



Enforcement News

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD LOS ANGELES REGION

320 West Fourth Street, #200, Los Angeles, California 90013
(213) 576-6600 ☐ FAX (213) 576-6640
<http://www.waterboards.ca.gov/losangeles>

For Immediate Release
Oct. 31, 2013

Contact: Cris Carrigan
Phone: (916) 341-5889

L.A. Regional Water Board Files Notice of Intent to Sue U.S. Army Corps of Engineers for Water Quality Violations

Cites Violations of Federal Clean Water Act at Verdugo Wash and Sepulveda Basin

The Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) has issued a 60-day notice of intent to sue the U.S. Army Corps of Engineers (Army Corps) for two unauthorized dredge and fill operations in Los Angeles County that violated the federal Clean Water Act and the California Porter-Cologne Water Quality Control Act (Porter-Cologne). The Water Board is being represented in the matter by the California Attorney General's office.

The 60-day notice of intent, which was signed by Los Angeles Water Board Executive Officer Samuel Unger and sent to the Army Corps on Oct. 31, cites unauthorized Army Corps dredge and fill operations at the Verdugo Wash in the city of Glendale and the Sepulveda Basin in the San Fernando Valley.

During the 60-day notice of intent period, the Los Angeles Water Board will attempt to seek a resolution through a formal agreement with the Army Corps that the Corps will, going forward, seek state water quality certifications before engaging in dredge and fill activities in waters of the United States.

The Verdugo Wash is a 9.5 mile long tributary of the Los Angeles River, and the Sepulveda Basin is a 2,000 acre flood risk management basin on the upper portion of the Los Angeles River. The Verdugo Wash and the Los Angeles River are waters of the United States and of the State of California.

These unauthorized dredging activities by the Army Corps have resulted in substantial discharges of sediment to these jurisdictional waters.

"The Army Corps of Engineers both implements and oversees dredge and fill operations in waters of the United States. The Corps is subject to the same requirements as all other dischargers when it implements dredge and fill projects," said Maria Mehranian, Chair of the Los Angeles Water Board. "Our action today will prevent unauthorized projects that result in habitat destruction from happening in the future, and supports the Los Angeles River revitalization efforts by the Water Board, city of Los Angeles, and other stakeholders."

One of the Los Angeles Water Board's core functions is to protect the waters of California and the United States from pollution and contamination. The Clean Water Act and Porter-Cologne prevent the dredging and filling of waters of the United States except as allowed by a permit and state water quality certification.

In early 2012, the Los Angeles Water Board learned that the Army Corps had illegally removed vegetation and sediment at the confluence of the Verdugo Wash and the Los Angeles River. The Army Corps' action was undertaken without receiving the required state certification from the Los Angeles Water Board under Section 401 of the Clean Water Act. The Army Corps' unauthorized removal of habitat at the site harmed water quality in an approximate 6.5 acre area in the confluence.

In December 2012, the Los Angeles Water Board learned that the Army Corps had removed approximately 43 acres of vegetation from a designated wildlife preserve in the Sepulveda Basin. A subsequent investigation revealed that significant heavy equipment was used to remove vegetation from a large portion of the Basin.

Four water bodies within the Sepulveda Basin were affected: The Los Angeles River, Haskell Creek and Encino Creek, all waters of the United States, and Pothole Pond, a water of the State of California.

Specifically, the Army Corps, without state certification from the Los Angeles Water Board, removed riparian vegetation along Haskell Creek, which impacted water quality because heavy equipment used in the process caused direct sediment discharges to the water. Removal of the vegetation caused destabilization and erosion, which is a significant threat to water quality. Removal of vegetation along the banks of Haskell Creek impaired riparian and aquatic habitat and beneficial uses by increasing direct sunlight exposure and water temperature, which can affect several species of fish common in the Los Angeles River.

The Army Corps also conducted dredge and fill operations in the Los Angeles River and its tributary, Encino Creek. Islands within the river bed were modified, and in some areas cleared of vegetation and sediment by construction equipment.

The Los Angeles Water Board contends that the Army Corps routinely fails to apply for and obtain Clean Water Act Section 401 Water Quality Certifications from the Water Board for flood control maintenance activities, as required by law. In addition, the Army Corps routinely fails to implement best management practices or provide compensatory mitigation for permanent or temporary impacts to water quality.

During the 60-day notice period the Los Angeles Water Board is prepared to discuss remedies with the Army Corps for the violations. If resolution is not reached, the Water Board intends to sue the Army Corps in United States District Court, seeking a court order directing the Army Corps to restore or otherwise mitigate the damaged areas of the Verdugo Wash and the Sepulveda Basin, and issue an order directing the Army Corps to comply with Section 401 of the Clean Water Act for future dredge and fill activities.



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A copy of the Sixty-Day Notice of Intent to Sue may be found at:

<http://www.waterboards.ca.gov/losangeles/>



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

Los Angeles Regional Water Quality Control Board

October 31, 2013

John McHugh, Secretary
U.S. Department of the Army
1400 Defense, Pentagon
Washington, DC 20301

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Claim No. 7012 3460 0000 2166 0279

Lieutenant General Thomas P. Bostick
Acting Commanding General and
Acting Chief of Engineers
U.S. Army Corps of Engineers
441 G Street, N.W.
Washington, DC 20314

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Claim No. 7012 3460 0000 2166 0286

Colonel C. David Turner, Commander
U.S. Army Corps of Engineers
South Pacific Division
1455 Market Street
San Francisco, CA 94103

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Claim No. 7012 3460 0000 2166 0293

**Re: Sixty-Day Notice of Intent to Sue for Violations of the Federal Water
Pollution Control Act**

Gentlemen:

The California Regional Water Quality Control Board, Los Angeles Region (Water Board), an agency responsible for protecting and preserving U.S. and California waters, hereby provides this notice of its intent to sue the United States Army Corps of Engineers (Army Corps). The Water Board provides this notice pursuant to sections 505(a)(1) and 505(b)(1) of the Federal Water Pollution Control Act (hereafter referred to as the Clean Water Act or CWA), 33 U.S.C. §1365(a)(1) and (b)(1) and its implementing regulations, 40 C.F.R. Part 135, Subpart A.

The Water Board is an agency of the State of California, and is one of nine such regional water quality control boards that have been delegated the authority to administer and implement the Clean Water Act in California, including the authority to issue National Point Source Discharge Elimination System (NPDES) permits and to enforce the Clean Water Act through the California Porter-Cologne Water Quality Act (Porter-Cologne). (Cal. Water Code §§13200 et seq., 13370, 13372, 13376, 13377, 13385.) The Water Board is a "citizen" within the meaning of 33 U.S.C. §1365(g), because its core functions protecting the People of the State of California and the Waters of California and the United States from pollution and contamination, and protecting the designated beneficial uses of waters of California and of the United States, have been adversely

affected by the Army Corps' discharges of pollutants to Waters of the United States and California waters in violation of the Clean Water Act, as described below.

THE CLEAN WATER ACT

The Clean Water Act and Porter-Cologne prevent the dredging and filling of waters of the United States except as allowed by permit. (Clean Water Act, § 404, 33 U.S.C. § 1344, Cal. Water Code § 13376.) The Army Corps has two roles with respect to dredge and fill activities. On the one hand, the Army Corps issues permits to third parties who seek to conduct dredge and fill work, known as a "Section 404 permit" (regulatory function.) On the other hand, the Army Corps also undertakes dredge and fill work itself, which activities are the subject of the current violations (operations function.)

Before receiving any section 404 permit, a permittee must seek and obtain a "Section 401 certification" from the state in which the work is being conducted certifying that the project is compliant with local water quality requirements. (Clean Water Act, § 401, 33 U.S.C. § 1341.) Any Section 404 permit issued by the Army Corps is required to incorporate conditions imposed by a state's Section 401 certification. Typical Section 401 certification conditions include requiring the permittee to use standard sediment control measures, to use good housekeeping efforts, best management practices and to monitor the water body to ensure that the conditions are indeed protecting water quality and the natural environment.

The Clean Water Act also provides that federal agencies engaging in dredge and fill activities "shall comply" with State regulations "to the same extent that any person is subject to such requirements," including seeking and complying with a section 401 certification. (Clean Water Act, §404(t), 33 U.S.C. § 1344(t).) Further, the Army Corps has adopted regulations governing its own Army Corps projects. (33 C.F.R. § 336.1 (1988).) The regulations provide that although the Army Corps does not issue itself Section 404 permits for its own dredging activities, the Army Corps must comply with all substantive legal requirements of sections 401 and 404 of the CWA, including seeking and obtaining 401 certification and complying with any conditions imposed by the state in the certification. (*Id.* § 336.1(a).) The Army Corps' regulations acknowledge that "Section 401 of the CWA requires the Corps to seek and obtain state water quality certification for dredged material disposal into waters of the U.S." (*Id.* § 336.1(b)(8).)

THE CURRENT VIOLATIONS

This matter involves two Army Corps dredge and fill operations that violated the Clean Water Act as follows:

A. Verdugo Wash

The Verdugo Wash is a tributary of the Los Angeles River in Glendale, California (north of downtown Los Angeles), and is a water of the United States and the State of California. The Army Corps dredged vegetation and sediment from Verdugo Wash between October 24, 2011 and November 7, 2011, without seeking and obtaining certification from the Water Board under Sections 401 and 404 of the Clean Water Act. The Water Board only learned of the project on

January 13, 2012, after the project had already been completed, when it received an Army Corps document entitled "Categorical Exclusion (CX) and Record of Environmental Consideration (REC) Verdugo Wash Operation and Maintenance Ramp Repair" that described the Verdugo Wash dredging project. The Categorical Exclusion referenced the "Verdugo Wash Operation and Maintenance Ramp Repair" project and described vegetation and sediment removal to allow for Army Corps and/or its contractor to access the Wash channel for maintenance purposes. After receiving the Categorical Exclusion document, Water Board staff determined that the Army Corps did not submit a 401 certification application prior to dredge and fill activities in the Wash.

Historic aerial photographs evidence a substantial amount of established vegetation existed in the accumulated sediment in the Verdugo Wash since at least 2006. Heavy machinery used by the Army Corps not only removed the vegetation from waters of the United States and the State of California in the Los Angeles River and the Wash, but the Water Board believes the Army Corps undertook few, if any, precautionary measures to prevent the discharges of oil and grease from the machinery into the confluence area of the Wash and Los Angeles River or to prevent suspended sediment and turbidity stirred up by the removal activities from being distributed downstream to the soft-bottom portion of the Los Angeles River. Accordingly, this vegetation and sediment removal at Verdugo Wash caused harm to water quality attendant to the removal of established habitat.

The Water Board and State Water Board Office of Enforcement staff conducted a site inspection to investigate the extent of the Army Corps' violations of the Clean Water Act in the Verdugo Wash. It is clear that the Army Corps engaged in significant vegetation and sediment removal of a 6.5 acre area during its Verdugo Wash sediment and vegetation removal project without seeking and obtaining a 401 certification from the Water Board.

We understand that on May 21, 2008, the Water Board issued the City of Glendale a section 401 certification for its activities in the Verdugo Wash related to a Caltrans Highway 134/Fairmont Avenue Extension Project. The Army Corps issued the City of Glendale Nationwide Permit No. 14, which covers activities required for construction, expansion, modification, or improvement of linear transportation crossings in waters of the United States. The project required removal of debris and sediment deposits within a permanent impact area footprint of less than 0.01 acres. The impact area was the minimum required to facilitate the installation of five bridge columns within the Verdugo Wash. The May 21, 2008 certification is narrow in scope and only applies to vegetation and sediment removal for the purposes of installing overpass support structures associated with the City of Glendale's extension project. In no way can the 2008 certification be interpreted to apply to the subsequent extensive dredge and fill operation in the Verdugo Wash by the Army Corps that covered over 6 acres, and in fact it shows some of the limitations and protections the Water Board would have included in any section 401 certification it would have given the Army Corps had it sought such certification.

B. Sepulveda Basin

The Sepulveda Basin (Basin) is a flood risk management basin of over 2,000 acres located on the upper portion of the Los Angeles River in the San Fernando Valley in Los Angeles County. The

Los Angeles River and its tributaries, including Haskell Creek and Encino Creek, cross the Sepulveda Basin and are waters of the United States and the State of California. A water known as Pothole Pond is located in the Sepulveda Basin and is a water of the State of California. Sepulveda Basin includes a dam and other infrastructure. It was built in 1941 as a flood control measure for the Los Angeles River after serious flooding in 1938. The Basin also provides for recreation and the preservation of natural resources.

On December 29, 2012, the Water Board learned that the Army Corps had removed approximately 43 acres of vegetation from the Basin. The Army Corps suspended its activities after a series of newspaper articles in the *Los Angeles Times*, and public comments from other entities. Shortly thereafter, the Water Board conducted several site inspections. Those inspections revealed that significant heavy equipment was used to remove vegetation from a large portion of the Basin, including the Los Angeles River and its tributaries, Haskell Creek, Encino Creek, and Pot Hole Pond. The Army Corps failed to seek and obtain section 401 certification from the Water Board for all of the above noted activities that impacted waters of the United States and the State of California as confirmed by the Water Board during its site inspections.

Specifically, during the month of December, 2012, the Army Corps on several occasions removed Riparian vegetation along Haskell Creek, which impacted water quality in three ways. First, the manner in which vegetation was removed, by using heavy machinery along the nearly vertical banks of Haskell Creek, caused direct sediment discharges to waters of the United States and of the State of California. Second, with vegetation removed along both the banks of Haskell Creek (stretching approximately 300 feet downstream of a footbridge overcrossing) destabilization and erosion is, and remains, a significant threat to water quality. Erosion control and sediment laden runoff to waters of the United States and of the State of California is a particular concern to the Water Board because, as the Army Corps itself concluded, the soils have a high runoff potential and a very slow infiltration rate. In addition, removal of vegetation along the banks of Haskell Creek impaired riparian and aquatic habitat and beneficial uses by increasing direct sunlight exposure and water temperature in-stream. There are several species of fish common in the Los Angeles River including bass, carp, moquitofish, sunfish, fathead minnow, and various species of catfish. Several of these species prefer aquatic habitat with cover.

In addition to the vegetation removal along the banks of Haskell Creek, the Army Corps also conducted dredge and fill operations in the Los Angeles River itself and in another of its tributaries, Encino Creek. The riverbed and banks of the Los Angeles River contain track marks indicating construction equipment traffic in the river channel from Burbank Boulevard south to the Sepulveda Dam. Islands within the river bed were modified, and in some areas cleared of vegetation and sediment by construction equipment. Mounds of sediment and debris, cleared vegetation, or a combination of both remain in the Los Angeles River channel. As for Encino Creek, it is also clear that the Army Corps used heavy equipment to make multiple bank cuts ranging from 1 to 4 feet in height further causing discharges to waters of the United States and of the State of California.

The requirement to seek and obtain state water quality certification from the Water Board pursuant to Clean Water Act Section 401 prior to instituting dredge and fill activities is clear. The Water Board has not previously certified compliance for the specific type of activity covered by the dredge and fill operations described herein, and have not received a request for such a certification from the Army Corps. Because the Army Corps failed to seek such certification, it has violated the Clean Water Act.

* * *

During the 60-day notice period commencing with this letter, we are prepared to discuss effective remedies for these violations, as well as compliance with Section 401 of the CWA going forward. If satisfactory resolution of this matter is not forthcoming, the Water Board intends to sue the Army Corps in the United States District Court. Among other relief, the Water Board will seek a court order directing the Army Corps to both restore or otherwise mitigate the damaged areas of the Verdugo Wash and Sepulveda Basin, and an order directing the Army Corps to henceforth comply with Section 401 and 404 of the Clean Water Act for any future dredge and fill activities. We shall also seek all recoverable fees and costs.

If you wish to further discuss this matter, please contact the Regional Board's attorney on this matter, Mayumi Okamoto, at (916) 341-5674, or feel free to contact me directly at (213) 576-6605.

Sincerely,


Samuel Unger, P.E.
Executive Officer

cc: See mailing list

MAILING LIST

[via email only]

Eric Holder
Attorney General of the United States

Sally Jewell, Secretary
U.S. Department of the Interior

Penny Pritzker, Secretary
U.S. Department of Commerce

Gina McCarthy, Administrator
U.S. Environmental Protection Agency

Christian M. Carrigan, Director
California State Water Resources Control Board, Office of Enforcement

Robert Byrne, Senior Assistant Attorney General
California Department of Justice, Office of the Attorney General

Noah Golden-Krasner, Deputy Attorney General
California Department of Justice, Office of the Attorney General

Kurt Weissmuller, Deputy Attorney General
California Department of Justice, Office of the Attorney General

Paula Rasmussen, Assistant Executive Officer
California Regional Water Quality Control Board, Los Angeles Region