California Regional Water Quality Control Board
Santa Ana Region

March 4, 2005

ITEM: 14

SUBJECT: Order No. R8-2004-0110, Century Crowell Communities, Tract 15548, City of Yucaipa

SUMMARY

The matter before the Board is to consider issuing a Clean Water Act Section 401 Water Quality Standards Certification and adopting Order No. R8-2004-0110 for Century Crowell Communities, authorizing the discharge of fill to waters of the U.S. and waters of the State resulting from the extension of a culvert at the intersection of Wildwood Canyon Road and Holmes Avenue in the City of Yucaipa. The proposed Order also specifies after-the-fact mitigation requirements to address water quality impacts resulting from portions of the development by Century Crowell Communities of the adjacent Tract 15548, which is served by the culvert. Development of the Tract is now complete. Separate enforcement action is pending for Century Crowell Communities' alleged failure to provide notification of the discharge of fill to waters of the U.S. and waters of the State resulting from the development of other portions of the Tract, and to obtain requisite authorization prior to the discharge.

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.

A Certification is a statement by the Regional Board that any discharge from a proposed project will comply with the applicable provisions of sections 301 (Effluent Limitations), 302 (Water Quality Related Effluent Limitations), 303 (Water Quality Standards and Implementation Plans), 306 (National Standards of Performance), and 307 (Toxic and Pretreatment Effluent Standards) of the Clean Water Act, and with other applicable requirements of State law.

Most Certifications are issued by the Executive Officer 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 (SWRCB) 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." In dredge and fill situations where the issuance of a 404 permit/401 certification is not required[1], the SWRCB has asserted its authority to regulate discharges of dredge and fill to waters of the State under the Porter-Cologne Water Quality Control Act. In this case, the adoption of individual waste discharge requirements is recommended, rather than Certification accompanied by authorization to discharge pursuant to Order No. 2003-0017-DWQ.

On December 5, 2003, Michael Brandman Associates (MBA) submitted an application for Certification on behalf of Century Crowell Communities. At that time, the proposed project was described as the extension of an existing culvert, under Wildwood Canyon Road at Holmes Street in the City of Yucaipa, into approximately 0.03 acres (375 linear feet) of a drainage that terminated at the existing culvert. The drainage was identified as a water of the U.S. and subject to the U.S. Army Corps of Engineers Clean Water Act Section 404 permitting authority.

Upon review of the application, on December 31, 2003, Regional Board staff sent a letter to MBA and the applicant recognizing that residential development was understood to be occurring near the intersection of Wildwood Canyon Road and Holmes Street. The December 31, 2003 letter further stated that it was probable that the developer(s) were conditioned by the City of Yucaipa to improve Wildwood Canyon Road and its storm drain system as part of their development(s). The letter indicated that if this was the case and those developments were contributing storm water discharges to the drainage, the scope of review of the certification application would be expanded to include the developments in order to assess the direct, indirect, and cumulative effects of their discharges from the culvert to waters of the U.S.

On December 30, 2003, MBA submitted the March 26, 1993 initial study for Tentative Tract Map 15548 at the northeast corner of Wildwood Canyon Road and Holmes Street. In addition to identifying the need to construct an eastbound left turn lane and westbound acceleration lane, the initial study also noted that there existed on Tract 15548 a "small watercourse/creek traversing the middle of the site from east to west which flows to the creek on the west side of Holmes Street."

Subsequently, Regional Board staff learned that the construction of Tract 15548 was largely complete, having started some time in August 2001 and finished in October or November 2003. Regional Board staff further learned that the culvert under Holmes Street and Cherrywood Road had also been replaced some time in October 2001 and that no Certification had been sought for the discharge of fill to the creek from the construction of Tract 15548 or the replacement of the culvert.

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[1] These situations arise where the dredge/fill activity takes place in waters of the state that are deemed outside the jurisdiction of the U.S. Army Corps of Engineers.

In response to Board staff's request, on March 1, 2004, MBA submitted requested street improvement plans, dated March 2002, indicating that impacts to waters of the U.S. would need to occur as the result of the extension of the culvert under Wildwood Canyon Road and showing that the storm drain system from Tract 15548 ties into the existing culvert. During a site visit to Tract 15548 on March 17, 2004, Regional Board staff learned that the culvert under Holmes Street also serves as an outfall for nuisance flow and storm water discharges from the Tract. Nuisance flow discharges were observed coming from both of the outfalls.

Board staff asserts that Certification for the discharges of fill associated with the construction of Tract 15548 and the replacement of the culvert under Holmes Street should have been sought prior to the construction of Tract 15548. By failing to obtain certification for the culvert replacement and outfall at Holmes Street and Cherrywood Road and postponing application for Certification of the culvert/outfall extension at Wildwood Canyon Road and Holmes Street, Century Crowell Communities has avoided fully mitigating the impacts of the outfalls on water quality. Had a Certification application been timely submitted, the scope of review for the Certification would have included the impact of nuisance flow and storm water discharges from Tract 15548 though the outfalls at both Holmes Street and Wildwood Canyon Road on water quality in the receiving waters.

The discharger would have been required, as a condition of Certification, to construct post-construction structural best management practices (BMPs), meeting best available technology and best conventional technology standards (BAT/BCT), as part of the construction of Tract 15548. Acceptable BMPs would have included natural treatment systems such as bio-filters, vegetated swales, constructed wetlands, extended detention basins, and sand filters or infiltration BMPs. Any such BMP commitment would require assurance of funding for its maintenance through a community service district, lighting and maintenance district, or similar arrangement with the City of Yucaipa. However, as the result of the discharger's alleged failure to submit a requisite timely application for Certification for discharges of fill associated with development of the Tract, no funding can now be reasonably secured for maintenance of installed BMPs for Tract 15548, and no BMPs, meeting BAT/BCT, can be reasonably constructed after-the-fact. Enforcement of alleged violations of Water Code Section 13260 resulting from Century Crowell Communities' failure to provide notification of proposed discharges and to obtain requisite authorization is proceeding as a separate action.

The proposed extension of the outfall at Wildwood Canyon Road, for which the 401 Certification application was received is, in part, intended to alleviate traffic and flood hazards at the intersection of Wildwood Canyon Road and Holmes Street. The Regional Board's issuance of a denial of Certification for this project to the discharger, though arguably warranted by the fact that BMPs meeting BAT/BCT can no longer be implemented for the project as a whole, could cause the Corps of Engineers to deny issuance of a Clean Water Act Section 404 Permit. The issuance of a denial will not assure mitigation of water quality impacts on the physical or chemical integrity of the receiving waters and would continue the flood and traffic

hazards at the intersection of Wildwood Canyon Road and Holmes Street. The discharger has placed the Regional Board in the awkward position of needing to take an action on the proposed project (i.e. issue a certification or a denial of certification), but not being able to certify all discharges from the extended outfall and making a denial impractical. Consequently, Regional Board staff recommends that individual waste discharge requirements be issued that would allow for certification action of the project's discharges of fill, as the result of the extension of the outfall at Wildwood Canyon Road and Holmes Street, and for storm water and non-storm water discharges from construction-related activities. The Certification will not apply to storm water and non-storm water discharges from the outfall. These discharges are regulated through the San Bernardino County Area-Wide Urban Storm Water Runoff Permit (Regional Board Order No. R8-2002-0012). The Certification application serves as the report of waste discharge.

Proposed Order No. R8-2004-0110 authorizes the discharge of fill and requires that the discharger implement mitigation for impacts to waters of the U.S. The discharger has proposed to mitigate through an in-lieu fee contribution of 0.09 acres of mitigation credit to be paid to the local Resource Conservation District for enhancement of waters of the U.S. In addition, the discharger has agreed to contribute funds to the City of Yucaipa for the development of a multi-use, regional storm water treatment basin. The contributed funds will be the proportional cost of the development of the basin based on the proportional area of Tract 15548 compared to the tributary area to the basin, but not to exceed $60,000.

Pursuant to CEQA, a negative declaration for Tract 15548 was prepared and certified by the City of Yucaipa on November 17, 1993.

RECOMMENDATION

Adopt Order No. R8-2004-0110

Comments on the proposed Order were solicited from the following agencies and parties:

U.S. Army Corps of Engineers, Los Angeles District
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

California Regional Water Quality Control Board
Santa Ana Region

Order No. R8-2004-0110

Clean Water Act Section 401 Water Quality Standards Certification and Waste Discharge Requirements

for

Century Crowell Communities
Tract 15548, City of Yucaipa

TENTATIVE

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

1. Century Crowell Communities (hereinafter, discharger) proposes to fill 0.03 acres (375 linear feet) of a perennial drainage that are waters of the U.S. and tributary to Yucaipa Creek, as part of the development of Tract 15548. The discharge of fill is the result of the widening of Wildwood Canyon Road in the area of Holmes Street. The widening of Wildwood Canyon Road has resulted in the need to fill an adjacent drainage and extend a culvert. The widening stems from a 1994 condition of approval by the City of Yucaipa for Tract 15548. The culvert is one of three point discharge locations (outfalls) for the storm drain system for Tract 15548. Tract 15548 consists of a 63 lot residential subdivision on 39.4 acres. Construction of the Tract was begun in 2001 and completed in October or November 2003. The project is located in Section 7 of Township 2 South, Range 1 West, shown on the U.S. Geological Service *Yucaipa, California* quadrangle (34 degrees, 01 minute, 30 seconds N/117 degrees, 04 minutes, 30 seconds W).

2. Near the completion of the development of Tract 15548, on December 5, 2003, the discharger submitted an application for Clean Water Act Section 401 Water Quality Standards Certification for the extension of the culvert/storm drain outfall at Wildwood Canyon Road and Holmes Street. The discharger characterized the project exclusively as the extension of a culvert for the widening of Wildwood Canyon Road.

3. During the course of constructing Tract 15548 in 2001, the discharger replaced a culvert under Holmes Street, at the recently constructed Cherrywood Road, without obtaining a Clean Water Act Section 401 Water Quality Standards Certification (Certification). In addition, the U.S. Army Corps of Engineers (Corps) and Regional Board staff alleges that the discharger has filled a drainage channel that previously bisected the Tract. The culvert replacement and, allegedly, grading of Tract 15548 have resulted in the unauthorized discharge of fill to a water of the U.S., subject to the Corps' Clean Water Act Section 404 permit authority, and in violation of California Water Code Section 13260.

4. On August 17, 2004, at the request of the Executive Officer in a Notice of Violation dated May 18, 2004, the discharger submitted an "after-the-fact" Certification

application for the culvert replacement at Holmes Street and Cherrywood Road. The application indicated that excavation had occurred in approximately 0.04 acres of waters of the U.S. The culvert at Holmes Street and Cherrywood Road is also an outfall for the storm drain system for Tract 15548.

5. The issuance of a Certification is a finding by the Regional Board that any discharge from a project will comply with the applicable provisions of Sections 301 (Effluent Limitations), 302 (Water Quality Related Effluent Limitations), 303 (Water Quality Standards and Implementation Plans), 306 (National Standards of Performance), and 307 (Toxic and Pretreatment Effluent Standards) of the Clean Water Act, and with other applicable requirements of State law. In the case of Tract 15548, a Certification would also apply to storm water and non-storm water discharges from the outfalls at Holmes Street and Wildwood Canyon Road.

6. In order for a project to receive Certification, all discharges are to be treated using structural and non-structural best management practices meeting best available technology and best conventional technology (BAT/BCT) standards.

7. As the result of the discharger's untimely application for Certification, no practical storm water treatment can be applied to discharges from the outfall structures at Wildwood Canyon Road and Holmes Street. Since BAT/BCT standards cannot be met, the issuance of this Certification does not apply to storm water and non-storm water discharges from the outfall, which will be regulated under the San Bernardino County Area-Wide Urban Storm Water Runoff Permit (Regional Board Order No. R8-2002-0012).

8. The proposed widening of Wildwood Canyon Road is intended, in part, to alleviate traffic and flood hazards at the intersection of Wildwood Canyon Road and Holmes Street.

9. Certification or denial of certification does not obviate the need to regulate the discharge of fill under appropriate Waste Discharge Requirements (WDRs).

10. By adopting this Certification/ Waste Discharge Requirements, the Corps will be able to issue a 404 Permit and authorize the discharge of fill.

11. The proposed discharge of fill at Wildwood Canyon Road will result in impacts to beneficial uses through the incremental loss of 0.03 acres of waters of the U.S. WDRs are necessary to address impacts of the fill on waters of the U.S.

12. Discharges of fill that allegedly have occurred in violation of California Water Code Section 13260 are not addressed by this Order. Complete mitigation of impacts to beneficial uses from such unauthorized discharges will be addressed through separate enforcement action(s).

13. The discharger has committed to mitigate impacts resulting from construction and operation of the Wildwood Canyon Road and Holmes Street outfall. Direct impacts to waters of the State and waters of the U.S are to be mitigated through the payment of an in-lieu fee to the local Resource Conservation District equal to 0.09 acres of

mitigation credit. The discharger has also agreed to mitigate impacts to the chemical integrity of waters of the State resulting from untreated runoff from Tract 15548 through a contribution to a regional storm water treatment facility within the same watershed. The proposed Order requires the discharger to proceed with the proposed mitigation.

14. In compliance with the California Environmental Quality Act, a Negative Declaration was prepared for Tract 15548, including the culvert replacement projects at Holmes Street and Wildwood Canyon Road, and certified by the City of Yucaipa on November 17, 1993.

15. The Water Quality Control Plan for Santa Ana River Basin (1995)(Basin Plan) does not specifically designate beneficial uses for the affected surface waters on the project site. Based on Regional Board staff assessment of the site and the requirements of State Board Resolution No. 88-63 (Sources of Drinking Water Policy), beneficial uses that are existing or attainable for these waters include:

    a. Municipal and Domestic Supply (MUN)
    b. Wildlife habitat (WILD)
    c. Groundwater recharge (GWR)
    d. Water-contact recreation (REC-1)

16. This Order regulates the discharge of fill material to waters of the State. The discharger submitted an application for Certification on December 5, 2003 with subsequent amendments to the project description that recognize the culvert as a storm drain outfall from Tract 15548. The Board accepts the discharger's application, as amended, as a report of waste discharge required pursuant to Water Code Section 13260.

17. The Regional Board has considered antidegradation pursuant to State Board Resolution No. 68-16 and finds that the discharge is consistent with those provisions.

18. 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.

19. 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. 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, is prohibited.

C. PROVISIONS:

1. The discharger's request for Clean Water Act Section 401 water quality standards certification is approved. This certification applies only to the discharge of fill to waters of the U.S. at Wildwood Canyon Road and Holmes Street and storm water discharges associated with related construction activities. Impacts to water quality standards resulting from the outfall extension at Wildwood Canyon Road and Holmes Street will be addressed by the mitigation required by this Order.

2. The discharger shall mitigate direct impacts to waters of the State and waters of the U.S through the payment of an in-lieu fee to the local Resource Conservation District equal to 0.09 acres of mitigation credit. Proof of the payment shall be provided to the Regional Board by May 4, 2005.

3. The discharger shall mitigate for impacts from untreated discharges of urban runoff through the contribution of funds to a regional structural storm water treatment basin

within the Yucaipa Creek watershed operated by the City of Yucaipa. The contribution shall be equal to the proportional cost of construction of the basin based on the formulas below, but shall not exceed $60,000.

$$Contribution(\$) = Ba\sin ConstructionCost(\$)\frac{Tract15548ContributingTributaryArea}{TotalBa\sin TributaryArea}$$

and;

$$Contribution(\$) \leq \$60{,}000$$

The costs to the discharger of construction costs of the basin need not include costs that are unrelated to storm water treatment, such as costs related to the recreational use of the basin.

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.

11. This Order does not convey any property rights of any sort, or any exclusive privilege.

12. This Order is not transferable to any person except after notice to, and approval by, the Executive Officer. The Regional Board may require modification or revocation and re-issuance of this Order to change the name of the discharger.

13. 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 Regional Board.

14. The Regional 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 March 4, 2005.

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Gerard J. Thibeault
Executive Officer