

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

October 28, 2011

ITEM: 9

SUBJECT: Order No. R8-2011-0051, City of Fontana, Interstate 15/Duncan Canyon Road Interchange Project, City of Fontana.

SUMMARY

The matter before the Board is to consider adoption of Order No. R8-2011-0051, 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

considered 'non-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.

INTERSTATE 15/DUNCAN CANYON ROAD INTERCHANGE PROJECT

On May 30, 2011, Regional Board staff received a report of waste discharge (ROWD) from the City of Fontana, who proposes to discharge fill to 0.28-acres of waters of the State. The discharges will occur as part of the construction of a new interchange on Interstate 15 (I-15) at the existing Duncan Canyon Road overcrossing, in the City of Fontana, San Bernardino County, California. The proposed work includes constructing northbound and southbound on and off-ramps and widening the existing Duncan Canyon Road to match the standard cross section in the City's General Plan. The project is being constructed by the City of Fontana, in cooperation with the California Department of Transportation and the Federal Highway Administration.

The project site includes four existing, unnamed earthen and concrete-lined roadside drainage ditches within the footprint of the proposed Duncan Canyon Road interchange. The project site drains to the south. Currently, runoff flows are conveyed in roadside ditches, until they outlet or dissipate to the south. The affected waters are ephemeral drainages with no emergent wetlands or woody riparian vegetation. A total of 9,637 linear feet of ditches will be filled. Drainage work will primarily involve rerouting the existing ditches to facilitate the new interchange.

The project will modify three of the four drainage ditches on the project site, primarily through relocation and/or conversion into filter fabric-lined bioswales or concrete-lined open channels. Some sections of the 3 drainages will be confined to underground culverts. In addition, the proposed project includes tying the two drainages located north of Duncan Canyon into the proposed Line A Storm Drain (not a part of the proposed project), which outlets into the Hawker-Crawford Channel. The Line A Storm Drain project recently received CWA section 401 Certification. The fourth drainage, located in the NW quadrant of the project site, will not be impacted by the proposed project. Approximately 9,673 linear feet (0.28 acres) of drainage ditches will be affected.

In a letter dated July 16, 2008, the U.S. Army Corps of Engineers (Corps) verified that the project waters are not subject to regulation under Section 404 of the Clean Water Act.

Impacts to water quality occur from relocating existing drainages onsite and/or converting them to bioswales and culverts. The proposed drainage revisions were designed to minimize impacts to the extent possible. Onsite BMPs, including construction of approximately 9,226 linear feet (1.89 acres) of bioswales, a 1.23 acre detention basin, and implementing standard erosion controls should improve the water quality of any surface runoff leaving the project site. Bio-swales will be hydroseeded with a native plant mix. The City of Fontana will prepare a Stormwater Pollution Prevention Plan (SWPPP) detailing construction and post-construction BMPs, including hydroseeding of final slopes. The proposed project will result in a reported net gain of 1.61 acres of waters of the state onsite.

Based on review of biological reports provided in the ROWD, Board staff has determined that the existing or potential beneficial uses of the waters affected by the proposed project include wildlife habitat (WILD) and groundwater recharge (GWR). Board staff has determined that the discharges to the non-federal waters of the State at the proposed Duncan Canyon Interchange, with the proposed mitigations, would not adversely affect the beneficial uses of the affected waters.

The Discharger proposes to mitigate impacts to beneficial uses supported by the onsite waters by paying an in-lieu fee to the Santa Ana Watershed Association for the restoration of 0.56-acre of riparian habitat, including the removal and ongoing eradication of invasive plant species. The project is located within the Santa Ana Watershed. Regional Board staff believes that the proposed mitigation is appropriate and acceptable.

Discharges that will occur as part of the construction of the I-15/Duncan Canyon Interchange include construction and post-construction discharges of storm water runoff. These discharges are addressed by State Board Water Quality Order No. 2009-0009 -DWQ, "General Permit for Discharges Associated with Construction Activity" (Order No. 2009-0009-DWQ) and the "National Pollutant Discharge Elimination System (NPDES) Permit for Storm Water Discharges from the State of California, Department of Transportation (Caltrans) Properties, Facilities, and Activities" (Order No. 99-06-DWQ). As required under these permits, a Storm Water Pollution Prevention Plan (SWPPP) 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 Stormwater Data Report, provided as part of the ROWD, indicates that City-funded and maintained water quality BMPs will provide treatment of runoff from the interchange improvements. Additional BMPs will be identified in the SWPPP.

The property owner(s) is responsible for operation and management of all BMPs on the proposed Interchange site during construction. The City has accepted responsibility for ongoing operation and maintenance of the interchange improvements and associated post-construction BMPs. Note that while the City will be responsible for all BMPs installed within the City right-of-way, BMPs located within the Caltrans right-of-way will be maintained by Caltrans.

Pursuant to CEQA, the California Department of Transportation (Caltrans) prepared a Mitigated Negative Declaration (MND)/Environmental Assessment for the I-15/Duncan Canyon Road Interchange in November 2009 and adopted it on November 3, 2009. A Notice of Determination was filed on November 9, 2009. 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. A Responsible Agency has responsibility for mitigating direct or indirect environmental effects of those parts of a project it decides to carry out or approve (California Code of Regulations, Title 14, Section 15096). Board staff has considered the City's MND for the project and the proposed mitigation discussed above, and independently finds that there are no un-mitigated significant impacts on water quality that would result from the proposed project.

RECOMMENDATION

Board staff recommends that the Regional Board adopt Order No. R8-2011-0051.

Comments were solicited from the following agencies and parties:

SWRCB
California Department of Fish and Game
City of Fontana
Caltrans
Inland WaterKeeper
NRDC

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

Waste Discharge Requirements
Order No. R8-2011-0051
For
City of Fontana
Interstate 15/Duncan Canyon Road Interchange Project
City of Fontana, San Bernardino County

Tentative

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

1. The City of Fontana (hereinafter, Discharger) proposes to discharge fill to 0.28 acres of ephemeral, roadside drainage ditches (9,637 linear feet), as part of the construction of a new interchange for Interstate 15 (I-15) at Duncan Canyon Road (Project) in the City of Fontana (City).
2. The Project is the construction of a new interchange on I-15 at the existing Duncan Canyon Road overcrossing, in the City of Fontana, San Bernardino County, California. The proposed work includes constructing northbound and southbound on and off-ramps, widening the existing Duncan Canyon Road overcrossing to match the standard cross section in the City's General Plan, rerouting and modifying existing drainage ditches to facilitate the new interchange and providing storm water treatment onsite. The I-15/Duncan Canyon Road Interchange Project is located within Sections 13 and 14, Township 1 North, Range 6 West, as shown on the U.S. Geological Service *Devore, California* quadrangles (34 deg. 09 min. 55 sec. N/-117 deg. 27 min. 41 sec. W).
3. Approximately 9,673 linear feet of drainage ditches that are waters of the state, covering a total area of about 0.28 acres, will be filled to construct the project. The Project will construct approximately 9,226 linear feet of bio-swales, covering approximately 1.89 acres, and a 1.23 acre detention basin. The project will create 1.61 acres of waters of the state.
3. In a letter dated July 16, 2008, the U.S. Army Corps of Engineers (Corps) verified that the Project waters are not subject to regulation under Section 404 of the Clean Water Act.

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

Waste Discharge Requirements
Order No. R8-2011-0051
For
City of Fontana
Interstate 15/Duncan Canyon Road Interchange Project
City of Fontana, San Bernardino County

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

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3. In a letter dated July 16, 2008, the U.S. Army Corps of Engineers (Corps) verified that the Project waters are not subject to regulation under Section 404 of the Clean Water Act.

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 where the discharge is also subject to regulation by the Corps. This occurs when 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.
5. The waters of the State on the Project site consist of ephemeral roadside drainage ditches. The Water Quality Control Plan for Santa Ana River Basin (1995, revisions compiled 2008) does not designate beneficial uses for any of the surface waters on the site. Based on the applicant's biological assessment and staff's observations of these waters, beneficial uses that are existing or attainable for the ephemeral drainages include:
 - a. Wildlife habitat (WILD); and
 - b. Groundwater recharge (GWR).
6. Waste Discharge Requirements are necessary to address potential 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 subject to Corps CWA Section 404 jurisdiction (nonfederal). The discharger submitted a Report of Waste Discharge (ROWD) on May 30, 2011.
8. The discharger has committed to mitigate direct impacts to waters of the State by paying an in-lieu fee to the Santa Ana Watershed Association In-Lieu Fee Program for the restoration of 0.56-acre of riparian habitat, including the removal and ongoing eradication of invasive plant species.
9. Pursuant to the California Environmental Quality Act (CEQA) contained in Chapter 3 (commencing with Section 21100), Division 13 of the Public Resources Code., the California Department of Transportation (Caltrans) adopted a Mitigated Negative Declaration (MND) for the I-15/Duncan Canyon Road Interchange Project on November 3, 2009. A Notice of Determination was filed by Caltrans on November 9, 2009.

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. A Responsible Agency has responsibility for mitigating direct or indirect environmental effects of those parts of a project it decides to carry out or approve (California Code of Regulations, Title 14, Section 15096). The Regional Board has considered the MND prepared by Caltrans for this project in the adoption of these waste discharge requirements and finds that measures specified in Caltrans' MND and herein mitigate impacts to water quality standards to insignificant levels. There will be no un-mitigated significant impacts on water quality that would result from the proposed project.
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. The project is not expected to result in lowering of water quality. Project construction should not affect water quality if conducted in compliance with applicable State Water Resources Control Board permits. The project's potential long-term effects on water quality standards will be minimized or avoided by implementing appropriate best management practices specified in approved water quality management plans, and by complying with the mitigation measure required herein.
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 discharge of fill materials shall be limited to inert materials, as defined in California Code of Regulations (CCR) Title 27, Section 20230. 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, are prohibited.

C. PROVISIONS:

1. The onsite storm water treatment bio-swales and detention basin shall be constructed as shown in the project plans submitted with the Project's ROWD.
2. To mitigate for the discharge of fill to 0.28 acres of waters of the state, the discharger shall pay an in-lieu fee to the Santa Ana Watershed Association In-Lieu Fee Program for the restoration of 0.56-acre of riparian habitat, including the removal and ongoing eradication of invasive plant species. The fee shall include monies for a minimum of 6-years of follow-on maintenance. Evidence of the payment shall be provided to the Executive Officer by January 27, 2012.
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 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.
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. This Order does not convey any property rights of any sort, or any exclusive privilege.
11. 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.
12. 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.
13. 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, except as noted below. 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.
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.

D. REPORTING:

Upon completion of the discharge of fill to waters of the state authorized by this Order, the Discharger shall submit a compliance report to the Board. The report shall:

1. Notify the Board that the discharge has been completed;
2. Include information concerning compliance with the specifications, prohibitions and provisions of this Order; and,
3. If not previously submitted, provide evidence of the payment of in-lieu mitigation fees to the Santa Ana Watershed Association.
4. Request the rescission of this Order.

I, Kurt V. Berchtold, 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 October 28, 2011.

Kurt V. Berchtold
Executive Officer