



## State Water Resources Control Board

It Should Ensure a More Consistent Administration of  
the Water Quality Certification Program

Report 2012-120



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June 6, 2013

2012-120

The Governor of California  
President pro Tempore of the Senate  
Speaker of the Assembly  
State Capitol  
Sacramento, California 95814

Dear Governor and Legislative Leaders:

As requested by the Joint Legislative Audit Committee, the California State Auditor presents this audit report concerning the administration of the water quality certification program (certification program) by the State Water Resources Control Board (state water board) and the regional water quality control boards (regional water boards) as it relates to the California Department of Transportation (Caltrans). Under the program, the State issues water quality certifications to certify that projects will comply with federal and state water quality laws.

This report concludes that the water quality certifications that the state water board, and the North Coast, Central Valley (Redding Office), and San Diego regional water boards issued during fiscal years 2007–08 through 2011–12 generally complied with federal and state law and regulations. However, the state water board could improve consistency in the certification program by implementing a single application form and ensuring that applications are processed within required time frames.

The state water board also needs to address inconsistent monitoring practices at the regional water boards and improve its own administration practices. The regional water boards' inconsistent monitoring practices, including not formally tracking reporting requirements and differing practices for conducting site visits, do not adequately ensure that water quality certification-holders adhere to the conditions of their water quality certifications. Additionally, staffing costs that the regional water boards include in penalty actions—fines assessed when the terms of a water quality certification are violated—are generally not supported and are inaccurate because of inflated cost rates. Further, the state water board does not adequately track the penalty amounts it receives from penalty actions and, contrary to legislative intent, over the past five fiscal years it deposited fines totaling \$374,000 into an incorrect account. Additionally, due to a significant data entry backlog and regional water boards' inconsistent use, the primary database the state water board uses to track water quality certifications does not provide the public and other stakeholders access to reliable certification program information as state law requires.

Finally, although certain of Caltrans' concerns about the administration of the certification program are valid, it was unable to support that its costs of complying with the program have increased.

Respectfully submitted,



ELAINE M. HOWLE, CPA  
State Auditor

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## Summary

### Results in Brief

The Federal Water Pollution Control Act, commonly referred to as the *clean water act*, includes requirements designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters. California's Porter-Cologne Water Quality Control Act (water quality act) designates the State Water Resources Control Board (state water board) as the State's water pollution control agency for all purposes of the clean water act. Specifically, the water quality act authorizes the state water board to exercise any powers delegated to the State by the clean water act and authorizes it to make rules and regulations to carry out its powers and duties, including setting state policy for water quality control. The water quality act recognizes that regional differences such as precipitation and topography affect how water quality control should be administered. Under the water quality act, nine regional water quality control boards (regional water boards) coordinate among themselves and with the state water board to protect water quality. Although the regional water boards exercise some autonomy in protecting water quality within their regions, they must adhere to the state water board's regulations and policies.

This audit is of a specific water quality control program—the water quality certification program (certification program). The certification program addresses Section 401 of the clean water act, which requires any entity applying for a federal license or permit to conduct any activity that may result in a discharge of pollutants into federal waters to obtain a water quality certification from the state in which the activity is to occur. For example, performing an activity that requires the dredging or filling of rivers, streams, or wetlands (dredge and fill projects) requires a water quality certification. Typical dredge and fill projects include building bridges, widening roadways, and stabilizing roadway slopes and embankments.<sup>1</sup> When the State issues a water quality certification for a project, it is certifying that the project will comply with state and federal water quality laws and regulations. In fact, the federal government cannot issue a license or permit for these activities unless the state where the activities will occur has issued a water quality certification or waived its right to do so.

This audit focuses on the water quality certifications that the California Department of Transportation (Caltrans) has obtained. As the state agency responsible for highway, bridge, and rail

<sup>1</sup> Other construction projects may also require water quality certifications, including building nuclear power plants or hydroelectric projects; however, this audit focuses on dredge and fill projects related to Caltrans.

### Audit Highlights . . .

*Our audit of the State Water Resources Control Board's (state water board) and the regional water quality control boards' (regional water boards) administration of the water quality certification program (certification program) as it relates to the California Department of Transportation (Caltrans) highlighted the following:*

- » *The water quality certifications issued during fiscal years 2007–08 through 2011–12 by the state water board and three regional water boards we reviewed generally complied with federal and state law.*
- » *The state water board needs to improve consistency in the certification program—it and the regional water boards use different application forms and do not ensure that applications are processed within required time frames.*
- » *The state water board needs to address inconsistent monitoring practices at the regional water boards.*
  - *The regional water boards do not adequately ensure that water quality certification-holders adhere to the conditions of their water quality certifications.*
- » *The state water board needs to improve its administration practices.*
  - *It directed the regional water boards to use a staff cost rate that does not reasonably reflect the costs of the certification program.*
  - *It does not adequately track the penalty amounts it receives from water quality certification enforcement activities.*

*continued on next page . . .*

- *The database it uses to track water quality certifications has a backlog of over 1,600 documents for certifications and is not used consistently by the regional water boards.*

- » *Caltrans asserted that costs of complying with the certification program have increased. However, it was unable to support this claim because it does not track these costs.*

transportation planning, construction, and maintenance, Caltrans is required to obtain water quality certifications for many of its projects. For example, if a highway embankment near a water body becomes unstable, Caltrans may need to obtain a water quality certification in order to receive a federal permit that authorizes those repairs. From fiscal years 2007–08 through 2011–12, the water boards issued more than 300 water quality certifications to Caltrans.

In our review of four water boards—the state water board, the North Coast Regional Water Quality Control Board (North Coast), the Central Valley Regional Water Quality Control Board’s Redding Office, and the San Diego Regional Water Quality Control Board (San Diego)—we found that the water quality certifications they issued during fiscal years 2007–08 through 2011–12 generally complied with federal and state law. For example, these water boards did not exceed their authority when they added conditions to water quality certifications requiring water quality certification-holders (certification-holders) to protect water quality during construction.

However, the state water board could take additional actions to improve consistency in the certification program. For example, even though the requirements to apply for a water quality certification are the same throughout the State, the water boards use differing application forms for water quality certification, which unnecessarily burdens applicants. The length of the application forms at the state water board and the three regional water boards we visited range from five to 17 pages, as each requires a different level of detail. The state water board said it plans to implement a statewide electronic application form to address the inconsistencies among applications. Additionally, none of the water boards we visited consistently notify applicants regarding the completeness of their applications within 30 days as state laws and regulations require. Of the 41 projects we evaluated, the water boards did not send notifications for 15 within the required time frame—including three that were not sent at all. Although we could not determine whether the missed deadlines delayed the issuance of certifications, applicants such as Caltrans may not be aware that their application is incomplete or that they need to provide more information if they do not receive formal notification of their application status.

Moreover, the water boards have not consistently issued certifications within 60 days of deeming applications complete, which federal regulations require for water quality certifications that are a prerequisite to a dredge and fill permit. Of the 41 projects we reviewed, four certifications were issued more than 60 days after the water boards deemed the application complete. In one instance San Diego did not issue a certification to Caltrans

until 129 days after it received a complete application. These delays are the result of the water boards' misunderstandings about the program requirements. Further, one regional water board—North Coast—does not review the accuracy of application fees it collects from Caltrans. As a result, North Coast failed to collect \$18,000 from Caltrans for six of the nine application fees that we reviewed. The state water board expects regional water boards to review application fees but acknowledged that it has not specifically directed them to do so.

In evaluating other aspects of the certification program, we found that the state water board needs to assert more effective leadership to address inconsistent monitoring practices at the regional water boards, and it needs to improve its administration practices. Specifically, the regional water boards' inconsistent monitoring practices do not adequately ensure that certification-holders adhere to the conditions of their water quality certifications. As an example, although certifications often require the submission of periodic reports, the regional water boards generally do not track certification-holders' compliance with these requirements. Additionally, the staffing costs that the regional water boards include in penalty actions<sup>2</sup> are inaccurate and the regional water boards do not generally support those costs with sufficient documentation. The state water board's enforcement policy encourages the regional water boards to add staff enforcement costs into the penalties they assess, which include the time it takes for staff to validate and document violations and prepare penalty actions as well as to prepare for any necessary hearings. However, two of the three regional water boards could only substantiate staff enforcement costs for five of the 11 penalty actions they issued that included these costs over the past five fiscal years. The other regional water board did not take any penalty actions during this time. Further, the state water board has directed the regional water boards to use a staff cost rate that does not reasonably reflect the costs of the certification program, resulting in an overstatement of estimated staff enforcement costs of \$87,000 in one penalty action we reviewed. However, in this case the certification-holder negotiated a settlement so no overpayment occurred.

In reviewing other administration practices at the state water board, we found that it does not adequately track the penalty amounts it receives from water quality certification enforcement activities and, contrary to legislative intent, over the past five fiscal years it has deposited penalty amounts totaling \$374,000 into an incorrect account. Once we alerted the state water board to this oversight, it transferred the penalty amounts into the correct account.

<sup>2</sup> Penalty actions are fines assessed to certification-holders who violate the terms of their water quality certifications.

Caltrans indicated that working with the nine regional water boards is difficult because they have different ways of administering the certification program. Our review confirmed that inconsistencies exist in the water boards' application process and monitoring efforts, which leads to a perception of differing requirements among them. Caltrans also expressed concern that the regional water boards sometimes exceed their authority under state regulations by adding prescriptive best management practice requirements to water quality certifications. However, the regional water boards we visited use a consistent enforcement process for the certification program and the conditions they added to their water quality certifications did not exceed their authority. Caltrans also asserted that its costs to comply with requirements of the certification program have increased significantly over the last five years. Because it does not track these costs, Caltrans was unable to support its claim.

Finally, the primary database the state water board uses to track water quality certifications—the California Integrated Water Quality System (water quality database)—is incomplete. The reasons are twofold: the state water board has a backlog of over 1,600 documents for certifications that it has not entered into the system as of March 2013, and it has not done enough to ensure that the regional water boards consistently record their monitoring activities and other certification program information in the water quality database. As a result, the public and other stakeholders do not have access to reliable certification program information as the water quality act requires.

### **Recommendations**

The state water board should remind regional water boards of required application processing time frames and notifications and continue with its effort to adopt a single application form.

The state water board should direct North Coast as well as the other regional water boards to verify the accuracy of fees that applicants submit. Additionally, North Coast should take steps to collect the underpaid fees from Caltrans that we identified.

The state water board should direct regional water boards to more consistently monitor compliance with water quality certifications and use the water quality database to track their monitoring efforts.

If regional water boards continue to include staff enforcement costs in penalty actions, the state water board should require the systematic tracking of staff enforcement hours and documentation

of cost calculations. Further, it should revise the staff cost rate used in penalty action calculations to reflect actual staff and overhead costs for the certification program.

The state water board should maintain a regular accounting of fines collected on penalty actions.

If Caltrans believes that its costs related to compliance with the certification program are increasing, it should track those costs for a period of time and work with the state and regional water boards to resolve any cost concerns.

The state water board should resolve the backlog for the water quality database and ensure that the regional water boards enter all appropriate certification program information into the system.

#### **Agency Comments**

The California Environmental Protection Agency and state water board concurred with our findings and recommendations and stated that implementing the recommendations will result in a more accountable and transparent certification program. North Coast acknowledged that the report is consistent with our discussions. Finally, the Business, Transportation and Housing Agency and Caltrans agreed with our conclusions, and Caltrans stated that it recently established a committee to determine the most effective course of action to implement our recommendation.

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## Introduction

### Background

The Federal Water Pollution Control Act, commonly referred to as the *clean water act*, includes requirements designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters. According to Section 401 of the clean water act, any entity applying for a federal license or permit to conduct any activity that may result in a discharge of pollutants into federal waters must obtain a water quality certification from the state in which the activity is to occur. For example, performing an activity that requires the dredging or filling of rivers, streams, or wetlands (dredge and fill projects) requires a water quality certification.<sup>3</sup> Typical dredge and fill projects include building bridges, widening roadways, and stabilizing roadway slopes and embankments. When the State issues a water quality certification for a project, it is certifying that the project will comply with state and federal water quality laws and regulations. Once the State issues its certification, it is up to the applicable federal entity to decide whether to issue a federal license or permit allowing the project to proceed. The federal government cannot, however, issue a license or permit that requires a water quality certification until the state where the activity will occur has done so or the state has waived its right to certify.

### State Water Resources Control Board and Regional Water Quality Control Boards

The State Water Resources Control Board (state water board) is responsible for administering the clean water act, and California's Porter-Cologne Water Quality Control Act (water quality act), enacted in 1969, set up the statewide structure for water quality control. The water quality act designates the state water board as the water pollution control agency for all purposes stated in the clean water act, and it authorizes the state water board to exercise any powers that the act delegates to the State. Further, other sections of state law authorize the state water board to make rules and regulations that it deems advisable in carrying out its powers and duties. The state water board consists of five full-time members appointed by the governor for four-year terms.

<sup>3</sup> Other construction projects may also require water quality certifications, including building nuclear power plants or hydroelectric projects; however, this audit focuses on dredge and fill projects related to the California Department of Transportation (Caltrans).

In the water quality act, the Legislature also identified that the statewide program for water quality control could be most effectively administered regionally to take into account regional differences in precipitation, topography, population, recreation, agriculture, industry, and economic development, but within a framework of statewide coordination and policy. To facilitate this approach, nine regional water quality control boards (regional water boards) coordinate among themselves, along with the state water board and other state agencies, to protect water quality. Figure 1 shows the jurisdictions of the nine regional water boards. Each regional water board is composed of seven members who are appointed by the governor for four-year terms. The work of each regional water board is carried out by technical and administrative staff supervised by an executive officer.

The diversity of California's geography presents regional water boards with unique challenges to protect water quality within their jurisdictions. For example, the jurisdiction of the North Coast Regional Water Quality Control Board (North Coast) stretches from the Oregon border through Sonoma County with annual rainfall varying from 20 to 120 inches. Much of North Coast's work is concerned with the water quality impacts of construction, timber harvesting, and livestock grazing, as these activities can increase water temperatures and the amount of sediment and metals polluting the region's waters. North Coast adds conditions to water quality certifications to address these and other unique characteristics within its jurisdiction. The geographies of the other regional water boards' jurisdictions present similar challenges as they process their water quality certifications.

In addition to their other responsibilities, state law requires regional water boards to develop water quality control plans (basin plans), and to review them periodically. These basin plans reflect the unique water quality challenges facing each region. Federal law also directs states to review water quality standards, which are identified in the regional water boards' basin plans, at least every three years. Through this triennial process, regional water boards keep their basin plans current to ensure the protection of water quality for public, agricultural, and industrial uses, as well as recreational uses and the protection of fish and wildlife. State law requires regional water boards to hold a public hearing before adopting their basin plans or any periodic updates. Additionally, the state water board, the U.S. Environmental Protection Agency (where applicable), and the State's Office of Administrative Law each review and approve basin plans and amendments. Once these agencies approve the basin plans, they have the force of law and become a primary regulatory tool that regional water boards use to ensure water quality within their regions.

**Figure 1**  
Regional Water Quality Control Board Map



Source: State Water Resources Control Board.

Note: Two regional water quality control boards maintain offices in multiple locations: Central Valley has offices in Fresno, Rancho Cordova, and Redding, and Lahontan has offices in South Lake Tahoe and Victorville.

Although the regional water boards exercise some autonomy in protecting water quality within their regions, the regional water boards must adhere to the state water board's regulations and policies, and the water quality act allows the state water board to review many of the regional water boards' actions. Further, the state water board has budgetary authority over the regional water boards; it allocates their budgets, including their staffing levels. In creating this structure, the Legislature intended the state and regional water boards, collectively referred to as the *water boards*, to coordinate their respective activities to achieve a unified and effective water quality control program for the State.

### **The State's Water Quality Certification and Enforcement Process**

Both the state water board and the regional water boards have the authority to issue water quality certifications to persons or entities that require a federal license or permit to engage in activities that may impact water quality in the State. The state and regional water boards are also responsible for enforcing the terms of those certifications. Applicants for a water quality certification must submit a complete application and application fee to the appropriate water board. Typically they submit an application to the water board at the same time that they submit an application for a dredge and fill permit to the Army Corps of Engineers (army corps). For dredge and fill projects, the State's Permit Streamlining Act (permit act) and applicable federal regulations establish the time frame for the water boards to issue a certification. The permit act expedites the approval of these projects, while the federal regulations apply to water quality certifications that require an army corps permit for dredge and fill discharges. These requirements applied to all of the water quality certifications we reviewed.

If a water board's processing and review of the application will take more than 60 days, it may request additional time from the army corps or issue a *denial without prejudice*, which allows the applicant to resubmit an application for the same project. This type of denial usually occurs when an applicant has not supplied requested information or the project is complex and issues have not been resolved. A denial without prejudice is not a reflection on the project but rather a means to stop the clock until the applicant has provided the required information. Once the state or regional water board reviews the complete application and issues the water quality certification, the applicant may then obtain a permit from the army corps to conduct dredge and fill activities, after which it can start work on its project.

The water boards have the primary responsibility for enforcing the requirements of the water quality certifications. The water quality act grants the water boards the authority to enforce the water quality laws, regulations, policies, and plans to protect the groundwater and surface

waters of the State. According to the state water board's records, the water boards issued about 3,100 water quality certifications from fiscal year 2007–08 through fiscal year 2011–12, and they found 272 violations resulting in 204 enforcement actions. The total water quality certifications issued by the water boards includes 22 issued by the state water board, which is responsible for projects that cross two or more of the regional water boards' boundaries.<sup>4</sup> To help the regional water boards enforce water quality requirements in the most efficient, effective, and consistent manner, the state water board adopted the Water Quality Enforcement Policy (enforcement policy), which addresses actions that take place in response to a violation. The enforcement policy establishes a process for ranking enforcement priorities based on the actual or potential impact to water quality and for using progressive levels of enforcement, as necessary, to achieve compliance. The enforcement actions that may be taken by the water boards in response to a violation are listed in Figure 2 on the following page.

The water quality act allows the water boards to impose civil penalties to address, correct, and deter water quality violations. As seen in Figure 2 on the next page, the administrative civil liability is the highest level of administrative enforcement action that the water boards can take. The enforcement policy establishes a calculation methodology for administrative civil liability penalties with the intent to create a fair and consistent statewide approach to imposing fines for certification violations. A certification-holder may also file a petition with the state water board to challenge an administrative civil liability that it receives from a regional water board. In addition, upon receipt of a notice of administrative civil liability, the certification-holder may waive its right to a public hearing and pay the liability, settle the liability for less than the full amount, or appear at a board hearing to dispute the complaint.

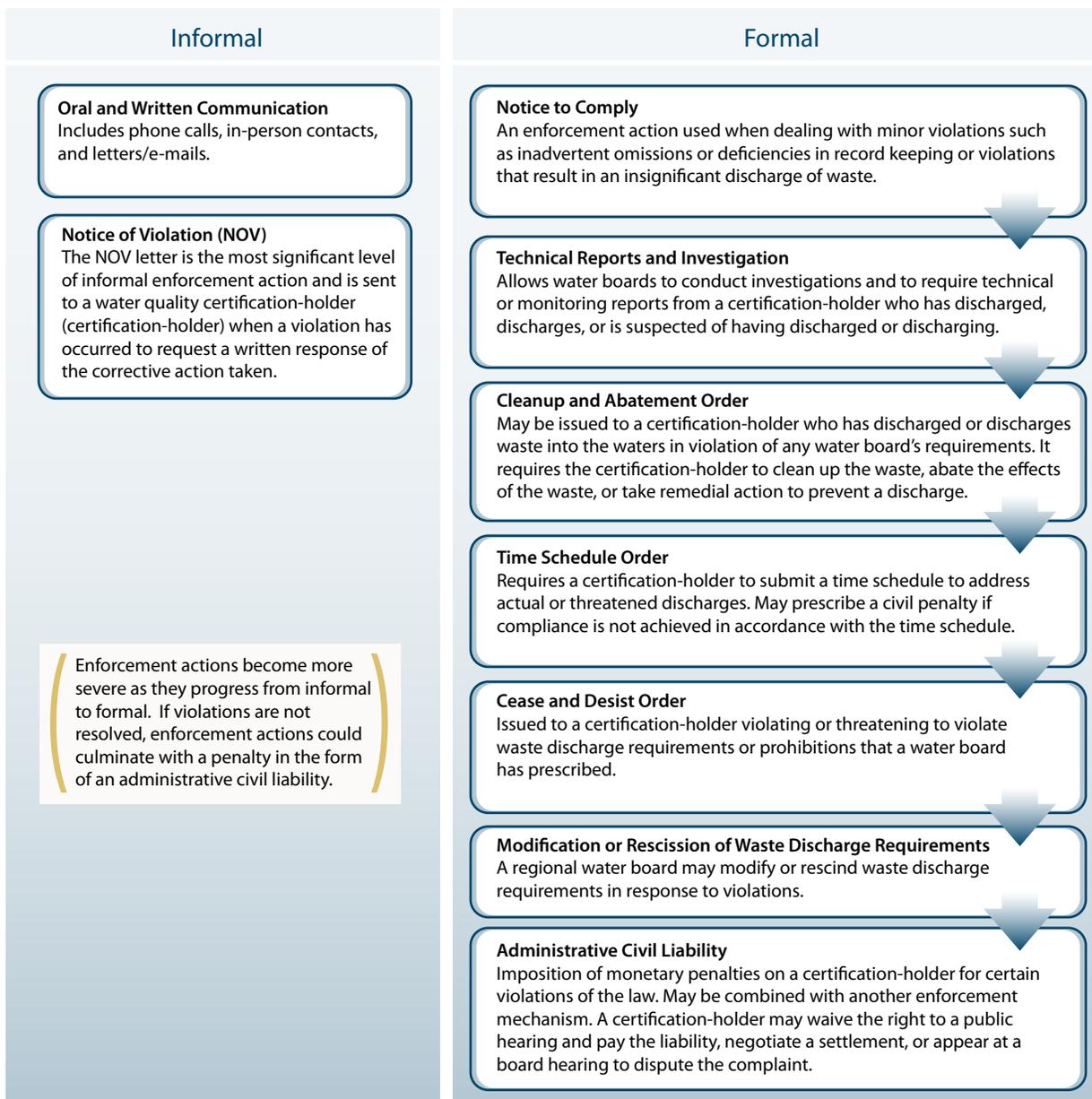
## Caltrans

Although our audit concerned the water boards in general, the Joint Legislative Audit Committee (audit committee) asked us to pay particular attention to the water quality certification process as it relates to Caltrans. As the state agency responsible for the design, construction, maintenance, and operation of the State's highway system, Caltrans is required to obtain water quality certifications for many of its projects. For example, depending on the proximity of a waterway, if a highway embankment

<sup>4</sup> The state water board recorded only seven of the 22 water quality certifications it issued in the California Integrated Water Quality System (water quality database), which is a database for tracking activities of the certification program and other state water board programs. As noted in Table 3 on page 16, we found that the water quality database was not sufficiently reliable due to a data entry backlog of documents related to water quality certifications, but we used this data as it was the best source available.

becomes unstable, Caltrans may need to obtain a water quality certification before it can receive a permit from the army corps to authorize repairs. Similarly, before it widens a bridge over a waterway, it would likely need a water quality certification and army corps approval in addition to other required environmental documents.

**Figure 2**  
Levels of Administrative Enforcement Options for the Water Quality Certification Program



Source: The State Water Resources Control Board's Water Quality Enforcement Policy, effective May 2010.

Note: Courts may also impose penalties for water quality violations.

Structurally, Caltrans’ operations are divided into 12 district offices covering the State. Each district has responsibility for a geographic area and is led by a district director who is authorized by state law to carry out responsibilities related to state highways within the district. Caltrans’ division of environmental analysis develops the environmental policies and procedures that are implemented at the 12 district offices. This division also oversees Caltrans’ environmental compliance activities, which include applying for and ensuring compliance with water quality requirements.

As shown in Table 1, the water boards issued more than 300 water quality certifications for Caltrans projects during fiscal year 2007–08 through 2011–12. According to the state water board’s data covering all of the water boards, Caltrans violated the conditions of its water quality certifications 87 times, which resulted in the regional water boards issuing 47 enforcement actions. However, in performing our testing, we did not restrict our evaluation to only Caltrans projects; we included other entities, when appropriate.

**Table 1**  
**Water Quality Certifications Issued to the California Department of Transportation**  
**Fiscal Years 2007–08 Through 2011–12**

ENTITY	WATER QUALITY CERTIFICATIONS ISSUED	VIOLATIONS	ENFORCEMENT ACTIONS	ADMINISTRATIVE CIVIL LIABILITIES ASSESSED
State Water Resources Control Board	4	1	0	0
<b>Regional Water Quality Control Boards</b>				
North Coast	91	61	31	5
San Francisco	25	2	1	0
Central Coast	14	2	1	0
Los Angeles	14	0	0	0
Central Valley	85	14	12	0
Lahontan	25	7	2	0
Colorado River	9	0	0	0
Santa Ana	27	0	0	0
San Diego	21	0	0	0
<b>Totals</b>	<b>315</b>	<b>87</b>	<b>47</b>	<b>5</b>

Source: The State Water Resources Control Board provided this information from its California Integrated Water Quality System (water quality database) as of November 7, 2012.

Note: Although this table provides a measure of the magnitude of the water quality certifications the state and regional water boards issued to the California Department of Transportation and other related actions these water boards have taken during fiscal years 2007–08 through 2011–12, it does not reflect all activity in the water quality certification program over this period. Table 3 on page 16 shows we determined that the data in the water quality database are not sufficiently reliable due to a data entry backlog of documents related to water quality certifications. However, we presented these data in the report because they represented the best source available.

## Scope and Methodology

The audit committee directed us to audit the state water board and the nine regional water boards' administration of the water quality certification process as it relates to Caltrans. Specifically, the audit committee directed us to address the objectives listed in Table 2.

**Table 2**  
**Audit Objectives and the Methods Used to Address Them**

AUDIT OBJECTIVE	METHOD
1 Review and evaluate the laws, rules, and regulations significant to the audit objectives.	Reviewed relevant laws, such as the Federal Water Pollution Control Act and California's Porter-Cologne Water Quality Control Act, as well as federal and state regulations.
2 Determine how the State Water Resources Control Board (state water board) ensures consistent practices across the regional water quality control boards (regional water boards) for making water quality certification decisions and for investigating and enforcing violations.	<ul style="list-style-type: none"> <li>• Based on information the state water board provided from its California Integrated Water Quality System (water quality database), we selected three regional water boards for review that had more significant water quality certification program (certification program) activity with the California Department of Transportation (Caltrans).</li> <li>• Interviewed staff of the state water board to understand how they administered the certification program.</li> <li>• Reviewed the state water board's policies and practices that help ensure consistency across the regional water boards.</li> <li>• Judgmentally selected 12 water quality certifications at each of the regional water boards we reviewed and five water quality certifications at the state water board to evaluate the water quality certification process, the monitoring process, and the enforcement process. Additionally, we evaluated consistency in these processes among the state water board and the regional water boards we visited.</li> </ul>
3 With regard to the best management practices reflected in a selection of water quality certifications, do the following: <ol style="list-style-type: none"> <li>a. For the state water board and a selection of regional water boards, determine whether the definition of best management practices is consistent with applicable laws, rules, and regulations.</li> <li>b. Determine how the state water board ensures that regional water boards use a consistent definition of best management practices.</li> </ol>	<ul style="list-style-type: none"> <li>• Interviewed staff to identify the definition of best management practices that the state water board and the selected regional water boards use.</li> <li>• Interviewed staff and obtained documentation to determine how the state water board addresses consistency in best management practices across the regional water boards.</li> <li>• Judgmentally selected three water quality certifications issued by the state water board and the regional water boards we visited to evaluate whether they exceeded their authority when specifying best management practices in water quality certifications.</li> </ul>
4 For a selection of water quality certifications related to Caltrans, determine the following: <ol style="list-style-type: none"> <li>a. Whether the regional water boards conducted the certification process in accordance with applicable laws, rules, and regulations.</li> <li>b. Whether the requirements or conditions in the certifications are clearly presented and consistent with applicable laws, rules, and regulations.</li> </ol>	<ul style="list-style-type: none"> <li>• Interviewed staff at the selected regional water boards to identify their processes for reviewing and approving applications for water quality certifications, as well as their processes for developing conditions to include in the water quality certifications they issue.</li> <li>• Reviewed three water quality certifications at each selected regional water board to determine if the conditions in the water quality certifications were clearly presented and consistent with applicable laws, rules, and regulations.</li> <li>• Judgmentally selected 12 water quality certifications at each of the regional water boards we reviewed and five water quality certifications at the state water board to evaluate whether they process applications for water quality certifications in accordance with applicable laws, rules, and regulations.</li> <li>• Reviewed the accuracy of application fees for two water quality certifications that Caltrans submitted at each selected region. We performed additional testing at the North Coast Regional Water Quality Control Board (North Coast) because we found that it was not reviewing the accuracy of Caltrans' application fees.</li> </ul>

AUDIT OBJECTIVE	METHOD
<p>5 For a selection of enforcement actions against Caltrans related to violations of water quality certifications, determine whether the regional water boards complied with applicable laws, rules, and regulations when doing the following:</p> <ol style="list-style-type: none"> <li>a. Gathering evidence and conducting investigations.</li> <li>b. Conducting hearings.</li> <li>c. Imposing civil administrative penalties or taking other enforcement actions.</li> </ol>	<ul style="list-style-type: none"> <li>• Interviewed staff at each selected regional water board to identify how they prepare for adjudicatory hearings and determine if they had adequate practices in place to train staff and board members for hearings.</li> <li>• Interviewed state water board legal counsel and enforcement staff to identify the guidance they provide to the regional water boards regarding water quality enforcement.</li> <li>• Reviewed case files and the water quality database to select enforcement actions for review and to determine whether the selected regional water boards adhered to requirements when enforcing water quality violations.</li> </ul>
<p>6 Determine whether the regional water boards have adequate practices in place to avoid conflicts of interest, including practices to adequately address conflicts of interest that were identified.</p>	<ul style="list-style-type: none"> <li>• Determined if the selected regional water boards had adequate practices in place to train staff and board members to maintain separation of functions and adhere to communication requirements during hearings. Our review found that the state water board provided sufficient training and guidance to the regional water boards' members and staff that would allow them to comply with these requirements.</li> <li>• Interviewed state water board legal and enforcement staff to learn about their roles in the hearing process.</li> <li>• Reviewed case files and the water quality database to identify enforcement actions issued by the selected regional water boards and determine whether a hearing had been held. Only North Coast held a hearing related to a certification program violation by Caltrans during our audit period, in June 2011, related to Caltrans' Confusion Hill project. Our review of North Coast's practices as well as its procedures for the hearing on the Confusion Hill project did not identify any irregularities.</li> </ul>
<p>7 For the most recent five years, quantify the cost of staff at a selection of regional water boards and at Caltrans for participating in the water quality certification enforcement process.</p>	<ul style="list-style-type: none"> <li>• Interviewed staff of selected regional water boards and Caltrans to determine how they track staff enforcement costs associated with water quality certifications.</li> <li>• Reviewed documentation to evaluate the state water board's and selected regional water boards' processes to calculate staff enforcement costs that they include in penalty actions, which are fines assessed to water quality certification-holders who violate the terms of their water quality certifications.</li> </ul>
<p>8 For the most recent five years, quantify fines collected by the regional water boards based on Caltrans' water quality certification violations and determine whether a selection of those fines have been used in accordance with state requirements, including any required deposits to the State's General Fund.</p>	<ul style="list-style-type: none"> <li>• Interviewed staff and reviewed accounting records to determine how the state water board accounts for penalty amounts it receives for violations of water quality certifications.</li> <li>• Reviewed receipts and expenditure transactions to quantify the total penalty amounts collected for the water quality certification program from July 2007 through June 2012 and verify that these penalty amounts were expended for allowable purposes. We did not identify any deposits to the State's General Fund during this period.</li> </ul>
<p>9 Review and assess any other issues that are significant to the state water board or the regional water boards' certification process.</p>	<p>As detailed in Table 3 on the following page, we identified data reliability issues related to the state water board's water quality database.</p>

Sources: The California State Auditor's analysis of Joint Legislative Audit Committee audit request number 2012-120 and the analysis of information and documentation identified in the table column titled *Method*.

### Assessment of Data Reliability

In performing this audit, we obtained electronic data files extracted from the information system listed in Table 3. The U.S. Government Accountability Office, whose standards we follow, requires us to assess the sufficiency and appropriateness of computer-processed information that is used to support findings, conclusions, or recommendations. Table 3 shows the results of this analysis.

**Table 3**  
**Methods of Assessing Data Reliability**

INFORMATION SYSTEM	PURPOSE	METHODS AND RESULTS	CONCLUSION
State Water Resources Control Board (state water board)  California Integrated Water Quality System (water quality database)  Data for fiscal years 2007–08 through 2011–12	<ul style="list-style-type: none"> <li>To identify the number of water quality certifications, violations, enforcement actions, and penalty actions issued to Caltrans for the period July 2007 through June 2012.</li> <li>To identify violations and enforcement actions related to water quality certifications.</li> </ul>	We obtained the water quality database but did not analyze it because after interviewing staff at the state water board we learned that, due to a data entry backlog, the water quality database does not contain all water quality certifications and related documents. For further information on this backlog, see Chapter 2.	Not sufficiently reliable for the purposes of this audit.  Nevertheless, we presented these data as compiled by the state water board because they represent the best available data source for statewide information.

Sources: California State Auditor's analysis of various documents and interviews with state water board staff.

## Chapter 1

### **ALTHOUGH THE STATE'S WATER QUALITY CERTIFICATIONS COMPLY WITH LEGAL REQUIREMENTS, THE STATE WATER RESOURCES CONTROL BOARD HAS NOT ENSURED A CONSISTENT APPLICATION PROCESS**

#### **Chapter Summary**

The State Water Resources Control Board (state water board) works with the nine regional water quality control boards (regional water boards) to administer the water quality certification program (certification program). We reviewed the water quality certifications that three regional water boards—North Coast, Central Valley's Redding Office (Redding), and San Diego—issued and others that the state water board issued during fiscal years 2007–08 through 2011–12. As discussed in the Introduction, water quality certifications impose conditions on activities that may result in a discharge of pollutants into waters of the United States, and the certifications are designed to ensure that activities comply with state and federal water quality laws and regulations. Our review of a selection of water quality certifications found that they complied with applicable laws, rules, and regulations. We also found that the regional water boards and the state water board—collectively referred to as the *water boards*—did not exceed their authority when they added best management practices as conditions to their certifications.

However, although the state water board has broad authority to ensure that the regional water boards employ consistent practices when reviewing and issuing applications, it has not fully exercised its authority to do so. Because the state water board has not provided sufficient guidance for consistent practices, the water boards we reviewed have not followed a consistent process or complied with laws and regulations when reviewing and issuing certifications. Specifically, the three regional water boards had differing interpretations of the legal requirements to review and approve water quality certifications for the dredging and filling of rivers, streams, or wetlands (dredge and fill projects) within certain time limits. We also found that each of the water boards uses a different application form, which unnecessarily burdens applicants. Finally, North Coast does not consistently review the accuracy of the application fees it receives from the California Department of Transportation (Caltrans); as a result, it failed to collect \$18,000 for six of nine Caltrans application fees we reviewed.

## State and Regional Water Boards' Water Quality Certifications Generally Meet Applicable Requirements

To ensure that activities meet each region's water quality standards, state regulations allow the water boards to place conditions into the water quality certifications that they issue. Entities must adhere to these conditions as they conduct their activities or face potential enforcement actions such as penalties for noncompliance. We reviewed the conditions of 12 water quality certifications issued by each of the three regional water boards we visited and five water quality certifications issued by the state water board. The number of conditions the water boards added to these water quality certifications ranged from 16 to 62, depending on project-specific issues or risks.

The conditions that the regional water boards included in the water quality certifications we reviewed complied with applicable laws, rules, and regulations. Each of the reviewed water boards included three standard conditions as state regulations require. We also found that the water boards did not exceed their authority when

### Typical Best Management Practices to Protect Water Quality

- Waste management
- Erosion and sediment control
- Preserving existing vegetation
- Soil stabilization

Sources: Applications for water quality certifications reviewed at the water boards we visited.

they added best management practices to their water quality certifications. Federal regulations require water boards to provide reasonable assurance that any activity they certify will not violate applicable water quality standards. To this end, the state water board's regulations require applicants to identify in their water quality certification application the best management practices they will use to avoid, minimize, or compensate for the loss of or significant adverse impacts to beneficial uses of the water. The text box provides examples of typical best management practices.

According to state law, water boards cannot specify the design, location, type of construction, or particular manner in which a water quality certification-holder (certification-holder) complies with water quality requirements. This means the water boards cannot be overly prescriptive when specifying the methods certification-holders must take to protect water quality. For example, a water board could not require a certification-holder to use a specific brand of material to contain potential spills or other pollution discharges. We found that the water boards we visited did not exceed their authority when adding conditions related to best management practices to the water quality certifications they issued. Specifically, we reviewed three water quality certifications at each water board and found the conditions were consistent with state law, as they were related to the protection of water quality and were not overly prescriptive. Similarly, in our review

of other conditions that the regional water boards added to their certifications, we did not identify any that exceeded the water boards' authority.

Further, the water boards we reviewed have a similar understanding of best management practices and their processes for reviewing these practices are relatively consistent. The term *best management practices* is defined for purposes of other, related aspects of the Federal Water Pollution Control Act, commonly referred to as the *clean water act* to mean schedules of activities, prohibition of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters. It is our understanding that the water boards generally apply this definition in the context of water quality certifications as well. Although this federal regulation generally describes best management practices and the objectives they are designed to achieve, the regulations do not prescribe the specific best management practices for any particular situation.

The water boards' implementation of best management practices is also similar to the way Caltrans implements them: using any program, technology, process, operating method, measure, or device that controls, prevents, removes, or reduces pollution. Additionally, each water board's process for issuing water quality certifications includes reviewing environmental documents, project maps, and photographs as applicable to evaluate the best management practices that applicants propose. Further, each water board added conditions related to best management practices to their water quality certifications to help prevent the violation of water quality standards. Many of the conditions they added correspond to Caltrans' best management practices manual, which it created to provide guidance to its staff and contractors. The water boards also required erosion control practices, appropriate storage of construction materials to minimize pollution from runoff, and measures to prevent fuel and petroleum spills.

### **The State Water Board Has Not Adequately Ensured That the Regional Water Boards Follow a Consistent Process or Comply With Regulations When Issuing Water Quality Certifications**

Although the state water board has taken some actions to ensure statewide consistency in the certification process, it needs to do more. For example, several issues within the certification program still need to be addressed, such as differing interpretations of application processing time frames, which lead to applicants not being appropriately notified when the regional water board has approved their applications, and inconsistencies in the regional water boards' application forms, which make the application

process unnecessarily confusing and burdensome. The state water board has acknowledged it can do more to enhance consistency in these and other areas of the certification program, and it is in the process of implementing several changes to improve its effectiveness.

### ***The State Water Board Has Taken Limited Actions to Ensure Consistency in the Certification Process***

As discussed in the Introduction, although the regional water boards exercise some autonomy in protecting water quality within their regions, the state water board has budgetary authority over them, and they must adhere to the state water board's regulations and policies. California's Porter-Cologne Water Quality Control Act designates the state water board as the water pollution control agency for all purposes of the clean water act, and it authorizes the state water board to make rules and regulations that it deems advisable in carrying out its powers and duties. In creating this structure, the Legislature intended for the state and regional water boards, collectively referred to as the *water boards*, to coordinate their respective activities to achieve a unified and effective water quality control program for the State.

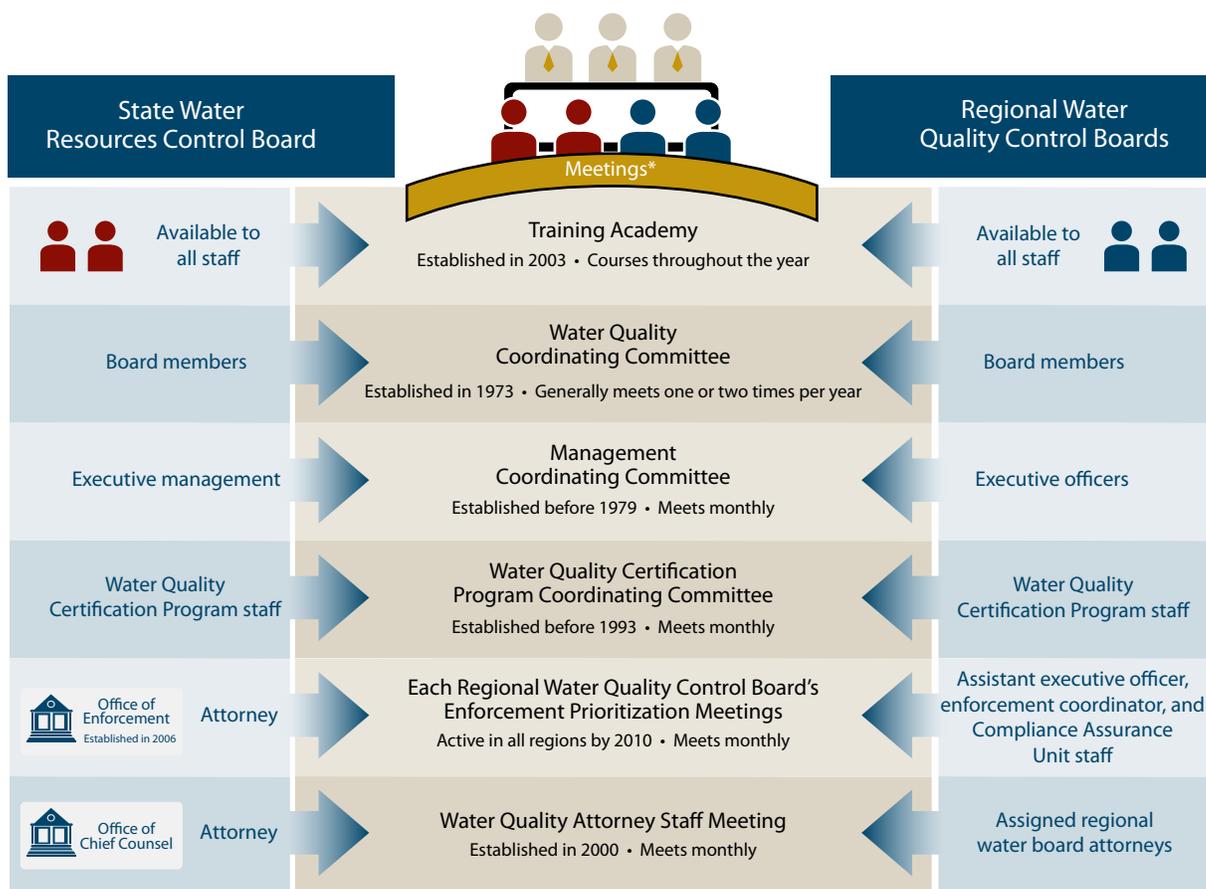
Under its authority to regulate the activities of the regional water boards, the state water board has taken certain actions to ensure consistency in the certification process. As an example, it has adopted regulations to increase consistency in the certification program's application process. Specifically, in 2000 the state water board specified the contents of a complete application for a water quality certification, the process for filing the application form, and the actions the water boards can take after reviewing the application.

Further, the state water board has implemented an information sharing network that can assist it and the regional water boards in coordinating their respective activities. As shown in Figure 3, committees, meetings, and training sessions allow the water boards to exchange information and ideas about such things as developing basin plans; adopting water quality control policies; setting priorities; and other aspects of administering their many programs, including the certification program. In a recent example, certification program staff discussed the differing formats of water quality certification templates across the regional water boards at an October 2012 Water Quality Certification Program Coordinating Committee meeting. In another recent example, the state water board's Training Academy provided certification program staff with an overview of basin plans and the establishment of water quality objectives in August 2012. Because staff from all water boards

***The state water board has adopted regulations to increase consistency in the certification program's application process.***

participate in these information sharing meetings, the meetings provide a venue for discussing how to improve consistency in the certification program.

**Figure 3**  
State and Regional Water Boards' Coordination Activities



Sources: Meeting agendas and other documents obtained from the State Water Resources Control Board (state water board).  
\* Dates established and frequency of meetings provided by the state water board's deputy director of administration and chief counsel.

However, the state water board has acknowledged it can do more to enhance consistency in certain areas of the certification program. Specifically, we found inconsistencies in the regional water boards' interpretation of application processing time frames, their application forms, and their review of application fees. To address the different understandings of these timelines among the water boards, the chief counsel for the state water board issued a memo in May 2013 to clarify required time frames within the application process. Further, the state water board plans to implement a statewide electronic application form for its and the regional water

boards' use, but as of April 2013 it is assessing how to fund the project. As applicable, we include additional perspective from the state water board in the sections that follow.

### ***Some Regional Water Boards Do Not Comply With Application Processing Time Frames***

The water boards must review and determine whether to approve applications for water quality certifications within certain time limits established by both state and federal regulations and by the Permit Streamlining Act (permit act), which is intended to expedite the approval of certification applications. However, the three regional water boards we reviewed had differing interpretations of these requirements and often missed or did not act on these time requirements. State regulations and the permit act direct the water boards to notify an applicant in writing that its application is complete or incomplete within 30 days of receipt, as shown in Figure 4. In addition, when the applicant resubmits an incomplete application with additional information, a new 30-day period begins, during which the water boards must again determine the completeness of the application. The permit act adds that the application is considered complete if the water board fails to make a written determination of completeness within either of the 30-day periods. If this occurs, the water board has lost the opportunity to consider the completeness of the application and to require that the applicant submit additional information.

***None of the water boards we visited consistently notified applicants regarding the completeness of their applications within the required 30 days.***

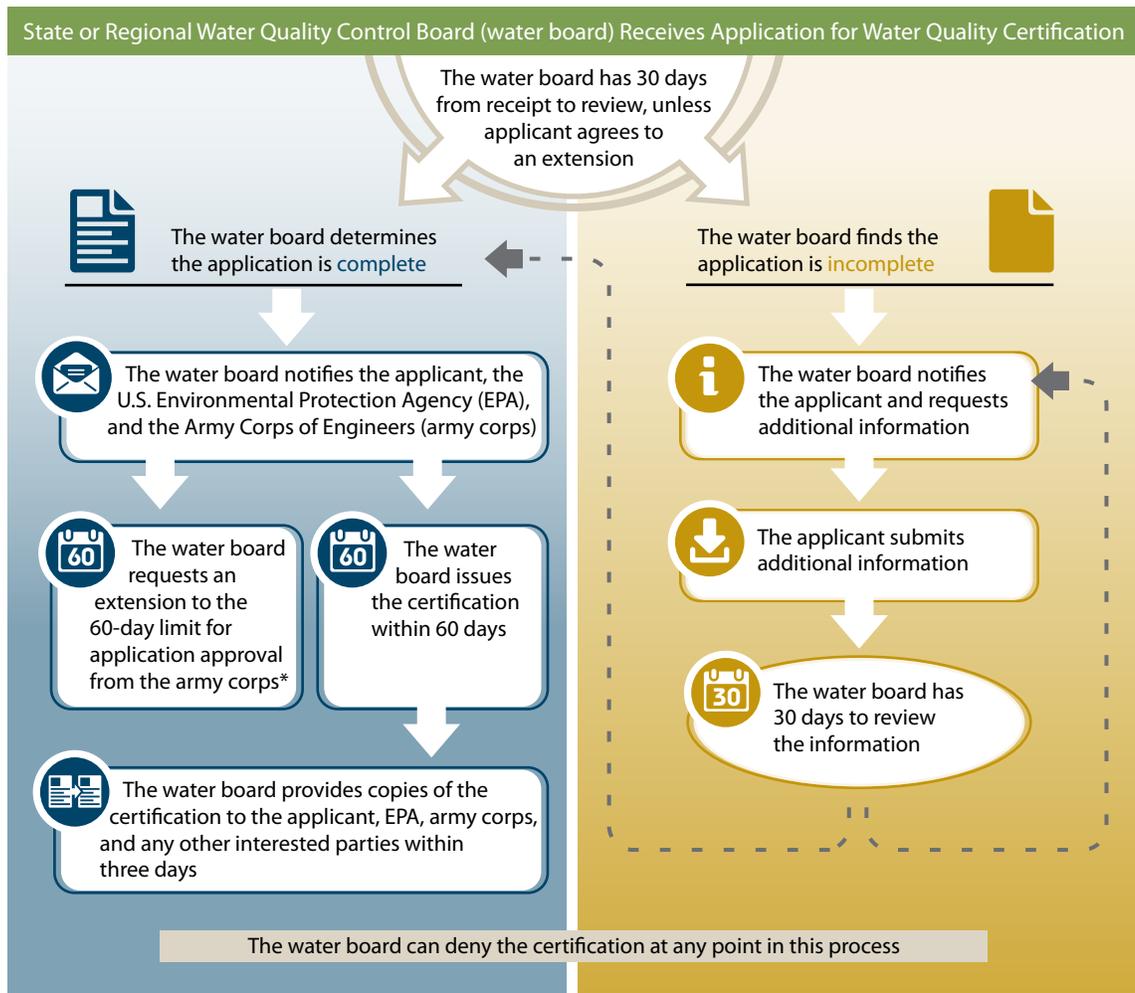
At the first stage of the application process, none of the water boards we visited consistently notified applicants regarding the completeness of their applications within the required 30 days. Of the 41 projects we evaluated, the water boards did not send notifications to applicants for 15 applications within the required time frame—including three that were not sent at all.<sup>5</sup> Only San Diego, which missed the 30-day notification deadline for two applications, acknowledged that the two applications were complete through operation of law.<sup>6</sup> Redding indicated that it was aware of this time requirement but was unable to meet the deadline in its instances of late notifications because of resource constraints. North Coast exceeded the 30-day deadline for two of the applications we reviewed, and it stated that it may have contacted the applicants by phone to notify them that their applications were

<sup>5</sup> The on-time notifications included applications that were subject to extensions agreed to by North Coast and Caltrans, as allowed by the permit act. The chief of Caltrans' north region environmental planning section indicated that in lieu of a formal 30-day written notice, North Coast and Caltrans hold monthly phone conferences to discuss any issues with the certification applications.

<sup>6</sup> In this case, *operation of law* is an approval that occurs automatically, as existing law states the approval will occur after a specified time period.

incomplete but had not sent any written notifications. According to the permit act, these 15 applications should have been considered complete as a result of the water boards' failure to notify applicants as to the status of their applications. Although the applications were complete through operation of law, other than San Diego, the water boards continued with their processing of the applications as if the applications were not complete, which may have delayed the issuance of these certifications.

**Figure 4**  
General Time Requirements for Water Quality Certifications for Army Corps of Engineers Dredge and Fill Permits



Sources: Federal regulations, California regulations, and California Government Code.

\* If the army corps extends the 60-day limit for a water board to issue a water quality certification and if the water board is responsible for the project's California Environmental Quality Act (CEQA) approval, the certification must be issued within 180 days of the application being determined complete or within 180 days of CEQA approval. If the water board is not responsible for CEQA approval, the certification must be issued within one year of the application being determined complete.

***The water boards did not send notices of completeness for 17 of the 26 projects for which they had determined that the original application was incomplete.***

We also found that not only did the water boards miss the 30-day deadline to send initial notices of completeness, but none consistently sent required notifications when they subsequently found that resubmitted applications were complete. The water boards did not send this notice for 17 of the 26 projects for which they had determined that the original application was incomplete. Redding and the state water board indicated they were unaware of this requirement. Although North Coast and San Diego knew of this second 30-day limit for resubmitted applications and have incorporated this deadline into their application processing flow charts, they also failed to notify applicants that their applications were complete after the submission of additional information for two and four projects, respectively. Because the water boards did not notify the applicants of the status of these 17 applications, we were unable to determine if the water boards issued the certifications on time, or if they delayed the application review process. Additionally, applicants may not be aware if their application is complete or if they need to provide more information if they do not receive formal notification of their application status.

Once a water board deems an application complete, applicable federal regulations require it to issue or deny a water quality certification within 60 days. However, federal regulations allow the Army Corps of Engineers (army corps) to extend this time frame. Otherwise, if a water board fails to take action on a certification within 60 days, federal regulations deem that a waiver of the certification requirements has occurred. In addition, a water board may deny an application at any point, which allows the applicant to withdraw from the review process and resubmit an application.

Of the 41 projects we reviewed, four certifications were issued more than 60 days after the water boards determined that the related application was complete. In one instance, San Diego did not issue a certification to Caltrans until 129 days after receipt of a complete application. Under applicable federal regulations, an extension of the 60-day period can occur if the army corps determines a longer period is reasonable. However, if an extension is not granted, a water board may have waived its authority to impose conditions in a water quality certification for the project. According to federal regulations, the requirement for Caltrans to obtain a water quality certification should have been waived. Instead, each of these projects was delayed while the water boards finished their review. Further, we were unable to determine whether certifications for 20 of the remaining projects were issued within the 60-day deadline because the water boards did not send notices of completeness for these projects.

These instances of noncompliance can be largely attributed to the water boards' misunderstanding of application processing requirements. The state water board provides program business rules on its Web site and issued a memo in 1989 that correctly identifies application processing requirements. Further, each water board we reviewed created either informal internal written procedures or flow charts to provide guidance to their staff. However, these informal documents indicate that the regional water boards have different understandings of the requirements. For example, North Coast's flow chart does not provide the 60-day deadline by which staff must issue a certification when the related federal permit is for a dredge and fill activity, while the only deadline mentioned in Redding's internal certification application procedures is the initial 30-day period to provide notice of an incomplete application. In addition, the only deadline mentioned in the state water board's flow chart is the 60-day deadline. In contrast, San Diego's flow chart includes all the required deadlines.

Further, our review of these documents and conversations with staff at the regional water boards revealed that each has a different understanding of which time frames apply to them. For example, San Diego, the state water board, and Redding staff understand they must approve or deny a certification within 60 days of the application being complete or they will have waived their right to certify. However, North Coast staff believes they have 180 days to take action on a certification once the application is complete. As noted previously, to address the different understandings of these timelines among the water boards, the chief counsel for the state water board issued a memo in May 2013 to clarify required time frames within the application process.

### ***Regional Water Boards Do Not Always Provide Federal Agencies With Required Notifications***

Although state regulations require the water boards to notify federal agencies at certain points in the water quality application process, we found that they did not always do so. Under state regulations, the water boards must notify the army corps and U.S. Environmental Protection Agency (EPA) in writing within 30 days of having received a complete water quality application. Despite this requirement, the water boards did not notify one or both of these federal agencies of a complete application for 37 of the 41 projects we reviewed, as shown in Table 4 on the following page. In fact, Redding, San Diego, and the state water board failed to send notifications to one or both of the federal agencies of complete applications for every one of the projects we reviewed. All three of these water boards stated that they were unaware of the requirement to send formal notices of complete applications

***Redding, San Diego, and the state water board failed to send notifications to one or both of the federal agencies of complete applications for every one of the projects we reviewed.***

to these agencies. In addition, North Coast acknowledged that its process to notify the federal agencies of a complete application has been less than consistent; however, these federal agencies have now subscribed to its electronic mailing list of interested parties who are notified of complete water quality applications.

**Table 4**  
**Compliance With Notification Requirements to Federal Agencies**

ENTITY	PROJECTS REVIEWED	NO NOTIFICATION OF A COMPLETE APPLICATION SENT TO ONE OR BOTH FEDERAL AGENCIES*	NO CERTIFICATION SENT TO ONE OR BOTH FEDERAL AGENCIES*
State Water Resources Control Board	5	5	0
<b>Regional Water Quality Control Boards</b>			
North Coast	12	8	3
Central Valley's Redding Office	12	12	1
San Diego	12	12	1
<b>Totals</b>	<b>41</b>	<b>37</b>	<b>5</b>

Sources: California State Auditor's review of water quality certification application files.

\* Federal agencies are the U.S. Environmental Protection Agency and the Army Corps of Engineers.

Additionally, at the next major step in the process, water boards must send copies of water quality certifications to the army corps and the EPA within three days of their issuance. Our review found that the water boards were more diligent in meeting this requirement, sending copies of water quality certifications to the army corps and the EPA for 36 of the 41 projects we reviewed, as shown in Table 4. North Coast, which did not send certifications for three of these projects, indicated that although its former practice was to send the federal agencies a copy when the certifications were issued, it has not done so consistently. However, both federal agencies now subscribe to North Coast's electronic mailing list and will receive a copy of water quality certifications for every project. For the remaining two instances, the regional water boards involved—Redding and San Diego—both explained that they did not send the required copies because they erroneously excluded the federal agencies from their mailing lists.

When the regional water boards fail to notify federal agencies that they have received complete applications or issued certifications, they impede the ability of those agencies to perform important oversight functions. The army corps can only issue a permit to an applicant once a water board has issued a water quality certification or waived the certification requirements. According to the army corps, the notification of a complete application alerts it

that a project is in the process of being certified to obtain a permit. The army corps also uses this notification to verify whether the applicant has applied for a dredge and fill permit. Further, if the army corps is not provided with a copy of the certification, it may not know when it can issue the permit. Also, when the EPA receives notification of a complete application, it is alerted to the fact that a project is in the certification process and that it may begin working with the army corps so that it can review and comment during the permit process.

### ***Each Regional Water Board Uses a Different Water Quality Certification Application Form***

Although state regulations are specific about what information the water boards should request for a water quality certification application, the water boards we reviewed use differing application forms and in some cases request information that is helpful for their review but is beyond what state regulations require. If the water boards do not receive all of the contents of a complete application as state regulations describe, the water board has 30 days in which it can determine that the application is incomplete and require the applicant to submit additional information. However, regulations also state that once a water board determines that an application is complete, it may request supplemental information from the applicant when determining whether to issue a certification.

Each of the water boards' application forms that we reviewed direct the applicant to submit information that state regulations require, as shown in Table 5 on the following page, although the format and order in which it is requested are different on each application. For example, all four applications ask for applicant information on the first page of the form, followed by a project description. However, the order in which the remaining required information is requested differs for each application. For example, the state water board and Redding's applications each include a section that asks for the names and types of the water bodies that the project will impact along with the estimated amount of materials that may be discharged into those water bodies. North Coast's application requests this information in one section but in more detail, while San Diego's application requests this information in two separate sections. Finally, each of the four applications requests specific additional information about the applicant's California Environmental Quality Act documents. Although regulations only require the applicant to provide a copy of these documents, it is likely that this additional information is helpful to the water boards reviewing the application.

*The water boards we reviewed use differing application forms and in some cases request information that is helpful for their review but is beyond what state regulations require.*

**Table 5**  
**Overview of Amount of Detail and Types of Information Requested in Application Forms for Four California Water Boards**

	REGIONAL WATER QUALITY CONTROL BOARD			
	STATE WATER RESOURCES CONTROL BOARD	CENTRAL VALLEY'S REDDING OFFICE	SAN DIEGO	NORTH COAST
<b>Information Required by California Regulations</b>				
Applicant information	Yes	Yes	Yes	Yes
Project description	Yes	Yes	Yes	Yes
Types/names of impacted water bodies	Yes	Yes	Yes	Yes
Project location	Yes	Yes	Yes	Yes
Copy of California Environmental Quality Act (CEQA) documents	Yes	Yes	Yes	Yes
Federal licenses/permits/agreements	Yes	Yes	Yes	Yes
Proposed mitigation activities	Yes	Yes	Yes	Yes
State/local licenses/permits/agreements	Yes	Yes	Yes	Yes
Description of best management practices	Yes	Yes	Yes	Yes
Estimated impacts on water bodies	Yes	Yes	Yes	Yes
Past/future proposals for related projects	Yes	Yes	Yes	Yes
<b>Additional Requested Information</b>				
Identification of land ownership	No	No	Yes	No
Detailed project plan	No	No	No	Yes
State or federal endangered species impacted by the project	Yes	Yes	Yes	Yes
CEQA information	Yes	Yes	Yes	Yes
Beneficial uses of affected water bodies	No	No	No	Yes
Strategies for low-impact development	No	No	No	Yes
Methods of waste disposal	No	No	No	Yes
<b>Attachments Included</b>				
Project plan checklist	No	No	No	Yes
Stream and riparian mitigation checklist	No	No	No	Yes
Wetland mitigation checklist	No	No	No	Yes
Storm water and low-impact development resource listing	No	No	No	Yes
<b>Other</b>				
Length of application (in pages)	5	5	13	17
Fee on application is correct?	No	Yes	Yes	Yes
Required signatures	Applicant (or agent)	Applicant (or agent)	Only applicant	Applicant (or agent) and construction oversight manager must sign

Source: California State Auditor's review of water quality certification applications obtained at each entity shown. The table displays most but not all of the information that each application requests.

Note: Lighter shaded areas indicate differences among the applications in format and level of detail required.

As Table 5 shows, North Coast requests more information in its application than the other three water boards, such as the methods the applicant proposes to use for disposing of waste. Additionally, North Coast's application form includes eight pages of attachments, three of which are checklists to guide the applicant in understanding what information to include in the application. For example, North Coast's wetland mitigation checklist appendix suggests that the applicant submit an implementation plan that includes a rationale to successfully mitigate the project's impact, including a proposed vegetation planting plan that describes the species of vegetation, planting dates, and density of plantings. We asked the state water board and the three regional water boards if any of the differences in the amount of information they request were due to differences in the regions' basin plans.<sup>7</sup> Redding and the state water board indicated that there is nothing in their applications that requests information specific to the basin plans, while North Coast and San Diego identified a few sections specific to their basin plans.

To further illustrate differences in the applications, the length of the applications ranges from five to 17 pages, giving the perception that the shorter applications request less information than the longer applications. In addition, the state water board's application includes an outdated fee amount, which increases the risk of underpayments by applicants, and North Coast requests signatures on the application of the applicant or its agent and the construction oversight manager. Although some minor differences between the applications are due to differences in the regions' basin plans, we would expect the application forms for each water board to be very similar because the requirements for these applications are the same. However, the applications we reviewed give the perception that the requirements differ among water boards.

Many of Caltrans' 12 district offices work with more than one regional water board, and the location of a project might affect how much information a district office must compile and submit to obtain a water quality certification. For example, Caltrans district office 2, headquartered in Redding, includes parts of both Redding and North Coast, and may need to complete either the five-page form that Redding uses or the 17-page form for North Coast, depending on a project's location. According to Caltrans, completing different forms makes it more difficult and time-intensive, particularly for projects located in North Coast's region. North Coast believes its detailed application form is easier

*The length of the application forms range from five to 17 pages, giving the perception that the shorter applications request less information than the longer applications.*

<sup>7</sup> As discussed in the Introduction, state law requires each regional water board to develop a basin plan that reflects the unique water quality challenges within their respective regions. The basin plans have the force of law and are a primary regulatory tool that each regional water board uses to ensure water quality within their respective regions.

*The state water board plans to implement a statewide electronic application form to address inconsistency among the applications, improve project management, and facilitate electronic record keeping.*

for the applicant to understand, saves time on processing the application, and makes the applicant aware of the other laws and requirements. Further, North Coast asserted that after approving an application, it is more difficult to request more information. Nevertheless, by asking for more information than the other boards, North Coast is placing an additional burden on applicants.

According to the state water board's deputy director of administration, the state water board plans to implement a statewide electronic application form to address inconsistency among the applications, improve project management, and facilitate electronic record keeping. With the current use of paper application forms, the state water board is unable to systematically track information related to the application process. Under its new process, applicants would submit the statewide application form through the state water board's Web site, which would notify the applicable water board that it has received an application. The state water board implemented a pilot program last year and is currently testing the application system and form. According to the chief of the state water board's water quality certification unit (unit chief), when the state water board completes the pilot program in July 2013, it will prepare a feasibility study and request \$250,000 to implement the system. The unit chief estimated that the system will be fully implemented within a year after its approval, at which point the state water board will direct regional water boards and applicants to use it.

### **The North Coast Regional Water Quality Control Board Does Not Review Caltrans Application Fees for Accuracy**

Although regulations require that the applicant submit a correct application fee before the water board can issue a certification, North Coast does not ensure that Caltrans is doing so. Regulations establish application fee amounts for water quality certifications, which include a base fee that is updated periodically; currently the base fee is \$944. The remaining fee depends on the type of work and the effects on water in terms of the project's size and the materials discharged. The state water board maintains a spreadsheet on its Web site that an applicant can use to calculate the application fee. Because the application asks for information about the project's materials and size, the water boards can verify that the applicant submitted the correct fee amount.

Because of limited staffing and also because it has found that Caltrans had in the past submitted the correct fee amount, North Coast does not review the accuracy of the application fees that Caltrans submits. However, our review of nine application fees totaling nearly \$63,000 that Caltrans submitted to North Coast found that it underpaid almost \$18,000 on six projects and overpaid

more than \$900 on another project. The underpayment that we found for the six projects represents about 29 percent of the total fees paid on these nine projects.<sup>8</sup> North Coast indicated that it will attempt to collect the underpayments from Caltrans for any active projects, and that it will credit Caltrans for the overpayment. In contrast, staff at Redding and San Diego consistently check the accuracy of Caltrans' application fees as part of their application review process, and they maintain evidence of their fee recalculation in the project file. Our review of two application fees that Caltrans submitted to Redding and San Diego found that it paid the correct amount due for the projects.<sup>9</sup>

The manager of the state water board's fee branch indicated that one of the fee branch's standard practices is to annually update and provide a fee calculator to the certification program, which is used to calculate and validate the fee amounts based on the information provided in the application. Although to the manager's knowledge no formal direction has been given by the fee branch, it is his understanding that the regional water boards review fees for accuracy as part of their standard business practice. Further, he stated that the state water board does not perform any additional work to check fee amounts that the regional water boards process and that it relies on them to ensure that the amounts collected are accurate. Because North Coast does not review Caltrans' application fees for accuracy and we found errors in seven of the nine Caltrans application fees that we reviewed at North Coast, additional errors may exist. The state water board was unable to tell us the amount of the application fees that North Coast collected from Caltrans, but it did know that all water boards received \$14.8 million in application fees for the 3,088 certifications they issued during our five-year audit period. According to the state water board's records, North Coast issued 91 of those certifications to Caltrans, which could potentially include many more erroneous payments.

## Recommendations

To ensure that regional water boards, as well as the state water board itself, follow a more consistent process when reviewing water quality applications and issuing certifications, and to comply with state and federal requirements, the state water board should remind regional water boards of required application processing

<sup>8</sup> Using the correct application fee amounts, the total fees due on these nine projects is nearly \$80,000.

<sup>9</sup> We expanded our review at North Coast from two application fees to nine because of the errors we found.

time frames and notifications. The state water board should also continue with its effort to adopt a single application form for the certification program.

To ensure that applicants pay the correct fee amounts for the certification program, the state water board should direct North Coast as well as the other regional water boards to verify the accuracy of fees that applicants submit to them.

North Coast should continue with its plans to collect from Caltrans the underpayment of application fees and to reimburse the overpayment of application fees that we identified. It should also consider reviewing a selection of past application fees it received from Caltrans to determine if other errors exist.

## Chapter 2

### THE STATE WATER RESOURCES CONTROL BOARD COULD IMPROVE MONITORING PRACTICES AND ADMINISTRATION OF THE WATER QUALITY CERTIFICATION PROGRAM

#### Chapter Summary

The State Water Resources Control Board (state water board) could more fully exercise its authority under California's Porter-Cologne Water Quality Control Act (water quality act) to ensure that regional water quality control boards (regional water boards) consistently monitor the water quality certifications they issue. The three regional water boards we reviewed—North Coast, Central Valley's Redding Office (Redding), and San Diego—do not have a consistent approach for monitoring projects for compliance with water quality certifications, lending to a perception that some regional water boards have more stringent enforcement activities than others. For example, they do not consistently track reporting requirements included in water quality certifications to ensure that entities who have obtained water quality certifications submit all required reports. However, once the regional water boards we visited identify violations, we found that they generally do adhere to enforcement requirements.

In addition to inconsistent monitoring, the three regional water boards do not track or document the overall cost of staff that participate in the enforcement process of the water quality certification program (certification program). Further, although the state water board's enforcement policy encourages the regional water boards to include staff enforcement costs when taking penalty actions, the three regional water boards do not consistently track or document these costs. We also noted that the state water board used a flawed methodology to determine the hourly rate for staff enforcement costs that regional water boards include in penalty actions. As a result, the state water board instructed the regional water boards to use inflated rates for hourly staff time and overhead charges when taking penalty actions for water quality violations, resulting in an \$87,000 overstatement of estimated staff enforcement costs in one penalty action we reviewed.<sup>10</sup> However, because the water quality certification-holder (certification-holder) negotiated a settlement to reduce the penalty amount, we did not find that the certification-holder overpaid for the penalty action.

<sup>10</sup> Most penalty actions we reviewed for this audit were administrative civil liabilities, which are fines the water boards assess to certification-holders who violate the terms of their water quality certifications.

The state water board also needs to address several other administrative aspects of the certification program. For example, the three regional water boards charge other programs for work they perform on the certification program, which does not provide the state water board with a reliable measure of the certification program's true costs. Our review also found that the state water board had not maintained a regular accounting of the fines it collected from penalty actions issued during fiscal years 2007–08 through 2011–12, although it was ultimately able to provide this information. Additionally, it deposited \$374,000 of the fines it had collected over this five-year period into the wrong account. To its credit, after we notified the state water board of the incorrect deposits, it resolved this issue. Furthermore, the primary system the state water board uses to inform the public and other stakeholders about the certification program does not contain a complete record of information, such as the number of water quality certifications, monitoring activities, and enforcement actions.

#### **The State Water Board's Lack of Guidance Has Contributed to Regional Water Boards' Inconsistent Monitoring of Certified Projects**

The three regional water boards we reviewed do not have a consistent approach for monitoring projects' compliance with water quality certifications, lending to a perception that some regional water boards have more stringent enforcement practices than others. These inconsistencies also hinder the regional water boards' ability to ensure that certification-holders adhere to the conditions of their water quality certifications. Although the state water board's enforcement policy provides direction on how to proceed with violations and enforcement actions, it does not provide regional water boards with guidance on how to actively monitor projects. Federal and state laws give the regional water boards authority to conduct monitoring activities to determine whether certification-holders are complying with water quality requirements. These monitoring activities rely partly on the information obtained through the reporting requirements placed in water quality certifications, such as requiring certification-holders to send reports after a storm to verify that the measures taken to protect water quality during the weather event were effective. The regional water boards may also perform site visits to observe and inspect the measures that certification-holders take to comply with water quality certifications. In addition, regional water boards receive complaints from the public or other agencies to alert them about potential violations that require monitoring.

However, our review of 12 water quality certifications issued by each of the three regional water boards between fiscal years 2007–08 through 2011–12 found that the regional water boards' monitoring

practices are inconsistent. For example, the regional water boards do not formally track the reporting requirements included in water quality certifications to ensure that certification-holders submit all required reports, yet managers and staff at all three regional water boards stated that they use these reports to identify water quality violations. North Coast and Redding acknowledged that they have no formal process for tracking the reporting requirements included in water quality certifications and they indicated that their staff are responsible for tracking whether certification-holders submit required reports. For example, North Coast staff maintained tracking sheets used to monitor reporting requirements. However, the staff's tracking sheets did not include specific dates that reports were due, instead they contained only a general comment regarding whether certification-holders were in compliance with reporting requirements included in the water quality certifications of two projects we reviewed. San Diego also does not have a method for tracking certification-holder reporting requirements but stated it had made an effort between 2003 and 2011 to track all reporting requirements stipulated in water quality certifications. However, San Diego does not currently track reporting requirements, asserting that it has insufficient staffing to do so. By not consistently tracking the reporting requirements imposed on certification-holders, regional water boards deprive themselves of an important tool that would allow them to more effectively detect threats to water quality and pursue enforcement when necessary. Moreover, even though the regional water boards sometimes include penalties in administrative civil liabilities for certification-holders' failure to submit required reports, they have not been consistently documenting the receipt of required reports.

Further, the practice of conducting project site visits varied considerably among the three regional water boards. As shown in Table 6 on the following page, North Coast and Redding performed site visits for some projects while San Diego did not conduct any site visits. North Coast and Redding both stated that they prioritize inspections based primarily on a project's threat to water quality, as well as the size of the project, the length of the project, availability of staff, and complaints. Redding also stated that it monitors for violations of the certification program while inspecting sites for violations of other programs, which we confirmed in our review. In discussing why it did not conduct any inspections for the 12 projects we reviewed, San Diego told us that it usually only visits projects after receiving a complaint of a water quality violation and that it had no record of receiving a complaint for any of those projects. However, a practice of conducting occasional site visits can act as a deterrent for potential water quality violators.

***By not consistently tracking the reporting requirements imposed on certification-holders, regional water boards deprive themselves of an important tool that would allow them to more effectively detect threats to water quality and pursue enforcement.***

**Table 6**  
**Number of Projects That Received a Site Inspection**

REGIONAL WATER QUALITY CONTROL BOARD	PROJECTS REVIEWED	PROJECTS REVIEWED THAT RECEIVED A SITE VISIT
North Coast	12	7
Central Valley's Redding Office	12	4
San Diego	12	0

Source: California State Auditor's review of the California Integrated Water Quality System for selected projects.

The three regional water boards we reviewed also have inconsistent processes for responding to complaints. All three regional water boards stated that their decision to visit a site is affected by complaints they receive about potential water quality violations. However, the regional water boards indicated they did not always formally track the receipt of complaints or their resolution. All three noted that they receive some complaints from the public through a database that the California Environmental Protection Agency maintains, but they also address complaints made directly to their respective regional water board. San Diego, which indicated that it usually only performs site inspections in response to a complaint, stated that it does not record or track the complaints that it receives. North Coast has designated an individual to track incoming complaints and its responses using an internal spreadsheet; however, it acknowledged that staff do not always follow this process when they directly receive a complaint.

Further, as part of their monitoring activities, the three regional water boards informally communicate with certification-holders by phone and e-mail during the course of their projects to discuss issues and questions that arise. These informal communications can provide the regional water boards with ongoing knowledge of certification-holders' compliance with water quality standards. However, the regional water boards indicate that they do not uniformly track these informal communications. Better tracking of these informal communications would provide the regional water boards with a more complete record of their interactions with certification-holders.

Although in 2010 the state water board officially began using the California Integrated Water Quality System (water quality database) to record and track information related to the certification program, the three regional water boards we visited do not always use it

to record their certification program monitoring activities.<sup>11</sup> For example, of the 36 water quality certification projects we reviewed, only 11 had documented site inspections in the database. While North Coast and Redding asserted that they enter all site inspections into the water quality database, San Diego stated that it does not record site inspections if it does not find a violation or if the violation was resolved. The water quality database can also be used to record and track reporting requirements included in the water quality certifications related to reports due once or on specific dates, but the three regional water boards stated that they do not enter the reporting requirements into the database. The state water board indicates that reports that do not have due dates—such as reports required after a storm event—would be difficult to track in the water quality database, but that regional water boards could still use the water quality database to track that this requirement exists.

Finally, although the water quality database can also be used as a monitoring tool to record informal communications with certification-holders regarding compliance with their certifications, none of the regions we visited are consistently using it for this purpose. If the regional water boards were to take advantage of the water quality database to track their informal communications with certification-holders, they would have a more complete record of such communications to assist in their monitoring activities.

The state water board's deputy director of administration (administration director) indicated that the state water board intends to take some actions to improve the regional water boards' monitoring efforts. Specifically, the administration director stated that the state water board intends to further incorporate the certification program into its performance reporting system in fiscal year 2014–15, which will allow the state water board to better evaluate the certification program's performance metrics on tasks such as monitoring, inspections, and complaint response. He added that by December 2013 the state water board will evaluate extending the capabilities of the water quality database to improve management of the certification program.

### **The State Water Board Has Ensured That the Regional Water Boards Generally Adhere to Most of Its Enforcement Requirements**

As a result of the state water board's efforts, the regional water boards' enforcement of the certification program has been consistent with enforcement requirements. Our review of both specific

*Of the 36 water quality certification projects we reviewed, only 11 had documented site inspections in the water quality database.*

<sup>11</sup> Although in 2010 the state water board officially began using the water quality database to record and track information related to the certification program, most regional water boards stated that they began using the water quality database for the certification program before 2010.

enforcement actions and general enforcement processes found that the three regional water boards we visited followed the guidance the state water board provided in the Water Quality Enforcement Policy (enforcement policy). However, we found that the three regional water boards did not accurately calculate staff costs included in penalty actions that they issued to some certification-holders. Further, the state water board did not regularly account for penalty amounts that it received as a result of issuing these penalty actions.

### ***The State Water Board's Guidance to the Regional Water Boards Has Established a Consistent Enforcement Process***

The state water board has taken a number of actions to ensure statewide consistency in the enforcement of water quality violations. For instance, it established an enforcement policy in 1996, which provided regional water boards with general guidance for taking actions to help better ensure the consistent, fair, and predictable enforcement of water quality laws. The state water board updated this policy in 2002 and 2010.

***In 2006 the state water board formed its Office of Enforcement to ensure firm, fair, and consistent enforcement of state and federal water laws, and to improve the performance of the water boards' enforcement program.***

Further, in 2006 the state water board formed its Office of Enforcement (enforcement office) to ensure firm, fair, and consistent enforcement of state and federal water laws, and to improve the overall performance of the water boards' enforcement program. In creating the office, the state water board identified that it had not been providing the regional water boards with sufficient legal support, oversight, or funding. To address these and other shortcomings, it created the enforcement office and expanded the legal staff available to the regional water boards to nine attorneys by 2010 to assist with the enforcement of water quality violations.

Our review of both specific enforcement actions and general processes at the three regional water boards found that all three generally comply with enforcement requirements related to the water quality act and the state water board's enforcement policy. The enforcement policy, which applies to all water quality programs, directs regional water boards to rank violations according to significance, to establish enforcement priorities, and to use progressive levels of enforcement when water quality violations occur. Each of the three regional water boards holds meetings to rank water quality violations and prioritize enforcement cases. For example, San Diego has a compliance oversight group that meets monthly to set enforcement goals. This group decides which cases receive formal enforcement action and what type of action is appropriate. Similarly, Redding and North Coast enforcement staff also hold monthly meetings, at which they discuss water quality violations and propose enforcement actions.

We also reviewed enforcement actions for violations of the certification program that the three regional water boards issued to the California Department of Transportation (Caltrans) during the past five years and found that they practiced progressive enforcement. As described in Figure 2 on page 12 in the Introduction, the enforcement policy lists the progressive levels of informal and formal administrative enforcement actions that the regional water boards may use in response to actual or threatened water quality violations by certification-holders. Enforcement actions can escalate to a penalty action, which imposes a monetary penalty to address, correct, and deter water quality violations.

At North Coast we reviewed two penalty actions that it issued to Caltrans and found that each was preceded by at least one lower-level enforcement action that put Caltrans on notice of North Coast's concerns about potential and actual water quality violations. For example, an administrative civil liability for Caltrans' Confusion Hill project was preceded by enforcement actions that included both notices of violation and requests for technical reports from Caltrans. These lower-level enforcement actions began in April 2006. Because North Coast concluded that Caltrans continued to violate the water quality act, it escalated the enforcement to an administrative civil liability in March 2008. According to the state water board's records, Redding issued only informal enforcement actions against Caltrans during our five-year audit period, as the region's philosophy is to work with certification-holders, especially Caltrans, to prevent the need for a penalty action. San Diego issued one enforcement action against Caltrans during this period, which was informal.

Finally, we found that all three regional water boards currently adhere to the enforcement policy when calculating penalty actions. The regional water boards' authority to issue penalty actions, and the basic rules for calculating them based on the type and severity of the violation, are found in the water quality act. The enforcement policy also includes a detailed methodology to calculate penalty amounts based on the minimum penalty requirements in the water quality act. The three regional water boards we visited have incorporated this detailed methodology in their process for calculating administrative civil liabilities.

***The State Water Board Does Not Ensure That the Regional Water Boards Include Accurate Staffing Costs When Assessing Penalties for Water Quality Violations***

Although the state water board's enforcement policy encourages regional water boards to include staff enforcement costs when taking penalty actions, the three regional water boards do not consistently track or document these costs. Examples include the cost of

***All three regional water boards currently adhere to the enforcement policy when calculating penalty actions.***

investigating violations, preparing enforcement actions, participating in settlement negotiations, conducting hearings, as well as the staff benefits and overhead costs associated with these activities. Although including these costs is valid from an economic standpoint—as it requires those illegally polluting water to pay the full costs of their violations—the regional water boards we visited do not consistently track the time staff spend on enforcement activities and generally do not have support for the staff enforcement costs they include in penalty actions.

Two of the three regional water boards could not support the staff enforcement costs for five of the 11 penalty actions they issued that included these costs during our audit period. Although Redding did not issue penalty actions for water quality violations during fiscal years 2007–08 through 2011–12, the other two regional water boards we visited issued 13 penalty actions over this period; 11 of these penalty actions included staff enforcement costs ranging from \$1,500 to \$70,000 as part of the total penalty amounts.<sup>12,13</sup> For these penalty actions, we requested documentation supporting how the regional water boards calculated their staff enforcement costs. North Coast could not provide documentary support for staff enforcement costs it included in four of the five penalty actions it issued that included these costs, and San Diego was unable to support the staff enforcement costs it included in one of the six penalty actions it issued over the same period. The unsupported staff enforcement costs totaled \$59,000, including \$35,000 of unsupported staff enforcement costs included in the four penalty actions issued by North Coast and \$24,000 in the penalty action issued by San Diego.

Because the state water board's enforcement policy does not require regional water boards to create or retain supporting documentation for staff enforcement costs, there is a continuing risk that regional water boards will not be able to substantiate these costs if certification-holders or others request that they do so. To the extent that regional water boards are unable to support the staff enforcement costs they include in penalty actions, we believe their basis for including these costs is questionable.

Further, the three regional water boards we visited only informally tracked staff enforcement time and were unable to substantiate the staff hours they included in penalty actions. For example, officials at North Coast informed us that their staff use various means to track the time they spend on enforcement activities—some refer to their electronic calendars while

<sup>12</sup> North Coast issued three of these 11 penalty actions that included staff enforcement costs to Caltrans, and the penalties included staff enforcement costs of \$7,400, \$25,000, and \$70,000, respectively.

<sup>13</sup> North Coast also issued two penalty actions, both administrative civil liabilities, which did not include staff enforcement costs. As previously discussed, the state water board's enforcement policy does not require but encourages regional water boards to include these costs in the administrative civil liabilities that they issue; hence, the regional water boards do not always include these costs.

others use personal planners or spreadsheets. The other two regional water boards acknowledged having similar informal practices. Not using a more formal and systematic method to track staff enforcement time increases the risk that the water boards will include incorrect enforcement costs in penalty actions, and it leaves the water boards open to legal challenges for the penalties they have assessed.

Finally, the state water board instructed the regional water boards to use hourly rates for staff enforcement costs that do not reasonably reflect the salaries of staff who work on enforcement or the certification program's overhead costs. The director of the state water board's enforcement office (enforcement director) indicated that in late 2009 or early 2010 his office instructed regional water boards to start charging staff enforcement costs at a rate of \$150 per hour, which consists of a \$63 hourly rate for salary and benefits, plus 135 percent overhead.<sup>14</sup> However, the \$63 hourly rate the state water board used is based on the top-end salary of a water resources control engineer. We observed that a variety of staff at the state and regional water boards work on penalty actions. Therefore, charging the top-end salary of one employee classification for all of the staff working on a penalty action misrepresents actual staff enforcement costs. Further, the 135 percent overhead rate is attributable to a different program—the Site Cleanup Program—and is much higher than the overhead rate for the certification program. Specifically, the state water board's accounting system shows that overhead costs associated with the water certification program were 86 percent in fiscal year 2011–12.

Table 7 on the following page shows a comparison of staff enforcement costs for one of the penalty actions the North Coast issued to Caltrans in 2012. In the table we compare the enforcement costs North Coast calculated using the state water board's instructions—\$150 per staff hour that includes the incorrect 135 percent overhead cost rate—to the budgeted salary rates for each staff member that North Coast identified as participating in the penalty action plus the more realistic 86 percent overhead rate that we calculated for fiscal year 2011–12. As the table shows, the North Coast's use of the state water board's method resulted in overestimating staff's average hourly rate by a range of \$37 to \$66 per hour. Applying this difference to the hours North Coast estimated its staff worked on the enforcement process shows that North Coast overstated its staff enforcement costs by \$87,000.<sup>15</sup> It should be noted that, ultimately, North Coast did not receive

***The state water board instructed the regional water boards to use hourly rates for staff costs that do not reasonably reflect the salaries of staff who work on enforcement or the certification program's overhead costs.***

<sup>14</sup> This calculation would result in an hourly rate of over \$148, which the state water board rounded to \$150.

<sup>15</sup> In our calculation, we had no choice but to use the estimated staff hours that North Coast used for this administrative civil liability because, as we indicated earlier, North Coast and the other regional water boards only informally track staff enforcement time and were therefore unable to substantiate the staff hours they included in penalty actions.

the \$236,000 it estimated as staff enforcement costs for this administrative civil liability. During negotiations with Caltrans, North Coast settled for \$70,000 in staff enforcement costs. Nonetheless, the comparison illustrates that the state water board's method overstates staff enforcement costs.

**Table 7**  
**Evaluating Staff Enforcement Costs for an Administrative Civil Liability Issued to the California Department of Transportation**

STAFF	COMPARISON OF HOURLY RATES ATTRIBUTED TO STAFF*				ESTIMATED HOURS STAFF WORKED ON ENFORCEMENT <sup>†</sup>	COMPARISON OF TOTAL STAFF ENFORCEMENT COSTS		
	NORTH COAST REGIONAL WATER QUALITY CONTROL BOARD (NORTH COAST)	STATE AUDITOR CALCULATION	NORTH COAST'S OVERESTIMATE	CALCULATION OF STAFF ENFORCEMENT COSTS				
				NORTH COAST		STATE AUDITOR	NORTH COAST'S OVERESTIMATE	
Water Resources Control Engineer	\$150	\$84	\$66	690	\$103,500	\$57,960	\$45,540	
Water Resources Control Engineer	150	102	48	180	27,000	18,360	8,640	
Attorney	150	113	37	200	30,000	22,600	7,400	
Attorney	150	99	51	500	75,000	49,500	25,500	
				<b>Totals</b>	<b>1,570</b>	<b>\$235,500</b>	<b>\$148,420</b>	<b>\$87,080</b>

Source: California State Auditor's analysis of information obtained from the State Water Resources Control Board and the North Coast Regional Water Quality Control Board (North Coast) for the March 2012 administrative civil liability issued to the California Department of Transportation for its Confusion Hill project.

\* Hourly rates include staff salaries, benefits, and overhead costs.

<sup>†</sup> Because North Coast did not have verifiable estimates of the hours its staff worked on the enforcement process, we used the North Coast's estimated hours in our calculations. Hence, North Coast's \$87,080 overestimate of staff enforcement costs is based on its estimated staff enforcement hours. Ultimately, North Coast settled for \$70,182 in staff enforcement costs, so the potential for overcharge was avoided.

In our discussions with the state water board's enforcement director, he agreed that the method to determine staff enforcement costs for inclusion in penalty actions should be established and well-defined in the regulations. However, he indicated that the state water board did not include more specifics about the calculation of staff enforcement costs in the enforcement policy because it received pushback on the overall penalty calculation procedures from the regional water boards. He added that the state water board generally receives pushback when it attempts to enact new policies and regulations because the regional water boards view these as restrictions on their authority. As an example, the enforcement director stated that some regional water board members appeared at the state water board hearing to speak against the 2010 update to the enforcement policy. While we acknowledge the enforcement director's concern, the Legislature intended the water boards to coordinate their respective activities to achieve a unified and

effective water quality control program. Ultimately, if the regional water boards are uncooperative, the state water board can move forward with making state policy on water quality control.

In discussions with the state water board's administration director regarding the hourly rates the state water board instructed the regional water boards to use for staff enforcement costs associated with penalty actions and the regional water boards' general lack of tracking of these enforcement costs, he indicated that the state water board will evaluate the practice of collecting staff costs associated with enforcement actions as a matter of policy and business. He also stated that establishing an overhead rate and recalculating it annually, collecting and maintaining justification documentation, and developing and maintaining a system to track the hours staff work on enforcement actions pose costs that could exceed the value of the amounts collected in penalty actions. The administration director added that the state water board's decision whether to continue collecting staff costs associated with penalty actions needs to be based on a full evaluation of the associated costs of maintaining a system that can withstand any future audits equivalent to this one. Although the decision to include staff enforcement costs in penalty actions is at the state water board's discretion, we found overhead rates to be readily available in its accounting system. Further, the state water board's accounting system has the existing capability to track costs at various levels, including the time individual staff members spend on enforcement activities.

### **The State Water Board Did Not Properly Account for Penalty Amounts From Enforcement Actions**

Although state law requires the state water board to separately account for the water quality certification penalty amounts it receives, it did not maintain a regular accounting of these penalty amounts during fiscal years 2007–08 through 2011–12. In our initial discussions with the state water board, we requested a full accounting of these penalty amounts. Although the state water board was ultimately able to account for the penalty amounts it received, its initial attempts to provide this information contained errors. In discussing why the state water board had not maintained a regular accounting of certification program penalty amounts, the accounting chief for the state water board cited staffing limitations and the relative small size of the certification program's penalty receipts as the primary reasons. He added that the accounting office has concentrated on accounting for all penalty receipts separately from fee receipts, as opposed to individually tracking each type of penalty, like water quality certification penalties.

*Although the state water board was ultimately able to account for the penalty amounts it received, its initial attempts to provide this information contained errors.*

As Table 8 shows, during fiscal years 2007–08 through 2011–12, the state water board received \$3.6 million in penalty amounts from certification-holders, which includes \$521,000 from Caltrans and \$3.1 million from other entities.<sup>16</sup> This \$3.6 million is a result of 29 penalty actions, six of which had not been paid as of June 2012. In addition to the amount it has already paid for four penalty actions, Caltrans still owes more than \$6 million for two penalty actions that the North Coast issued in 2012. As of April 2013 the state water board indicated these penalty amounts were under administrative review and they are not subject to payment until final.<sup>17</sup>

**Table 8**  
**Penalty Amounts the State Water Resources Control Board Received From Water Quality Certification-Holders**  
**Fiscal Years 2007–08 Through 2011–12**

PENALTY AMOUNTS RECEIVED BY ENTITY/ACCOUNT TO WHICH THEY WERE DEPOSITED	
<b>California Department of Transportation (Caltrans)</b>	
Waste Discharge Permit Fund (permit fund)	\$85,000
State Water Pollution Cleanup and Abatement Account (cleanup account)	436,000
<b>Subtotal</b>	<b>\$521,000</b>
<b>Other Entities</b>	
Permit fund	\$480,000
Cleanup account	2,636,000*
<b>Subtotal</b>	<b>\$3,116,000</b>
<b>Total</b>	<b>\$3,637,000</b>
PENALTY AMOUNTS RECEIVED BY FUND/ACCOUNT TO WHICH THEY WERE DEPOSITED	
Permit fund	\$565,000
Cleanup account	3,072,000
<b>Total</b>	<b>\$3,637,000</b>
PENALTY AMOUNTS NOT YET RECEIVED AS OF DECEMBER 2012	
Caltrans	\$6,041,000
Other entities	2,816,100
<b>Total</b>	<b>\$8,857,000</b>

Sources: California State Auditor's review of accounting records and supporting documentation obtained from the State Water Resources Control Board (state water board).

\* The state water board incorrectly deposited \$374,000 of the fines it received for violations of water quality certifications to the cleanup account. In January 2013 it transferred this amount to the permit fund.

<sup>16</sup> In fiscal years 2007–08 through 2011–12, 29 penalty actions were taken, which included 24 administrative civil liabilities issued by the regional water boards, three court orders, a penalty action related to a clean-up order, and a penalty action taken by a district attorney.

<sup>17</sup> According to the state water board, typically the contractor that Caltrans uses pays any penalty amounts assessed on a project.

As Table 8 also illustrates, of the penalty amounts the state water board received during the period we reviewed, it deposited \$565,000 to the State's Waste Discharge Permit Fund (permit fund) and \$3.1 million to the State Water Pollution Cleanup and Abatement Account (cleanup account), which is a subaccount within the larger State Water Quality Control Fund. The \$565,000 the state water board deposited into the permit fund is a result of the penalty amounts the regional water boards collected that specifically cited violations pertaining to water quality certifications. The \$3.1 million deposited to the cleanup account is the result of penalty actions in which the regional water boards cited other violations of the clean water act or the water quality act. Looking specifically at the four Caltrans-related penalty actions, it paid \$85,000 for violations related to water quality certifications and \$436,000 for violations of other sections of water quality law.

In some instances, regional water boards cite multiple sections of water quality law in their penalty actions, requiring the state water board to split the penalty amounts it receives and deposit the appropriate amounts to the two funds. As described in the text box, there are differences in the allowable uses of these funds. One of these differences is specifically applicable to the state water board's use of the penalty amounts it collects: the state water board can use penalty amounts it deposits to the cleanup account for the clean up and abatement of water pollution without a specific appropriation, while deposits to the permit fund are not available to the state water board until the Legislature appropriates the funds.

As noted in Table 8, while the state water board was working to respond to our request for an accounting of the penalty amounts it received, it discovered that it had incorrectly deposited five penalty amounts totaling \$374,000 into the cleanup account rather than the permit fund. In discussing these errors with the accounting chief, he indicated the deposits were incorrectly coded in the water quality database. To avoid repeating these types of errors, the accounting chief indicated that the state water board will add additional penalty revenue codes into the water quality database, which he believes will ensure that penalty amounts are better tracked by water code section. He also indicated that in June 2013 the state water board plans to automate the accounting for penalty amounts and begin reconciling monthly the penalty amounts recorded in the water

### Funds and Accounts to Which Penalty Amounts May Be Deposited

#### Waste Discharge Permit Fund

- The fund acts as a depository for certification application and other fees the State Water Resources Control Board (state water board) collects from waste discharges.
- The Legislature appropriates moneys from the fund to the state water board that may be used to carry out water quality control laws, which includes operating the Water Quality Certification Program.
- California's Porter-Cologne Water Quality Control Act (water quality act) requires the state water board to deposit certain penalty amounts to this fund. However, it specifies that these penalty funds are not available to the state water board until the Legislature appropriates them.

#### State Water Pollution Cleanup and Abatement Account

- Among other things, this account is a depository for some criminal and civil penalties as well as clean-up reimbursement funds the state water board collects as a result of violations of certain provisions of the water quality act.
- The allowable uses of this account include providing public agencies with grants for the clean up and abatement of water pollution. Unlike the Waste Discharge Permit Fund, the state water board may expend funds from this account without a specific appropriation of the amounts by the Legislature.

Source: The water quality act.

*The state water board used the water quality certification fines it has received in accordance with state law.*

quality database with the state water board's accounting system. Subsequent to our discussions, in January 2013 the state water board appropriately transferred the \$374,000 from the cleanup account to the permit fund.

Aside from not maintaining a regular accounting of the certification program penalty amounts it has received and its incorrect deposits to the cleanup account, we found the state water board used the water quality certification fines it has received in accordance with state law. Specifically, during our five-year audit period, it received legislative approval to use \$5.6 million of the penalty amounts it had received from the certification program as well as from other programs.<sup>18</sup> In 2008 the Legislature approved using \$3.2 million in penalty amounts for water quality improvement projects. We reviewed a selection of the projects the state water board funded and found it spent these penalty amounts appropriately. In 2011 the Legislature also approved the use of \$2.4 million to support the state water board's litigation expenses related to a water quality issue in North Coast's jurisdiction. As of June 2012 the state water board had expended approximately \$1.8 million for this purpose.

### **The Regional Water Boards We Reviewed Do Not Adequately Track Water Quality Certification Program Costs**

Staff at the three regional water boards we visited charge the time they spend working on various programs to specific cost codes in the state water board's accounting system. The certification program is one of the smaller of the 15 programs funded by the permit fund. For example, the Legislature's fiscal year 2011–12 appropriation from the permit fund totaled \$102 million, and the state water board allocated \$2.9 million of this amount to the certification program. In many cases, regional water board staff do not work solely on one program; accordingly, the state water board's accounting system is set up to allow regional water board staff to charge their time to several different cost codes. In this way, the accounting system can track the costs of separate programs, which can assist the state water board in making informed decisions each year about how to allocate its resources.

In our work to quantify the overall costs that the three regional water boards incur to enforce violations of water quality certifications, we found that North Coast, Redding, and San Diego do not routinely track the time that their staff spend

<sup>18</sup> While the water quality act requires the state water board to separately account for certification program penalty amounts deposited to the permit fund, the act does not prescribe an accounting requirement for amounts expended from the fund pursuant to legislative appropriation. Hence, the \$5.6 million includes penalty amounts received from the certification program mixed with penalty amounts received from other programs.

on enforcement separately from the time that they spend on other activities.<sup>19</sup> Although the state water board's administration director acknowledged there is a cost code in the state water board's accounting system that would allow the regional water boards to track their overall enforcement costs, he indicated that separately tracking these costs is unnecessary for program operations. He added that when the state water board tracked costs to this level of detail in the past, it believed that the results were unreliable and that the additional time necessary to track costs exceeded the benefits. Regardless, as previously noted, the water boards would need to track and substantiate staff enforcement costs that they include in penalty actions to accurately recover these costs.

While we were attempting to identify their overall enforcement costs, the three regional water boards acknowledged that they charge other programs for the work staff perform on the certification program due to limited funding. In pursuing this topic, we noted that none of the three regional water boards tracked the time staff charge to other programs that should be charged to the certification program. However, charging other programs funded by the permit fund for activities the regional water boards perform in the certification program does not go against the purpose of the permit fund. When the Legislature appropriates funding for the permit fund, it does not indicate the funding for specific programs. Rather, how the funding is divided across programs is at the discretion of the state water board.

However, charging other programs for work performed in the certification program is a resource allocation issue. The failure to accurately track the actual costs of the water quality certification program inhibits the state water board's ability to know how much the certification program really costs to operate. Lacking this information, it cannot make informed decisions about how many staff or other resources it needs to operate the program at the appropriate level. Further, it also creates the risk that regional water board staff may charge time related to the certification program to activities not funded by the permit fund, which could result in a misuse of funds.

Our findings agree with a report that the state water board's Office of Research and Planning issued in March 2012; among other things, the report found that the state water board's staffing allocations were misinformed. Specifically, it showed that the state water board allocated too many resources to some programs and not enough to others, and that the certification program was using more staffing

***Due to limited funding, the three regional water boards acknowledged that they charge other programs for the work staff perform on the certification program.***

<sup>19</sup> As discussed earlier in this chapter, the regional water boards often include staff enforcement costs when issuing penalty actions. However, they do not track staff enforcement costs when they implement the other enforcement options identified in Figure 2 on page 12 in the Introduction.

resources than the state water board had budgeted for it. The report concluded that the state water board had budgeted 18.1 personnel years to the certification program in fiscal year 2010–11 but that 32.7 personnel years were necessary to operate it.<sup>20</sup> In our discussion of these findings with the administration director, he indicated that the state water board has not decided on a specific approach to realign program staff, specifying that it may be done internally or require approval through the formal budget process depending on the nature and size of the realignment.

### **Certain of Caltrans' Concerns About the Administration of the Certification Program Are Valid**

Caltrans asserts that working with the nine regional water boards is difficult because they have different ways of administering the certification program. For example, Caltrans indicated that the application form for the certification program varies across the regional water boards. As noted in Chapter 1, our review confirmed that the state water board and the three regional water boards do have different applications, each requiring varying levels of requested information. Because many of its district offices work with multiple regional water boards, Caltrans stated that variances among their respective applications makes completing them more difficult and time-intensive. For example, the jurisdiction of one of Caltrans' district offices crosses the jurisdictions of three regional water boards, meaning the district office must complete one of three different application forms depending on a project's location.

*Caltrans indicated that regional water boards often do not respond within required time frames to its applications.*

Caltrans also indicated that regional water boards often do not respond within required time frames to its applications. Our review confirmed that the three regional water boards and the state water board had differing interpretations of required application processing time frames, often missed required deadlines, and sometimes failed to notify applicants regarding the status of their applications. Caltrans indicated that when the regional water boards do not send notifications about the completeness of its applications, it assumes the regional water boards have all the information they need. Caltrans added that not receiving timely responses from the regional water boards can result in delays because it cannot start projects without the water quality certification.

In commenting on the water quality certifications it has received from the water boards, Caltrans expressed concerns that some regional water boards seem to exceed their authority under state regulations when adding prescriptive best management practice requirements as conditions to its water quality certifications.

<sup>20</sup> A personnel year represents the work for a full-time staff person for one year.

However, as we discuss in Chapter 1, we found that the conditions the water boards we visited added into their water quality certifications did not exceed their authority.

Caltrans also expressed concerns about inconsistent monitoring and enforcement practices among the regional water boards. As discussed in this chapter, we found that the regional water boards we visited do not have a consistent approach for monitoring compliance with water quality certifications. For example, the three regional water boards do not formally track reporting requirements and have inconsistent processes for responding to complaints. In addition, the regional water boards' practice for conducting project site visits varied, and San Diego did not conduct site visits of Caltrans at all. However, we found that the regional water boards we visited do use a consistent enforcement process for the certification program, including the ranking of enforcement actions, the use of progressive enforcement, and the calculation of administrative liabilities.

Finally, Caltrans asserted that monitoring requirements have been expensive to comply with and that its costs of responding to enforcement actions have increased significantly over the last five years. However, Caltrans was unable to demonstrate that those costs increased because it does not separately track them. While Caltrans tracks its staff's time, it does not require staff to specifically track the time they spend related to the certification program nor is it aware of any requirement to do so. Further limiting its ability to quantify its cost related to the water boards' administration of the certification program is the fact that Caltrans does not know the total number of water quality certifications it received from the water boards from fiscal years 2007–08 through 2011–12. Caltrans stated that in 2011 it began requiring district offices to record their water quality certifications in a newly implemented database. However, Caltrans acknowledged that the new database does not currently contain a complete record of Caltrans' water quality certifications because not all district offices have recorded the certifications they obtained before 2011. In addition, Caltrans does not know the total number of enforcement actions that the water boards have taken on its water quality certifications from fiscal years 2007–08 through 2011–12 because it does not separately track violations and enforcement actions related to water quality certifications. Therefore, although we were able to confirm certain of Caltrans' concerns about the regional water boards' different ways of administering the certification program, we were unable to verify Caltrans' assertion of increasing costs related to complying with monitoring requirements and enforcement actions because Caltrans does not track the information needed to validate its concerns relating to these costs.

***Caltrans was unable to demonstrate that costs have increased for complying with monitoring requirements and enforcement actions because it does not separately track them.***

### **The Water Boards Are Not Meeting Requirements to Provide Stakeholders With Reliable Information**

The water quality database does not provide the public and other stakeholders with all pertinent information about the certification program as the water quality act requires. The state water board implemented the water quality database in 2005, and it began using the system to track information on the certification program in 2010, nearly three years after the Legislature amended the water quality act to require it and the regional water boards to provide this information on a central Web site. Multiple sections of the water quality act require the water boards to provide water quality information on the Internet. For example, a 2007 amendment to the water quality act requires the water boards to place and maintain information about water quality monitoring, assessment, research, standards, regulation, enforcement, and other pertinent matters on the Internet in a single location rather than separately by region.

Through accessing the water quality database on the state water board's Web site, the public and other stakeholders—such as water quality certification-holders, environmental groups, legislative staff, and attorneys—can obtain information about the water quality certifications the water boards have issued, including the names of certification-holders, the number of water quality violations, and the number and type of enforcement actions that water boards have taken to address these violations. According to the state water board's administration director, the water quality database also allows the water boards to store and access key documents and records such as water quality certifications and enforcement orders, and it allows them to track information about projects, such as notes about site inspections that they perform. The state water board uses the system to generate reports that the water quality act requires it to issue, such as its annual enforcement and performance reports.

However, due to a significant data entry backlog, the water quality database does not provide the public and other stakeholders with all pertinent information the water quality act requires, nor does it adequately function as a management and reporting tool for the water boards. The administration director acknowledged that as of March 2013 the water quality database did not contain 1,620 documents related to water quality certifications. This significant backlog reduces the usefulness of the water quality database to the water boards and the public.

*As of March 2013 the water quality database did not contain 1,620 documents related to water quality certifications—a backlog that reduces the usefulness of the water quality database to the public and other stakeholders.*

The backlog exists because the state water board did not place an emphasis on entering certification program information into the water quality database until 2010, and it has not kept up to date

with its data entry since that time. According to the administration director, due to limited funding and staffing, the state water board implemented the water quality database in stages, concentrating its first efforts on adding information about its core regulatory programs. The state water board delayed including water quality certification program information in the water quality database due to the small size of the program. The chief of the state water board's Water Quality Certification Unit (unit chief) indicated that up to 2009 the regional water boards would forward the water quality certifications that they issued to the state water board, which would then track key information outside of the water quality database. It began using student assistants to enter water quality certification information into the water quality database in mid-2010. However, the unit chief indicated that the statewide elimination of student assistant positions in September 2012 caused the backlog to increase. He stated that the state water board estimates it will eliminate the March 2013 backlog by June 2014 using state water board certification program staff to perform data entry.

In addition to the state water board's backlog, none of the three regional water boards we reviewed consistently use the water quality database to record their monitoring and enforcement actions. Management of the three regional water boards assert that the water quality database contains a complete record of the applications they have received for the certification program, the certifications they have issued, and the formal enforcement actions they have taken. However, the three regional water boards acknowledged that staff do not enter all site inspections or informal enforcement actions, such as verbal communications with certification-holders, into the water quality database. Further, in surveying the other regional water boards, we found that they use the water quality database rather haphazardly, with some asserting that the system accurately reflects all of their water certification program activities and others acknowledging that it is incomplete. As Table 9 on the following page shows, although the 12 regional water board offices indicated that they use the system to track information on the water quality certification program, only four indicated that they record all monitoring activities. Further, only seven of the regional water board offices indicated that they record all enforcement actions in the water quality database. Therefore, any reports generated from the water quality database will not contain all monitoring and enforcement actions related to water quality certifications that the regional water board offices have issued.

***None of the three regional water boards we reviewed consistently use the water quality database to record their monitoring and enforcement actions.***

**Table 9**  
Regional Water Quality Control Boards' Use of the California Integrated Water Quality System to Track Water Quality Certification Program Information

REGIONAL WATER QUALITY CONTROL BOARD	DATE BEGAN USING THE CALIFORNIA INTEGRATED WATER QUALITY SYSTEM (WATER QUALITY DATABASE)	INFORMATION TRACKED IN THE WATER QUALITY DATABASE				ENFORCEMENT ACTIONS*
		APPLICATIONS	CERTIFICATIONS	MONITORING ACTIVITIES	VIOLATIONS	
North Coast	2007	Yes	Yes	No	Yes	Partial
San Francisco	2011	No	No	No	No	Partial
Central Coast	2011	Yes	No	No	Yes	Yes
Los Angeles	2007	No	No	No	Yes	Partial
Central Valley—Fresno	2007	Yes	Yes	No	Yes	Yes
Central Valley—Redding	2005	Yes	Yes	Yes	Yes	Partial
Central Valley—Sacramento	2005	Yes	Yes	No	Yes	Yes
Lahontan—South Lake Tahoe	2005	Yes	Yes	Yes	Yes	Yes
Lahontan—Victorville	2005	Yes	Yes	Yes	Yes	Yes
Colorado River	2011	Yes	Yes	Yes	Yes	Yes
Santa Ana	2005	Yes	Yes	No	Yes	Yes
San Diego	2007	Yes	Yes	No	Yes	Partial

Source: California State Auditor's survey of the regional water quality control boards (regional water boards).

Note: The regional water boards we visited are shaded tan.

\* A partial response in this column occurs when the regional water board asserted that only formal enforcement actions are tracked.

The director of the state water board indicated that starting in fiscal year 2010–11 he incentivized the regional water boards' use of the water quality database by tying the results of their performance reports directly to the data in the water quality database. He stated that the eventual goal is to tie the regional water boards' program budgets to outcomes reflected in the water quality database, such as how many permits or water quality certifications the regional water boards issue and the number of inspections they report each year. He added that the state water board has not adequately enforced the regional water boards' use of the system for the certification program, but it will take additional steps as a result of this audit.

### Recommendations

The state water board should direct regional water boards to more consistently monitor compliance with water quality certifications and use the water quality database to track their monitoring efforts.

When regional water boards include staff enforcement costs in the penalty actions they issue, the state water board should require that they use a systematic method for tracking the hours staff spend on enforcement activities related to penalty actions and maintain

documentary support for these staff enforcement cost calculations. Further, if regional water boards continue to include these costs in the penalty actions they issue, the state water board should revise its staff cost rate to reflect actual staff salaries and overhead cost for the certification program.

To ensure that it accurately records and uses fines it collects for violations of water quality certifications, the state water board should maintain a regular accounting of these fines.

To improve its ability to allocate adequate resources to the certification program and better assess whether its budget is sufficient for program operations, the state water board should instruct regional water boards to accurately track staff time spent on the certification program.

If Caltrans believes that responding to the monitoring requirements and enforcement actions related to the certification program is too costly, it should begin to gather and track these costs using its accounting system. Once it has tracked these costs for a period of time, Caltrans should analyze whether these monitoring and enforcement activities are, in fact, too costly and work with the state and regional water boards to resolve how these costs might be better contained.

Because the water quality database is the primary system for meeting statutory reporting obligations for the certification program, the state water board should resolve its data entry backlog and ensure that the regional water boards enter all relevant information into the system, including information about the applications received, the certifications issued, monitoring activities, water quality violations, and enforcement actions.

We conducted this audit under the authority vested in the California State Auditor by Section 8543 et seq. of the California Government Code and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives specified in the scope section of the report. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Respectfully submitted,



ELAINE M. HOWLE, CPA  
State Auditor

Date: June 6, 2013

Staff: John Baier, CPA, Audit Principal  
Alicia Anne Beveridge, MPA  
David J. Edwards, MPPA  
Joshua K. Hammonds, MPP  
Earl Hsu  
Michelle J. Sanders  
Joseph S. Sheffo

Legal Counsel: Donna Neville, Chief Counsel  
Richard B. Weisberg, JD

IT Audit Support: Michelle J. Baur, CISA, Audit Principal  
Richard W. Fry, MPA, ACDA

For questions regarding the contents of this report, please contact Margarita Fernández, Chief of Public Affairs, at 916.445.0255.

June 2013



**MATTHEW RODRIQUEZ**  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

## CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

1001 I STREET, SACRAMENTO, CALIFORNIA 95814 • P.O. BOX 2815, SACRAMENTO, CALIFORNIA 95812-2815  
(916) 323-2514 • (916) 324-0908 FAX • [WWW.CALEPA.CA.GOV](http://WWW.CALEPA.CA.GOV)



**EDMUND G. BROWN JR.**  
GOVERNOR

May 14, 2013

Elaine M. Howle, CPA  
California State Auditor  
555 Capitol Mall, Suite 300  
Sacramento, CA 95814

Thank you for providing the California Environmental Protection Agency (CalEPA) with an opportunity to review the California State Auditor's draft report entitled "State Water Resources Control Board: It Should Ensure a More Consistent Administration of the Water Quality Certification Program," Report 2012-0120. My staff and I have reviewed the report with the State Water Resources Control Board (State Water Board), and concur in the board's attached comments.

The Clean Water Act's water quality certification process provides important protections for our state's waters. I am pleased to read that the Auditor's office concludes that the water boards' water quality certifications contain appropriate conditions that are generally consistent and abide with water quality laws. Likewise, I appreciate the report's recognition of the lawful and consistent enforcement practices across the water boards. Enforcement coordination and consistency is an area where CalEPA has worked closely with all its constituent boards, departments, and offices.

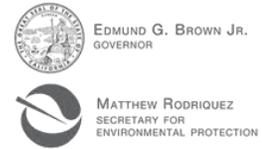
Nonetheless, the draft report includes important findings and recommendations that the State Water Board will need to address. The draft report's eight recommendations are reasonable and appropriate. As your report notes, the State Water Board has already implemented or begun implementing a number of the recommendations. When fully implemented, the recommendations will provide those seeking water quality certifications a more consistent application process with clear processing timelines. It will also result in a more accountable and transparent water quality certification program.

I greatly appreciate your audit team's thoroughness and professionalism during this audit.

Sincerely,

Matthew Rodriguez  
Secretary for Environmental Protection

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## State Water Resources Control Board

May 14, 2013

Elaine M. Howle, CPA  
California State Auditor  
555 Capitol Mall, Suite 300  
Sacramento, CA 95814

Dear Ms. Howle:

### STATE AND REGIONAL WATER QUALITY CONTROL BOARDS SECTION 401 CERTIFICATION: AUDIT REPORT NO. 2012-120

Thank you for the opportunity to review the California State Auditor's draft report entitled "State Water Resources Control Board: It Should Ensure a More Consistent Administration of the Water Quality Certification Program," Report 2012-0120. The draft report provides a helpful roadmap for improving the water boards' implementation of the water quality certification program. Throughout the development of the report your auditors were professional and thorough, and their work product reflects that.

I concur with the draft report's conclusion that the State Water Resources Control Board (State Water Board) can do more to ensure consistency in the administration of the water quality certification process. As you note in the report, the water boards have already initiated a number of efforts to improve the water quality certification program, including developing a uniform electronic application, developing statewide checklists and templates, releasing updated guidance on the legal requirements for application processing, adding additional accounting codes to more accurately track penalties, and moving toward an automated penalty accounting reconciliation system. These actions are important, but they are only a start.

My staff and I will review our on-going activities and assess what further actions are necessary to fully implement the audit recommendations. Many of the recommendations the water boards are already implementing will benefit the applicants by ensuring consistent application processing across the water boards. The more difficult challenges will be to address the data entry backlog, data system, and compliance monitoring issues that will support a more transparent and effective water quality certification program. Despite the resource challenges associated with these recommendations, they are important to the long-term success of the water quality certification program and water resource protection.

While the draft report's recommendations are important, I also appreciate the positive findings within the report. The report notes that the water boards apply a consistent definition of best management practices and include lawful and appropriate conditions, including best management practices, to protect water quality. Similarly, the report acknowledges the water

Elaine M. Howle, CPA

- 2 -

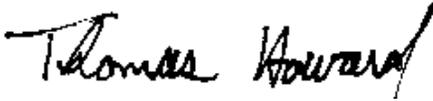
May 14, 2013

boards' creation of an Office of Enforcement and its development of an updated water quality enforcement policy as providing consistency and fairness in water quality certification enforcement.

Over the last several years, the water boards have embraced accountability. Our annual performance reports allow everyone to see where the water boards are performing and under-performing. Audits like the one your office is concluding provide a complementary opportunity to assess our performance and improve our organization for the benefit of Californians and their water resources.

Again, I thank your staff for a thorough report, and I appreciate their professionalism and courtesy.

Sincerely,

A handwritten signature in black ink that reads "Thomas Howard". The signature is written in a cursive, slightly slanted style.

Thomas Howard  
Executive Director

June 2013



---

**North Coast Regional Water Quality Control Board**

May 14, 2013

Ms. Elaine Howle  
California State Auditor  
555 Capitol Mall, Suite 300  
Sacramento, CA 95814

Dear Ms. Howle:

North Coast Regional Water Board staff has reviewed the sections of the draft 401 program audit report applicable to the North Coast Region, and we do not have any comments. The report as drafted is consistent with our discussions with you and your team. Thank you very much for working with us in such a collaborative and professional manner throughout your audit.

Sincerely,

*(Signed by: Matthias St. John)*

Matthias St. John  
Executive Officer

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June 2013

## STATE OF CALIFORNIA

EDMUND G. BROWN JR.  
Governor

Department of Alcoholic Beverage Control  
Department of Corporations  
Department of Financial Institutions  
California Highway Patrol  
California Housing Finance Agency  
Department of Housing & Community Development  
Department of Motor Vehicles  
Department of Real Estate  
Department of Transportation



BRIAN P. KELLY  
Acting Secretary

Office of Real Estate Appraisers  
Office of Traffic Safety  
New Motor Vehicle Board  
Board of Pilot Commissioners  
California Film Commission  
California Office of Tourism  
Infrastructure and Economic Development Bank  
Small Business Loan Guarantee Program  
Public Infrastructure Advisory Commission

## BUSINESS, TRANSPORTATION AND HOUSING AGENCY

May 14, 2013

Elaine M. Howle, California State Auditor\*  
California State Auditor's Office  
555 Capitol Mall, Suite 300  
Sacramento, CA 95814

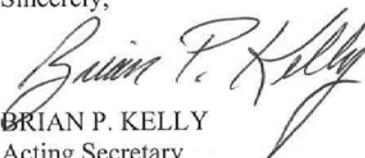
Dear Ms. Howle:

Attached please find a response from the California Department of Transportation (Caltrans) to your redacted draft audit report entitled "State Water Resources Control Board:..." (Report 2012-120). Thank you for allowing Caltrans and the Business, Transportation and Housing Agency (Agency) the opportunity to respond to the report.

As noted in its response, implementation of the sole recommendation directed at Caltrans will begin later this month. We appreciate your identification of opportunities for improvement and your recommendations for best practices that Caltrans can follow.

If you need additional information regarding Caltrans' response, please do not hesitate to contact Michael Tritz, Agency Deputy Secretary for Audits and Performance Improvement, at (916) 324-7517.

Sincerely,

  
BRIAN P. KELLY  
Acting Secretary

Attachment

cc: Malcolm Dougherty, Director, California Department of Transportation

\* California State Auditor's comment appears on page 65.

**DEPARTMENT OF TRANSPORTATION**

OFFICE OF THE DIRECTOR  
P.O. BOX 942873, MS-49  
SACRAMENTO, CA 94273-0001  
PHONE (916) 654-5266  
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*Flex your power!  
Be energy efficient!*

May 10, 2013

Brian P. Kelly  
Acting Secretary  
Business, Transportation and Housing Agency  
980 9<sup>th</sup> Street, Suite 2450  
Sacramento, CA 95814

Dear Mr. Kelly:

Thank you for the opportunity to review and comment on the California State Auditors' (CSA) draft report entitled "State Water Resources Control Board: ...." (Report 2012-120). As portions of the draft report were redacted, the California Department of Transportation (Caltrans) limits its comments to the portions relevant only to Caltrans.

At the request of the Joint Legislative Audit Committee, the CSA conducted an audit of the State Water Quality Control Board and the nine Regional Water Quality Control Boards' Section 401 certification process. Although the audit concerned the water boards in general, the Joint Legislative Audit Committee requested the CSA to pay particular attention to the water quality certification process as it relates to Caltrans. This focus is due to the fact that Caltrans is required to obtain water quality certifications for many of its projects.

In the draft audit report, the CSA auditors noted that Caltrans had concerns with the administration of the Water Quality Certification Program. Specifically, Caltrans asserted that:

- Working with the nine regional water boards is difficult because they have different ways of administering the certification program.
- Regional water boards often do not respond within required time frames to Caltrans' applications.
- Some regional water boards seem to exceed their authority under state regulations when adding prescriptive best management practice requirements as conditions to its water quality certifications.
- Inconsistent monitoring and enforcement practices are implemented among the regional water boards.
- Monitoring requirements have been expensive to comply with, and costs of responding to enforcement actions have increased significantly over the last five years.

Mr. Brian P. Kelly  
May 10, 2013  
Page 2

The CSA auditors concluded that Caltrans was unable to demonstrate that costs of responding to enforcement actions have increased over the last five years because it does not specifically track costs related to the certification process. Caltrans is not aware of any requirement to do so. ①

CSA's recommendation and Caltrans' response are listed below:

**Recommendation:**

If Caltrans believes that responding to the monitoring requirements and enforcement actions related to the certification program are too costly, it should begin to gather and track these costs using its accounting system. Once it has tracked these costs for a period of time, Caltrans should analyze whether these monitoring and enforcement activities are, in fact, too costly and work with the state and regional water boards to resolve how these costs might be better contained.

**Caltrans Response:**

Caltrans is investigating methods to track the cost information, and has recently established a committee to determine the most effective course of action to accomplish this goal. The first committee meeting is scheduled for May 21, 2013.

Caltrans appreciates the opportunity to provide a response to the relevant portions of the draft audit report. If you have any questions or require further information, please contact Katrina Pierce, Chief, Division of Environmental Analysis, at (916) 653-7136, or William E. Lewis, Assistant Director, Audits and Investigations, at (916) 323-7122.

Sincerely,

  
FOR MALCOLM DOUGHERTY  
Director

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## Comment

### **CALIFORNIA STATE AUDITOR'S COMMENT ON THE RESPONSE FROM THE BUSINESS, TRANSPORTATION AND HOUSING AGENCY, CALIFORNIA DEPARTMENT OF TRANSPORTATION**

To provide clarity and perspective, we are commenting on the response to our audit report from the Business, Transportation and Housing Agency, California Department of Transportation (Caltrans). The number below corresponds to the number we placed in the margin of Caltrans' response.

We acknowledge that there is not a requirement for Caltrans to track its costs of complying with the water quality certification program. However, as we indicate on page 49 of the report, because it does not track this information, neither we nor Caltrans could validate its assertion that these costs have increased over the last five years.

①

cc: Members of the Legislature  
Office of the Lieutenant Governor  
Little Hoover Commission  
Department of Finance  
Attorney General  
State Controller  
State Treasurer  
Legislative Analyst  
Senate Office of Research  
California Research Bureau  
Capitol Press