

ENFORCEMENT SUMMARY REPORT
May 12, 2010

- ITEM: 10
- SUBJECT: Administrative Civil Liability against the City of Carlsbad, Agua Hedionda Creek Emergency Dredge Project. The San Diego Water Board will consider adoption of a tentative Order that would accept a settlement reached in response to Notice of Violation No. R9-2008-0099 for alleged violations of Water Quality Certification No. 06C-0007. The proposed settlement supports the assessment of \$47,647 and requires the purchase of 3.58 acres of habitat mitigation. (Tentative Order No. R9-2010-0008) (*Frank Melbourn*)
- PURPOSE: The San Diego Water Board will consider adoption of Tentative Order No. R9-2010-0008 (Supporting Document No. 2) implementing the Settlement Agreement (Supporting Document No. 3). If the San Diego Water Board rejects the tentative Order, the matter may be rescheduled to a future public hearing at which time the San Diego Water Board will receive evidence, testimony and consider assessment of liability.
- PUBLIC NOTICE: Notice of the San Diego Water Board's consideration of the Tentative Order, the Settlement Agreement, and the opportunity for public comment was posted on the San Diego Water Board's website¹ and e-mailed to interested parties on March 2, 2010. Notice was also published in the San Diego Union-Tribune on March 10, 2010 with written comments on the proposed settlement requested by April 5, 2010.
- DISCUSSION: The Executive Officer issued Clean Water Act section 401 Water Quality Certification No. 06C-007 (Certification) to the City of Carlsbad (City) for the Agua Hedionda Creek Emergency Dredge Project (Project) on March 2, 2006 (Supporting Document No. 4). The purpose of the Project was to protect 210 mobile homes from potential flooding during a 100-year storm event. The Certification required the City to mitigate the Project's permanent and temporary

¹ http://www.waterboards.ca.gov/sandiego/water_issues/programs/compliance/Hearing_Schedules.shtml

water quality impacts by September 30, 2007. Between March 6 and March 25, 2006, the City used a backhoe and excavator to remove approximately 15,000 cubic yards of accumulated sediment from Agua Hedionda Creek and Calavera Creek.

Notice of Violation (NOV) No. R9-2008-0099 was issued on August 11, 2008 alleging that the City failed to complete the Certification's mitigation requirements by September 30, 2007 (Supporting Document No. 4). In response to the NOV, the City demonstrated that on August 16, 2007 it purchased 0.48 acres of created wetlands from the North County Habitat Bank (NCHB). The City also stated that it believed the outstanding Project mitigation requirements would be addressed in a future certification for a comprehensive dredge project of Agua Hedionda Creek recently proposed by the City.

Compliance with the Certification

The Certification required the City to conduct both enhancement and creation mitigation. After settlement negotiations, the City met its obligation for enhancement mitigation by purchasing 3.56 acres of enhancement credits from the NCHB on or about December 30, 2009. The City also directed NCHB to credit the Project with 0.02 acres of creation credit from an August 16, 2007 City purchase for a total of 0.5 acres of creation credit. Although 0.5 acres of creation credit is only half of the amount of creation mitigation required under the Certification, the City bought fully functional (i.e., meeting success criteria) wetland acreage from the NCHB. The Prosecution Team determined that, in this case, the purchase of 0.5 acre of fully-functional created wetlands was functionally equivalent to the 1.0 acre Certification requirement predicated upon the assumption that creation of new wetland acreage would take several years to meet success criteria. Accordingly, there was no net loss of functional wetlands.

Liability Amount

The settlement liability offered by the City is in the amount of \$47,647. The liability amount recoups the economic benefit enjoyed by the City (\$32,897) and the San Diego Water Board staff costs (\$14,750).

LEGAL CONCERNS: None.

**SUPPORTING
DOCUMENTS:**

1. Location Map
2. Tentative Order No. R9-2010-0008
3. Settlement Agreement
4. Water Quality Certification No. 06C-007
5. Notice of Violation No. R9-2008-0099

RECOMMENDATION: The Prosecution Team recommends adoption of tentative Order No. R9-2010-0008.