

## **Conditional Waiver No. 6 – Discharges of Dredged or Fill Materials Nearby or Within Surface Waters**

Conditional Waiver No. 6 is for discharges of dredged or fill materials nearby or within surface waters of the state. Dredged or fill materials are sources of pollutants that can adversely affect the quality of waters of the state.

The following types of discharge not regulated or authorized under WDRs may be eligible for Conditional Waiver No. 6:

- Discharges from sand and gravel mining operations
- Discharges from dredging projects
- Discharges from stream channel alteration projects
- Other projects proposing to discharge dredged or fill materials nearby or within surface waters of the state.

Discharges from these types of projects have similar properties, enrollment requirements, and waiver conditions. Therefore, discharges from all these types of projects were grouped together into one discharge classification. These types of projects that comply with the waiver conditions are not expected to pose a threat to the quality of waters of the state.

Obstruction, alteration, excavation, and/or discharges of dredged or fill material into or nearby waters of the United States are subject to regulation under section 10 of the River and Harbors Act and/or section 404 of the Clean Water Act. Projects regulated under Clean Water Act section 404 are not subject to federal NPDES regulations.<sup>1</sup> In any case, discharges of dredged or fill materials that can affect the quality of waters of the state (which include waters of the United States) are subject to regulations in the state Water Code and may be regulated with WDRs, unless a waiver is issued.

Sand and gravel mining, dredging, stream channel alteration projects, as well as other projects that may discharge dredged or fill materials nearby or within surface waters of the state, typically must apply for a permit under section 10 of the River and Harbors Act and/or section 404 of the Clean Water Act (collectively referred to herein as “Federal Permits”) from the United States Army Corps of Engineers (ACOE). In order for the project to obtain a Federal Permit, the project must first obtain a Clean Water Act section 401 water quality certification (401 Certification) from the appropriate Regional Water Board.

However, these types of projects may not always need a 401 Certification. There are water bodies that are considered “*waters of the state*” but not “*waters of the United States*.” These waters include nonnavigable, isolated, and intrastate waters that do not have interstate commerce ties, which may include ephemeral streams and vernal pools.

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<sup>1</sup> Code of Federal Regulations Title 40 section 122.3(b)

In such cases, the ACOE may determine that a Federal Permit is not required, which means a 401 Certification may not be required.

In addition to obtaining a Federal Permit and 401 Certification, mining of sand and gravel within or nearby waters of the United States is subject also to the Surface Mining and Reclamation Act (SMARA) regulations.<sup>2</sup> SMARA includes water quality protection and management requirements. Sand and gravel mining operations are required to obtain a Surface Mining Permit from the city or county “lead agency” (typically the local planning or building department). There may be situations where a sand and gravel mining operation may not be located in an area requiring a Federal Permit and 401 Certification. However, a Surface Mining Permit requires the applicant to include performance standards for the protection of water quality.

Under the existing conditional waivers, enrollment for a conditional waiver for these projects is fulfilled with a 401 Certification. Regulation by a Surface Mining Permit and/or Federal Permit and 401 Certification would effectively regulate discharges of dredged or fill materials nearby or within surface waters. Obtaining the required Surface Mining Permits and/or Federal Permits and 401 Certifications should be included as waiver conditions that can serve as the method of enrollment for a conditional waiver for discharges from these types of projects. For San Diego Water Board to delegate regulation of specific types of discharge to another public agency is consistent with the Basin Plan and in the public interest. In this case, completed and approved documentation for these types of projects from the city or county “lead agency” and/or ACOE, as well as 401 Certification applications submitted to the San Diego Water Board, can provide sufficient information and data to the San Diego Water Board to determine compliance with the conditions of the conditional waivers. However, in cases where a Surface Mining Permit and/or Federal Permit and 401 Certification is not required, the discharger must submit a RoWD to the San Diego Water Board to determine if issuing an individual conditional waiver, or if regulation by individual WDRs is appropriate.

In addition, waiver conditions should be developed in order for members of the public, cities, counties, local agencies and organizations, and/or the San Diego Water Board to determine if discharges of dredged or fill materials nearby or with surface waters pose a threat to the quality of the waters of the state. If dischargers are not in compliance with waiver conditions, they can be issued a Notice of Violation and required to correct deficiencies in order to be eligible for Conditional Waiver No. 6. If dischargers violate any waiver conditions, the San Diego Water Board has the option to terminate the conditional waiver for the discharge and begin regulating the discharge with individual WDRs and/or take other enforcement actions.

In order to be eligible for Conditional Waiver No. 6, discharges must comply with certain conditions to be protective of water quality. The waiver conditions applicable to

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<sup>2</sup> Public Resources Code section 2710 et seq. and California Code of Regulations Title 14 section 3500 et seq.

discharges of dredged or fill material within or nearby surface waters of the state include the following:

- 6.I.A. General Waiver Conditions for Projects that Discharge Dredged or Fill Material Nearby or Within Surface Waters Required to Obtain a Surface Mining Permit and/or Federal Permit (River and Harbors Act Section 10 or Clean Water Act Section 404 Permit) and Clean Water Act Section 401 Water Quality Certification
- 6.II.A. Specific Waiver Conditions for Sand and Gravel Mining Operations

Discharges of dredged or fill materials nearby or within surface waters that comply with the general and specific waiver conditions in Conditional Waiver No. 6 are not expected to pose a threat to the quality of waters of the state.

**6.I.A. General Waiver Conditions for Projects that Discharge Dredged or Fill Material Nearby or Within Surface Waters Required to Obtain a Surface Mining Permit and/or Federal Permit (River and Harbors Act Section 10 or Clean Water Act Section 404 Permit) and Clean Water Act Section 401 Water Quality Certification<sup>3</sup>**

1. Operators must comply with measures included in the Surface Mining Permit and/or Federal Permit and Clean Water Act section 401 Water Quality Certification to protect surface water and groundwater quality.
2. The San Diego Water Board and/or other local regulatory agencies must be allowed reasonable access to the site in order to perform inspections and conduct monitoring.
3. At least one copy of any permits, licenses, and certifications must be available for on site inspection.
4. Operators must minimize or eliminate the discharge of any pollutants that could adversely affect the quality or beneficial uses of waters of the state.

**6.II.A. Specific Waiver Conditions for Sand and Gravel Mining Operations**

1. Sand and gravel mining operations cannot be conducted in flowing streams or other water bodies.

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<sup>3</sup> For projects that discharge dredged or fill material nearby or within surface waters NOT required to obtain a Surface Mining Permit or Federal Permit (River and Harbors Act section 10 or Clean Water Act section 404 Permit) and Clean Water Act section 401 Water Quality Certification, the discharger must file a Report of Waste Discharge (RoWD) with the San Diego Water Board.