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**San Diego Regional Water Quality Control Board**

August 5, 2016

VIA E-MAIL ONLY

John J. Lormon, Esq.  
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Office of Enforcement  
State Water Resources Control Board  
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**Subject: ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R9-2016-0092,  
KB HOME, SETTLER'S POINT PROJECT, RULING ON OBJECTIONS<sup>1</sup>**

Messrs. Lormon and Boyers:

This letter transmits the Regional Water Quality Control Board, San Diego Region (San Diego Water Board) Advisory Team's ruling on evidentiary objections KB Home submitted August 1, 2016.

On July 26, 2016, the San Diego Water Board's Prosecution Team served an administrative subpoena for records and documents concerning the above Administrative Civil Liability Complaint (ALCL) on Helix Environmental Planning, Inc. (Helix). KB Home, through its representative John Lormon, objected to "evidence that is has learned the Prosecution Team is seeking by subpoena issued to [Helix]" on the following grounds:

- (1) Sending a copy of the subpoena to members of the San Diego Water Board's Advisory Team for the above ALCL was an improper *ex parte* communication and bias of Advisory Team members should be presumed.
- (2) Records that might be produced in response to the subpoena could not be submitted timely under the existing Revised Hearing Procedures for the ACL matter because the

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<sup>1</sup> The June 3, 2016, Advisory Team email transmitting the Revised Hearing Procedures acknowledged the Parties' request to establish a deadline of August 3 for rulings on evidentiary objections but declined the proposal, committing to rule on objections as early as practicable. See attached email.

deadlines for the Prosecution Team's case-in-chief and rebuttal submittals have passed and any records, if submitted, would be for an impermissible purpose.

### **Ruling on Ex Parte Communication and Bias Objection**

The Administrative Procedure Act (APA) (Gov. Code, § 11430.10 et seq.) requires disclosure of *ex parte* communications that occur "[w]hile the proceeding is pending ." (Gov. Code , § 11430.40.) The presiding officer must make prohibited *ex parte* communication part of the record in the proceeding. (Gov. Code, § 11430.50.) If the communication is in writing, the writing, and any written response of the presiding officer, goes into the record. (*Id.*, subd. (a)(1).) It appears that the Advisory Team was inadvertently copied on the subpoena issued to Helix as the Advisory Team does not need to receive notice of this type of communication. However, to the extent the communication is an *ex parte* communication, it was promptly disclosed and together with KB Home's response has been added to the record.<sup>2</sup>

It is unclear if KB Home is suggesting that the five Advisory Team members who received a copy of the subpoena should be disqualified for bias. "Absent a financial interest, adjudicators are presumed impartial." (*Withrow v. Larkin* (1975) 421 U.S. 35, 47.) "To show nonfinancial bias sufficient to violate due process, a party must demonstrate actual bias or circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" (*Today's Fresh Start, Inc. v. Los Angeles Co. Office of Educ.* (2013) 57 Cal.4<sup>th</sup> 197, 221, (quoting *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4<sup>th</sup> 731, 737.) KB Home has not alleged financial interest on the part of the Advisory Team members nor has it alleged facts demonstrating actual bias or circumstances making the probability of actual bias highly likely. The subpoena has been made a part of the record consistent with Government Code section 11430.50, subdivisions (a)(1) and subdivision (b) and KB Home, through its evidentiary objection, has commented on the communication as permitted in section 11430.50, subdivision (c). Receipt of the subpoena subsequently sent to KB Home does not prevent any of the Advisory Team members from being impartial in their consideration of the ACL matter. KB Home's objection to the *ex parte* communication and the bias issue are overruled.

### **Ruling on the Propriety of the July 26, 2016 Subpoena**

It appears that KB Home's primary objection is as to the Prosecution Team's potential use of any records it may obtain from the subpoena rather than to the propriety of the subpoena itself. The Prosecution Team points out in its response to KB Home's evidentiary objections, a motion to quash an administrative subpoena may be made by the person served with the subpoena (Gov. Code § 11450.30). John Lormon does not purport to represent Helix. Whether or not the objection should have been framed instead as a motion to quash or whether it was filed by a proper party is not determinative of the issues raised. The administrative subpoena was properly issued in accordance with applicable provisions of the APA. ("Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at hearing." (Gov. Code § 11450.10.)) KB Home's objection to the subpoena and records that may be produced in response is overruled.

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<sup>2</sup> Upon receipt of the email transmitting the subpoena, the Advisory Team queried whether KB Home had also received the communication. Shortly thereafter, the subpoena was emailed to Mr. Lormon. See attached emails from Catherine Hagan to Barbara Neal and Barbara Neal to John Lormon.

The Prosecution Team states that it may use documents obtained through the subpoena for impeachment purposes at hearing. It is premature to rule on the validity of this or any other potential purpose. The Prosecution Team is cautioned that any proposed use of the records obtained through the subpoena is subject to separate challenge and it may only use records obtained through the subpoena for proper purposes and in accordance with applicable deadlines in the Revised Hearing Procedures.

Sincerely,

/s/

Catherine George Hagan  
Senior Staff Counsel  
Office of Chief Counsel  
State Water Resources Control Board

Attachments

cc: Shown on Transmittal Email

## Hagan, Catherine@Waterboards

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**From:** Hagan, Catherine@Waterboards  
**Sent:** Friday, June 03, 2016 11:24 AM  
**To:** john.lormon@procopio.com; Kaplowitz, Naomi@Waterboards; Boyers, David@Waterboards  
**Cc:** Means, Christopher@Waterboards; Clemente, Chiara@Waterboards; Smith, James@Waterboards; Haas, Jeremy@Waterboards; Gibson, David@Waterboards; Nunez, Adriana@Waterboards; Jayne, Deborah@Waterboards; Porter, Mike@Waterboards  
**Subject:** Administrative Civil Liability Complaint No. R9-2016-0092, KB Home  
**Attachments:** R920160092 Hearing Procedure.pdf

To the Designated Parties to Administrative Civil Liability Complaint No. R9-2016-0092:

Attached is the hearing procedure for the above administrative civil liability complaint. The Advisory Team notes that procedural objections were timely submitted by KB Home (Discharger) on May 2, 2016, and appreciates that the Designated Parties promptly resolved the objections and proposed a modified hearing procedure. Please be aware that no entity requested designation as a party under the deadlines contained in the proposed modified procedure. The Designated Parties proposed that the hearing procedure include a deadline of August 3 by which the Advisory Team is obligated to issue rulings on evidentiary objections. The Advisory Team appreciates that it will be helpful to all concerned that evidentiary objections, if any, are ruled on in advance of the hearing and will make every effort to do so as early as practicable. The existing framework for the hearing procedure has not been modified to establish a deadline for resolution of objections.

Sincerely,

Catherine George Hagan  
Senior Staff Counsel  
Office of Chief Counsel  
State Water Resources Control Board  
2375 Northside Drive, Suite 100  
San Diego, CA 92108  
Tel. 619-521-3012  
Fax 619-516-1994  
E-mail: [catherine.hagan@waterboards.ca.gov](mailto:catherine.hagan@waterboards.ca.gov)

## Hagan, Catherine@Waterboards

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**From:** Hagan, Catherine@Waterboards  
**Sent:** Tuesday, July 26, 2016 1:23 PM  
**To:** Neal, Barbara@Waterboards  
**Cc:** Nunez, Adriana@Waterboards; Jayne, Deborah@Waterboards; Bradford, Darren@Waterboards; Thotakura, Lalitha@Waterboards; Kaplowitz, Naomi@Waterboards; Smith, James@Waterboards; Haas, Jeremy@Waterboards; Clemente, Chiara@Waterboards; Means, Christopher@Waterboards  
**Subject:** RE: ACL AGAINST KB HOME; SETTLER'S POINT PROJECT, LAKESIDE, CA; ACL COMPLAINT NO. R9-2016-0092

Good afternoon Ms. Neal,

Can you confirm that the representatives of KB Home have also received this communication? I do not see their names on the email or the cover letter to the attachment. Thank you.

Catherine George Hagan  
Senior Staff Counsel  
Office of Chief Counsel  
State Water Resources Control Board  
2375 Northside Drive, Suite 100  
San Diego, CA 92108  
Tel. 619-521-3012  
Fax 619-516-1994  
E-mail: [catherine.hagan@waterboards.ca.gov](mailto:catherine.hagan@waterboards.ca.gov)

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**From:** Neal, Barbara@Waterboards  
**Sent:** Tuesday, July 26, 2016 1:12 PM  
**Cc:** Hagan, Catherine@Waterboards; Nunez, Adriana@Waterboards; Jayne, Deborah@Waterboards; Bradford, Darren@Waterboards; Thotakura, Lalitha@Waterboards; Kaplowitz, Naomi@Waterboards; Smith, James@Waterboards; Haas, Jeremy@Waterboards; Clemente, Chiara@Waterboards; Means, Christopher@Waterboards  
**Subject:** ACL AGAINST KB HOME; SETTLER'S POINT PROJECT, LAKESIDE, CA; ACL COMPLAINT NO. R9-2016-0092

Ladies & Gentlemen:

Please see attached Helix Administrative Subpoena Package that is being served upon Ms. Kristin Olszak, Agent for Service of Process for Helix Environmental Planning, Inc. via personal service in the next 48 hours.

Thank you.

**Barbara K. Neal, Senior Legal Typist**  
State Water Resources Control Board  
Office of Enforcement  
1001 I Street, 16<sup>th</sup> Floor  
Sacramento, California 95814  
Phone: 916-341-5278  
Fax: 916-341-5896

## **Hagan, Catherine@Waterboards**

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**From:** Neal, Barbara@Waterboards  
**Sent:** Tuesday, July 26, 2016 1:52 PM  
**Cc:** john.lormon@procopio.com  
**Subject:** ACL AGAINST KB HOME; SETTLER'S POINT PROJECT, LAKESIDE, CA; ACL COMPLAINT NO. R9-2016-0092  
**Attachments:** Helix\_Administrative\_Subpoena Package.doc.pdf

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***Barbara K. Neal, Senior Legal Typist***  
State Water Resources Control Board  
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1001 I Street, 16<sup>th</sup> Floor  
Sacramento, California 95814  
Phone: 916-341-5278  
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