

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

**EXECUTIVE OFFICER SUMMARY REPORT
DECEMBER 12, 2018**

ITEM 5

SUBJECT

Informational Item: Update on the Clean Water Act Section 401 Program for Dredge and Fill Material Discharges. (*Eric Becker*)

STAFF RECOMMENDATION

This is an informational item and the Board will not take an action.

KEY ISSUE

Continued improvements in strategies and outcomes of the Clean Water Act Section 401 Dredge and Fill Program (401 Program) are needed to leverage the effectiveness of regulatory actions to protect and restore the San Diego Region's wetlands and riparian areas.

PRACTICAL VISION

The 401 Program implements the San Diego Water Board's Practical Vision entitled Healthy Waters, Healthy People¹. The permitting, inspection, compliance, and enforcement activities of the 401 Program directly implement the aspirational goals of the Recovery of Stream, Wetlands and Riparian Systems chapter of the Practical Vision to attain no overall net loss and a long-term net gain in the quantity, quality and sustainability of aquatic resources.

DISCUSSION

The 401 Program's jurisdiction over dredged and fill material discharges puts it on the front line of protection for wetlands and riparian areas. A summary overview of the regulatory framework is provided in **Supporting Document No. 1**. San Diego Water Board Members last received an update on the 401 Program at the September 13, 2017 Board meeting. The 2017 update identified many challenges facing the 401 Program in protecting and restoring wetland and riparian areas. These include workload, inadequate monitoring and reporting, compliance with compensatory mitigation requirements, and attainment of measurable ecological performance standards (success criteria) for mitigation projects.

Triage Approach

The 401 Program continues to face a significant backlog (currently over 120 applications) of projects requiring decisions on Water Quality Certification (Certification) that impacts San Diego Water Board ability to process all applications for Certification in a timely manner. The 401 Program budget levels are too small to adequately staff a program that averages issuing approximately 70 Certifications per year and regulating over 450 on-going permitted projects. With this number of projects, a prioritization strategy is essential. The 401 Program uses the following criteria to identify the highest priority projects to work on first: 1) Funds at Risk 2) Threats to Human Health and Safety 3) Environmental Justice 4) Type of Impacts and 5) Threats to Property or Infrastructure.

In the September 2017 update, a "triage" approach was identified that puts new projects into one of three categories: 1) low impact projects where a Certification action can be taken using a shortened Certification template and approval process; 2) projects with complete applications and sufficient proposed compensatory mitigation to achieve goals for no net loss/net gain of aquatic resources; and 3) projects with inadequate proposed compensatory mitigation that unless improved, will be denied Certification. Over the last year, 401 Program staff implemented this

¹ Practical Vision: https://www.waterboards.ca.gov/sandiego/water_issues/programs/practical_vision/

triage approach to more quickly process new applications. Significant efficiency gains were achieved in processing low impact projects. Of the approximately 60 Certifications issued since October 2017, 40 percent were processed using the shortened Certification template and approval process. In the period since October 2017, the 401 Program staff have also identified an increasing number of existing applications (approximately 10 percent have been identified so far) that can be denied due to the age of the application, project cancelation, or adequacy of the application. There has been more emphasis on compliance inspections and an increase in the number of applications requiring initial review, that have also led to a slowdown in the rate of Certification issuance.

Although the 401 Program has made improvements, the application process (**Supporting Document No. 2**) can be difficult and time consuming for both applicants and 401 Program staff. All new applications must be reviewed within thirty (30) days of submittal to determine if they are complete or incomplete. If complete, the San Diego Water Board is required to act within sixty (60) days unless a time extension is granted by the U.S. Army Corp of Engineers or the project is denied Certification. Most 401 applications require supplemental information whether the application is complete or incomplete. This stage of the process requires the most intense use of staff resources to ensure that the applicant has taken adequate steps to first avoid, then to minimize, and lastly mitigate for adverse impacts to aquatic resources. Historically, 401 Program staff has worked extensively with applicants to complete their application so that a Certification action can be taken on the project. This has contributed to long processing times and the project backlog. The 401 Program is streamlining this approach to reach a decision point on applications sooner. Under this approach, staff will continue to work with project applicants; however, inadequate projects will be denied Certification with or without prejudice earlier in the regulatory process. The goal of the streamlined approach is to either take a Certification action or deny Certification on the project in less than one (1) year.

Compliance Oversight

The 401 Program is not just a permitting program; compliance evaluation is on-going for over 450 permitted projects to enforce compensatory mitigation requirements and meet goals for no net loss/net gain of aquatic resources. Previous enforcement efforts have resulted in most projects now submitting the required monitoring reports. The 401 Program staff review these monitoring reports in combination with field inspections to verify compliance. Field inspections have concentrated on projects in their 5th year of monitoring (end of Certification period) to evaluate if mitigation projects have achieved success criteria. Although these compliance efforts divert staff resources from work on new and existing Certification applications, the efforts are essential to ensure mitigation success and meeting goals for no net loss/net gain of aquatic resources.

San Diego Water Board Adoption Actions

Most Certifications are issued by the San Diego Water Board's Executive Officer under delegated authority. Certifications and waste discharge requirements (WDRs) are brought to the Board for consideration and adoption under specific circumstances. First, if the project does not impact waters of the U.S., WDRs requiring Board adoption are used to regulate project impacts to waters of the State that are outside of federal jurisdiction. These projects are often a "success," since most impacts to aquatic resources have been avoided. The second circumstance is if the Executive Officer finds that a project has significant stakeholder issues or controversy, the Certification can be brought to the Board for consideration and adoption.

City of San Diego Funded Position

Earlier this year the City of San Diego (City) agreed to fund one additional staff position in the 401 Program, and supervisory costs, for a period of 5 years. The staff position will work exclusively under the direction of the San Diego Water Board to perform environmental review, permitting, and compliance assurance work for City projects such as: the development of a General

Certification for maintenance dredging activities, early consultation on environmental review documents, preparation of applicable permits, and post-construction follow-up inspections. In June 2018, the City and State Water Board signed an agreement to fund a Senior Environmental Scientist (Specialist) position and recruitment to fill the new position is underway. The availability of one additional staff position dedicated to the City's projects will improve application processing time. In addition, redistributing the significant workload for processing the City's applications will increase the time available for San Diego Water Board staff to review and process other project applications, prepare Certifications and oversee compliance with compensatory mitigation requirements.

PUBLIC NOTICE

This item was publicly noticed in the Meeting Notice and Agenda for the December 12, 2018 meeting.

SUPPORTING DOCUMENTS

1. Summary Information on Regulatory Framework for Wetland Riparian Area Protection
2. 401 Process Flowchart