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6
7 BEFORE THE
8 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

9 In the Matter of:
10 California Regional Water Quality Control
Board, San Diego Region Water Quality
11 Certification 07C-106; Agua Hedionda and
Calavera Creek Dredging and Improvement
12 Project

Water Quality Certification Application No.
07C-106

PETITION FOR APPEAL AND
RECONSIDERATION OF THE DENIAL OF
WATER QUALITY CERTIFICATION 07C-
106 BY THE REGIONAL WATER
QUALITY CONTROL BOARD, SAN
DIEGO REGION

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16 **A. INTRODUCTION**

17 Pursuant to Section 13320 of the California Water Code and Section 2050 of Title 23 of
18 the California Code of Regulations, the City of Carlsbad hereby petitions the State Water
19 Resources Control Board ("State Board") for review of Water Quality Certification Application
20 No. 07C-106, Agua Hedionda and Calavera Creek Dredging and Improvement Project
21 ("Project").

22 **B. INFORMATION REQUIRED BY CODE OF REGULATIONS §2050**

23 **1. Name, address, telephone number and e-mail address of the petitioner:**

24 City of Carlsbad
1200 Carlsbad Village Drive
25 Carlsbad, California 92008
26 Telephone: (760) 434-2891
Facsimile: (760) 434-8367

27
28 The Petitioner should be contacted through its attorney of record.

1 **2. The action or inaction of the Regional Water Board being petitioned:**

2 The City of Carlsbad (“Petitioner”) petitions the State Board for review of the denial of
3 Water Quality Certification Application No. 07C-106; Agua Hedionda and Calavera Creek
4 Dredging and Improvement Project (Project).

5 **3. Date the Regional Water Board Acted**

6 The letter denying Water Quality Certification Application No. 07C-106 was issued on
7 July 29, 2013 (Exhibit A).

8 **4. Reasons the Action was Inappropriate or Improper**

9 See the Memorandum of Points and Authorities

10 **5. Manner in Which Petitioner is Aggrieved**

11 In the 1970’s the senior community of the Rancho Carlsbad Mobile Home Park was
12 constructed near the confluence of the Agua Hedionda Creek Channel and Calavera Creek
13 Channel. In 1996 the community was converted to condominium ownership. At that time it was
14 determined that 278 out of 496 lots were in the 100 year flood plain. Petitioner conditioned the
15 residents as the owner of the development to mitigate the potential flooding impacts. Due to the
16 expense the residents objected to the Project. Petitioner agreed to take on the Project on their
17 behalf with payments made to Petitioner over a ten year period by putting the project into the
18 Petitioner’s Master Drainage Plan. The project is the culmination of over a decade’s worth of
19 study and planning, working with various permitting agencies to arrive at a project that would
20 meet the needs of all involved.

21 Through the Section 404 permit process, which ran concurrent with the 401 process,
22 Petitioner had discussed numerous alternatives with California Regional Water Quality Control
23 Board, San Diego Region (“Regional Board”), California Department of Fish and Wildlife
24 (“CDFW”), and US Army Corps of Engineers (“USACOE”) and the group agreed that none of
25 those alternatives were feasible. Based upon that agreement in 2012, CDFW and USACOE staff
26 continued working with Petitioner and, through multiple project redesigns and changes in the
27 mitigation plan, Petitioner was able to satisfactorily address all of their issues. In contrast to the
28 Regional Board actions, CDFW and USACOE continued to dialogue and work with Petitioner to

1 achieve resolution of all issues. Petitioner was attempting to address the Regional Board issues
2 through this 401 certification application process; however, after only one deficiency letter
3 issued February 22, 2013, Petitioner was not given opportunity for dialog to address these issues.
4 The CDFW and USACOE are also charged with protecting aquatic resources and use a no-net-
5 loss evaluation criteria for mitigation of wetland impacts. Petitioner was able to work
6 collaboratively with these agencies to agree on a successful project. Petitioner has spent a
7 significant amount of money to date on biologic, hydrologic, and other expert studies preparing
8 and designing this project.

9 Petitioner is further aggrieved because it already has purchased compensatory wetland
10 mitigation for the Project at Robertson Ranch for the impacts to the Project, after meetings and
11 on-site visits from 2008-2010 with Regional Board staff where suitability of the site was
12 communicated verbally. This expense was \$613,647. The Regional Board's denial of the water
13 quality certification in 2013 makes the purchase of these acres potentially worthless. Also,
14 reapplying for a new water quality certification will require Petitioner to expend additional time
15 and money.

16 **6. Specific Action Requested**

17 Petitioner requests that, consistent with Section 3869(a)(3)-(a)(4) of Title 23 of the
18 California Code of Regulations (CCR), the State Board set aside the Regional Board's denial
19 with prejudice of Water Quality Certification Application No. 07C-106, and direct the Executive
20 Officer of the Regional Board to issue the certification. However, pursuant to 23 CCR Section
21 2050(d), the Petitioner hereby requests this petition to be held in abeyance pending additional
22 discussions with the Regional Board.

23 Further, for the reasons stated in Sections 5 and 7, Petitioner requests that the State Board
24 provide an evidentiary hearing on the Denial, as authorized by Section 2050.6(b) of Title 23 of
25 the CCR. A hearing is necessary to present evidence and expert testimony regarding the issues
26 raised by this appeal.

1 **7. Points and Authorities in Support of Petition**

2 On October 19, 2007, Petitioner submitted an application for a Clean Water Act Section
3 401 Water Quality Certification to the Regional Board, Application No. 07C-106: Agua
4 Hedionda and Calavera Creek Dredging and Improvement Project; Reference No.
5 707737:amonji. That request for a water quality certification was for the Agua Hedionda Creek
6 Channel and Calavera Creek Dredging and Improvement Project.

7 On November 15, 2007 Regional Board issued a letter notifying the Petitioner that the
8 application was incomplete.

9 On October 24, 2008 Petitioner requested to amend the application.

10 On November 4, 2008 the Regional Board denied the request.

11 On February 2, 2010 Regional Board issued a letter regarding Review of Mitigation
12 Proposal stating that real creation at this site had potential and that Petitioner was encouraged to
13 develop a detailed mitigation plan.

14 On April 23, 2012, the Project application was deemed statutorily complete; however
15 additional project information was requested pursuant to California Code of Regulations (CCR),
16 title 23, section 3836(a).

17 On May 30, 2012, Petitioner submitted requested information.

18 On June 7, 2012 pursuant to CCR, title 23, section 3838(c), the Regional Board issued a
19 Denial Without Prejudice due to lack of time to adequately review Petitioner submittals.

20 On February 22, 2013, the Regional Board issued a letter to Petitioner stating that the
21 application “..does not currently comply with key legal and policy considerations in several
22 important respects ... and cannot be processed at this time.” A list of deficiencies was included
23 in the letter that required a response from Petitioner by April 15, 2013.

24 On April 15, 2013, Petitioner submitted a 279 page response, with two requests for
25 continued discussions with Regional Board staff, and three requests for Regional Board approval
26 of Petitioner proposed additional mitigation.

27 On July 29, 2013, the Regional Board issued a letter denying the Section 401 Water
28 Quality Certification application.

1 Essentially the Regional Board has found that the Petitioner has not adequately mitigated
2 the impacts of the Project. Petitioner maintains that the Regional Board has failed to review the
3 project in its entirety by analyzing the *current* condition of the project area, a previously
4 constructed trapezoidal channel filled with invasive species and potential stream bed pollutants,
5 and comparing it to the ecosystem that would be established as a result of this Project. The
6 Regional Board has found that the proposed mitigation is inadequate in description and in kind.
7 In part, this is the result of the Regional Board's lack of participation in the planning process and
8 a resistance to engage in a dialog with the Petitioner throughout the process.

9 Specifically:

10 a. The denial letter fails to acknowledge that, in addition to the 2,800 lineal feet of
11 on-site rehabilitation restoration and enhancement, Petitioner also proposed 5.06 acres of off-site
12 creation, restoration, and enhancement. In the April 15, 2013 letter to Regional Board, Petitioner
13 proposed to use success criteria for the entire on-site rehabilitation restoration and enhancement
14 area, which would only be met once the mitigation areas were self-sustaining. In addition,
15 Petitioner proposed to work with the neighboring residents to prevent any future disturbances.

16 b. The denial letter inaccurately states that no creation is included in the mitigation
17 proposal. The off-site mitigation area includes both creation and restoration/enhancement. The
18 impacts to the existing willow riparian forest are being mitigated at a 3:1 ratio. Impacts to the
19 unvegetated channel, which currently provides minimal aquatic resource value, are being
20 mitigated through the off-site restoration/enhancement of 3.09 acres of wetlands and the on-site
21 restoration/enhancement of 2,800 lineal feet of channel. All of this proposed mitigation will be
22 subject to success criteria and, therefore, will not be approved until fully established and self-
23 sustaining. Given the degraded condition of the existing on-site channel, the proposed on-site
24 restoration and enhancement will substantially increase the quality and sustainability of
25 wetlands, especially in their diversity and condition. This proposed rehabilitation through an
26 active native planting and seeding program is required to restore native habitat, functions, and
27 services to the channel.

28

1 It should also be noted that, in 2012 in response to the Regional Board's discussion of a
2 new 'lineal feet' requirement, Petitioner proposed to provide mitigation for both the acreage of
3 impacts and the lineal feet of impacts, even though the impact areas are coincident. This
4 requirement for lineal feet was not revealed to Petitioner until late in the permit processing and
5 was inconsistent with previously approved 401 permits. To compensate for impacts of a
6 previous dredging operation in the same location, Petitioner and Regional Board reached a
7 settlement (Order No. R9-2010-0008) wherein Petitioner provided 3.06 acres of mitigation for
8 impacts to Waters of the State. The settlement does not mention the need for mitigation of lineal
9 feet of impacts. Additionally, the No Net Loss Policy (Executive Order W-59-93) calls for
10 "...no overall net loss...of wetland acreage and values..." not "acreage and lineal feet".

11 c. The Regional Board has provided no evidence to support their claim that the
12 project would produce adverse water quality impacts, and in fact current conditions could prove
13 more damaging to water quality than the proposed project. Petitioner committed to following a
14 Regional Board approved SWPPP and implementing all Best Management Practices throughout
15 construction. The project would remove sediments that likely contain settled pollutants and
16 would reduce the opportunity for flood waters to convey pollutants from adjacent residential
17 areas into the channel. One of the project's rehabilitation components involves seeding the bed
18 and bank with native grasses, providing native habitat to the existing condition, which is non-
19 native and has severely limited function and service. Increasing the flow capacity and
20 maintaining a pervious bottom would maintain or improve the infiltration and water conveyance
21 functions of the channel.

22 d. The statements in the Regional Board denial letter indicate a lack of understanding
23 of the permit application, as well as a misreading of Petitioner's April 15, 2013 letter. Petitioner
24 proposed to revise the Wetland Mitigation Site Monitoring and Maintenance Plan to reflect the
25 agreement between Regional Board and Petitioner regarding potential impacts to future
26 maintenance activities. Since these would occur in the future and their scope and impact cannot
27 be assessed at this time, Petitioner proposed working with Regional Board to identify a suitable
28 upstream location for restoration through treatment of invasive species. Also, as clearly stated in

1 the project description, all impacts of future maintenance activities will be temporary since the
2 entire area of work will be reseeded and/or replanted with native vegetation.

3 No legal arguments are made in this petition per direction of Phil Wyels by phone on
4 August 21, 2013. Petitioner will supplement the points and authorities prior to any hearing.

5
6 **8. Statement that the Petition Has Been Sent to the Regional Board and Any**

7 **Dischargers**

8 A true and correct electronic copy of this Petition was sent via email on ____ to the State
9 Board and Regional Board and the dischargers at the following addresses:

10 State Water Resources Control Board
11 Office of Chief Counsel
12 Jeannette L. Bashaw, Legal Analyst
13 P.O. Box 100
14 Sacramento, CA 95812-0100
15 email: jbashaw@waterboards.ca.gov

16 San Diego Regional Water Quality Control Board
17 David Gibson
18 Executive Officer
19 9174 Sky Park Court, Suite 100
20 San Diego, CA 92123
21 amonji@waterboards.ca.gov

22 Peggy Bartels
23 U.S. Army Corps of Engineers
24 Peggy.j.bartels@usace.army.mil

25 Kevin Hupf
26 California Department of Fish and Wildlife
27 khupf@wildlife.ca.gov

28 Rancho Carlsbad Owner's Association, Inc.
info@RanchoCarlsbadOA.org

U.S. EPA, OWOW, Region 9
75 Hawthorne Street
San Francisco, CA 94105
R9-WTR8-mailbox@epa.gov

1 **9. Statement that the Substantive Issues or Objections in the Petition were Raised**
2 **Before the Regional Board**

3 This matter did not involve a hearing before the Regional Board, and all communication
4 by Petitioner prior to the issuance of the denial of the Section 401 certification was with
5 Regional Board staff. Those communications were minimal, however, and often lacked clarity
6 on expected standards the Petitioner would have to meet. Petitioner requested the Regional
7 Board's written policy related to linear feet mitigation and it was never offered. Petitioner's
8 response letter dated April 22, 2013 requested, in both the opening and closing of the letter,
9 feedback from the Regional Board to further understand expected standards, and requested
10 continued discussions with Regional Board staff. In addition, the phrase 'if acceptable to the
11 Regional Board the city will....' was included in three separate locations indicating a willingness
12 to continue working with Regional Board staff to enhance mitigation and work towards
13 resolution of Regional Board expectations, and obtain a successful project for all stakeholders.
14

15 Respectfully submitted on behalf of the City of Carlsbad,

16 Dated: Aug. 28, 2013

CELIA A. BREWER
City Attorney

17
18 By 
19 RONALD C. KEMP
20 Assistant City Attorney
21 Attorneys for City of Carlsbad
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EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

California Regional Water Quality Control Board, San Diego Region

July 29, 2013

Certified Mail – Return Receipt Requested
Article Number: 7011 0470 0002 8961 6077

Ms. Sherri Howard
City of Carlsbad
1635 Faraday Avenue
Carlsbad, CA 92008

In reply refer to:
707737: amonji

Subject: Denial of Water Quality Certification Application No. 07C-106; Agua Hedionda and Calavera Creek Dredging and Improvement Project

Ms. Howard:

On October 19, 2007 the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board), received an application for Water Quality Certification pursuant to section 401 of the Clean Water Act (CWA) on behalf of the City of Carlsbad (City) for the **Agua Hedionda and Calavera Creeks Dredging and Improvement Project** (Project) and it was assigned file number **07C-106**. The San Diego Water Board has completed a comprehensive evaluation of the application (Application No. 07C-106), including the most recent supplemental information submitted on April 15, 2013, and based on the considerations described below the application for Water Quality Certification is denied.

BACKGROUND

On April 23, 2012, the Project application was deemed statutorily complete; however, additional project information was requested pursuant to California Code of Regulations (CCR), title 23, section 3836(a). The requested information was provided on May 30, 2012. Certification of the Project was denied without prejudice on June 7, 2012 pursuant to CCR title 23, section 3838(c) because the San Diego Water Board needed additional time to review the additional information submitted for the Project.

The Project proposes construction of drainage channel infrastructure modifications and improvements along Agua Hedionda Creek and Calavera Creek to provide flood protection for the residents of the Rancho Carlsbad mobile home community. The current revised Project includes two riprap drop structures in Agua Hedionda Creek, one drop structure in Calavera Creek, a riprap channel stabilization structure under the Cannon Road Bridge, and rock slope protection along both sides of Agua Hedionda Creek starting from Rancho Carlsbad Drive to Cannon Road Bridge. Project construction would include dredging approximately 36,000 cubic yards of sediment from Agua Hedionda Creek and Calavera Creek channels and deepening portions of Agua Hedionda Creek by six to eight feet. The City reports that the proposed flood control Project will remove approximately 168 Rancho Carlsbad mobile home lots from the 100-year flood plain by means of channel modifications, and thereby, allow the Rancho

Carlsbad property owners to qualify for flood insurance. The construction of the Project would permanently impact 3.15 acres (3,541 linear feet (LF)) of jurisdictional wetland waters of the United States and 1.79 acres of waters of the State. The Project also proposes routine channel maintenance dredging in portions of both creeks in order to maintain the proposed design depth and flood capacity.

BASIS FOR DENIAL

By letter dated February 22, 2013, the San Diego Water Board informed you that the City's application for CWA section 401 Certification for the Project did not currently comply with key legal and policy considerations in several important respects and that staff would recommend that the Executive Officer deny certification for the Project unless complete information was submitted by April 15, 2013 to address the application deficiencies. The City's supplemental information submitted on April 15, 2013 did not adequately address the noted deficiencies in the application. Moreover, the benefits to water quality from the Project will be minimal and the City has failed to demonstrate that beneficial uses of waters of the United States and/or State will be protected over the life of the Project. The Project would result in significant, long-term adverse impacts to water quality by permanently impacting (dredge and fill) 3,541 LF of perennial streambed of waters of the State. Your application is being denied for the following reasons:

Inadequate Minimization and Mitigation

1. To compensate for the Project permanent impacts, the Project proposes approximately 1,000 linear feet of off-site restoration and enhancement and 2,800 LF of onsite enhancement within Agua Hedionda and Calavera Creek channels and at the top of the channel banks. The onsite enhancement includes maintaining the vegetation within the channel at a height of 2 feet or less and revegetation of the areas impacted by maintenance dredging. The proposed onsite enhancement does not qualify as mitigation because it is not designed to be self-maintaining once adequately established. The San Diego Water Board finds the proposed additional enhancement mitigation unacceptable.
2. The Project will result in a net loss of aquatic resources because mitigation as creation (establishment of aquatic resources where none previously existed) is not part of the proposed mitigation; the proposed mitigation includes only restoration and enhancement. Pursuant to the California Code of Regulations and the No Net loss Policy, it is the intent of the San Diego Water Board to ensure no overall net loss and a long-term net gain in the quantity, quality, and sustainability of wetlands including their abundance, diversity, and condition. The City's proposed Project does not meet these standards.
3. The additional information submitted by the City on April 15, 2013 does not clearly demonstrate that the amount of compensatory mitigation proposed is sufficient to offset adverse water quality impacts attributed to the Project in a manner that protects and

restores the abundance, types, and conditions of aquatic resources and supports their beneficial uses. The description of the modifications lacks the detail necessary for the San Diego Water Board to evaluate the adequacy of the modified mitigation proposal.

4. To compensate for impacts from channel maintenance and dredging, additional enhancement is proposed upstream of the Project site in Agua Hedionda Creek. The revised *Wetland Mitigation Site Monitoring and Maintenance Plan for City of Carlsbad Agua Hedionda and Calavera Creek Channels Dredge Project No. 3338*, dated April 2013 (Mitigation Plan) does not provide the location(s) in Agua Hedionda Creek where the enhancement would take place; figures of the additional proposed areas; and supporting information, including a revised Mitigation Plan, demonstrating that the proposed upstream restoration will adequately compensate for the Project's temporary and permanent impacts to Agua Hedionda and Calavera Creeks.

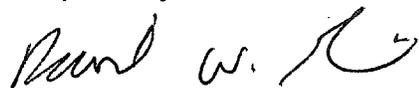
In accordance with CCR Title 23 section 3837(b) (1), this Denial of Certification is issued because the proposed project would not comply with applicable water quality standards. Appeal of this denial may be made within 30 days of its issuance in accordance with CCR Title 23 sections 3867 – 3869.

FUTURE APPLICATIONS

You may elect to reapply for Clean Water Act section 401 Water Quality Certification and Waste Discharge Requirements with a different project. The San Diego Water Board is open to discussing alternatives for controlling the sources of the flooding into Agua Hedionda and Calavera Creeks, opportunities for improvement of water quality, and opportunities for habitat creation and restoration.

In the subject line of any response, please include the reference number 707737:amonji. For questions or comments, please contact Alan Monji by phone at (858) 637-7140, or by email at amonji@waterboards.ca.gov.

Respectfully,



David W. Gibson
Executive Officer
Regional Water Quality Control Board

DG:js:db:kkd:at

cc: (via email)

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75 Hawthorne St.
San Francisco, CA 94105
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State Water Resources Control Board, Division of Water Quality
401 Water Quality Certification and Wetlands Unit
P.O. Box 100
Sacramento, CA 95812-0100
Stateboard401@waterboards.ca.gov

Tech Staff Info & Use	
File No.	07C-106
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Place ID	707737
Person ID	269588