

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

February 29, 2008

ITEM: *10

SUBJECT: Order No. R8-2008-0025, Distinguished Homes, Tract Map No. 16798, City of Colton

SUMMARY

The matter before the Board is to consider adoption of Order No. R8-2008-0025, which authorizes 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 are 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

STAFF REPORT

U.S., some projects discharge dredge or fill to waters of the State that are '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 relatively small discharges of fill.

On August 28, 2006, Regional Board staff received a report of waste discharge (Report) from Glenn Lukos Associates (GLA) on behalf of Distinguished Homes. In the Report, Distinguished Homes proposes to discharge fill to 0.30 acres of waters of the State. A total of 3,886 linear feet of waters of the State will be filled. On June 2, 2004, the Corps issued a letter stating that the discharge is not subject to Section 404 of the Clean Water Act.

The affected waters are un-named ephemeral drainages and include 0.15 acres of riparian stream. Discharges leave the site via road culverts beneath Barton Road to the west and are conveyed to the Santa Ana River in the urban storm drain system.

The discharges will occur as part of the development of Tract Map 16798 (TM 16798, a.k.a. "Iron Horse Hills"). TM 16798 is for the construction of 187 single-family residences and associated roadways and infrastructure on 119.6 acres located in an undeveloped portion of an area generally bound by Barton Road, Reche Canyon Road and Westwood Street in the City of Colton (34 deg. 03 min. 24 sec. N/-117 deg. 17 min. 29 sec W).

As a result of Board staff review of biological reports provided in the report of waste discharge, 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 the discharges to the non-federal waters of the State at TM 16798 would affect these beneficial uses of the receiving drainages. However, the Board could not authorize the proposed discharges in accordance with Order No. 2004-0004-DWQ because the discharges exceeded the impact thresholds of that Order. Consequently, the proposed discharge would need to be authorized using individual waste discharge requirements.

Distinguished Homes proposes to mitigate impacts to beneficial uses by enhancing portions of the drainage after it has been graded. Those portions will

STAFF REPORT

remain as open space and be vegetated with native riparian plants. A separate storm drain system will be constructed to convey off-site flows through the site to the downstream reach, while discharges from the developed portions of the site will be conveyed in another drainage system to an extended detention basin. A total of 4.8 acres of mulefat scrub and 0.95 acre of Elderberry and Sycamore woodland is proposed. The proposed mitigation is detailed in a Conceptual Mitigation and Monitoring Plan submitted on August 28, 2006. Board staff expects that the mitigation site will require maintenance, consisting of vegetation thinning, in order to provide defensible space for fire protection.

Distinguished Homes has also offered to vegetate the extended detention basin with riparian plants as mitigation for impacts to streams subject to the jurisdiction of the Department of Fish and Game (Department). Board staff does not believe that storm water treatment facilities should be accepted as compensatory mitigation for impacts to beneficial uses. Such an approach implies that protecting the beneficial uses of the facility would take priority over their intended treatment function. This would inevitably result in conflicts between beneficial uses and treatment function. One such conflict has occurred surrounding the decommissioning of dairy waste lagoons in the southern portion of the Chino Basin. In that instance, Board staff declined to regulate the decommissioning of the lagoons to protect various species that had taken residence in them; species that were of interest to the Department. Board staff believes it would be counter-productive to regulate the operation and maintenance of treatment facilities in order to create and protect incidental and unintentional beneficial uses.

Other discharges that will occur as part of the development of TM 16798 are construction and post-construction (urban) discharges of storm water runoff. Both discharges are addressed by State Board Water Quality Order No. 99-08-DWQ, "General Permit for Discharges Associated with Construction Activity" (Order No. 99-08-DWQ) and Regional Board Order No. R8-2002-0011, NPDES Permit No. CAS618033, commonly known as the Riverside County Urban Storm Water Runoff Permit, and subsequent renewals. As required under these permits, a Storm Water Pollution Prevention Plan (SWPPP) and a final Water Quality Management Plan (WQMP) will be developed. Typical construction best management practices (BMPs) will be employed to control and remove pollutants in storm water runoff. The WQMP will be subject to review and approval by the City of Colton.

Pursuant to CEQA, the City of Colton certified an Environmental Impact Report (State Clearinghouse No. 2005041028) on August 8, 2006. A Notice of Determination was filed with the San Bernardino County Clerk on August 10, 2006.

RECOMMENDATION

Board staff recommends that the Board adopt Order No. R8-2008-0025.

Comments were solicited from the following agencies and parties:

U.S. Army Corps of Engineers, Los Angeles District
California Department of Fish and Game
U.S. Environmental Protection Agency, Supervisor of the Wetlands Regulatory
Office
State Water Resources Control Board, Department of Water Quality, Water
Quality Certification Unit

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

Order No. R8-2008-0025

Waste Discharge Requirements

for

Distinguished Homes
Tentative Tract Map No. 16798, City of Colton
San Bernardino County

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

1. Distinguished Homes (hereinafter, discharger) proposes to discharge fill to 0.30 acres of ephemeral drainages, including 0.15 acres of riparian areas, as part of the development of residential Tract Map No. 16798 (TM 16798, a.k.a. "Iron Horse Hills"), in the City of Colton.
2. TM 16798 is for the construction of 187 single-family residences and associated roadways and infrastructure on 119.6 acres located in an undeveloped portion of an area generally bounded by Barton Road, Reche Canyon Road and Westwood Street, Colton (34 deg. 03 min. 24 sec. N/-117 deg. 17 min. 29 sec W).
3. On June 2, 2004, the Corps issued a letter stating that the discharge is not subject to 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 (Certifications) where the discharge is also subject to regulation by the Corps. This occurs when the receiving water is both a water of the State as defined by the California Water Code and a water of the U.S. under CWA Section 404. 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 thereof.
5. The waters of the State consist of two ephemeral drainages tributary to Reach 4 of the Santa Ana River, in part, by way of an urban storm drainage system. The drainages overlie the Colton Groundwater Management Zone. The Water Quality Control Plan for Santa Ana River

Basin (Basin Plan) designates the following beneficial uses for the Santa Ana River (Reach 4):

- a. Groundwater Recharge (GWR);
 - b. Water Contact Recreation (REC-1);
 - c. Non-contact Water Recreation (REC-2);
 - d. Warm Freshwater Habitat (WARM);
 - e. Wildlife Habitat (WILD);
6. Based on the applicant's biological assessment, beneficial uses of the drainage that may be impacted by the proposed discharge of fill are:
 - a. wildlife habitat (WILD) and
 - b. groundwater recharge (GWR).
 7. Waste Discharge Requirements (WDRs) are necessary to address impacts of the fill on the beneficial uses of waters of the State.
 8. This Order regulates the discharge of fill material to waters of the State that are not considered under Corps CWA Section 404 jurisdiction (non-federal). The discharger submitted a ROWD on August 28, 2006.
 9. The discharger has committed to mitigate direct impacts to waters of the State by enhancing the on-site waters by planting a total of 4.8 acres of mulefat scrub and 0.95 acres of Elderberry and Sycamore woodland
 10. Pursuant to CEQA, the City of Colton certified an Environmental Impact Report for the proposed TM 16798 on August 8, 2006.
 11. 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 to approve. (Public Resources Code, Section 21002.1(d); California Code of Regulations, Title 14, Section 15096(g), (h).) The City's environmental document identified potentially significant impacts (unless mitigated) to biological resources as the result of discharges of fill to waters and to water quality as the result of pollutants in storm water runoff from the project. To address these impacts, General Provision C.1. of this Order requires the discharger to enhance the portion of the drainage that will be temporarily impacted. Pollutants in storm water runoff from the project site will be removed through the construction and operation of the extended detention basin and implementation of additional site design best management practices. The Board finds that the significant effects of the discharge of fill to waters of the State that will occur when TM 16798 is graded are reduced to a less-than-significant level provided the measures specified in Part C. "Provisions" 1. and 2. of this Order are implemented.

12. The Board has considered antidegradation pursuant to State Board Resolution No. 68-16 and finds that the discharge is consistent with those provisions.
13. 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.
14. 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 groundwater in the vicinity of the project shall not be degraded as a result of the project activities or placement of fill for the project.
4. The discharge of fill materials shall be limited to inert materials, as defined in Section 20230, Division 2, Title 27. 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. Except as authorized by this Order, 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 shall plant a total of 4.8 acres of mulefat scrub and 0.95 acres of Elderberry and Sycamore woodland along the on-site waters as proposed in the Conceptual Mitigation and Monitoring Plan submitted on August 28, 2006 (Mitigation Plan).
2. The discharger shall fully implement the Mitigation Plan according to Provision C.1. above, except as follows:
 - a. Initial site preparation shall occur concurrent with initial site grading.
 - b. Initial planting and the installation of the related irrigation systems shall occur not later than November 15th following installation of any underground utilities on the project site.
 - c. A conservation easement or other appropriate legal instrument shall be placed over the mitigation sites for the purpose of preserving beneficial uses. The instrument shall be in effect prior to the issuance of a grading permit from the City of Colton.
3. 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.
4. 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.
5. 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.

6. 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.
7. 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.
8. 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.
9. 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.
10. This Order does not convey any property rights of any sort, or any exclusive privilege.
11. 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.
12. 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 Board.
13. 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.

I, Gerard J. Thibeault, 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 February 29, 2008.

Gerard J. Thibeault
Executive Officer