

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

**EXECUTIVE OFFICER SUMMARY REPORT
DECEMBER 8, 2021**

ITEM 17

SUBJECT

Update on the Clean Water Act Section 401 Certification Regulatory Framework for Dredge and Fill Material Discharges to Waters of the United States and/or State. *(Eric Becker)*

STAFF RECOMMENDATION

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

KEY ISSUE

In 2020 the United States Environmental Protection Agency (USEPA) promulgated significant changes to federal regulations defining the scope of waters subject to regulation under the Clean Water Act and implementing the water quality certification process. These regulation changes are referred to as the Navigable Waters Protection Rule and the Clean Water Act Section 401 Certification Rule (401 Certification Rule) respectively. Implementation of the Navigable Waters Protection Rule and the 401 Certification Rule have been halted as a result of recent court decisions which have vacated and remanded the regulation changes and reinstated the prior regulatory schemes that were in place for interpreting “waters of the United States” and implementing the water quality certification process. These back and forth changes have caused confusion and uncertainty in the regulated community and present an implementation challenge for the San Diego Water Board’s Wetlands and Riparian Protection Program. San Diego Water Board staff will provide an update and perspective on these issues.

PRACTICAL VISION

The Wetlands and Riparian Protection Program implements the San Diego Water Board’s Practical Vision entitled *Healthy Waters, People and Communities*. The permitting, inspection, compliance, and enforcement activities of the Program directly implements the aspirational goals of Chapter 3 of the Practical Vision, *Recover Stream, Wetland and Riparian Areas*, to attain no overall net loss and a long-term net gain in the quantity, quality, and sustainability of aquatic resources.

DISCUSSION

401 Certification Rule and Navigable Waters Protection Rule Changes

In June 2020, the USEPA promulgated the 401 Certification Rule that significantly changed the existing 401 Certification process and imposed significant administrative burdens on California’s Water Boards. The 401 Certification Rule also accelerated the time in which the San Diego Water Board had to act on 401 Certification applications. At about the same time, USEPA issued a Navigable Waters Protection Rule that significantly changed the definition of waters of the United States which defines the scope of waters that receive federal protections. As a result, many of the aquatic resources in the San

Diego Region including ephemeral streams, lost federal protection. Over the last year, the San Diego Water Board's Wetlands and Riparian Protection Program has worked with stakeholders and 401 Certification applicants to determine how the new rules applied to projects. Projects that were no longer impacting waters of the United States under the Navigable Waters Protection Rule were subject to a longer permitting process of obtaining Waste Discharge Requirements adopted by the San Diego Water Board in a public hearing.

In recent court cases, both the Navigable Waters Protection Rule and the 401 Certification Rule have been vacated and remanded. In *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*, a federal district court in Arizona issued an order vacating and remanding the Navigable Waters Protection Rule on August 30, 2021. As a result, USEPA has announced that it and the United States Army Corps of Engineers (USACOE) have halted implementation of the Navigable Waters Protection Rule and are now interpreting the scope of waters of the United States consistent with the pre-2015 regulatory regime. More recently on October 21, 2021, the U.S. District Court for the Northern District of California's order vacated and remanded the 401 Certification Rule. The court order is effective immediately, and the prior regulations governing the Clean Water Act Section 401 water quality certification process are now reinstated until USEPA adopts new regulations. California's Water Boards are working closely with the USACOE and USEPA to implement both court orders.

Compensatory Mitigation

Obtaining adequate compensatory mitigation for discharges resulting in permanent losses of waters of the United States and/or State continues to be one of the biggest challenges for the San Diego Water Board's Wetlands and Riparian Protection Program. Lack of available mitigation banks in the San Diego Region, inadequate compensatory mitigation proposals, and misunderstanding of mitigation requirements are main sources of the challenge. The USACOE is the designated lead federal agency in approving mitigation banks under the applicable federal regulations. The San Diego Water Board supports the approval of more mitigation banks by participating in USACOE's Interagency Review Team (IRT). The IRT provides regulatory review, approval, and oversight of the mitigation banks that can help speed up the regulatory process. One helpful provision of the 401 Certification Rule was the requirement for applicants to participate in a pre-application meeting on all 401 Certifications. This has been an effective tool in discussing what is adequate compensatory mitigation with project applicants prior to the application submittal and preventing the submittal of deficient applications. To address misunderstandings, the Wetlands and Riparian Protection Program staff continue to reach out to stakeholders, participate in workshops, and provide guidance on the minimum compensatory mitigation that the San Diego Water Board expects for offsetting permanent project impacts to aquatic resources.

PUBLIC NOTICE

This item was publicly noticed in the Meeting Notice and Agenda for the December 8, 2021 meeting. The agenda notice for today's meeting was posted on the San Diego Water Board website and sent to subscribers to the email list for Board meetings.