

STATE OF CALIFORNIA  
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION

STAFF SUMMARY REPORT (Abigail Smith)  
MEETING DATE: May 10, 2017

**ITEM:** 7B

**SUBJECT:** **Audit of Compliance with Clean Water Act Section 401 Water Quality Certification Mitigation Requirements in the North Bay – Information Item**

**DISCUSSION:** This item provides a status update on staff's recent audit of compliance with the mitigation and monitoring requirements in Clean Water Act section 401 water quality certifications (certifications) issued by the Board between 2009 and 2014 for dredge and fill projects in San Francisco and the region's four North Bay counties: Marin, Napa, Solano, and Sonoma. A total of 390 certifications were issued for projects in those counties over the six-year period covered by the audit. Of the 390 certifications issued, 192 included monitoring and reporting requirements. Staff reviewed a representative sample of about 60 percent of the certifications. We found that 77 percent of the audited projects were in compliance with mitigation reporting requirements. An additional 21 percent of the audited projects were conditionally in compliance, and the remaining 2 percent are out of compliance. We are working with the dischargers who are in conditional compliance to have them submit acceptable monitoring reports and will consider appropriate progressive enforcement for those dischargers who do not come into compliance.

During the audit, we identified oversight challenges resulting from changes in records management databases, inconsistent data entry into the databases, and opportunities for improvement in database functionality. We have resolved most of these challenges by obtaining staff resources for data entry, centralizing data entry, and assigning a dedicated staff person to develop a systematic compliance management program for certifications. We are working with State Board staff to develop database reporting tools that will facilitate future compliance oversight.

**RECOMMEN-  
DATION:** This item is for information only and no action is required.

**APPENDIX A:** Memorandum: Audit of Compliance with Clean Water Act Section 401 Water Quality Certification Mitigation and Monitoring Requirements in the North Bay

## **Appendix A**

**Memorandum: Audit of Compliance with Clean Water Act Section 401 Water Quality Certification Mitigation and Monitoring Requirements in the North Bay**

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## San Francisco Bay Regional Water Quality Control Board

**TO:** Bruce H. Wolfe  
Executive Officer

**FROM:** Abigail Smith  
Environmental Scientist  
**Watershed Management Division**

**DATE:** April 27, 2017

**SUBJECT: Audit of Compliance with Clean Water Act Section 401 Water Quality Certification Mitigation and Monitoring Requirements in the North Bay – Initial Report**

This memo presents the initial results of a staff-performed audit of compliance with the mitigation and monitoring requirements in the certifications used for our dredge and fill program. The audit goals were to identify:

- (1) Whether mitigation monitoring report submittal requirements for dredge and fill projects are being met; and
- (2) Whether there is a need to develop a systematic process to track and review mitigation monitoring reports.

The audit found that 77 percent of the audited projects were in compliance with report submittal requirements. An additional 21 percent of the audited projects were conditionally in compliance, and the remaining 2 percent are out of compliance. The audit results are discussed further below.

### Background

The Water Board issues approvals for projects that propose to discharge dredge or fill material to waters of the State and United States. These approvals are typically Water Quality Certifications under section 401 of the federal Clean Water Act (certifications) or Waste Discharge Requirements under the California Water Code. Types of projects permitted under this program include, but are not limited to, residential subdivisions, office parks, and other urban development; flood control capital improvement and maintenance projects; creek and wetland restoration projects; and construction and maintenance of roads and utilities that impact waterbodies.

Projects must comply with the State's "no net loss" policy, which requires no net loss and a long-term net gain in wetland functions and values, permanence, and extent. As a result, when a project has unavoidable impacts to wetlands, including creeks, it must also include compensatory mitigation consistent with San Francisco Bay Basin Water Quality Control Plan requirements. Dischargers are typically required to implement the mitigation, monitor it for a specified period of time, and report annually to demonstrate it has appropriately become established sufficient to mitigate permitted project impacts. Mitigation projects and their associated monitoring may be modest in scope, such as

revegetation of a small area of disturbed creek bank, or large, such as the creation of many acres of wetlands and enhancement of thousands of linear feet of creek. The latter is something that has been required, for example, for large subdivisions with mass grading and concomitant impacts to wetlands and creeks. In some cases, mitigation measures are incorporated into a project's design and monitored to document success. For example, the use of biotechnical streambank stabilization measures, such as willow staking, may be part of a larger project that includes harder fill such as rock rip-rap.

The Water Board issues about 250 certifications and related approvals annually. This audit reviewed a representative sample of 119 certifications issued over a six-year period to identify whether report submittal requirements were being met and to consider whether improvements were needed to this aspect of the program.

### **Scope of Audit**

The audit tracked mitigation monitoring report submittal for a subset of the certifications issued from 2009 through 2014 for projects in San Francisco and our Region's four North Bay counties: Marin, Napa, Solano, and Sonoma. We issued 390 certifications for projects in those counties during that period. Of those 390 certifications, 192 included mitigation monitoring and reporting requirements. Given available staff resources, staff selected a representative sample of 119 of the certifications, or 60 percent of the total number of projects that were required to submit mitigation monitoring reports. We reviewed whether those projects had submitted the required reports. We expect to report at a later date whether reports showed that the mitigation performance criteria were being met.

### **Audit Process**

Once we identified the projects within the scope of the audit, we located and reviewed the certification and the mitigation monitoring reports for each project. Where the reports were not available in the Water Board's files, we contacted the discharger to obtain them to determine whether the discharger had met report submittal requirements.

### **Audit Results**

The audit found that of the 119 projects reviewed, 77 percent were in compliance with report submittal requirements. An additional 21 percent of the audited projects were conditionally in compliance because they were working with us to submit the required reports, and the remaining 2 percent are out of compliance because they did not respond to the audit. Projects that were in compliance had either submitted reports in a timely manner, or the project had not been constructed. If a project was not constructed, then the permitted impacts had not taken place, and no mitigation or monitoring was required.

The compliance status for the 119 projects is as follows:

- **In Compliance – 77%**
  - Submitted reports = 66% (n=78)
  - Project never constructed = 12% (14)
- **Conditionally in Compliance – 21%**
  - Applicants have contacted us, but have not yet submitted any reports = 21% (25)
    - Dischargers in communication to resolve reporting (12)
    - Dischargers out of touch (13)
- **Out of Compliance – 2%**
  - Discharger did not submit reports and did not respond to audit = 2% (2)

As shown above, staff is working with the 21 percent of dischargers who did not timely submit reports. While about half of them are responsive, there are gaps in communication with the others, demonstrating a challenge common to many of our regulatory programs. Staff will continue to follow up with the remaining dischargers, including considering appropriate progressive enforcement, where appropriate.

In addition, staff has begun detailed reviews of the submitted monitoring reports to assess whether dischargers have met their mitigation project performance criteria. We intend to report on the results of that review at a future Board meeting.

### **Issues Identified and Resolution**

Overall, the audit found that the vast majority of certification requirements for report submittal are being met in a timely manner, indicating that the program is functioning effectively. In addition, we found that informal communication with dischargers was an effective means of obtaining compliance in a majority of the instances where a report had not been timely submitted.

Additionally, the audit required a significant investment of staff resources because many of the systems that we had to rely on were not in a state that we could easily query or assess the data we needed and because many certification documents were available only in hard copy. Improvements have been made to the Water Boards' electronic permit and data management systems that, in combination with tools developed during the audit, should significantly reduce the staff resources needed to oversee future compliance with mitigation monitoring report submittal requirements.

#### *Document Management and Access*

During the period over which the audit was completed, there were not statewide databases for permit tracking or document management for the dredge and fill program. Those systems were implemented during the audit period, and staff resources were obtained in 2013 to populate and improve the document and database management systems. As a result, future evaluation of project status and compliance will be much simpler. The current audit required use of a combination of paper files, informal databases at our Region, and limited information available from the document and database management systems.

#### *California Integrated Water Quality System (CIWQS)*

CIWQS is the Water Boards' statewide permit management database. Initially constructed to manage NPDES wastewater permitting, it was expanded in 2015 to include the dredge and fill program. It was used on an *ad hoc* basis before 2015 to manage certain aspects of the dredge and fill program. As a result, CIWQS certification records before 2015 are incomplete, limiting their usefulness in identifying our target population and gathering the project information we needed.

Resolution – In 2013, we hired a staff member to consistently enter certification information into CIWQS. In 2015, the State Water Board developed protocols for entering monitoring report due dates into CIWQS. In addition, State Water Board staff uploads the certification document into CIWQS. Based on these changes, it will be much easier moving forward to 1) locate the digital copy of each certification, 2) track the date the project was certified, 3) determine which projects required submittal of monitoring reports, and 4) gather information for each monitoring report.

#### *Electronic Content Management System (ECM)*

Starting in 2009, we began to use ECM to store electronic versions of certification files. At that time, we did not have the staff resources to scan, index, and upload certification files into ECM. As a result, for the audit period, ECM has a limited amount of the certification files.

Resolution – In 2013, we hired a staff member to consistently upload application materials and certifications into ECM. As a result, certification letters and mitigation and monitoring plans are now easier to find. We have also assigned a staff person to track and upload monitoring reports into ECM.

Resolution – Based on the changes noted above for CIWQS and ECM, we are effectively transitioning to electronic tracking and document management for the dredge and fill program. On a forward-looking basis, the need to manually search for paper documents will no longer be required.

### **Next Steps for Our Compliance Tracking Program**

We will continue to track report submittal for all North Bay projects certified in 2015 and beyond. This is possible because many of the system problems have been resolved, reducing the amount of time required to identify projects and process project information. For example, we now can use the CIWQS database to track the dates monitoring reports are due and received. In addition, we have also made all monitoring reports due on January 31, a unified date that will allow us to more easily determine compliance and communicate with dischargers about non-compliance.

In addition to tracking the submittal of monitoring reports, we are also developing a notification system to remind dischargers that their monitoring report will be due soon or is overdue. We plan to contact dischargers proactively several months prior to the due date for their monitoring reports. We will also notify them in a timely manner when a report is overdue, similar to the approach we take for annual reports due under the statewide construction and industrial stormwater permits. We anticipate taking progressive enforcement to address instances of non-responsiveness and non-compliance, similar to the approach taken for our stormwater permits.

### **Remaining Challenges**

While many of the tasks will be much easier as we move ahead, we still have a few outstanding issues that require doing tasks manually.

#### *Party Information*

The CIWQS database includes standard reports that provide certain information about dischargers, also known as “parties” in CIWQS. For the dredge and fill program, the CIWQS party report contains only general information about a discharger. It lacks details like the discharger’s name and contact information, the discharger’s consultants, and agencies related to the permitted project. We currently must, therefore, go into each record in CIWQS manually or go back to the original project files to obtain this information.

#### *Location Information*

CIWQS does not track all the location information we need. CIWQS does not include a means to automatically track and report the location of mitigation that is implemented off-site (i.e., not at the same location as the permitted project). As a result, we have to go through each individual certification and identify that information from the certification’s requirements.

We are working closely with State Board to remedy the above issues by working with them to put together a new report format that will contain all the information we need that is currently in CIWQS.