

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

September 7, 2007

ITEM: *9

SUBJECT: Order No. R8-2007-0066, Centex, Tract Map No. 32786, City of Lake Elsinore.

SUMMARY

The matter before the Board is to consider adoption of Order No. R8-2007-0066, 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 'non-

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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 May 21, 2007, Regional Board staff received a report of waste discharge (Report) from Glenn Lukos Associates (GLA) on behalf of Centex. In the Report, Centex proposes to discharge fill to 0.49-acres of waters of the State. The affected waters are un-named ephemeral drainages but include 0.07 acres of wetlands. In addition, there will be temporary construction impacts to 0.03 acres of ephemeral drainages. A total of 8,240 linear feet of waters of the State will be filled.

The discharges will occur as part of the development of Tract Map 32786 (TM 32786, a.k.a. "Terracina" and "Lakeside Palms"). TM 32786 consists of the construction of 368 single-family residences and associated roadways and infrastructure on 151.8-acres located east of Terra Cotta Road, west of Dryden Street, and north of Lakeshore Drive, south of existing residential communities in the City of Lake Elsinore.

GLA identified a total of 0.91-acres of largely ephemeral drainages on the property; 0.40-acres of which are wetlands. GLA asserts that none of the waters are subject to regulation by the U.S. Army Corps of Engineers (Corps) under Section 404 of the Clean Water Act because the drainages do not support a "significant nexus" connection to a navigable water pursuant to the U.S. Supreme Court Consolidated Cases titled *Rapanos v. United States* [Rapanos] and *Carabell v. U.S. Army Corps of Engineers* [Carabell]. GLA's assertion has not been verified by the Corps.

As a result of Regional 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 warm freshwater habitat (WARM), wildlife habitat (WILD), groundwater recharge (GWR), and spawning, reproduction and development (SPWN). Regional Board staff has determined that the discharges to the non-federal waters of the State at TM 32786 would affect beneficial uses of the receiving drainages. However, the Regional Board could not authorize the proposed discharges in accordance with Order No. 2004-0004-DWQ because the discharges exceeded the impact

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thresholds of that Order. Consequently, the proposed discharge would need to be authorized using individual waste discharge requirements.

Centex proposes to mitigate impacts to beneficial uses by avoiding 0.33 acres of wetlands and 0.06 acres of non-wetland ephemeral drainage immediately south of Terra Cotta Road in the project site (33.69768 degrees N/-117.37767 degrees W). In addition, 0.03 acres of temporarily affected non-wetland ephemeral drainage will be returned to original contour elevations and re-vegetated with native plants. Centex proposes to excavate the adjacent uplands along the avoided drainage and to vegetate the area with native plants in order to widen the stream width and create a total of 1.0 acres of waters of the State consisting of 0.14 acres of freshwater marsh and 0.86 acres of southern willow scrub.

Regional Board staff has no objection to the proposed mitigation concept. However, the discharger has not provided an adequate hydraulic rationale. Such a rationale would consist of an analysis of existing and proposed channel hydraulics that would demonstrate that there is sufficient flow to support the proposed compensatory mitigation within the new channel configuration. In order to address this, the proposed Order requires that an amended mitigation plan be prepared that includes an acceptable hydraulic rationale.

Under the developed condition, the mitigation site will convey approximately 145 cubic feet per second (cfs) of flow from a 10-year storm event and approximately 208 cfs of flow from a 100-year storm event. Under both storm conditions, flow velocities may be erosive. In addition to creating additional waters of the State, the proposed mitigation is expected to minimize erosive flow conditions.

Other discharges that will occur as part of the development of TM 32786 are construction and post-construction 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) for erosion control and sediment control devices such as silt fences and gravel bags, will be employed to control and remove pollutants in storm water runoff.

A preliminary WQMP, provided as part of the Report, indicates that four extended detention basins will be used to remove pollutants in discharges from the developed neighborhood. The WQMP is being amended to address untreated discharges from the north-central portion of the project. This may be resolved by adding an additional basin, relocating basins, and/or modifying the storm drain

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system. Additional BMPs will be identified in the SWPPP and final WQMP. The WQMP will be subject to review and approval by the City of Lake Elsinore.

Pursuant to CEQA, the City of Lake Elsinore prepared a Mitigated Negative Declaration (MND) and adopted it on October 11, 2005. A Notice of Determination was filed on October 11, 2005.

RECOMMENDATION

Board staff recommends that the Regional Board adopt Order No. R8-2007-0066.

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

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Waste Discharge Requirements

for

Centex
Tentative Tract Map No. 32786, City of Lake Elsinore
Riverside County

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

1. Centex (hereinafter, discharger) proposes to discharge fill to 0.49-acres of ephemeral drainages, including 0.07 acres of wetlands, as part of the development of residential Tract Map No. 32786 (TM 32786), in the City of Lake Elsinore. An additional 0.03 acres of ephemeral drainage will be temporarily impacted during construction.
2. TM 32786 consists of the construction of 368 single-family residences and associated roadways and infrastructure on 151.8-acres located east of Terra Cotta Road, west of Dryden Street, north of Lakeshore Drive, and south of existing residential communities. TM 32786 is located within Sections 26, 27, and 35, Township 5 South, Range 5 West, as shown on the U.S. Geological Service *Lake Elsinore and Alberhill, California* quadrangles (33.69508 degrees N/117.37944 degrees W).
3. The discharger asserts that the drainages proposed for fill are not subject to Clean Water Act Section 404 permits administered by the U.S. Army Corps of Engineers (Corps). The discharger has prepared a functional assessment within the project area and concluded that the affected drainages do not have a "significant nexus" to navigable waters pursuant to the U.S. Supreme Court Cases titled *Rapanos v. United States* [Rapanos] and *Carabell v. U.S. Army Corps of Engineers* [Carabell]. The discharger's assertion has not been verified by Corps staff. This Order will regulate the discharges of fill even if a Section 404 permit and Section 401 certification are ultimately determined to be necessary.
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 both 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 thereof.

5. The waters of the State consist of two ephemeral drainages and their smaller tributaries. The Water Quality Control Plan for Santa Ana River Basin (1995) does not designate beneficial uses for any of the surface waters on the project site. Based on the applicant's biological assessment, beneficial uses that are existing or attainable for the ephemeral drainages include:
 - a. warm freshwater habitat (WARM);
 - b. wildlife habitat (WILD);
 - c. groundwater recharge (GWR); and
 - d. spawning, reproduction, and development (SPWN).
6. Waste Discharge Requirements (WDRs) are necessary to address 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 considered under Corps CWA Section 404 jurisdiction (non-federal). The discharger submitted a ROWD on May 21, 2007.
8. The discharger has committed to mitigate direct impacts to waters of the State by avoiding 0.33 acres of wetlands and 0.06 acres of non-wetland ephemeral drainage on-site. In addition, 0.03 acres of temporarily affected non-wetland ephemeral drainage will be returned to original contour elevations and re-vegetated with native plants. The discharger proposes to excavate the adjacent uplands along the avoided drainage and to vegetate the area with native plants in order to widen the stream width and create 1.0 acres of waters of the State.
9. Pursuant to CEQA, the City of Lake Elsinore adopted a Mitigated Negative Declaration (MND) for the proposed TM 32786 on October 11, 2005.
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 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

restore the temporarily impacted drainage. General Provision C.2. requires the discharger to create both wetlands and ephemeral drainage through the excavation of uplands adjacent to an avoided on-site drainage based upon a hydraulic rationale required by Provision C.3. Pollutants in storm water runoff from the project site will be removed through the construction and operation of extended detention basins 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, as a result of the grading of TM 32786, authorized by this Order, are reduced to a less-than-significant level as the result of implementation of the project in accordance with these provisions.

11. The Regional Board has considered antidegradation pursuant to State Board Resolution No. 68-16 and finds that the discharge is consistent with those provisions.
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 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 shall restore the temporarily affected 0.03 acres of waters of the State by restoring original contour elevations and re-vegetating the area with native riparian plants.
2. The discharger shall compensate for permanent impacts to beneficial uses by avoiding 0.33 acres of wetlands and 0.06 acres of non-wetland ephemeral drainage located at the north-central portion of the site immediately south of Terra Cotta Road (33.69768 degrees N/-117.37767 degrees W). In that area, the discharger proposes to create a minimum of 0.14 acres of riparian wetlands and 0.86 acres of non-wetland ephemeral drainage.
3. The creation effort shall occur according to an approved Mitigation Plan with a 5-year implementation horizon. The Mitigation Plan shall include an hydraulic analysis of the proposed channel configuration in order to evaluate whether the configuration will support the created waters. The Mitigation Plan shall also include at least one alternative mitigation proposal in the event that the mitigation effort fails or is not anticipated to be supported hydraulically. A draft Mitigation Plan shall be submitted for approval by Board staff by October 7, 2007.
4. Discharges of fill to waters of the State are prohibited until a final Mitigation Plan is approved by Board staff.

5. The discharger shall fully implement the approved final Mitigation Plan.
6. 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.
7. 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.
8. 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.
9. 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.
10. 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.
11. 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.
12. 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.
13. This Order does not convey any property rights of any sort, or any exclusive privilege.
14. 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.

15. 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.
16. 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. 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.
17. 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 September 7, 2007.

Gerard J. Thibeault
Executive Officer