

EXECUTIVE OFFICER SUMMARY REPORT
September 13, 2017

- ITEM: 8
- SUBJECT: Informational Item: Update on the Clean Water Act Section 401 Dredge and Fill Program. (*Eric Becker*)
- PURPOSE: To update the San Diego Water Board on progress and challenges pertaining to the protection and restoration of wetlands, riparian areas and other waters of the State (also referred to collectively in this report as aquatic resources).
- RECOMMENDATION: This is an informational item and the Board will not take an action.
- KEY ISSUES: 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 People*. 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 [August](#) and [October 2016](#) Executive Officer Reports (EORs) addressed the 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 measureable ecological performance standards (success criteria) for mitigation projects. This report provides an update on various improvements 401 Program staff have implemented over the last year to address the challenges. A summary overview of the regulatory framework for wetland and riparian area protection is provided in **Supporting Document No. 1**.

Process Improvements

The 401 Program budget levels are too small to adequately staff a program that averages issuing approximately 80 Certifications per year and regulating over 400 on-going permitted projects annually. Due to a significant backlog (Over 130 in 2016) of projects requiring decisions on Certification, the San Diego Water Board has not been able to process all applications for Certifications in a timely manner. To better manage this project backlog over the past year, the 401 Program staff reviewed all existing applications for those that could be withdrawn due to the age of the application or project cancelation (at least 10 percent of the project applications). For new applications, 401 Program staff are implementing a “triage” approach to more quickly process applications. The triage approach puts projects into one of three categories: 1) Low impact projects that can be certified with a shortened Certification template; 2) Complete project applications with sufficient proposed compensatory mitigation; and 3) projects with inadequate proposed compensatory mitigation that unless improved, would be denied Certification. The triage approach has increased regulatory efficiency and effectiveness by directing staff efforts to processing project applications that are largely complete with approvable compensatory mitigation proposals to compensate for impacts and ensure a net gain in aquatic resources. Of the 45 Certifications issued in 2017, 15 of them have been with the shortened Certification template.

Reporting and Compliance

As discussed in the previous EORs, many permittees fail to submit required monitoring reports after receiving their Certifications. The 401 Program staff have reviewed the files for over 400 permitted projects, with Certifications issued over the last 5 years, to determine if required monitoring reports were missing. Project permittees with missing or inadequate monitoring reports were notified and given the opportunity to submit complete reports. Many permittees with missing reports also had other compliance issues such as delayed implementation of compensatory mitigation requirements. These permittees received escalating enforcement ranging from staff issued violation notices to imposition of administrative civil liability (ACL) monetary penalties. The effort has been very successful at assuring the regulated community stays in compliance. Almost all of the certified projects since 2012 have now submitted their

required reports. Oversight is an ongoing effort that must continue.

Compensatory Mitigation

The 401 Program is increasing outreach efforts to ensure Certification applicants have an adequate understanding of what the San Diego Water Board requires for compensatory mitigation to offset the adverse water quality impacts attributed to a project. The term *compensatory mitigation* means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. The San Diego Water Board requires either establishment or re-establishment compensatory mitigation for unavoidable permanent impacts to replace the function and services of impacted aquatic resources such as infiltration, aquatic habitat, water quality improvement, flow conveyance, and flood control. Simply put, if aquatic resources are eliminated as a result of project impacts, the replacement of the full range of lost aquatic resources and/or functions and services must be provided by the permittee in perpetuity. The San Diego Water Board requires compensatory mitigation projects to be located as close to the impact site as possible and where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses. The required replacement ratio increases with distance between the affected aquatic resource and the compensation site.

The San Diego Water Board requires compensatory mitigation projects offsetting permanent impacts to aquatic resources to achieve a minimum mitigation ratio of one to one in acreage and length of stream replacement to meet California's No Net Loss policy. This ratio can increase due to a variety of factors including mitigation type and location, the aquatic resource values, timing of mitigation, and other considerations. For example mitigation ratios typically increase by an additional one to one factor for every watershed away from the impact that the mitigation occurs.

Mitigation Performance Standards

Mitigation performance standards are observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives. Mitigation performance standards must be specified in approved mitigation plans as a condition of the Certification and must relate to the acreage and linear feet objectives of the required compensatory mitigation project. The mitigation plan must also provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than 5 years. Other performance standards sometimes used include numbers of plants surviving, maximum percentage of weeds, and percent area covered. However, many of these criteria do not demonstrate if the compensatory mitigation is truly replacing the function and services of the aquatic resources impacted. The 401 Program is seeking better performance standards based on best available science that can be measured or assessed in a practicable manner to ensure mitigation objectives are met. Such an approach could include requiring a new aquatic resource delineation report to determine boundaries of mitigation wetlands at the end of the five year monitoring period. Use of the California Rapid Assessment Method (CRAM) and Indices of Biotic Integrity based upon benthic macroinvertebrate assemblages are also being considered to assess performance of compensatory mitigation projects in terms of landscape context, hydrology, physical structure and biotic structure. Performance standards are a statewide issue that the State Water Board is also evaluating.

LEGAL CONCERNS: None

SUPPORTING DOCUMENTS: 1. Summary Information on Regulatory Framework for Wetland Riparian Area Protection.

PUBLIC NOTICE: This item was publically noticed in the Meeting Notice and Agenda for the September 13, 2017 meeting.