

APPENDIX D

LTMS AGENCIES: ENFORCEMENT

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ENFORCEMENT AND PENALTIES

This section describes the compliance and enforcement authorities of the primary LTMS agencies.¹ Enforcement fines, penalties and restoration orders are intended by the agencies primarily as deterrents to unauthorized activities and non-compliance with permit terms and conditions. Thus, enforcement serves to prevent potential impacts associated with dredging and disposal and/or reuse at the in-Bay, ocean, and beneficial reuse/disposal environments. The following sections describe the enforcement authorities and policies of the LTMS agencies.

U.S. Army Corps of Engineers, San Francisco District (USACE)

The USACE has enforcement authority under the Rivers and Harbors Act, the Clean Water Act (CWA) and the Marine Protection, Research, and Sanctuaries Act (MPRSA). USACE enforcement regulations are at 33 CFR 326. USACE and U.S. Environmental Protection Agency (USEPA) entered into a Memorandum of Understanding to allocate enforcement responsibilities of the two agencies. It was agreed that USEPA would take the lead for activities undertaken without a required Department of the Army permit, and the USACE would take the lead for activities not in compliance with the terms and conditions of issued permits.

Once the USACE determines that a violation has occurred, the agency informs the responsible party(s). If work has not been completed, that notification takes the form of a Cease and Desist Order. Depending on the nature, location, and anticipated or existing impacts of the violation, the USACE may seek to resolve the violation administratively or through legal action. Because USEPA has independent enforcement authority under the CWA and MPRSA, the USACE may also choose to submit the violation to USEPA for resolution.

Administrative action may take the form of “initial corrective measures” that may include full or partial restoration of the area, compensatory mitigation, and/or other measures necessary to minimize adverse environmental effects. The USACE develops initial corrective measures in coordination with USEPA, the U.S. Fish and Wildlife Service (USFWS), and other pertinent resource agencies. USACE also has the authority to issue administrative penalties of up to \$25,000 per violation per day. Pursuit of an administrative solution does not prohibit the USACE from seeking legal action or the pursuit of a criminal or civil legal action against the party(s) responsible for a violation. For appropriate cases for legal action, including violations that are willful, repeated, or flagrant, the USACE will work with the local U.S. Attorney to resolve the violation.

¹ Although not a primary agency, the U.S. Coast Guard (USCG) is responsible for conducting surveillance and other appropriate enforcement activities to prevent unlawful disposal in ocean waters. The USCG assists the USACE and USEPA in their pursuit of violations and non-compliance with permit terms and conditions.

Under MPRSA, USACE may revoke a permit or suspend a permit for a specified period of time. As with USEPA, revocation or suspension can occur only after the permittee has been given notice and the opportunity for a hearing. The USACE may also work with the U.S. District Attorney's office to bring civil or criminal charges against permittees.

U.S. Environmental Protection Agency (USEPA)

As mentioned previously, USEPA has oversight of the Section 404 program and has independent enforcement authority. Further, under Section 102 of the MPRSA, USEPA is responsible for issuing permits to dispose of dredged material in the ocean. Under Section 102, USEPA designates areas where ocean disposal is permitted subject to the specific conditions of permits issued by the USACE. Most of the CWA's enforcement authority is vested in USEPA, including the authority to assess administrative penalties for unpermitted projects. Class I penalties can not exceed \$10,000 per violation or a maximum of \$25,000. Class II penalties may not exceed \$10,000 per day of violation to a maximum of \$125,000.

USEPA is given authority under MPRSA to assess civil penalties for violations and may work with the U.S. District Attorney in bringing criminal charges. Civil penalties of not more than \$50,000 for each violation are assessed by USEPA, after the violator has been given notice and an opportunity for a hearing. In determining the amount of the penalty, USEPA considers the gravity of the violation, prior violations, and the demonstrated good faith of the person charged with the violation. For good cause, USEPA may remit or mitigate such penalty. Criminal action may be taken against knowing and flagrant violators. Conviction may result in fines up to \$50,000 and imprisonment for up to one year. For the purposes of imposing civil penalties and criminal fines, each day of a continuing violation constitutes a separate offense, as does disposal from different vessels.

San Francisco Bay Regional Water Quality Control Board (SFBRWQCB)

Whenever there is a threatened or existing violation of a permit condition or a water quality standard by an unpermitted discharge, the SFBRWQCB can take enforcement action. The SFBRWQCB has several enforcement options, including orders, fines, and judicial referrals. These options exist for any threatened or existing violation within the SFBRWQCB's jurisdiction, and thus may apply to most dredging projects, all in-Bay projects, and most upland disposal projects.

Orders

Enforcement orders include Cleanup and Abatement Orders, Site Cleanup Requirements, and Cease and Desist Orders. Cleanup and Abatement Orders are issued by the SFBRWQCB's Executive Officer for short-term cleanups such as spills or erosion problems. These Cleanup and Abatement Orders list specific actions that must be accomplished within a defined schedule. Site Cleanup Requirements are used for long-term cleanups such as remediating contaminated groundwater and are only issued after public hearings by the SFBRWQCB. Cease and Desist Orders may be issued for permit violations, and usually include schedules for specific actions. Cease and Desist Orders, like Site Cleanup Requirements, are only issued after public hearings before the SFBRWQCB.

Fines

The SFBRWQCB has the authority to impose Administrative Civil Liabilities fines if a discharger violates permit conditions, standards, time schedules, and in some cases late or incomplete submittal of required reports. The amount of an Administrative Civil Liability is based on the volume of an illegal discharge (up to \$10 per gallon), the duration of an illegal discharge (up to \$10,000 per day), or the amount of time by which a report is late (up to \$1,000 per day). Assessment of Administrative Civil Liabilities requires SFBRWQCB staff to prepare a complaint describing the violation and proposing a fine. The discharger may pay the fine, waiving the right to a hearing, or may choose to proceed with a hearing before the SFBRWQCB. If there is a hearing, the SFBRWQCB may uphold staff's position, or raise, lower, or dismiss the fine. In several cases, the SFBRWQCB has accepted proposals for environmental projects in lieu of a fine. In these cases, a portion of the fine is usually suspended until project completion, at which time it is cancelled. It is a State Water Resources Control Board (SWRCB) policy that at least some portion of a fine must be paid, even if an environmental project is completed. For violations of dredging permits issued under the CWA, the SFBRWQCB or the SWRCB may administratively impose fines of up to \$10,000 per day or, for illegal discharges of over 1,000 gallons that are not cleaned up, \$10 for each gallon of discharge in excess of 1,000 gallons.

Judicial Referrals

The SFBRWQCB may refer cases to the Attorney General or a District Attorney for prosecution in the courts. Cases referred to the courts can be civil or criminal, and remedies can include fines, injunctions, or in criminal cases, jail sentences. The courts may impose fines that are significantly higher than those described above for Administrative Civil Liabilities. For violations of dredging permits issued under the CWA, fines of up to \$25,000 per day, or for illegal discharges of over 1,000 gallons that are not cleaned up, \$25 for each gallon discharged in excess of 1,000 gallons.

San Francisco Bay Conservation and Development Commission (BCDC)

BCDC, as provided under the McAteer-Petris Act, has the authority to issue cease and desist orders for any of the following: (1) undertaking or threatening to undertake an activity without first obtaining the required BCDC permit; (2) violating the terms or conditions of a BCDC permit; and (3) providing inaccurate information in a permit application or at a public hearing regarding a permit application. BCDC's Enforcement Unit is responsible for pursuing and resolving violations of BCDC's laws either administratively, through the imposition of penalties and/or fines, and, if necessary, with the assistance of the state Attorney General's staff.

BCDC's Enforcement Unit is also responsible for monitoring BCDC permits and any special conditions placed on permits to ensure projects are carried out in a manner consistent with the Commission's approval. BCDC permits for dredging and/or disposal projects typically contain conditions requiring the permittee or project proponent to, among other things, notify BCDC staff prior to project commencement, and allow staff to observe dredging and disposal operations. BCDC actively pursues violations of permit requirements and violations of BCDC's laws. If possible, BCDC attempts to resolve violations

administratively, but if necessary, pursues the imposition of penalties and fines by the Commission. BCDC's Enforcement Unit also investigates reports from the public regarding potential violations (e.g., unauthorized dredging or disposal activities). These should be reported directly to Enforcement Unit staff, either by telephone or in writing.