

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2002 - 0008

In the Matter of the Petition of
**NATURAL RESOURCES DEFENSE COUNCIL, INC., DEFEND
THE BAY, INC., PAULETTE HAWKINS, STEVE HAWKINS,
KARLA KYLE, and NANCY WELLS**

For Review of an Order for Water Quality Certification for the Vila Borba Project
Issued by the
California Regional Water Quality Control Board,
Santa Ana Region

SWRCB/OCC FILE A-1393

BY THE BOARD:

In this order, the State Water Resources Control Board (“State Board”) remands an order for water quality certification of the Vila Borba project, a residential housing project, to the Santa Ana Regional Water Quality Control Board (“Regional Board”) for consideration of the issuance of waste discharge requirements.

Section 401 of the Clean Water Act (33 U.S.C. § 1341) requires before a federal license or permit, including a dredge or fill permit under section 404 (33 U.S.C. § 1344), can be issued, a discharger must obtain certification from the state that the project will not violate water quality standards. Since Mary Borba Parente (“Parente”) was required to obtain a section 404 permit from the U.S. Army Corps of Engineers (“ACOE”) for the project, she requested the Regional Board issue water quality certification. Two petitions and a request for stay were filed challenging separate actions of the Regional Board relating to the attendant certification action.

I. BACKGROUND

On February 1, 2000, Parente submitted an application for certification for 75 acres (one tract) of a 336-acre (four tract) project to the Regional Board. Parente has never produced environmental documents for the project. In fact, although the City of Chino Hills

undertook an Initial Study, and planned to approve a mitigated negative declaration (“MND”), there is no evidence in the record that an MND was ever drafted. Nor did the City circulate any MND to the Regional Board or the State Clearinghouse. In addition, the Initial Study related to the ultimate development of only one of the four tracts.

On June 1, 2001, the Regional Board approved a motion that water quality certification for the entire 336 acres should be granted, upon receipt of certain supplemental materials. On June 29, 2001, the Natural Resources Defense Counsel, Inc., Defend the Bay, and Paulette Hawkins (collectively referred to as “NRDC”)¹ filed their petition for review, alleging that the impending approval violated the California Environmental Quality Act (“CEQA”) (SWRCB/OCC File A-1393).²

Before staff issued the written certification pursuant to the motion, and while they were waiting for submittal of supplemental materials promised by consultants for Parente, Regional Board staff received notice that ACOE intended to issue the 404 permit and deem certification waived. As a result, on August 8, 2001, the Regional Board’s Executive Officer denied, without prejudice, the certification request. Parente thereafter filed a petition (SWRCB/OCC File A-1407) contending that the Executive Officer lacked authority to deny the certification. Notwithstanding the denial of certification, the ACOE proceeded to issue a permit on January 14, 2002. Parente withdrew her petition on February 19, 2002.

II. CONTENTIONS AND FINDINGS³

Contention: The Regional Board abused its discretion by approving a project that had not properly complied with CEQA.

Finding: In light of the issuance of a permit by ACOE, it appears that the Regional Board is no longer in a position to grant or deny certification. Indeed, in light of the curious proceedings in this matter, Parente now contends that the petition should be dismissed as

¹ Paulette Hawkins joined in NRDC’s petition and also filed a separate petition on behalf of herself, Steve Hawkins, Karla Kyle, and Nancy Wells. By letter dated July 27, 2001, the State Board indicated its intent to, and does hereby, treat the petitions as one petition due to the identity of interests, contentions, and parties.

² On August 1, 2001, NRDC requested a stay pending review of the order. Because we are reviewing the petition on the merits, we will not act on the stay request.

³ To the extent this Order does not address all of the issues raised by Petitioners, the State Board finds that the issues that are not addressed are insubstantial and not appropriate for State Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349].)

While there is significant doubt as to whether certification was actually waived, it is clear that CEQA has not been complied with in the manner required by law. Both CEQA Guidelines and our regulations require the Regional Board to consider the final environmental document before approving the project. (Cal. Code Regs., tit. 14, § 15096; Cal. Code Regs., tit. 23, § 3856(f).) Thus, the Regional Board's vote to conditionally approve the project violated CEQA. As explained below, it is our view that should Parente proceed to develop the property, there are further regulatory steps required to protect water quality.⁴

III. APPROPRIATE REGULATION OF THE PROJECT

In light of the apparent mootness of the challenge to the Regional Board's certification decision, occasioned by ACOE's permit, we address this project further on our own motion. While there is some confusion regarding the proceedings in this matter, it appears ACOE is now contending that the Regional Board waived certification on February 1, 2001, based on a letter it issued on February 1, 2000, referring to Parente's application as "complete." ACOE now suggests that letter triggered the one-year federal period for certification actions. (33 U.S.C. § 1341(a)(1); 33 C.F.R. § 325.2(b)(ii).) The error of that apparent determination is obvious with a cursory review of our then-existing regulations (amended June 24, 2000), and the behavior of the Regional Board, Parente, and ACOE, all of whom acted contrary to ACOE's current position.

While certification would be a meaningless action at this time, it is appropriate instead for the Regional Board to consider regulating this project under waste discharge requirements, if Parente intends to pursue the project. It is a major project and, under the circumstances, the Regional Board was not able to ensure that appropriate conditions were included in the federal permit, or that the necessary CEQA documents were prepared. Therefore, waste discharge requirements are appropriate. (Cal. Code Regs., tit. 23, § 3857.) Accordingly, the matter is remanded to the Regional Board to consider regulating the Vila Borba project

⁴ At the workshop meeting, Parente's counsel stated that, notwithstanding receipt of the permit from ACOE, there is no current project and the City of Chino Hills must comply with CEQA before it approves development of the property.

pursuant to the procedures set forth in California Water Code section 13260 et seq.⁵, if the project proceeds.

IV. CONCLUSION

Based on the above discussion, the State Board concludes that:

- 1 CEQA has not been complied with in the manner required by law for the project.
2. The Regional Board's decision to grant water quality certification was inappropriate and improper for failure to comply with CEQA.
3. The requirements of Water Code sections 13260 et seq. apply to this project, and all provisions thereof shall be enforced by the Regional Board.

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⁵ Assuming the City will act as lead agency, adoption of waste discharge requirements would not be appropriate until the City complies with CEQA.

V. ORDER

IT IS HEREBY ORDERED that, for the reasons discussed above, this matter is remanded to the Regional Board for further proceedings consistent herewith, including, but not limited to, requesting a report of waste discharge from Parente if she intends to pursue the Vila Borba project, and following receipt of a report of waste discharge and compliance with the California Environmental Quality Act, the consideration of waste discharge requirements that are fully protective of water quality for the discharges associated with the Vila Borba Project. The request for a stay is denied.

CERTIFICATION

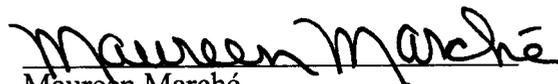
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 16, 2002.

Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

None

ABSENT: None

ABSTAIN None


Maureen Marché
Clerk to the Board