

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

April 21, 2005

ITEM: 9

SUBJECT: Order No. R8-2006-0033, Waste Discharge Requirements and Clean Water Act Section 401 Certification, Pinnacle Communities, Quincy Channel Hydro-modification, City of Moreno Valley

SUMMARY

The matter before the Board is to consider adoption of Order No. R8-2006-0033, simultaneously authorizing the discharge of fill to Quincy Channel, a water of the U.S., rescinding Order No. R8-2005-87, and transferring Clean Water Act Section 401 Water Quality Standards Certification for the development of Tract 31424 and Tract 31269 in the City of Moreno Valley.

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 any discharge from 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 (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 the absence of the need to obtain a Certification, 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. On May 4, 2004, the State Water Resources Control 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). Numeric impact thresholds limit the application of Order No. 2004-0004-DWQ to relatively small discharges of fill.

Because Certifications are most often issued as the result of Corps’ permits, applicants often misconstrue the project review to be limited to the discharge of dredge or fill. However, when the State issues a certification, it is certifying that all discharges from the project are protective of all water quality standards that apply to the affected water body. Thus, Certifications not only address the discharges of dredge and fill that trigger the need for certification, but also storm water discharges, dry-weather discharges, and other types of wastewater discharges from the project as a whole.

On August 18, 2004, Regional Board staff received an application for Clean Water Act Section 401 Certification (Certification) from the agent for Highpointe Communities, Inc., Tom Dodson and Associates (TDA), for discharges of fill to Quincy Channel, in association with the development of adjacent residential Tracts 31424 and 31269 in the City of Moreno Valley. The affected reach of Quincy Channel consists of an incised earthen channel between Eucalyptus and Cottonwood Avenues. The channel is vegetated largely with mulefat, native and non-native grasses, native shrubs, and a few trees. Within the channel is a smaller, meandering active channel with a sandy streambed. The ordinary high water mark (OHWM), indications of flow that denote the Corps’ jurisdiction, is generally limited to the smaller active channel (see Figure 1 below).

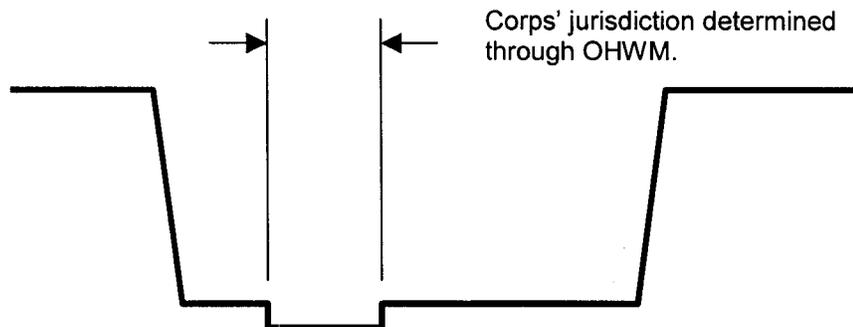


Figure 1: Schematic cross-section of Quincy Channel showing the limits of Corp’s jurisdiction relative to the overall channel. The smaller active channel (Corps jurisdiction) meanders back and forth within the larger channel.

Based on biological reports submitted with the application for Certification and a Regional Board staff site visit on April 12, 2005, existing or potential beneficial uses of Quincy Channel include: Wildlife Habitat (WILD), intermittent Water Contact Recreation (REC-1), Non-Contact Water Recreation (REC-2), and Groundwater Recharge (GWR).

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The discharger proposed to excavate within and along the active channel (Corps' jurisdiction) and up the east bank of the larger incised channel to construct a concrete panel channel bank with a slope of 1.5:1 and a toe key that is approximately 7 feet below ground surface. The existing channel grade would then be restored. The concrete panel channel slope will stabilize the east bank of Quincy Channel and protect the residential homes proposed for Tracts 31424 and 31269. The channel hydro-modification will widen Quincy Channel and create an additional 0.13 acres of waters of the State and United States.

The discharger also proposed to widen Cottonwood Avenue along the southern boundary of the project by 30 feet on the north and 25 feet on the south sides at Quincy Channel. This would involve replacing the existing culverts with larger and longer culvert pipes and placing an additional 50 feet of rip-rap for energy dissipation at both ends of the new culverts. Total impacts from widening Cottonwood Avenue will be 0.12 acres, or 155 linear feet of channel. Direct impacts from constructing the concrete panels for bank protection will be 0.11 acres, or 280 linear feet, of channel. As already noted, the excavation of the channel bottom is expected to result in a net increase of 0.13 acres of waters of the U.S. Except where the overall channel meanders onto Tracts 31424 and 31269, the west bank of Quincy Channel will not be directly affected.

For purposes of Certification, Regional Board staff reviewed post-construction structural best management practices (BMPs) proposed by the discharger for both Tracts 31424 and 31269 and the proposed discharges of dredge and fill. The discharger proposed to treat storm water runoff from Tract 31424 in a vegetated swale and from Tract 31269 in a water quality basin. Regional Board staff has determined that the proposed structural BMPs are acceptable for the purposes of Certification. The California Code of Regulations and State Board Order No. 2003-0017-DWQ allow the Executive Officer to issue a Certification on behalf of the Regional Board and to authorize the discharge under the State Board's Order. However, Regional Board staff believed that there were issues with this project related to compliance with the California Environmental Quality Act (CEQA), municipal and flood control agency land use approval processes, and the cumulative impacts of the proposed project that warranted consideration of this matter by the Regional Board.

CEQA requires that the agency approving a project evaluate the whole of the project, including its direct, indirect, and cumulative environmental impacts. The project, as proposed and approved by the City of Moreno Valley, was for two residential tracts adjacent to Quincy Channel, with subsequent modification of the Channel bank along the tracts. The basis of the City's approval of the project, Negative Declarations prepared for each Tract pursuant to CEQA, did not consider the ultimate configuration of the Channel and the indirect or cumulative impacts of the development of the Tracts and the related hydro-modification. In addition, the City of Moreno Valley did not distribute the draft Negative Declarations to the Regional Board for comment, as required by CEQA.

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Consequently, Regional Board staff met with staff of the City of Moreno Valley and staff of Riverside County Flood Control and Water Conservation District (District) and resolved three key issues: 1) the extent of future hydro-modification of Quincy Channel; 2) whether it is appropriate to issue Waste Discharge Requirements to the City of Moreno Valley to require mitigation for this and future projects to preserve the beneficial uses of Quincy Channel; and, 3) the ultimate configuration of Quincy Channel. Regional Board staff learned that the City of Moreno Valley expected both banks of Quincy Channel within the City limits to be modified in the same manner as proposed by Highpointe Communities. The modifications would be implemented as development occurs on adjacent properties and the channel bottom width would be set based on a vegetated, soft-bottom channel at the time the City exacted easements from the developments. Although it would be impractical to determine the precise channel bottom widths of each reach at this time, the City agreed to condition future development to use design input parameters that would preserve natural vegetation densities in the Channel without the need for routine maintenance. The City noted that there would be the need for the project proponents to improve road crossings as well. After some discussion, Regional Board staff determined that, due to the timing of development, the need to resolve CEQA compliance issues, and the potential hardship that could be imposed on Highpointe Communities, it would be inappropriate for the Regional Board to establish Waste Discharge Requirements for the City of Moreno Valley for the various projects that would impact Quincy Channel.

As the result, the Regional Board adopted Order No. R8-2005-0087 on March 27, 2005, authorizing the discharge as proposed, and issuing a Certification to Highpointe Communities, Inc. The authorization was issued with the understanding that the City of Moreno Valley would condition future development along the west bank of Quincy Channel in a manner that allowed for the agreed-upon ultimate Channel configuration.

On November 7, 2005, Regional Board staff attended a meeting with Highpointe Communities, Inc., District staff, and representatives of Pinnacle Communities. Regional Board staff learned that Highpointe Communities, Inc. was in the process of selling Tracts 31424 and 31269 to Pinnacle Communities and the District was not yet satisfied with the proposed ultimate Channel configuration¹. District staff expressed concerns regarding their ability to maintain the channel and wanted a maintained strip along the toe of the bank slope. This area would be routinely mowed and kept free of woody vegetation for the purpose of facilitating inspection of the concrete bank and to prevent woody vegetation from penetrating cracks or seams in the bank and buckling the concrete. The District also effectively wanted standing authorization to complete major work to repair compromised portions of the Channel bank in the event of a failure. Pinnacle Communities wanted to have the Regional Board's authorization for the hydro-modification transferred to them from Highpointe Communities, Inc.

¹ The District was consulted and provided opportunity to comment prior to the adoption of Order No. R8-2005-0087.

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Regional Board staff has determined that Order No. R8-2005-0087 would need to be rescinded and waste discharge requirements would need to be issued to Pinnacle Communities in order to accommodate their request and the requests of the District. In the process, the Certification would be transferred and the District's project modifications could be accommodated. Although Regional Board staff does not generally consider mowing and vegetation removal as discharges regulated under Porter-Cologne except under specific circumstances, they do constitute a potential impairment to the beneficial uses of Quincy Channel and a cumulative impact that should be considered in authorizing the hydro-modification. At the request of Regional Board staff, Pinnacle Communities submitted a report of discharge on February 27, 2006.

Regional Board staff does not believe that the standing authorization for major repair work requested by the District for bank failures is necessary. In the event that such work is necessary, it would likely qualify for authorization under an emergency permit issued by the Corps (currently Regional General Permit 63). The State Board has issued a General Certification for projects subject to general Corps emergency permits and Regional Board staff expects that the State Board will continue to do so. If major repair work does not qualify under a Corps emergency permit due to differences between State and Federal definitions of "emergency" or due to the conditions of the Corps' permit, the Executive Officer can still issue an emergency Certification within 24-hours of receiving a request. Regional Board staff prepares emergency Certifications in accordance with the CEQA definitions of an "emergency", which do not necessarily correspond to Federal definitions.

Regional Board staff does not believe that it would be appropriate for the Regional Board to provide standing authorization for non-emergency major repair work. Such work is nebulously defined, would not constitute maintenance, could individually or cumulatively impair the Channel's beneficial uses, and should therefore be subject to review and mitigation of its water quality impacts.

Efforts by the City of Moreno Valley and Regional Board staff to preserve the beneficial uses of Quincy Channel continue to pose significant challenges. On March 16, 2006, as part of a separate Certification application for residential Tentative Tract Map 30921 (TTM 30921), Regional Board staff received a final CEQA document prepared by the City of Moreno Valley. The Tract is located several miles downstream from the Highpointe Communities' (now Pinnacle Communities') Tracts and is bisected by Quincy Channel. The City approved TTM 30921, in part, on the basis that the individual lots do not encroach into Corps jurisdiction – the ordinary high water mark – and concluded that no water quality impacts would occur from the lots.

However, the project site plans indicate that TTM 30921 involves major encroachments into the floodplain of Quincy Channel. Floodplain encroachment results in the modification of the hydraulic radius of the channel flow under the 100-year storm runoff event. This typically results in the confinement of floodwaters, an increase in the floodwater's surface elevation, and consequent increases in shear stress on the channel bottom and banks. This increase in shear stress may result in

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channel bottom scour, removal of vegetation, destabilization of channel banks, and discharges of excess sediment². In order to address these impacts, channel armoring in one form or another may be necessary as part of the development of the Tract.

Regional Board staff believes that the lack of adequate water quality impact analysis completed for Tracts 31424 and 31269 and the incomplete analysis completed for TTM 30921 by the City of Moreno Valley indicates an inadequate understanding of water quality issues associated with new development. Regional Board staff experience with other cities in the Region indicates that this problem is not confined to the City of Moreno Valley. Regional Board staff believes that this matter may be partly addressed by including land use planning staff training requirements on permittees and co-permittees under the municipal storm water runoff permits. Such requirements would be considered as a separate matter in revising the MS4 permits for the counties within the Region.

Order No. R8-2006-0033 specifies waste discharge requirements for Pinnacle Communities for discharges associated with the development of Tracts 31424 and 31269 and concurrently constitutes Water Quality Certification for the project.

RECOMMENDATION

Adopt Order No. R8-2006-0033, as presented.

Comments 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
City of Moreno Valley
Riverside County Flood Control and Water Conservation District

² Among other adverse impacts, these conditions are referred to as hydraulic conditions of concern ("HCOC's").

California Regional Water Quality Control Board
Santa Ana Region

Order No. R8-2006-0033

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

for

Pinnacle Communities

Quincy Channel Hydro-modifications Associated with the Development of Single Family
Residential Tract 31269 and Tract 31424, City of Moreno Valley, Riverside County

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

1. Pinnacle Communities (hereinafter, discharger) proposes to develop Tract 31269 and Tract 31424, located along the east side of Quincy Channel between Eucalyptus and Cottonwood Avenues in the City of Moreno Valley. The Tracts consist of approximately 180 single-family residential lots and two open space lots. As part of the conditions of approval, the City of Moreno Valley has required the discharger to modify 2,605 linear feet of the adjacent eastern bank of Quincy Channel between Cottonwood and Eucalyptus Avenues and to widen Cottonwood Avenue.
2. Quincy Channel consists of an ephemeral, sandy, active channel within a larger incised earthen channel. The larger incised channel is largely vegetated with mule fat, native and non-native grasses, native shrubs, and a few large trees. The Corps' authority to regulate discharges of dredge and fill is generally limited to the sandy active channel.
3. The proposed hydro-modification of Quincy Channel involves reconstructing the incised banks to a concrete-panel bank with a slope of 1.5 to 1. The channel bottom will remain earthen and vegetated. During construction, the channel will be excavated at a maximum slope of 1:1, approximately 8 feet below the existing channel grade. The channel hydro-modification will widen Quincy Channel and create an additional 0.13 acres of waters of the State and United States. The Riverside County Flood Control and Water Conservation District will maintain a mowed strip, 6-feet wide, at the toe of the concrete-panel bank for the purpose of inspection and maintenance. Vegetation in this strip will be limited to herbaceous plants; woody vegetation will be removed.
4. As the result of the proposed widening of Cottonwood Avenue, the existing Quincy Channel culvert crossing will need to be replaced. This will result in the construction of culverts that are longer by 30 feet on the north side and 25 feet on

- the south side. New headwalls and grouted riprap energy dissipaters will be constructed at each end of the culverts. The energy dissipaters will extend 50 feet from each end of the new culverts.
5. The proposed hydro-modification and road widening will result in the discharge of dredge or fill to a water of the State that is subject to the Corps' Clean Water Act Section 404 Permits. The discharger is required to provide a Clean Water Act Section 401 Water Quality Standards Certification (Certification) to the Corps.
 6. The discharger has proposed to mitigate the discharge of fill to Quincy Channel through re-vegetation of temporarily impacted areas and vegetation of the created waters of the State and United States. The proposed Order requires the discharger to proceed with the proposed mitigation.
 7. The City of Moreno Valley adopted negative declarations for Tract 31269 and Tract 31424 on November 24, 2003 and April 5, 2004, respectively. The direct and cumulative impacts of the proposed project on beneficial uses, recognized by the Water Quality Control Plan for the Santa Ana River Basin (Basin Plan), are addressed by mitigation required by this Order.
 8. Upon review of biological reports provided by the discharger and a site visit conducted on April 5, 2005, Regional Board staff identified the following as existing or potential beneficial uses for the affected reach of Quincy Channel:
 - a. Wildlife habitat (WILD)
 - b. Water-Contact Recreation (REC-1)
 - c. Non-Contact Water Recreation (REC-2)
 - d. Groundwater Recharge (GWR)
 9. The discharger submitted an application for WDRs on February 27, 2006. This Order regulates the discharge of fill material to waters of the State to address project-related impacts to beneficial uses.
 10. The proposed discharge was previously authorized under Order No. R8-2005-0087, issued to Highpointe Communities, Inc. A Certification for the project was issued to Highpointe Communities, Inc. concurrently.
 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, through publication of a public notice, solicited 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 associated with the discharge requested herein for the Quincy Channel shall be limited to inert materials, as defined in Section 20230, Division 2, Title 27.

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, except as authorized by these waste discharge requirements, 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 Discharge Elimination System (NPDES) permit, are prohibited.

C. PROVISIONS:

1. The discharger shall re-vegetate temporarily impacted areas of Quincy Channel and vegetate the on-site created channel bottom using appropriate native species. The initial planting shall occur not later than October 31st following completion of excavation of Quincy Channel.

2. Site disturbance in Quincy Channel shall be limited to the minimum necessary to complete the hydro-modification. Native woody vegetation shall be avoided to the maximum extent practical.
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 Clean Water Act 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. Order No. R8-2005-0087 issued to Highpointe Communities, Inc. is hereby rescinded and the Certification is transferred to Pinnacle Communities.
11. This Order constitutes a Clean Water Act Section 401 Water Quality Standards Certification. The Regional Board hereby certifies that the development of Tract 31269 and Tract 31424 and the associated hydro-modification of Quincy Channel 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.
12. Under California Water Code, Section 1058, and Pursuant to 23 CCR §3860, the following shall be included as conditions of all water quality standards 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.
 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. 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 April 21, 2006.

Gerard J. Thibeault
Executive Officer