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SECRETARY FOR
ENVIRONMENTAL PROTECTION

San Diego Regional Water Quality Control Board

May 13, 2019

Certified Mail – Return Receipt Requested

Article Number: 7016 2140 0000 3904 4441

Mr. Arnold Veldkamp
Otay Hills, LLC
1508 West Mission Road
Escondido, CA 92029
aveldkamp@superiorm.com

In reply refer to:
Place ID 853054:MPorter

Subject: Order R9-2019-0106 for Denial of Water Quality Certification and Waiver of Waste Discharge Requirements for the Otay Hills Construction Aggregate and Inert Debris Engineered Fill Operation Project

Mr. Veldkamp:

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) received the Application for Water Quality Certification (Certification) for **Otay Hills Construction Aggregate and Inert Debris Engineered Fill Operation Project** (Project) on November 19, 2018 from Otay Hills, LLC (Applicant). The Application was deemed incomplete on December 14, 2018 due to the absence of a mitigation plan, the inadequate delineation of on-site aquatic resources, the absence of a draft CEQA document, the absence of a Biological Resources Report that included amphibian surveys, and the submittal of an incorrect Application Fee. The Application was deemed complete on March 22, 2019 when revisions to the application were submitted to the San Diego Water Board along with the additional Application Fee owed. By this letter the San Diego Water Board is issuing Order R9-2019-0106 denying water quality certification for the Project in accordance with Title 23 California Code of Regulations (CCR) section 3837 based on the reasons set forth below.

Project Location, Description, and Beneficial Uses of Waters of the State:

The San Diego Water Board has completed a comprehensive evaluation of your Application for Certification for the proposed Project and has conducted two inspections of the proposed Project site. The Application proposes the development of 102.7 acres (of a 414.4 acre property) into a hard rock aggregate mine, asphalt/concrete batch plant, and an inert debris landfiling facility. The proposed Project is located east of Calzada De La Fuente and Alta Road in the unincorporated community of Otay Mesa in San Diego County.

HENRY ABARBANEL, PH.D., CHAIR | DAVID GIBSON, EXECUTIVE OFFICER

2375 Northside Drive, Suite 100, San Diego, California 92108-2700 | www.waterboards.ca.gov/sandiego

The on-site aquatic resources are unnamed intermittent streams and wetlands tributary to the Tijuana River located in the Water Tanks Hydrologic Subarea (HSA 911.12). The San Diego Water Board's *Water Quality Control Plan for the San Diego Basin* (Basin Plan) designates existing beneficial uses of inland surface waters in HSA 911.12 as agricultural supply (AGR), non-contact water recreation (REC-2), warm freshwater habitat (WARM), and wildlife habitat (WILD). Potential beneficial uses of inland surface waters in HSA 911.12 are designated as industrial service supply (IND) and contact water recreation (REC-1).

Site Inspections and Application Review Timeline:

Site inspections conducted by the San Diego Water Board staff, Mike Porter (Engineering Geologist), on December 11 and 17, 2018 of the proposed Project development areas identified additional on-site aquatic resources than reported in the Certification application submitted on November 19, 2018. Within Stream H, four unmapped, in-stream ponds with Pacific tree frogs (calling for mates) were aurally-observed by Mike Porter, Helix Environmental Planning staff, and U.S. Army Corps of Engineers staff on December 11, 2018. These aquatic and amphibian resources had not been previously observed, nor reported in the Application.

Following is a summary chronological listing of activities pertaining to the processing of the Certification Application to date.

1. December 11 and 17, 2018: The San Diego Water Board attended on-site Project meetings and requested that compensatory mitigation for unavoidable impacts be mitigated in-kind and in-watershed.
2. December 12, 2018: The San Diego Water Board requested via e-mail that Amphibian Surveys be conducted to delineate all amphibians on the project site. HELIX Environmental Planning (HELIX) responded on behalf of the Applicant via e-mail that HELIX didn't see a need for the amphibian surveys.
3. December 14, 2018: The Application was deemed incomplete by the San Diego Water Board based on failure to submit the appropriate application fee of \$1638.00, a compensatory mitigation plan, a delineation report that accurately reflects the current water resources within the proposed Project areas, a draft or final CEQA document, and a revised Biological Resources Report that includes amphibian surveys.
4. December 14, 2018: HELIX responded via email with the Draft Environmental Impact Report dated November 2018.
5. January 15, 2019: HELIX responded to the San Diego Water Board Application completeness review with a mitigation plan for the purchase of mitigation credits at

the Rancho Jamul Mitigation Bank in the Otay Hydrologic Unit (HU 910.00), a revised Jurisdictional Delineation Report stating that an amphibian survey is not needed and showing only 2 of the 4 ponds in Stream H, and a statement that a draft CEQA document was included with the original application [The CEQA statement was inaccurate.].

6. January 17, 2019: HELIX responded to the Application completeness review with an additional check for \$138.00 to meet the required Application fee of \$1,638.00.
7. January 30, 2019: The San Diego Water Board requested via e-mail that HELIX add the two additional ponds (observed on December 11 and 17, 2018) to the Stream H figures in the revised Delineation Report (Helix Memorandum dated January 15, 2019) and revise the impact acreage within the Application (page 9 and HELIX Tables 1 and 2).
8. February 11, 2019: The San Diego Water Board stated via e-mail that the plan for compensatory mitigation at the Rancho Jamul Mitigation Bank was still inadequate because the proposed mitigation was out-of-watershed and out-of-kind.
9. March 1, 2019: HELIX responded via e-mail that the two additional ponds have been mapped and included on a revised Figure 9, showing all 4 ponds in-line with Stream H ; and the acreage of impacts have been revised in the Application on page 9 and Tables 1 and 2.
10. March 22, 2019: By letter dated March 22, 2019, the San Diego Water Board notified Otay Hills LLC and Helix the Application was complete and that the annual Project fee will be \$5,317.00 - based on the revised acreage of proposed impacts.
11. March 27, 2018: The San Diego Water Board stated the following via e-mail to HELIX and Otay Hills LLC:
 - a. The aquatic resources in *that* small watershed are providing vital habitat for the Pacific tree frog that was aurally observed (by all) on December 11th, 2018. The San Diego Water Board, again, requests *that* watershed to be avoided to protect the Pacific tree frogs' habitat. Can the project footprint be expanded in a different direction to maintain the desired amount of minable aggregate?
 - b. Can Otay Hills LLC investigate that option?
 - c. Can Otay Hills LLC further modify the project design to further avoid and minimize impacts to aquatic resources within the Project footprint?
 - d. Can Otay Hills LLC seek mitigation in-kind and in-watershed (Tijuana HU) for the unavoidable permanent impacts that the project will incur?

12. March 28, 2018: Helix Environmental Planning responded via e-mail stating:

- a. The Project cannot be redesigned to avoid that area (small watershed containing the Pacific tree frogs) in the center of the site.
- b. The pit cannot be expanded farther east without impacting additional waters.
- c. The Project has been in process with the County and Wildlife Agencies for 15 years.
- d. Regarding mitigation, the Applicant prefers to purchase mitigation within the Tijuana watershed if a mitigation bank existed within the watershed.

Applicant's Mitigation Proposal for Permanent Impacts:

The construction of the Project in the Tijuana Hydrologic Unit (911.00) would permanently impact:

- 0.20-acre (3,732-linear feet) of stream channels and ponds as waters of the U.S. and/or State; *and*
- 0.28-acre (502 linear feet) of wetland waters of the U.S and/or State.

The Applicant has proposed mitigation that consists of the purchase of mitigation credits from the Rancho Jamul Mitigation Bank located in the Otay Hydrologic Unit (910.00) that are not available for purchase. The mitigation credits from the Rancho Jamul Mitigation Bank Phase I are exhausted and Phase II is still in the environmental permitting stage and not available for purchase of mitigation credits. The Applicant's proposed mitigation as listed on page 12 of the Application is:

- 0.13-acre and 3,319 linear feet of Stream Channel establishment credits; and
- 0.54-acre and 805 linear feet of Wetland (0.28-acre establishment and 0.26-acre enhancement).

Lack of Avoidance and Minimization:

The proposed Project does not demonstrate that adequate measures will be taken to avoid or minimize potential impacts to waters of the United States and/or State. All aquatic resources on the Project site will be permanently impacted. This is contrary to applicable plans, policies and mitigation guidelines published by the U.S. Army Corps of Engineers, the California Department of Fish and Wildlife, the U.S. Fish and Wildlife Service, and other agencies including the Regional Water Boards and State Water Resources Control Board.

Inadequate Mitigation:

Otay Hills LLC has not proposed appropriate compensatory mitigation numerically, in-kind, or in-watershed to offset the proposed permanent Project impacts. The proposed mitigation is to purchase credits from Rancho Jamul Mitigation Bank where credits are not currently available. In addition, the proposed mitigation ratio of 1.4:1 is inadequate since the proposed mitigation is both out of kind and out of watershed. No documentation has been provided to account for the method of compensatory mitigation, the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site.

The proposed mitigation is out-of-kind for the on-site ephemeral and intermittent streams and ponds. Appropriate mitigation would be establishment or re-establishment (in acres and linear feet) of the ephemeral/intermittent streambed and the in-stream ponds on site or elsewhere in the Tijuana watershed (Tijuana Hydrologic Unit 911.00). The San Diego Water Board is required to protect the physical, chemical, and biological functions of *all* waters of the State pursuant to the Porter-Cologne Water Quality Control Act and the Basin Plan. The proposed out-of-kind and out-of-watershed mitigation does not protect the physical, chemical, and biological integrity of the Project site's first order, arid, ephemeral/intermittent streams. Arid ephemeral and intermittent streams have beneficial uses, services (values), and functions that are unique to them and cannot be replicated in a Southern willow scrub wetland as proposed. Some examples of beneficial uses, services, and functions of these streams include ground water recharge, first order oxidative biogeochemical transformation and cycling, nutrient export, mineral export, vegetation detritus export, and arid habitat for arid plants and animals.

The services and functions of arid and semiarid ephemeral and intermittent streams are well documented. A paper on the value of arid ephemeral and intermittent streams was published in November 2008 by the US EPA¹. Another available reference on this topic is a summary of a presentation that occurred during a workshop Episodic Streams Channels: Imperatives for Assessment and Environmental Planning in California, Costa Mesa, November 7-10, 2010)².

¹ The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest, USEPA, November 2008, available on the USEPA website at <https://www.epa.gov/cwa-404/ecological-and-hydrological-significance-ephemeral-and-intermittent-streams-arid-and-semi> (as of April 15, 2019).

² Ecological and Hydrological Significance of Episodic Streams, Lanie Levick, available on the Southern California Coastal Water Research Project website at

(footnote continued on next page)

Denial of Certification for the Proposed Project:

The Project, as proposed, is not consistent with applicable Basin Pan water quality standards and has failed to demonstrate that water quality standards will be protected over the life of the Project. The Project would result in significant, long-term, and unmitigated adverse impacts to water quality and beneficial uses by permanently impacting 0.20-acre (3,732-linear feet) of ephemeral/intermittent stream channel/pond waters of the U.S. and/or State and 0.28-acre (502 linear feet) wetland waters of the U.S and/ or State. Therefore, the San Diego Water Board is issuing this denial of Certification in accordance with Title 23 California Code of Regulations (CCR) section 3837 as the proposed project will not comply with water quality standards over the life of the project. You may elect to reapply for Certification with a different project that proposes appropriate impact avoidance/minimization and mitigation.

Petitions for Reconsideration:

Any person aggrieved by this action of the San Diego Water Board may file a petition for reconsideration with the State Water Resources Control Board to reconsider this Order in accordance with California Code of Regulations, title 23, section 3867, located at: https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/401regs.pdf.

The State Water Board must receive the petition by 5:00 p.m., 30 calendar days after the date of this letter. Petitions may be filed as follows:

In Person:

State Water Resources Control Board
Office of Chief Counsel
Adrianna M. Crowl
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Sacramento, CA 95814

By Mail:

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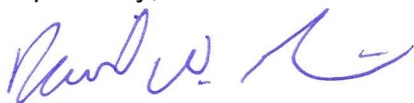
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Otay Hills Construction
Aggregate and Inert Debris
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In the subject line of any response, please include the reference number Place ID 853054:Mporter. For questions or comments, please contact Mike Porter by phone at (619) 521-3967 or by email at mike.porter@waterboards.ca.gov.

Respectfully,



David W. Gibson
Executive Officer

DWG:jgs:db:eb:mp

cc: (via email)

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State Water Resources Control Board, Division of Water Quality
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Otay Hills Construction
Aggregate and Inert Debris
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County of San Diego
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Tech Staff Info & Use	
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