

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 2000 - 09

In the Matter of the Petition of
DOUBLE WOOD INVESTMENT, INC.
For Reconsideration of the Executive Director's
Denial of Water Quality Certification
For Double Wood Golf Course.

SWRCB/OCC FILE C-017

BY THE BOARD:

On March 5, 1999, the Executive Director of the State Water Resources Control Board (State Water Board) denied water quality certification for the proposed Double Wood Golf Course. Double Wood Investment, Inc., (petitioner) filed a timely petition for reconsideration of the denial with the State Water Board. For the reasons contained herein, the State Water Board hereby issues a conditional water quality certification for the Double Wood Golf Course.

I. BACKGROUND

The proposed Double Wood Golf Course (project) is located in Fremont, California, on 396 acres of open space area east of Interstate 680, north and west of the recently-constructed Avalon Homes residential subdivision and its access road, and south of an established residential subdivision. The terrain is characterized by fairly steep hills that support non-native grasslands, and the area has historically been used for livestock grazing. Four seasonal watercourses run through the project area, including Toroges Creek, Arroyo Agua Fria Creek, Creek B, and Tributary B. These watercourses are tributary to Coyote Creek, and

eventually to the San Francisco Bay. The project design requires over two million cubic yards of cut and fill in order to create a suitable playing surface area. The project design also includes impacts to all four drainages, including the addition of fill to approximately 2,900 linear feet of Toroges Creek, to a maximum depth of 75 feet. Because of these proposed discharges of fill material, the project applicant was required to obtain a Clean Water Act section 404 dredge or fill permit from the United States Army Corps of Engineers (U.S. Army Corps). (33 U.S.C. § 1344.)

Applicants for federal permits to conduct activities that may result in a discharge to waters of the United States are required to obtain state water quality certification pursuant to Clean Water Act section 401. (33 U.S.C. § 1341.) Water quality certification is a determination that a proposed project complies with the applicable provisions of sections 301, 302, 303, 306 and 307 of the Clean Water Act and any other appropriate requirements of state law. (*Ibid.*) In California, the State Water Board is authorized to issue water quality certifications. (Wat. Code § 13160.) Generally speaking, in order to issue water quality certification, the State Water Board must find that there is a reasonable assurance that the project will comply with water quality standards, including the designated beneficial uses of the affected water bodies, the water quality objectives established to protect those beneficial uses, and State Water Board Resolution 68-16 (“Policy with Respect to Maintaining High Quality Waters in California”), which serves as the state’s anti-degradation policy, and any other relevant provisions contained in State Water Board and Regional Water Board Water Quality Control Plans and Policies. The State Water Board has given the Executive Director the authority to issue or deny water quality certification. (Cal. Code Regs., tit. 23, § 3838.) If the Executive Director denies water quality certification,

the applicant may petition for reconsideration by the State Water Board. (Cal. Code Regs., tit. 23, § 3867.)

Petitioner's quest to obtain water quality certification has been a long and complex effort. Pursuant to California's existing regulations governing section 401 water quality certification,¹ petitioner filed an application for certification with the San Francisco Bay Regional Water Quality Control Board (Regional Water Board, or SFBRWQCB) on August 27, 1996. Staff of the Regional Water Board, on several occasions, met with and corresponded with petitioner to attempt to resolve their concerns with the project. Unable to resolve those concerns, the staff recommended to the Regional Water Board on January 21, 1998, that it recommend that the Executive Director deny water quality certification for the project. After a lengthy discussion, the Regional Water Board was unable to muster a majority vote on either of two competing motions to recommend issuance or denial of water quality certification. Therefore, the project was forwarded to the Executive Director without a recommendation from the Regional Water Board.

The Executive Director conducted a public meeting in Fremont to take public comment on the project. On May 28, 1998, the Executive Director denied water quality certification for the project without prejudice. In his denial, the Executive Director focused primarily on what he determined to be a lack of adequate mitigation for the impacts to the watercourses. The petitioner requested and was granted an opportunity to revise its mitigation

¹ (Cal. Code Regs., tit. 23, § 3855.) Under the existing regulations, the Regional Water Quality Control Boards review applications for state water quality certification, but only make recommendations to the State Water Board's Executive Director to issue or deny water quality certification. The State Water Board recently adopted significant revisions to its water quality certification regulations. Among other things, the revisions delegate the authority to make final water quality certification decisions to the Regional Water Quality Control Boards. It is expected that the process for issuing or denying water quality certification will be improved once these revisions become effective.

proposal. Then ensued an extended series of communications between the Executive Director and the petitioner, concluding with another denial of water quality certification on March 5, 1999. The Executive Director cited several reasons for this denial, including the continuing inadequacy of the revised mitigation proposal, the potential need for further review of the project pursuant to the California Environmental Quality Act (CEQA) (Pub. Resources Code § 21000 et seq.), concerns about removing riprap from Arroyo Agua Fria Creek, and other project design issues.

Following the Executive Director's March 5, 1999, denial of water quality certification, petitioner filed the instant petition for reconsideration with the State Water Board. In addition to filing the petition, petitioner also requested that the State Water Board refer the matter to alternative dispute resolution,² and hold the petition in abeyance during the pendency of the alternative dispute resolution. The State Water Board first designated four parties for the purpose of determining whether to refer the matter to mediation: the petitioner, the Executive Director, the City of Fremont, and the Citizens Committee to Complete the Refuge, a local environmental group that had been involved with the project for several years. The staff of the Regional Water Board was also asked to act as a designated party, but declined.³ Upon receiving

² Although seldom utilized, the State Water Board's regulations provide that the State Water Board may refer disputes in adjudicative proceedings to mediation or nonbinding arbitration. (Cal. Code Regs., tit. 23, § 648.6.) The State Water Board is required to obtain the consent of all of the parties prior to referring any matter to alternative dispute resolution. (Gov. Code § 11420.10.) The process for designating parties is specified at Title 23, California Code of Regulations, section 648.1.

³ The Regional Water Board staff's involvement in the project has been a recurring, and sometimes troubling, theme. As explained above, the Regional Water Board failed to take a position when it had the opportunity to make a recommendation to the Executive Director. At the invitation of the State Water Board and the designated parties, the Regional Water Board staff did participate in the mediation, although not as a party. The Regional Water Board staff was also designated as a party for the purposes of the subsequent hearing before the State Water Board. During the hearing, the Regional Water Board staff strongly urged the State Water Board to remand the project to the Regional Water Board. Such a position appears to be inconsistent with the lack of a decision by the Regional Water Board itself. Because the Regional Water Board had failed to take a position when it had previously considered the project, it was (continued)

the consent of the designated parties, the State Water Board referred the petition to mediation. The mediation included three public sessions, and culminated with the mediator issuing a report on March 24, 2000.⁴ According to the mediator's report, the parties were able to identify the key areas of contention, but were unable to reach a consensus on any of the substantive issues.

Once the mediation was concluded, petitioner reactivated its petition for reconsideration before the State Water Board. Due to the impending retirement of the Executive Director, the State Water Board scheduled a workshop to receive the mediator's report and take brief comments from the Executive Director and the public. At the workshop, the Executive Director indicated that the current project addresses his concerns regarding adequate mitigation. Following the workshop, the State Water Board scheduled and conducted an evidentiary hearing on the petition. Many issues have been raised by the parties and interested persons with respect to the project; this order attempts to address those issues that are most directly relevant to water quality certification.

II. ISSUES AND FINDINGS

A. *Whether the applicant has demonstrated that there is no practicable alternative to the project.*

The Regional Water Board's Water Quality Control Plan has provisions that apply specifically to the filling of wetlands. These provisions incorporate by reference the

incumbent upon the staff to ensure that the staff position to remand was one that the Regional Water Board would support. It is not clear from the record whether this occurred.

⁴ Due to the laws regarding the admissibility of communications during mediation, the State Water Board has considered only the mediator's report, which was a consensus document produced by all of the parties, and other documents that were submitted to the State Water Board by the preparers of those documents that did not reveal any inadmissible mediation discussions. (See Evid. Code §§ 1119, 1122.) Counsel for the State Water Board did attend the mediation sessions in order to ensure that the State Water Board's procedural requirements were complied with, but did not reveal any of the inadmissible discussions to the State Water Board.

United States Environmental Protection Agency's (U.S. EPA) section 404(b)(1) "Guidelines for Specification of Disposal Sites for Dredge or Fill Material." (See 40 C.F.R. § 230 (1999).)⁵

Pursuant to the guidelines, the petitioner is required to show that there is "no practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."

Finding: The petitioner has conducted an adequate analysis to demonstrate that there is no practicable alternative to the proposed project that avoids or further minimizes impacts to aquatic resources. The City of Fremont, as lead agency under CEQA, analyzed several project alternatives, both offsite and onsite. The project was also revised several times to reduce its impacts on aquatic resources. In addition, in the course of the mediation, the petitioner analyzed another onsite alternative. None of the alternatives that achieved the overall project purpose appear to have lesser impacts on aquatic resources without causing other significant adverse impacts to the environment.

B. Whether the project will protect the beneficial uses of the affected watercourses.

The Regional Water Board's Water Quality Control Plan identifies beneficial uses for Coyote Creek. The Water Quality Control Plan also provides that "[t]he beneficial uses of any specifically identified water body generally apply to all its tributaries. In some cases a

⁵ The State Water Board approved this incorporation of the federal guidelines by the Regional Water Board. Nonetheless, the State Water Board is concerned about the potential conflicts inherent in having a Regional Water Board interpret and apply the same guidelines concurrently with the U.S. EPA and U.S. Army Corps. While the protection and enhancement of wetlands are of paramount importance to the state (see, e.g., Governor's Exec. Order No. W-59-93 (August 23, 1993)), the State Water Board strongly encourages the Regional Water Board to review this Water Quality Control Plan provision in order to determine whether it could be more specifically tailored to the state's interests and the Regional Water Board's jurisdiction. In this regard, the State Water Board's Executive Director is instructed to write a memorandum to the Regional Water Board asking for a reevaluation of the incorporation of the federal guidelines.

beneficial use may not be applicable to the entire body of water, such as navigation in Calabazas Creek or shellfish harvesting in the Pacific Ocean. In these cases, the Regional Water Board's judgment regarding water quality control measures necessary to protect beneficial uses will be applied." (SFBRWQCB Water Quality Control Plan at 2-5.) The Regional Water Board staff have identified wildlife habitat and preservation of rare and endangered species as the most significant beneficial uses for these tributaries to Coyote Creek.

Finding: Because of the unique characteristics of the project area, the project, including its mitigation components, adequately protects the beneficial uses of the affected waterbodies. The project involves the fill of a total of 4,580 linear feet, or 1.03 acres, of the watercourses, and impacts to approximately 0.92 acres of riparian habitat. The most significant impact is to Toroges Creek, which will be filled to a maximum depth of 75 feet, with the creek re-created on top of the fill. A concrete spillway will be used to bring the re-created creek down to the natural gradient of the creek at the downstream end of the fill. On the face of it, it appears that such a project would seriously affect the beneficial uses of Toroges Creek, at least with respect to the movement of aquatic species through the spillway. However, the setting for this project is unique. The project area is very unstable, and is dominated by landslides, soil erosion, and debris and silt stream flows. The watercourses are subject to erosion and heavy sedimentation, and are of very poor quality in the vast majority of the project area. (There are some higher quality areas of Toroges Creek in the upstream portion of the project area, and the project has been revised to avoid placing fill there.) The sedimentation is also adversely affecting downstream portions of the watercourses. Although there is evidence in the record that the watercourses in the project area may be susceptible to restoration, there have been no specific proposals to address the instability of the project area or restore the watercourses, and no

substantial likelihood that any such proposals might be forthcoming in the absence of the project. Nor has the Regional Water Board indicated that it has attempted to require the property owner to control the portion of the impacts in the overall project area that is attributable to anthropogenic causes.⁶ In fact, there is a consensus among the experts that it would be necessary to place a substantial amount of fill in Toroges Creek simply to restore it.

Immediately downstream of the project site, the watercourses flow through culverts and under a major freeway. From there, they are confined to narrow flood control channels for a significant distance. Immediately upstream from the project area, the watercourses are confined by existing development. In short, the watercourses in the project area are in very poor condition and very likely to remain that way.⁷ The beneficial uses of the watercourses in the project area have been severely compromised. As is discussed below, conditions are being imposed to protect the beneficial uses of the water bodies that are downstream of the project area. Therefore, the project as a whole, including mitigation, adequately protects and should enhance the beneficial uses of the watercourses.

C. Whether mitigation for the impacts to water quality is sufficient.

⁶ Had either of these efforts been underway, it is not likely that the State Water Board would be considering issuing water quality certification for the project. In light of our decision today to issue water quality certification for the project, however, any new effort by the Regional Water Board to require the current property owner to control all of the ongoing erosion in the project area would be inappropriate so long as the project is moving forward in a timely fashion. The Regional Water Board should, however, exercise its authority to ensure that petitioner controls future erosion in the project area, as provided for in Section G, below.

⁷ In marked contrast, the portions of the watercourses that run through the 1,100 acres of open space upslope of the Avalon Homes development are in much better condition than the portions of the watercourses that are in the project area. The same project, were it to be situated in the upper watershed, almost certainly would not qualify for water quality certification. This example should prove to be academic, as the City of Fremont, who owns the open space land, testified that they had no plans to allow development upon it.

Petitioner has submitted many different mitigation proposals and refinements to those proposals.⁸ The State Water Board concurs with the previous denials of water quality certification by the Executive Director, in which he disallowed any mitigation credit for the re-creation of Toroges Creek on top of the fill.⁹ Petitioner submitted another mitigation proposal during the pendency of the mediation.

Finding: The mitigation proposal, as supplemented by petitioner's January 19, 2000 submittal, is now sufficient. Without including the re-created Toroges Creek on top of the fill, the mitigation for impacts to 0.92 acres of riparian areas and 1.03 acres of jurisdictional waters now includes the creation of 2.0 acres of riparian areas upstream of the fill areas on Toroges Creek, the creation of 4.0 acres of riparian areas on Arroyo Agua Fria Creek, the planting of 0.4 acres of willows in Creek B, the creation of 0.37 acres of jurisdictional waters in Arroyo Agua Fria Creek, and the creation of 0.11 acres of seasonal ponds. Further, the mitigation proposals are now fully defined, unlike the previous conceptual proposals.

D. Whether further CEQA analysis is required.

As lead agency, the City of Fremont approved an Environmental Impact Report (EIR) for the Avalon Homes Subdivision in 1991, a Subsequent EIR for the Double Wood Golf Course in 1996, and an EIR Addendum on April 17, 2000.

Finding: The State Water Board has considered the EIR, Subsequent EIR, and EIR Addendum, and accepts the City of Fremont's analysis that further review pursuant to CEQA is not warranted. The City of Fremont has not identified any significant effects on the

⁸ The changing nature of these mitigation proposals was a major contributing factor in the length of time that it has taken to obtain water quality certification.

⁹ The petitioner's primary purpose for depositing the fill in Toroges Creek is to construct a golf course, rather than restore the creek.

environment of the project that fall within the jurisdiction of the State Water Board. All of the conditions imposed herein are designed to assist in the prevention of water quality impacts.

E. Whether the mitigation performance bond is adequate.

The Executive Director required that the petitioner secure the performance of the proposed mitigation measures with a bond. Agreement between the Executive Director and the petitioner on most of the details of the bond are memorialized in the mediator's report.

Finding: The substantive details of the proposed \$1,000,000 mitigation performance bond, as memorialized in the mediator's report, are sufficient. The final bond remains to be submitted. The State Water Board accepts the City of Fremont's offer to hold, and, if necessary, enforce the bond. As a condition of water quality certification, the petitioner shall, within three months of the date of this order, submit a final bond for the State Water Board Executive Director's approval consistent with the terms memorialized in the mediator's report. The petitioner shall also send a copy to the Regional Water Board. The mediator's report provides for future reductions of the amount of the bond as the mitigation is demonstrated to be successful. According to the mediator's report, those reductions were to be conditioned upon the concurrence of the State Water Board. As the Regional Water Board has greater expertise and ability to monitor the mitigation performance than the State Water Board, however, the bond shall require that the City of Fremont obtain the Regional Water Board's written concurrence prior to approving future reductions of the bond.

F. Whether approval of an Integrated Pest Management Plan should be required.

One of the conditions of approval imposed by the City of Fremont for the project was the development of an Integrated Pest Management (IPM) Plan. The City's condition

requires that the IPM Plan be submitted prior to operations. The City of Fremont has agreed to give the public an opportunity to comment on the IPM Plan prior to approving it.

Finding: The IPM Plan is a critical component for ensuring that the project does not result in discharges of pollutants that could further impair the water quality onsite and downstream. As a condition of water quality certification, the use of Diazinon, which has been listed as impairing the water quality of the lower San Francisco Bay, is prohibited. As a further condition of water quality certification, petitioner shall submit a proposed IPM Plan, which shall contain best management practices designed to eliminate any discharge of pesticides (including insecticides) to waters of the state, to the City of Fremont and the Regional Water Board for approval prior to the submittal of the final landscape plan. As a further condition of water quality certification, there shall be no use of pesticides by petitioner prior to the City of Fremont's and the Regional Water Board's approval of the IPM Plan.

G. Whether water quality monitoring should be required.

Although it is not clearly required as one of the City of Fremont's conditions of approval, both petitioner and the City of Fremont have pledged to put a water quality monitoring plan in place. This monitoring plan is to monitor for pollutants discharging from the ongoing operations of the project, and is therefore distinct from the required mitigation monitoring plan.

Finding: As conditions of water quality certification, petitioner shall submit a proposed water quality monitoring plan for the project to the Regional Water Board at the same time it submits the IPM Plan. Upon its approval, the Regional Water Board shall issue a water quality monitoring program to the petitioner for the project. The monitoring program shall include monitoring to address the use of pesticides, herbicides, insecticides, nutrients, and recycled water, and may also include monitoring to determine the success of the mitigation. The

cost of the monitoring program shall bear a reasonable relationship to the benefits to be obtained from the monitoring program. The Regional Water Board is also authorized to issue waste discharge requirements if it determines, based on the monitoring program, that discharges of pollutants from the project area are occurring.

H. Whether ongoing stabilization work on Creek B by the developers of the Avalon Homes subdivision must be considered in issuing water quality certification.

The Avalon Homes subdivision is experiencing ongoing instabilities that threaten several non-residential structures adjacent to Creek B, but upslope of the project area. The developers of the Avalon Homes are attempting to receive approval for work to stabilize that section of Creek B.

Finding: Both the 1991 Avalon Homes EIR and the 1996 Double Wood Supplemental EIR recognized that portions of the area were unstable. Therefore, this is not a new cumulative effect that must be analyzed. The Regional Water Board will likely require mitigation for the impacts to Creek B resulting from Avalon Homes developer's stabilization project. If there are no mitigation opportunities remaining on Creek B due to the existence of the Double Wood project, the Regional Water Board can require offsite mitigation. Conversely, if the stabilization efforts render petitioner's mitigation efforts in the downstream section Creek B unsuccessful, the Regional Water Board can require remedial measures, including different mitigation if necessary, under the mitigation performance bond.

I. Whether other conditions are appropriate.

The State Water Board frequently includes other, non-project specific, conditions to water quality certification, in order to protect water quality.

Finding: Petitioner shall comply with the following additional conditions.

Petitioner shall conduct its activities in accordance with its application for water quality certification, as amended. Petitioner shall comply with the State Water Board's General Permit for Storm Water Discharges Associated with Construction Activity, Water Quality Order 99-08-DWQ. Petitioner shall comply with all streambed alteration agreements issued by the Department of Fish and Game for this project. Petitioner shall comply with all water quality-related conditions of approval imposed by the City of Fremont. This certification is subject to modification or revocation upon judicial review.

III. ORDER

IT IS HEREBY ORDERED that water quality certification, subject to the conditions contained herein, is issued.

IT IS FURTHER ORDERED that all actions by the Regional Water Board with respect to this project shall be fully consistent with this issuance of water quality certification and the conditions thereto.

CERTIFICATION

The undersigned, Administrative Assistant 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 June 15, 2000.

AYE: Arthur G. Baggett, Jr.
Mary Jane Forster
John W. Brown
Peter S. Silva

NO: None

ABSENT: None

ABSTAIN: None

/s/
Maureen Marché
Administrative Assistant to the Board