

**State of California
California Regional Water Quality Control Board
Santa Ana Region**

June 15, 2012

ITEM: *11

SUBJECT: Order No. R8-2012-0036, FR/Cal Moreno Valley, LLC
Nandina Distribution Center Project, City of Moreno Valley,
Riverside County

SUMMARY

The matter before the Board is to consider adoption of Order No. R8-2012-0036, authorizing the discharge of fill to waters of the State that have been determined to be outside of the U.S. Army Corps of Engineers' jurisdiction and not subject to regulation under Clean Water Act Section 404 (non-federal waters).

BACKGROUND

California Water Code (CWC) Section 13376 states that, "any person discharging dredge or fill material or proposing to discharge dredged or fill material into the navigable waters of the United States within the jurisdiction of this state shall file a report of the discharge in compliance with Section 13260." Section 13260(a) of the CWC requires that any person discharging waste or proposing to discharge waste within any region, other than to a community sewer system, that could affect the quality of the waters of the State, file a report of waste discharge (ROWD). Under federal Clean Water Act (CWA) Section 401, every applicant for a federal permit or license for any activity that may result in a discharge to waters of the United States must obtain State Water Quality Certification (Certification) that the proposed activity will comply with state water quality standards.

Most Certifications are issued in connection with U.S. Army Corps of Engineers (Corps) CWA Section 404 permits for dredge and fill discharges. The State Water Resources Control Board (State Board) and Regional Water Quality Control Boards administer the Certification program in accordance with the requirements of California Code of Regulations Title 23, Section 3830 *et seq.* Since November 2003, all Certifications have been issued by the Executive Officer accompanied by authorization to discharge in accordance with State Water Resources Control Board Order No. 2003-0017-DWQ (Order No. 2003-0017-DWQ), "General Waste Discharge Requirements for Dredge and Fill Discharges That Have Received State Water Quality Certification."

Due to recent decisions by the Supreme Court that increasingly have limited the authority of the Corps to regulate discharges of dredge and fill to waters of the U.S., some projects discharge dredge or fill to waters of the State that are considered 'non-federal' waters. As a result, these projects are not subject to a

CWA Section 404 permit from the Corps and do not require a Certification. In the absence of the need to obtain a Certification, the State Board has asserted the State's authority to regulate discharges of dredge and fill to waters of the State under the Porter-Cologne Water Quality Control Act, codified as California Water Code Division 7.

On May 4, 2004, the State Board issued Water Quality Order No. 2004-0004-DWQ, "Statewide General Waste Discharge Requirements for Dredge and Fill Discharges to Waters Deemed by the U.S. Army Corps of Engineers to be Outside of Federal Jurisdiction (Order No. 2004-0004-DWQ)." However, numeric impact thresholds limit the application of Order No. 2004-0004-DWQ to very small discharges of fill.

FR/CAL MORENO VALLEY, LLC's NANDINA DISTRIBUTION CENTER PROJECT

On February 8, 2012, Regional Board staff received a ROWD from IDS Real Estate Group for FR/Cal Moreno Valley, LLC, who propose to discharge fill to 0.056-acres of waters of the State. The discharges will occur as part of the construction of two distribution warehouse buildings totaling 1,182,918 square feet, and related facilities, on approximately 54 acres (the Project), in the City of Moreno Valley, Riverside County, California. The proposed work includes the construction of a 6,884 linear feet of underground storm drain system within existing paved roadways, which will become part of Lateral B-3 of the Riverside County Flood Control and Water Conservation District's Master Drainage Plan for the area. Lateral B-3 connects to Lateral B, which drains to the Perris Valley Storm Drain, tributary to the San Jacinto River.

The project site includes 0.056 acres of waters of the state, including a seasonal pond and an unlined, earthen roadside drainage ditch. The affected waters are ephemeral with no wetlands and only ruderal vegetation. Permanent impacts to water quality standards will occur as a result of the discharge of fill to the ephemeral pond and drainage ditch. A total of approximately 1,240 linear feet of state waters will be filled.

In a letter dated October 24, 2007, the Corps verified that the waters on the Project site are not subject to regulation under Section 404 of the CWA.

Based on review of information provided in the ROWD and on an earlier application for CWA Section 401 water quality standards certification, Board staff has determined that the existing or potential beneficial uses of the waters affected by the proposed project include wildlife habitat (WILD) and groundwater recharge (GWR). Board staff has determined that when mitigated as proposed, the discharges to the waters of the state by the Project would not adversely affect water quality standards.

The Discharger has agreed to mitigate its permanent impacts to 0.056 acres of waters of the state by contributing \$ 204,184.54 to the San Jacinto Basin Resource Conservation District for the conservation (including but not limited to land acquisition) or enhancement of vernal pool habitat within the San Jacinto Watershed, as stipulated in its Streambed Alteration Agreement with the Department of Fish and Game. Regional Board staff believes that the proposed mitigation is appropriate and acceptable.

Discharges that will occur as part of the Project include construction and post-construction discharges of storm water runoff. These discharges are addressed by State Board Water Quality Order No. 2009-0009 -DWQ, "General Permit for Discharges Associated with Construction Activity" (Order No. 2009-0009-DWQ). As required by this permit, a Storm Water Pollution Prevention Plan (SWPPP) for the Project has been developed. A Water Quality Management Plan (WQMP) for the Project has also been developed. Best management practices specified in the project's SWPPP and WQMP, summarized in Attachment A of the applicant's report of waste discharge, should improve the water quality of any surface runoff leaving the project site. Discharges from the site should comply with applicable water quality standards.

Pursuant to CEQA, the City of Moreno Valley prepared a Mitigated Negative Declaration (MND) for the Project and adopted it on July 12, 2007. A Notice of Determination was filed on July 30, 2007. As a Responsible Agency under CEQA, the Board is required to consider the Lead Agency's environmental documents and make findings on the significant impacts within its jurisdiction. A Responsible Agency has responsibility for mitigating direct or indirect environmental effects of those parts of a project it decides to carry out or approve (California Code of Regulations, Title 14, Section 15096). Board staff has considered the City's MND for the project and the proposed mitigation discussed above, and independently finds that there are no un-mitigated significant impacts on water quality that would result from the proposed project.

RECOMMENDATION

Board staff recommends that the Regional Board adopt Order No. R8-2012-0036.

Comments were solicited from the following agencies and parties:

SWRCB
California Department of Fish and Game
City of Moreno Valley
Riverside County Flood Control and Water Conservation District
Inland WaterKeeper

State of California
California Regional Water Quality Control Board
Santa Ana Region

Waste Discharge Requirements
Order No. R8-2012- 0036
for
FR/Cal Moreno Valley, LLC
Nandina Distribution Center Project
City of Moreno Valley, Riverside County

The California Regional Water Quality Control Board, Santa Ana Region (hereinafter Board), finds that:

1. On February 8, 2012, the Board received a Report of Waste Discharge (ROWD) from FR/Cal Moreno Valley, LLC (hereinafter, Discharger) in which it proposes to discharge fill to and permanently impact 0.056 acres of non-wetland waters of the state as part of the construction of the Nandina Distribution Center (Project) in the City of Moreno Valley (City).
2. The proposed Project is to construct a 1,182,918 square foot industrial development, consisting of two buildings on approximately 54 acres. The project also includes the construction of a 6,884 linear foot underground storm drain system, which will become part of Lateral B-3 of in accordance with the Riverside County Flood Control and Water Conservation District's Master Drainage Plan for the area. Lateral B-3 connects to Lateral B, which drains to the Perris Valley Storm Drain, tributary to the San Jacinto River. The work will take place in the central portion of the City of Moreno Valley, in Riverside County, within Section 31 of Township 3 South, Range 3 West, of the U.S. Geological Survey *Perris, California* quadrangle map (33° 52' 01" N/ -117° 14' 10" W).
3. In a letter dated October 24, 2007, the U.S. Army Corps of Engineers (Corps) verified that the waters on the Project site are not subject to regulation under Section 404 of the Clean Water Act.
4. The Board commonly regulates discharges of dredge or fill to waters of the State through the issuance of Clean Water Act (CWA) Section 401 Water Quality Standards Certifications where the discharge is also subject to regulation by the Corps. This occurs when the definitions of "waters of the State" and "waters of the U.S." (under CWA Section 404) overlap. In the absence of an applicable federal permit or license, the Board may regulate the proposed discharge through the issuance of Waste Discharge Requirements or a waiver.
5. The waters of the State on the Project site consist of an ephemeral pond and a roadside drainage ditch. The Water Quality Control Plan for the Santa Ana River Basin (1995, as amended) does not designate beneficial uses for any of the surface waters on the site. Based on information provided in the applicant's

ROWD and staff's observations of these waters, beneficial uses that are existing or attainable for the ephemeral pond and drainage ditch include:

- a. Wildlife habitat (WILD); and
 - b. Groundwater recharge (GWR).
6. Waste discharge requirements are necessary to address potential impacts of the fill on the beneficial uses of waters of the State.
 7. This Order regulates the discharge of fill material to waters of the State that are not subject to Corps CWA Section 404 jurisdiction (nonfederal).
 8. The Discharger has agreed to mitigate its permanent impacts to 0.056 acres of waters of the state by contributing \$ 204,184.54 to the San Jacinto Basin Resource Conservation District for the conservation (including but not limited to land acquisition) or enhancement of vernal pool habitat within the San Jacinto Watershed, as stipulated in its Streambed Alteration Agreement with the California Department of Fish and Game.
 9. Pursuant to the California Environmental Quality Act (CEQA) contained in Chapter 3 (commencing with Section 21100), Division 13 of the Public Resources Code, the City of Moreno Valley (City) adopted a Mitigated Negative Declaration (MND) for the Project, which was then known as First Industrial Realty Trust, Inc.'s Nandina III Distribution Center, on July 12, 2007. A Notice of Determination was filed by the City on July 30, 2007.
 10. As a Responsible Agency under CEQA, the Board is required to consider the Lead Agency's environmental documents and make findings on the significant impacts within its jurisdiction. A Responsible Agency has responsibility for mitigating direct or indirect environmental effects of those parts of a project it decides to carry out or approve (California Code of Regulations, Title 14, Section 15096). The Board has considered the MND prepared by the City for the Project in the adoption of these waste discharge requirements and finds that measures specified in the City's MND and herein mitigate impacts to water quality standards to insignificant levels. There will be no un-mitigated significant impacts on water quality that would result from the proposed project.
 11. The Board has considered antidegradation pursuant to State Board Resolution No. 68-16 and finds that the discharge is consistent with those provisions. The project is not expected to result in lowering of water quality. Project construction should not affect water quality if conducted in compliance with applicable State Water Resources Control Board permits. The project's potential long-term effects on water quality standards will be minimized or avoided by implementing appropriate best management practices specified in approved water quality management plans, and by complying with the mitigation measure required herein.

12. The Board has notified the discharger and other interested agencies and persons of its intent to prescribe waste discharge requirements for the discharge and has provided them with an opportunity for public hearing and opportunity to submit their written views and recommendations.
13. The Board, in a public meeting, heard and considered all comments pertaining to the discharge.

IT IS HEREBY ORDERED that the Discharger, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, shall comply with the following:

A. DISCHARGE SPECIFICATIONS:

1. No activities associated with the project shall cause or threaten to cause a nuisance or pollution as defined in Section 13050 of the California Water Code.
2. The discharge of any substance in concentrations toxic to animal or plant life is prohibited.
3. The discharge of fill materials shall be limited to inert materials, as defined in California Code of Regulations (CCR) Title 27, Section 20230. The discharge of fill material other than native soil shall be only with the prior approval of the Executive Officer.

B. DISCHARGE PROHIBITIONS:

1. The direct discharge of wastes, including rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plains, is prohibited.
2. The discharge of floating oil or other floating materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.
3. The discharge of silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.
4. Discharges to surface waters of wastes or pollutants that are not otherwise regulated by a separate National Pollutant Elimination System (NPDES) permit, are prohibited.

C. PROVISIONS:

1. The Discharger is authorized to discharge fill to 0.056 acres of waters of the state at the locations described in its February 7, 2012, ROWD.
2. Best management practices (BMPs) described the Project's Water Quality Management Plan and summarized in Appendix A of the Discharger's February 7, 2012, ROWD shall be operational prior to occupancy of any of the Project's proposed buildings.
3. To mitigate for the discharge of fill to waters of the state, the Discharger shall provide proof of payment of \$204,184.54 to the San Jacinto Basin Resource Conservation District for the conservation (including but not limited to land acquisition) or enhancement of vernal pool habitat within the San Jacinto Watershed, as stipulated in its Streambed Alteration Agreement with the Department of Fish and Game. Evidence of the payment shall be provided to the Executive Officer no later than 90 days after the commencement of construction activities on the Project site.
4. The discharger shall maintain a copy of this Order at the site so that it is available to site operating personnel at all times. Key operating personnel shall be familiar with its content.
5. The discharger shall remove from the site any waste or fill material found to contain substances that may have a deleterious effect on water quality, and dispose of unacceptable wastes in a manner acceptable to the Executive Officer.
6. The discharger must comply with all of the requirements of this Order. Any violation of this Order constitutes a violation of the California Water Code and may constitute a violation of the CWA and its regulations, and is grounds for enforcement action, termination of this Order, revocation and re-issuance of this Order, denial of an application for re-issuance of this Order; or a combination thereof.
7. The discharger shall take all reasonable steps to minimize or prevent any discharge that has a reasonable likelihood of adversely affecting human health or the environment.
8. The provisions of this Order are severable, and if any provision of this Order, or the application of any provisions of this Order to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this Order shall not be affected thereby.

9. The filing of a request by the discharger for modification, revocation and re-issuance, or termination of this Order or a notification of planned changes or anticipated noncompliance does not stay any requirements of this Order.
10. The requirements prescribed herein do not authorize the commission of any act causing injury to the property of another, nor protect the discharger from liabilities under federal, state, or local laws, nor guarantee the discharger a capacity right in the receiving waters.
12. This Order does not convey any property rights of any sort, or any exclusive privilege.
13. This Order is not transferable to any person except after notice to, and approval by, the Executive Officer. The Board may require modification or revocation and re-issuance of this Order to change the name of the discharger.
14. In the event of any change in control or ownership of land or waste discharge facility presently owned or controlled by the discharger, the discharger shall notify the succeeding owner or operator of the existence of this Order by letter, a copy of which shall be forwarded to the I Board.
15. This Order will serve as a Clean Water Act Section 401 Water Quality Standards Certification in the event that one is required by any federal agency, except as noted below. Under California Water Code, Section 1058, and pursuant to 23 CCR §3860, the following shall be included as conditions of all water quality certification actions:
 - a. Every certification action is subject to modification or revocation upon administrative or judicial review, including review and amendment pursuant to Section §13330 of the Water Code and Article 6 (commencing with Section 3867) of this Chapter.
 - b. Certification is not intended and shall not be construed to apply to any activity involving a hydroelectric facility and requiring a FERC license or an amendment to a FERC license unless the pertinent certification application was filed pursuant to Subsection §3855(b) of this Chapter and that application specifically identified that a FERC license or amendment to a FERC license for a hydroelectric facility was being sought.
 - c. Certification is conditioned upon total payment of any fee required under this Chapter and owed by the applicant.

16. The Board and other authorized representatives shall be allowed:
- a. Entry upon premises where a regulated facility or activity is located or conducted, or where records are kept under the requirements of this Order;
 - b. Access to copy any records that are kept under the requirements of this Order;
 - c. To inspect any facility, equipment (including monitoring and control equipment), practices, or operations regulated or required under this Order; and
 - d. To photograph, sample and monitor for the purpose of assuring compliance with this Order.

D. REPORTING:

Upon completion of the discharge of fill to waters of the state authorized by this Order, the Discharger shall submit a compliance report to the Board. The report shall:

1. Notify the Board that the discharge has been completed;
2. Include information concerning compliance with the specifications, prohibitions and provisions of this Order; and,
3. If not previously submitted, provide evidence of the payment of the in lieu fees identified above to the San Jacinto Basin Resource Conservation District.
4. Request the rescission of this Order.

I, Kurt V. Berchtold, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Santa Ana Region, on June 15, 2012.

Kurt V. Berchtold
Executive Officer