California Regional Water Quality Control Board
Santa Ana Region

September 17, 2004

ITEM: 10a

SUBJECT: Order No. R8-2004-0071, The Irvine Company

SUMMARY

The matter before the Board is to consider adoption of Order No. R8-2004-0071, which authorizes the discharge of dredge or fill to waters of the State that have been determined by the U.S. Army Corps of Engineers to be outside of its jurisdiction and not subject to regulation according to 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 considered 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 issued by the Executive Officer have been 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 August 17, 2004, Regional Board staff received a report of waste discharge from Glenn Lukos Associates, on behalf of The Irvine Company, for excavation to be conducted within five to ten isolated seasonal pools near the Santiago Landfill in Orange County. The report also includes a verification letter from the Corps, dated February 26,

2004, signifying concurrence with the jurisdictional delineation report. The delineation map included in the report indicates that the seasonal pools are isolated, and thus, are not regulated by the Corps under Section 404 of the Clean Water Act. However, the seasonal pools are waters of the State and exhibit beneficial uses.

The discharge will occur in association with advance implementation of mitigation for impacts related to the construction of the East Orange Planned Community (EOPC). The future development of the EOPC will result in the fill of five of the seasonal pools. The proposed mitigation program includes the relocation of western spadefoot toads (WST) from the pools to newly created pools to be constructed within the Irvine Ranch Land Reserve. WST is a FWS and California species of special concern. The U.S. Fish and Wildlife Service (FWS) has provided written approval of the relocation plan for western spadefoot toad (WST). The implementation of the relocation plan in advance will increase the likelihood of success of the relocation effort and minimize disruption of the WST.

Implementation of the plan includes the following components: (1) data collection relevant to the biology and ecology of the breeding pool habitats proposed for development; (2) census of WST population to be relocated; (3) identification of existing unoccupied seasonal pool habitats on nearby Natural Communities Conservation Plan preservation lands suitable for potential WST relocation; (4) creation of approximately 30,000 square feet of high quality seasonal pool habitats adjacent to existing unoccupied pools; (5) salvage of non-listed fairy shrimp cyst and algal inoculums from the existing WST pools and relocation to created pools as a food base for larvae; (6) collection and relocation of egg masses, larvae, and metamorphs; (7) preservation of the created pool and adjacent upland estivation habitats; and (8) implementation of a monitoring program to verify success of the WST relocation and habitat creation program. Element (5) is the only task that would result in excavation within waters of the state.

Implementation of Element (5) of the WST Relocation Program would consist of collecting intact sections of the surface layer biomass (inoculum) from the seasonal pools adjacent to the Santiago Landfill. This will result in the excavation of up to approximately 0.70 acres of waters of the State in two phases. All inoculum collection will occur between August 15 and October 15.

An environmental impact report has been prepared for the East Orange Planned Community (State Clearinghouse No. 88110905) and certified by the City of Orange on December 19, 1989. A Notice of Determination was recorded on December 20, 1989.

The proposed Order regulates excavation within waters of the State for the purpose of mitigating impacts to WST habitat. This Order does not authorize the discharge of fill to waters of the State in association with the development of EOPC. Discharges of fill from the development of EOPC will be regulated under separate permit action by the Regional Board.

RECOMMENDATION

Board staff recommends that the Regional Board adopt Order No. R8-2004-0071, as presented.

California Regional Water Quality Control Board
Santa Ana Region

Order No. R8-2004-0071

Waste Discharge Requirements

for

The Irvine Company
East Orange Planned Community
Western Spadefoot Toad Relocation Program
Orange County

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

1. The Irvine Company proposes to conduct the initial phases of a Western Spadefoot Toad (WST) Relocation Program in Orange County that will require excavation of material from up to 0.70-acres of isolated seasonal pool habitat. WST is a U.S. Fish and Wildlife Service (FWS) and California species of special concern. The 0.70-acres of isolated seasonal pool habitat is located within the proposed East Orange Planned Community (EOPC). The future development of the EOPC will result in the fill of the seasonal pools and impacts to existing WST habitat. The FWS has approved this WST Relocation Program as mitigation for anticipated impacts to WST habitat. The Irvine Company proposes to conduct the initial phases of this program in advance of EOPC development in order to improve the likelihood of WST relocation success. The proposed mitigation program will result in the relocation of WST from five artificial pools adjacent to the Santiago Landfill to newly created pools to be constructed within the Irvine Ranch Land Reserve.

2. The affected waters of the State are between five and ten isolated pools with a combined area of approximately 0.70 acre. All of the pools are artificial, having been created as borrow sites during operation of the adjacent Santiago landfill. All of the pools meet the U.S. Army Corps of Engineers (Corps) criteria as waters of the U.S., however, the Corps has declined to take jurisdiction over these isolated features and the Corps will not issue a Clean Water Act (CWA) Section 404 Permit. Similarly, CDFG has declined jurisdiction because these features do not meet the definition of a streambed or lake.

3. The waste discharge requirements proposed herein address excavation in waters of the State necessary to implement the proposed WST relocation program. The relocation program involves collecting intact sections of the surface layer biomass (inoculum) from five to ten artificial pools adjacent to the Santiago Landfill. This will result in the excavation of up to approximately 0.70 acres of waters of the State in two phases. All inoculum collection will occur between August 15 and October 15.

4. Prior to grading for the development of EOPC, The Irvine Company will submit a Section 401 Water Quality Certification application for impacts to waters of the U.S. for the EOPC project. The future 401 Certification will be considered based on a separate CEQA document that addresses findings specifically to the EOPC. Implementation of this WST Relocation Program will not conflict with nor advance development of the EOPC. In the event that the EOPC is not developed, implementation of the WST Relocation Program would result in an increase of habitat for the WST.

5. In compliance with the California Environmental Quality Act, an Environmental Impact Report has been prepared and certified by the City of Orange. A Notice of Determination was filed on December 20, 1989.

6. The discharger has conducted a Biological Assessment of the site and found no threatened or endangered species designated under State or Federal law. The target of the program, the WST, is a FWS and California Department of Fish and Game (CDFG) Species of Special Concern.

7. This project is being carried out for the purpose of mitigating future impacts to WST habitat. The project goal is to substantially increase the numbers of WST and ensure the long-term persistence of WST within the Natural Communities Conservation Plan (NCCP) Central / Coastal Subregion in Orange County. The Irvine Company proposes to conduct the initial phases of this project in advance of EOPC development in order to improve the likelihood of WST relocation success.

8. The artificial seasonal pools are isolated and exhibit no surface or subsurface connection with other waters of the state (i.e., receiving waters). No beneficial uses are designated for the affected artificial, isolated pools within the Santa Ana River Basin Water Quality Control Plan (1995), however, the applicant's biological assessment documents the following beneficial uses as existing or as attainable:
    a. Wildlife Habitat (WILD)
    b. Warm Freshwater Habitat (WARM)
    c. Spawning, Reproduction, and Development (SPWN).

9. This Order regulates excavation within waters of the State for the purpose of mitigating impacts to WST habitat. The discharger submitted a Report of Discharge on August 17, 2004. This Order does not authorize the discharge of fill to waters of the State in association with the development of EOPC. Discharges of fill from the development of EOPC will be regulated under separate permit action by the Regional Board as described above.

10. Waste Discharge Requirements (WDRs) are necessary to address impacts of the fill of waters of the State and to meet the objectives of the State Wetlands Conservation Policy (Executive Order W-59-93).

11. The goals of the California Wetlands Conservation Policy (Executive Order W-59-93, signed August 23, 1993) include ensuring "no overall loss" and achieving a "...long-term net gain in the quantity, quality, and permanence of wetland acreage and values...." Senate Concurrent Resolution No. 28 states that "[i]t is

the intent of the legislature to preserve, protect, restore, and enhance California's wetlands and the multiple resources which depend on them for benefit of the people of the State."

12. The Regional Board has considered antidegradation pursuant to State Board Resolution No. 68-16 and finds that the discharge is consistent with those provisions.

13. 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.

14. 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 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. This Order does not convey any property rights of any sort, or any exclusive privilege.

9. 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.

10. 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.

11. 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 17, 2004.

Gerard J. Thibeault
Executive Officer