topography maps and planting locations) to the SDRWQCB within 90 days of completion of mitigation site preparation and planting, describing as-built status of the mitigation project. If the site grading and planting are not completed within six weeks of each other, separate reports will be submitted describing those specific as-built conditions.

Status: No report has been received by the Regional Board.

Condition C.9

The construction of proposed mitigation shall be completed within the same calendar year as impacts occur, or at least no later than 9 months following the close of the calendar year in which impacts first occur (e.g., if impacts occur in June 2006, construction of mitigation for all impacts must be completed no later than September 2007).

Status: Mitigation construction commencement is unknown due to lack of reporting. Based on the date of the activity, mitigation construction should have been completed no later than 12/6/06.

Condition C.12

Mitigation monitoring reports shall be submitted annually until mitigation has been deemed successful. Monitoring reports shall be submitted no later than 30 days following the end of the monitoring period. Monitoring reports shall include, but not be limited to, the following:

- a. Names, qualifications, and affiliations of the persons contributing to the report;
- b. Tables presenting the raw data collected in the field as well as analyses of the physical and biological data;
- c. Qualitative and quantitative comparisons of current mitigation conditions with pre-construction conditions and previous mitigation monitoring results;
- d. Photo-documentation from established reference points;
- e. Survey report documenting boundaries of mitigation area; and
- f. Other items specified in the draft and final Wetland and Riparian Mitigation and Monitoring Plan

Status: No reports have been received by the Regional Board.

Condition D.1

The City of Carlsbad shall develop and implement a five-year Bioassessment Monitoring program to evaluate changes in the benthic macroinvertebrate community in Agua Hedionda Creek resulting from impacts of the dredging project and future planned flood control projects.

Status: Bioassessment Monitoring program not received by the Regional Board.

Condition D.4

The five-year Bioassessment Monitoring Program will begin concurrently with the habitat mitigation program pursuant to Section C. of this certification. The bioassessment data and analysis shall be submitted as part of the required habitat mitigation monitoring reports pursuant to Condition C.12 of this certification.

Status: No results have been received by the Regional Board.

C. Mitigation Inspection Results:

On 7/2/2008 the Regional Board inspected the proposed mitigation site at Lake Calavera. Visual observation indicated that no work has been conducted in the area as proposed in the *Draft 1 Compensatory Habitat Mitigation and Monitoring Plan*. These observations are supported by the lack of reporting as required by the 401 Certification.



Picture above (IMG_0487.JPG): Photograph of proposed enhancement area, on eastern side of northward extending finger, at Lake Calavera. Two Palm trees are visible.