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8 **CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**
9 **SAN DIEGO REGION**
10

11 IN THE MATTER OF:

12 COMPLAINT FOR ADMINISTRATIVE CIVIL
LIABILITY NO. R9-2016-0092 AGAINST
13 KB HOME, SETTLER'S POINT PROJECT,
LAKESIDE, CALIFORNIA
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**KB HOME'S EVIDENTIARY
OBJECTIONS**

1 **I. INTRODUCTION**

2 KB Home ("KB") submits these objections to evidence that it has learned the Prosecution
3 Team is seeking by a subpoena issued to Helix Environmental Planning, Inc. ("Helix") dated July
4 26, 2016 ("Subpoena"). KB states it had to "learn" of the Subpoena because the Prosecution Team
5 did not serve a copy of the Subpoena on KB or on its attorneys, but only on the Advisory Team.
6 The Prosecution Team's written communication with the Advisory Team without copying KB was
7 an intentional violation of the *ex parte* rules listed in the Revised Hearing Procedure issued July 13,
8 2016 ("Revised Procedures") and a violation of the *ex parte* rules of the State Water Resources
9 Control Board.

10 In addition, the Subpoena directs Helix to produce information/documents by August 26,
11 2016. That is more than three weeks after the August 1, 2016, deadline for the Prosecution Team
12 to submit its rebuttal evidence and any evidentiary objections to written evidence or exhibits
13 submitted by KB. Submitting that information after August 1, 2016, would be a violation of the
14 Revised Procedures.

15 But, as Attorney Boyers' declaration supporting the Subpoena ("Boyer Declaration")
16 admits, the Prosecution Team issued the Subpoena for documents because KB argued in its
17 "Opposition to the Complaint that the Prosecution Team has not met its burden of proof to show
18 that the ephemeral drainage impacted by KB Home is a Water of the United States." What this
19 admission shows is that the Prosecution Team not only is ignoring the August 1, 2013, deadline to
20 submit rebuttal evidence as stated in the Revised Procedure, but it is not even seeking rebuttal
21 evidence from Helix through the Subpoena. Rather, the evidence being sought through the
22 Subpoena is to support the Prosecution Team's case in chief and its burden of proof on the issue of
23 whether the ephemeral drainage is a Water of the United States. Any such evidence should have
24 been provided with the Prosecution Team's June 22, 2016, submittal.

25 What makes the need for the Subpoena questionable at all is that the Prosecution Team did
26 rely on documents submitted to the Regional Board by Helix on behalf of Pulte Homes. The
27 Regional Board also met with Helix representatives more than one year ago at the site. Simply put,
28 the Regional Board and the Prosecution Team had ample opportunity to seek information from

1 Helix prior to June 22, 2016, and its failure to do so does not justify ignoring the Revised
2 Procedures.

3 The Advisory Team should rule that the Subpoena is invalid because it seeks
4 information/documents that cannot be submitted under the Revised Procedures. Even if the
5 Advisory Team chooses not to rule the Subpoena invalid, it should rule inadmissible any
6 documents/information obtained by the Prosecution Team through the Subpoena.

7 We note that the original Hearing Procedures listed August 3, 2016, as the deadline for the
8 Advisory Team to rule on evidentiary objections. That date was not included in the Revised
9 Procedures, but there was no "redline" showing the deletion of that deadline. KB considers the
10 August 3, 2016, deadline to still be valid, and the Advisory Team should rule on these issues by
11 then.

12 **II. LEGAL ANALYSIS**

13 **A. The Prosecution Team's Failure to Provide KB With a Copy of the Subpoena** 14 **Was an Improper *Ex Parte* Communication**

15 The Revised Procedures state clearly that the designated parties "are forbidden from
16 engaging in *ex parte* communications regarding this matter with members of the Advisory Team or
17 members of the San Diego Water Board." *Ex parte* communications are defined as any "written or
18 verbal communication pertaining to the investigation, preparation, or prosecution of the ACL
19 Complaint." The exception is a communication that "is copied to all other designated and
20 interested parties (if written)."

21 The Subpoena qualifies as an *ex parte* communication, and KB is a designated party that
22 was not provided a copy of the Subpoena and is not listed on the "cc" list in Mr. Boyers' cover
23 letter. However, five members of the Advisory Team are on that list, and it is assumed that each of
24 them received a copy of the letter, the Boyer Declaration and the Subpoena. Providing these
25 documents to the Advisory Team and not to KB clearly was an improper *ex parte* communication
26 by the Prosecution Team.

27 The State Board's rules state that "[p]ersons who fail to comply with the procedural
28 requirements specified in the hearing notice for participation as parties in a proceeding may be

1 dismissed as parties to the proceeding.” (23 C.C.R. § 648.1(c).) The potential severity of that rule
2 reflects the importance of compliance with the hearing procedures, which here clearly prohibit *ex*
3 *parte* communications. As the California Supreme Court has stated, “when rules mandating an
4 agency's internal separation of functions and prohibiting *ex parte* communications are observed, the
5 presumption of impartiality can be overcome only by specific evidence demonstrating actual bias
6 or a particular combination of circumstances creating an unacceptable risk of bias.” (*Morongo*
7 *Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 740.)

8 Here, the State Board’s rules prohibiting *ex parte* communications were ignored, and bias
9 to KB should be presumed. The Advisory Team should rule that the Subpoena is improper and that
10 Helix is not required to comply with the Subpoena.

11 **B. KB’s Showing That the Prosecution Team Failed to Prove That the Ephemeral**
12 **Drainage Is a Water of the US Does Not Provide the Prosecution Team With**
the Opportunity to Seek or Introduce Additional Evidence Now

13 The Boyer Declaration admits that the Subpoena was issued to obtain “evidence” from
14 Helix for the Prosecution Team to respond to KB’s showing in its Opposition that the Prosecution
15 Team did not meet its burden of proving that the ephemeral drainage is a Waters of the US. As KB
16 pointed out in its Opposition, the Prosecution Team submitted no evidence that the Army Corps of
17 Engineers had determined that the ephemeral drainage was a Water of the US, but simply claimed
18 that the “jurisdictional determination that the impacts associated with the knuckle were comprised
19 entirely of waters of the US and State was confirmed by the ACOE.” (ACL, Technical Analysis at
20 pg. 6.) But, as KB noted, the Regional Board’s own site inspection report admitted that the “Army
21 Corps and San Diego Water Board staff were unable to verify the preliminary jurisdictional
22 delineation of aquatic resources within the footprint of the unauthorized fill.”

23 As a matter of law, KB showed that the Prosecution Team had failed to carry its burden of
24 proof that the ephemeral drainage is a Water of the US, citing case law such as *Stoeco*
25 *Development, Ltd. v. Department of the Army*, 792 F.Supp. 339 (D.N.J. 1992) and *Precon*
26 *Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 293 (4th Cir. 2011). KB also
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1 showed that case law made it clear that it was legally impermissible for the Prosecution Team to
2 rely on the preliminary jurisdictional determination (“PJD”) prepared by Helix for Pulte Homes.

3 The fact is that the Prosecution Team relied on the Helix PJD to support its claims, but KB
4 showed that was not legally sufficient. While the Prosecution Team may try to argue against KB’s
5 legal position, there is no physical evidence to rebut. The Revised Procedures allow the submittal
6 of rebuttal evidence, but “[r]ebuttal evidence is generally defined as evidence addressed to the
7 evidence produced by the opposite party and does not include mere cumulative evidence of the
8 plaintiff’s case in chief.” (*Edgar v. Workmen’s Compensation Appeals Bd.* (1966) 246 Cal.App.2d
9 660, 665.) The only way the Prosecution Team can “rebut” KB’s argument is to show that KB
10 ignored evidence that the Prosecution Team submitted in its June 22, 2016, submittal. The
11 Prosecution Team cannot rebut a legal argument regarding the sufficiency of the evidence it
12 submitted by attempting to gather and submit entirely new evidence. That is not rebuttal evidence.

13 The rules for conducting adjudicatory hearings state that the parties “shall” submit evidence
14 prior to the hearing and that the “information shall be submitted in accordance with the procedure
15 specified in the hearing notice.” (23 C.C.R. § 648.4(b), emphasis added.) The Revised Procedures
16 establish clear deadlines for the submittal of evidence by the Prosecution Team for its case in chief,
17 KB in opposition, and any rebuttal evidence by the parties. The information the Prosecution Team
18 seeks with the Subpoena will not be submitted in accordance with the procedures and deadlines
19 established in the Revised Procedure and so is a clear violation of that requirement.

20 The Subpoena also raises critical questions as to when and how any information obtained
21 would be provided to KB and in what form. Is the Advisory Team planning on granting the
22 Prosecution Team the ability to revise and resubmit its June 22, 2016, submittal in light of any
23 information obtained? When would KB have the opportunity to respond to any such submittal
24 given that the hearing is scheduled for two weeks after the deadline in the Subpoena?

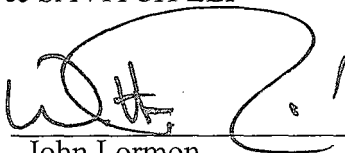
25 These are a few examples of the procedural concerns raised by the Prosecution Team’s
26 failure to comply with the Revised Procedures. The Advisory Team should not sanction an action
27 that explicitly violates the overriding policy of the State Boards and Regional Boards “to
28 discourage the introduction of surprise testimony and exhibits.” (23 C.C.R. § 648.4(a).)

1 **III. CONCLUSION**

2 Common sense, due process, and fairness show the impropriety of the secretive process by
3 which the Subpoena was issued and of its attempt to submit new, non-rebuttal evidence to which
4 KB cannot respond. In light of the fact that the process violates the Revised Procedures, the *ex*
5 *parte* rules and the State Board's rules, the Advisory Team should rule that the Subpoena is
6 improper and should not allow any information obtained through it to be submitted as part of the
7 hearing process.

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9 DATED: August 1, 2016

PROCOPIO, CORY, HARGREAVES
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11 By: 
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