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SUBJECT: REBUTTAL BRIEF AND EVIDENCE, ACL COMPLAINT NO. R9-2016-0092; KB HOME, SETTLER'S POINT PROJECT

Ms. Hagan and Mr. Lormon:

In accordance with the Hearing Procedure for Administrative Civil Liability (ACL) Complaint No. R9-2016-0092, issued to KB Home, the Prosecution Team submits the following information:

1. A Rebuttal Brief

2. A list of all rebuttal evidence (Exhibits Nos. 46-53). The rebuttal evidence is available for download at: https://ftp.waterboards.ca.gov/

   Username: RB9Public
   Password: rqfa51
   File Name: KB Home_R920160092_CJM; Rebuttal Evidence

Sincerely,

David Boyers
Assistant Chief Counsel
Office of Enforcement
State Water Resources Control Board

Enclosures:
1. Rebuttal Brief
2. Evidence List

(continued on following page)

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BEFORE THE SAN DIEGO

REGIONAL WATER QUALITY CONTROL BOARD

In the Matter of: COMPLAINT FOR ADMINISTRATIVE CIVIL LIABILITY AGAINST KB HOME, SETTLER'S POINT PROJECT, LAKESIDE, CALIFORNIA ACLC NO. R9-2016-0092	**PROSECUTION TEAM REBUTTAL BRIEF** 1. Rebuttal Brief 2. Rebuttal Evidence List

The Prosecution Team submits this Rebuttal Brief in response to the evidence and argument submitted by KB Home (KB or Discharger).

ARGUMENT

I. The San Diego Water Board has authority to impose civil liability for the alleged violations pursuant to Water Code section 13385

a. Enforcement Authority

KB argues that Administrative Civil Liability Complaint No. R9-2016-0092 (Complaint) is invalid because the State of California has no legal authority to enforce the federal Clean Water Act section 404 dredged and fill program, upon which the violations in the Complaint are based. KB's contention that the Complaint is invalid is without merit.

By way of background, Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." (33 U.S.C § 1251(a).) Section 301 of the Clean Water Act prohibits "the discharge of any pollutant by any person" into navigable waters except in compliance with the Clean Water Act. (*Id.* § 1311(a).) The Clean Water Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." (*Id.* § 1362(7).) The Clean Water Act sets up two permit mechanisms. Section 404 authorizes the Secretary of the Army, through the Army Corps of Engineers (ACOE), or a state with an approved program, to issue permits "for the discharge of dredged or fill material into the navigable waters." (*Id.* § 1344(a).) Section 402 authorizes the U.S. Environmental Protection Agency (USEPA), or a state with an approved program, to issue a National Pollutant Discharge Elimination System (NPDES) permits for the discharge of pollutants other than dredged or fill material. (*Id*. § 1342.) In California, USEPA delegates the issuance of NPDES permits to the Water Boards. Section 401 of the Clean Water Act requires any applicant for a federal license or permit conducting any activity that may result in a discharge to navigable waters to obtain from the state a certification that its activities will comport with state water quality standards. (*Id*. § 1341.) All applicants for permits for the discharge of dredged or fill material into waters of the U.S. under section 404 *must* first obtain a section 401 water quality certification from the appropriate Water Board. The failure to obtain a 404 permit prior to the discharge of dredged or fill material into waters of the U.S. is a violation of Clean Water Act section 301. (*Id.* § 1311; See *Borden Ranch Partnership v. U.S. Army Corps of Engineers* (9th Cir. 2001) 261 F.3d 810, 814 *aff'd* (2002) 537 U.S. 99.)

Water Code section 13385(a)(5) provides authority for the Water Boards to impose civil liability administratively against any person who violates Clean Water Act section 301. It states:

> (a) Any person who violates any of the following shall be liable civilly in accordance with this section: […]
> (5) A requirement of Section ***301***, 302, 306, 308, 318, 401, or 405 of the federal Clean Water Act. (emphasis added.)

Section 13385 (c) provides that liability may be imposed administratively by the State Water Resources Control Board (State Water Board) or a Regional Board in an amount not to

exceed $10,000 per day of violation and $10 per gallon discharged in excess of 1,000 gallons. Thus, as provided by Water Code section 13385, the San Diego Regional Water Quality Control Board (San Diego Water Board) *does* have authority to impose administrative civil liability against any person who discharges dredged or fill material without first obtaining a Clean Water Act section 404 permit since discharging without first obtaining a required 404 permit is a violation of Clean Water Act section 301. The fact that the Water Boards are not delegated authority to administer a section 404 permit program has no bearing on the San Diego Water Board's enforcement authority under section 301 of the Clean Water Act and section 13385 of the Water Code. In fact, the Clean Water Act expressly provides that it does *not* preclude or deny the right of any state from enforcing any limitation respecting discharges of pollutants. (*Id.* § 1370.)

KB's suggestion that the San Diego Water Board has no enforcement jurisdiction over a water of the U.S. located within its region—where an entity constructs a road *on top of* that water of the U.S., eliminating its beneficial uses—is an absurd and fundamentally flawed interpretation of the authorities that govern this matter. KB filled a water of the U.S. without obtaining either a section 404 permit from the ACOE or a 401 Certification from the San Diego Water Board, both of which are prerequisites to discharging fill material to navigable waters pursuant to Clean Water Act. Based on these failures, the Complaint appropriately alleges that KB discharged fill material in violation of section 301 of the Clean Water Act and Water Code section 13385.

The Complaint's additional reference to a violation of Water Code section 13376 was, however, imprecise. Because the State Water Board does not have an approved program for discharges of dredged or fill material in lieu of the ACOE section 404 program, section 13376 does not apply here. (Wat. Code § 13372(b).) The correct reference should have been to Water Code section 13260, which is the analogous provision for discharging waste to any water of the State without first submitting a report of waste discharge. Because the San Diego Water Board has authority to impose civil liability for a violation of Clean Water Act section 301 pursuant to Water Code section 13385, the alleged violation of Water Code section 13376 is unnecessary.

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b. The Discharge occurred to a water of the U.S.

i. The Prosecution Team has satisfied its burden of proof that a discharge occurred to waters of the U.S.

At most, administrative civil liability hearings before the Water Boards require proof by a preponderance of the evidence. (See e.g. Evidence Code §§ 115, 500.) This simply means that a fact essential to the claim of liability must appear more likely to be true than false. The Discharger's argument that the Prosecution Team has not satisfied its burden of proof in establishing that the impacted ephemeral drainages were waters of the U.S. is without merit.

There are two independent bases that establish that waters of the U.S. were impacted by KB: (1) A final revised Preliminary Jurisdictional Delineation (PJD) submitted by Helix Environmental Planning Inc. (Helix) and signed by the ACOE on December 10, 2015 concluded the possibility of federal waters at the site, which acts as an effective presumption of Clean Water Act jurisdiction (Brightwater PJD, PT Exhibit 46); and (2) The ephemeral drainages have a significant nexus to traditionally navigable waters and, thus, meet the applicable test for waters of the U.S. Taken together, these facts establish far *beyond* a preponderance of evidence that the subject drainages were waters of the U.S.

ii. An *ACOE PJD creates an effective presumption of Clean Water Act jurisdiction*

PJDs are usually issued at the request of landowners wishing to voluntarily waive or set aside questions regarding Clean Water Act section 404 and section 401 jurisdiction over a particular site, such as where jurisdiction is clear or is otherwise not worth contesting. (See ACOE, Regional Guidance Letter No. 08–02, (June 26, 2008) (hereinafter "RGL 08-02"), KB Exhibit O.) PJDs, while nonbinding, are written indications that there may be waters of the U.S. present within a site. (Brightwater PJD, at 3; 33 C.F.R. § 331.2.) A PJD was proposed and submitted by Helix, the same consulting firm retained by KB, on behalf of Pulte Homes for the same area where KB discharged its unauthorized fill. ACOE finalized the PJD on December 10, 2015 and concluded the impacted drainages may be waters of the U.S. (PT Exhibit 46.)

"PJDs render an 'effective presumption' of Clean Water Act jurisdiction." (See *National*

Ass'n of Home Builders v. E.P.A. (D.C. Cir. 2015) 786 F.3d 34, 37 [dicta].) This is because the information in the PJD must necessarily serve as the basis for permitting decisions. (RGL 08-02, at 6.) Furthermore, "[p]reliminary JDs are also commonly used in enforcement situations because access to a site may be impracticable or unauthorized, or for other reasons an approved JD cannot be completed in a timely manner." (RGL 08-02, at 3.) Here, access to the site, is indeed impracticable as it now lies 13 feet below the road constructed by KB. This is why the July 1, 2015 inspection report indicates that the ACOE "were unable to verify the preliminary jurisdictional delineation of aquatic resources within the footprint of the unauthorized fill." (PT Exhibit 5, Appendix D.) As an "affected party" pursuant to 33 C.F.R. section 331.2, KB could have requested that the ACOE conduct an approved JD when the Clean Water Act violations were first alleged in August of 2015. (RGL 08-02, at 1; PT Exhibit 5, Appendix E.) KB, however, elected not to do so. At this time, if an approved JD were to be conducted, it would not be completed in a timely manner relative to the pending proceeding.

In some circumstances, including those in which an approved JD cannot be completed in a timely manner, "a preliminary JD may serve as the basis for Corps compliance orders (e.g., cease and desist letters, initial corrective measures)." (RGL 08-02, at 3.) Here, the PJD serves as an appropriate basis to establish, beyond a preponderance of the evidence, the existence of waters of the U.S. at the site.

iii. *The ephemeral drainages have a significant nexus to traditionally navigable waters*

KB filled ephemeral drainages, which are waters of the U.S. under the applicable test. (See *Northern California River Watch v. City of Healdsburg* (2006) 457 F.3d 1023 [holding that the significant nexus test is controlling].) The Clean Water Act does not require that a body of water have a continuous flow to be waters of the U.S. (*Rapanos v. United States* (2006) 547 U.S. 715, 732-33.) Included in the definition of waters of the U.S. are intermittent non-navigable tributaries to traditionally navigable waters (TNWs) and non-navigable waters that have a significant nexus to TNWs. (*Env. Protection Information Center v. Pacific Lumber Co.* (2007) 469 F.Supp.2d 803 [applying the significant nexus test to non-navigable tributaries]; *U.S. v. Moses* (2007) 496 F.3d

984 [holding that non-navigable tributaries to TNWs are waters of the U.S]; See *Rapanos*, at 779.) In accordance with the definition of waters of the U.S., the fill area at issue in this proceeding is considered federal waters because it is part of a tributary to TNWs. (33 CFR 328.3(a); See 40 C.F.R. §122.2.) As stated in the Technical Analysis for the Complaint, the ephemeral streams impacted by the KB fill are tributary to Los Coches Creek. (PT Exhibit 4, at 10.) Los Coches Creek is tributary to the San Diego River, which is a TNW because it is subject to the ebb and flow of the tide. (KB Exhibit R.) The fill site conveys surface water flows from the upstream development area through a series of culverts, streams, wetlands, and channels, contiguously to the San Diego River, and ultimately the Pacific Ocean. (PT Exhibit 47.)

Moreover, the ephemeral streams are part of a tributary that has a significant nexus to a TNW. A significant nexus exists if a body of water has a substantial effect on the physical, chemical, and/or biological integrity of a TNW. (*Rapanos*, at 717; ACOE JD Guidebook, at 7, KB partial Exhibit Q, PT Exhibit 48, in full.) Pursuant to ACOE criteria, the significant nexus determination can be made using a consideration of factors such as "the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a TNW, plus the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands." (PT Exhibit 48, at 7, 15, 55, & 57; See *Rapanos,* at 781.)

The tributary in question has a significant nexus based on the proximity of the tributary to the TNW, and the functions performed by the tributary. The discharge area is 2.2 aerial miles (2.7 river miles) to the San Diego River, and 16.6 aerial miles (24 river miles) to the Pacific Ocean. (PT Exhibit 47.) Flow and rainfall characteristics for the tributary area are provided in the Hydromodification Plan prepared by Helix that was submitted as part of Pulte Home's application for section 401 Water Quality Certification (PT Exhibit 16) and the 2009 Settler's Point Drainage Study (PT Exhibit 11) which calculated the appropriate sizing infrastructure to accommodate flows to the Wellington Hills storm drain system.

The functions provided by the fill site are not only significant, but vital. Non-perennial streams, from ephemeral washes and headwaters that flow for only a few hours after rain events,

to those with sustained flows lasting nearly all year, comprise 73 percent of the waters in the San Diego region. (PT Exhibit 49, at 3.) The Beneficial Uses for Los Coches Creek and its tributaries include, but are not limited to, warm freshwater habitat[1] and wildlife habitat[2]. (PT Exhibit 4, at 10.) The Technical Analysis also notes that functions lost include "flood attenuation, groundwater recharge, pollutant assimilation, and biological productivity and diversity in the habitat lost." (PT Exhibit 4, at 12.)

The tributary is very likely to carry pollutants or flood waters to the TNW because surface flows are contiguous from the fill site to the TNW and a large portion of Los Coches Creek is channelized. As one of the few remaining natural (i.e. earthen) drainages in the area, the tributary in question serves a key role in the reduction of the amount of pollutants received, and flood waters reaching TNWs. Based on photographs of vegetation and/or vegetative debris in the tributary, and the continuity of the surface flows, the tributary has the capacity to transfer nutrients and organic carbon to support downstream food webs. (PT Exhibit 5 Appendix D, and PT Exhibit 46.)

In terms of ecologic functions, the biological resources of the tributary and its drainage area are described in a letter, which was prepared by Helix and submitted to the California Department of Fish and Wildlife as part of Pulte Home's application for section 401 Water Quality Certification. (PT Exhibit 16 at 237-240.) According to this letter:

> Six sensitive animal species (monarch butterfly [Danaus plexippus], Belding's orange-throated whiptail [Aspidoscelis hyperythrus beldingi], Cooper's hawk [Accipiter cooperi], turkey vulture [Cathartes aura], southern California rufous-crowned sparrow [Aimophila ruficeps canescens], and coastal California gnatcatcher[3] [Polioptila californica californica]), were observed on the project site during surveys.

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[1] Defined in the Basin Plan as follows: "Includes uses of waters that support warm water ecosystems including but not limited to, preservation or enhancement of aquatic habitats, vegetation, fish or wildlife, including invertebrates."

[2] Defined in the Basin Plan as follows: "Includes uses of water that support terrestrial ecosystems including, but not limited to, preservation and enhancement of terrestrial habitats, vegetation, wildlife (e.g., mammals, birds, reptiles, amphibians, invertebrates), or wildlife water and food sources."

[3] It should be noted in Figure 7 (at 116) of the report (Prosecution Team Exhibit 16) that the California gnatcatcher, a species listed as federally threatened, was observed in the drainage area, in close proximity to the fill.

Although these are generally referred to as "upland" species, the Basins Plan's WILD Beneficial Use does not limit its definition to terrestrial species that are indicative of wetland habitats. This is often the nature of ephemeral waters in the arid west, and is recognized by ACOE:

> Ephemeral waters in the arid west that are tributaries may have a significant nexus to a TNW. For example, in some cases they may serve as a critical transitional area between the upland environment and the traditional navigable waters. Such ephemeral tributaries, with the associated riparian corridor, may provide refuge, foraging and breeding opportunities in areas that may have limited stands of vegetation and water due to the environmental conditions of the arid southwest. During and following precipitation events, ephemeral tributaries collect and transport water or sometimes sediment from the upper reaches of the landscape to the traditional navigable waters. These ephemeral tributaries, and associated riparian corridors, may provide habitat for wildlife and aquatic organisms. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may affect the integrity of a TNW.

(PT Exhibit 48, at 54.)

Based on the foregoing analysis, the tributary in question has more than a speculative effect on the chemical, physical, and biological integrity of the San Diego River, and thus has a significant nexus to the traditionally navigable waters of the San Diego River. Therefore, KB's fill of those streams without a permit violates the Clean Water Act.

II. The number of gallons discharged was appropriately determined by the Prosecution Team

KB contends that the imposition of administrative civil liability based on "gallons" discharged is improper because the term only applies to liquid discharges, not to discharges of "non-waste" construction material. KB also contends that even if the imposition of a per gallon liability were appropriate, the number of gallons discharged has been overstated in the Complaint because it includes areas outside of the Ordinary High Water Mark (OHWM) of the ephemeral drainage, which is not considered part of a water of the U.S. KB's contentions should both be rejected.

a. <u>The conversion of cubic yards to gallons is appropriate to effectuate the intent of the statute and is consistent with other enforcement actions brought throughout the state</u>

As discussed above in Part I of this Rebuttal Brief, the San Diego Water Board's authority to impose administrative civil liability for the discharge of fill material without a permit in violation of Clean Water Act section 301 comes from Water Code section 13385. Subdivision (c) of section 13385 provides that liability may be imposed in an amount not to exceed $10,000 per day of violation and $10 per *gallon* discharged in excess of 1,000 *gallons*. Although the term "gallons" is generally a term used to describe volume of liquids, use of the term "gallons" in section 13385 should not be construed as restricting the Water Board's authority to impose liability for non-liquid fill violations, as KB argues. Section 13385, subdivisions (a) and (c) allow for the Water Boards to impose liability against dischargers who violate section 301 of the Clean Water Act based on the volume of the discharged and the duration of the violation. To interpret Water Code section 13385 as KB suggests would render per gallon liability under 13385(c) meaningless for violations of Clean Water Act section 301 involving fill material. (See *Cash v. Winn* (2012) 205 Cal.App.4th 1285, 1297 [holding that the words of statute should be examined so as to "give effect to the usual, ordinary import of the language and to avoid making any language mere surplusage"].) The discharge of fill material can be equally detrimental to beneficial uses as the discharge of wastes in a liquid form and, as such, a restrictive interpretation would create disparate penalty schemes for discharges of solid material versus those of liquid material. Such an absurd result could not have been intended by the Legislature and should be rejected. (See *John v. Superior Court* (2016) 63 Cal.4th 91, 96 [holding that a court should "construe the statute's words in context, and harmonize statutory provisions to avoid absurd results"].)

There is precedent throughout the state for interpreting the term "gallons" as used in Water Code section 13385 to encompass both liquid and solid discharges. In a recent case involving similar violations of section 301 of Clean Water Act for discharges without a section 404 permit or section 401 certification, the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) treated the discharge of 4,360 cubic yards of dredge and fill material as the

discharge of 880,607 gallons for purposes of calculating liability. (ACLC R4-2015-0207 (City of Industry) PT Exhibit 50.) Similarly, in a case arising from the San Francisco Bay Regional Water Quality Control Board (San Francisco Water Board), the discharge of 8,586 cubic yards of fill in violation of Clean Water Act section 301 is treated as the discharge of 1,490,186 gallons of material under section 13385. (ACLC R2- 2016-1008 (Point Buckler Club) PT Exhibit 51.) The precedent of converting discharge of cubic yards to gallons also extends to actions filed in civil court by the California Attorney General's Office. In a recent complaint filed by the Office of the Attorney General in Alameda County Superior Court, the discharge of vertical fill into streambeds in violation of Clean Water Act section 301 was alleged as the discharge of an estimated 1,450,000 gallons of material under Water Code section 13385. (*People v. James Tong et al.* (Super. Ct. Alameda County, 2015, No. RG15777482.) PT Exhibit 52.)

b. <u>It is appropriate to assess a penalty for *all* of the gallons of material discharged rather than just the gallons discharged below the OHWM</u>

The Prosecution Team appropriately alleged that the discharge of *all* the fill material by KB should be considered in the per gallon liability calculation under Water Code section 13385. KB's argument that only the volume discharged below the OHWM should be counted should be rejected.

The discharge of material *above* the OHWM in this case should be considered in the calculation of volume under Water Code section 13385 because there is no separation between the material above the OHWM and the material below the OHWM. It is this total mass of contiguous fill material within and on top of the ephemeral drain that is creating the impact to beneficial uses, not just the material that sits below the OHWM. The 350 cubic yards of fill placed within and above the OHWM of the stream segments was necessary to complete KB's objective of constructing the road knuckle. Conversely, restoration of the impacted streams to their pre-impact state would require that the entirety of the fill to be removed. Based on these facts alone the consideration of the entirety of the fill placed within and above the stream and its banks is appropriate.

Moreover, accepting KB's argument could result in unintended consequences in future enforcement cases. For example, it is well established that storm events frequently lead to the discharge of wastes for which administrative civil liability may be imposed by the Water Boards. These storm events can result in the discharge of waste that is commingled with storm water to waters of the state and U.S., often well above what would be considered the OHWM. (See e.g. ACL Order R9-2013-0137 against the City of La Mesa or ALC Order R9-2013-0004 against City of Oceanside.) If the Water Board accepted KB's argument, it would not have jurisdiction to impose administrative civil liability under Water Code section 13385 for each of those gallons of waste within the flood plain of the water body. Instead, it would be restricted to imposing liability only for those gallons of waste *below* the OHWM. Such a result is illogical and inconsistent with years of Water Board enforcement practice.

III. The Prosecution Team has correctly applied the Enforcement Policy in calculating penalties

KB argues in its brief that the Prosecution Team failed to apply the Enforcement Policy (Enforcement Policy) in a fair and consistent manner, in violation of the State Water Board's directive that the Water Boards "shall strive to be fair, firm and consistent in taking enforcement actions throughout the State, while recognizing the unique facts of this case." KB describes the various ways the Prosecution Team has failed to do this, including:

a. The Prosecution Team used the wrong "Potential for Harm" factor;
b. The Prosecution Team misinterpreted Enforcement Policy language;
c. The calculation of the Harm factor is unfair and inconsistent with other matters;
d. The Harm was minimal because the activity was eligible for Nationwide Permits; and
e. The number of days of violation should be reduced by applying multiple-day policy.

KB's arguments are without merit. The Prosecution Team applied the Enforcement Policy in a fair and consistent manner, resulting in the calculation of an appropriate liability amount, after taking into consideration the nature, circumstances, extent and gravity of the violation. The penalty calculation methodology provided in the Enforcement Policy was designed specifically to

address the statutory penalty factors contained in Water Code section 13385(e). (See generally Enforcement Policy, Section VI, Pages 9-22.) While KB provides myriad examples of enforcement actions it asserts demonstrate that the proposed penalty assessment is not consistent with other administrative civil liability determinations, most (if not all) of these enforcement actions and determinations are not analogous with the facts in this case. Sanitary sewer overflows, the discharge of potable water containing residual chloramines, and construction storm water cases (with a discharge of sediment) all result in *temporary* impacts to beneficial uses that can attenuate with the passage of time, as the pollutants move through a water body. This is not one of those cases.

a. <u>The Potential for Harm for Discharge Violations score applied by the Prosecution Team is appropriate</u>

KB states that the "most glaring problem" in the Prosecution Team's analysis is the score associated with Step 1 of the Enforcement Policy methodology, which is the Harm or Potential for Harm to Beneficial Uses score determined in Factor 1 of Step 1. As described in the Technical Analysis accompanying the Complaint, the Prosecution Team assigned a score of 5 (or Major) to Factor 1. On page 13 of the Enforcement Policy, Major Potential for Harm to Beneficial Uses is defined as:

> [H]igh threat to beneficial uses (i.e., significant impacts to aquatic life or human health, long term restrictions on beneficial uses (e.g., more than five days), high potential for chronic effects to human or ecological health).

KB alleges that there is no site-specific evidence of harm to the beneficial uses. The Enforcement Policy, however, only requires an analysis of *potential* for harm. Moreover, the undisputed fill that remains in place constitutes site-specific evidence of harm.

The harm to the beneficial uses of the impacted streams well exceeds the example of "greater than 5 days" contained in the definition. The permanent loss of these ephemeral stream segments is significant, and while KB's argument tends to downplay the inherent value of ephemeral streams (to minimize the effect of their unauthorized impacts) these types of streams

are integral to the health and function of stream systems within the San Diego region. (PT Exhibit 1.)

KB argues that the Prosecution Team has misinterpreted the Enforcement Policy language, and that to achieve a score of 5 (Major) the violation must meet ALL three "criteria" listed in the definition. KB distorts the Enforcement Policy language. The definition does not list a finite set of minimum criteria that must be met to satisfy a score of 5 (Major). Instead, the "i.e." before the listed points means "in other words" or "that is" and is intended to provide guidance as to what may constitute certain impacts that would fit the level of harm identified. Regardless, in addition to persisting for much longer than 5 days, the permanent unmitigated fill of a stream also has a high potential for chronic effects to ecological health and therefore would meet two of the three examples provided in the definition.

b. <u>The action is consistent with similar enforcement actions statewide</u>

Even though KB points to a number of cases it claims support the argument of inconsistent and unfair application of the Enforcement Policy by the Prosecution Team, KB failed to identify two recent Water Board cases where the fact pattern is strikingly similar to the one in this proceeding (i.e. an unauthorized discharge of fill to waters of the U.S. in violation of Clean Water Act section 301). A review of these cases shows that the Prosecution Team acted consistently with other regional water boards in the state.

On November 2, 2015, the Los Angeles Water Board issued Administrative Civil Liability Complaint No. R4-2015-0207 to the City of Industry proposing liability in the amount of $5,758,791.57 for violations of section 301 of the Clean Water Act and California Water Code Section 13376. (PT Exhibit 50.) That complaint alleged that, in May 2012, the City of Industry engaged in grading activities without a permit from the ACOE, or a Clean Water Act section 401 water quality certification from the Los Angeles Water Board. The unauthorized work resulted in the discharge of approximately 880,607 gallons (4,360 cubic yards) of river cobbles into the East Fork of the San Gabriel River. The alleged violations and the calculation of factors in Step 1 of the penalty calculation methodology in that case are <u>identical</u> to the determinations made by the Prosecution Team in the Complaint issued to KB. Both complaints calculated the total score for

Potential Harm for Discharge Violations as a 7 (based on a Harm score of 5 and a Toxicity score of 2) with a deviation from the requirement factor of Major.

On May 17, 2016 the San Francisco Water Board issued an Administrative Civil Liability Complaint in the amount of $4,600,000 to John D. Sweeny and the Point Buckler Club LLC, for alleged fill and degradation of over 29 acres of tidal wetlands at Point Buckler Island, located in the Suisun Marsh in Solano County California. (PT Exhibit 51.) The complaint issued in that case alleges that the discharger violated Basin Plan Prohibitions contained in the San Francisco Bay Basin Plan and Clean Water Act section 301 for filling waters of the U.S. to construct a levee, and violated section 401 of the Clean Water Act for failing to obtain a 401 certification for the work. Again, the calculation of factors in Step 1 of the penalty calculation methodology are identical to the determinations made by the Prosecution Team in this matter for Step 1. Both of the above cases also calculated the proposed liability to include both the per-gallon and per-day liability amounts, as did the Prosecution Team in this case.

The Prosecution Team utilized the penalty calculation methodology in a fair and consistent manner when it came to calculating the factors contained in Step 1 of the methodology. The determination of that score is entirely consistent with similar enforcement actions across the State, while recognizing the unique facts of this case.

c. The harm is not minimal simply because the activity was eligible for nationwide permits

KB argues that the Harm factor is excessive given that the Settler's Point Project (including the road knuckle) would have been eligible for coverage under Nationwide Permit (NWP) 14, Linear Transportation Projects, or NWP 29, issued by the ACOE.

According to the ACOE, the Nationwide Permits are meant to authorize activities that are "similar in nature, cause only minimal adverse environmental effects when performed separately, and cause only minimal cumulative adverse effects on the aquatic environment." The NWPs allow ACOE to focus their limited resources on the projects that are of greatest impact. It is not surprising, given ACOE's much broader scope and authority, that their focus would differ somewhat from the State of California's focus. Congress must have anticipated this because they

created the section 401 Water Quality Certification mechanism for the states to use to ensure that activities permitted by the ACOE do not degrade water quality or violate other applicable laws. Section 401 of the Clean Water Act requires a person applying for a federal permit or license, which may result in a discharge of pollutants into waters of the U.S., to first obtain a state water quality certification that the activity complies with all applicable water quality standards, limitations, and restrictions. No license or permit may be issued by a federal agency until the certification required by section 401 has been granted. Further, no license or permit may be issued if that certification has been denied.

Water quality standards, according to the Clean Water Act, include:

> **Beneficial Uses** - defined as the uses of water necessary for the survival or wellbeing of man, plants, and wildlife. Beneficial uses are designated in the Basin Plan for water bodies within the region. Examples include agricultural supply, water contact recreation, wildlife habitat, and warm freshwater habitat.
>
> **Water Quality Objectives** - are the constituent concentrations, levels, or narrative statements (aka. water quality standards or criteria) representing a quality of water that supports a particular use. When water quality objectives are met, water quality will generally protect the designated beneficial use.
>
> **Antidegradation Policy** - consists of the following three principles to protect water bodies: the first principle requires all existing in-stream water uses shall be maintained and protected; the second principle protects waters whose water quality exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water; and the third principle requires maintenance and protection of all high quality waters which constitute an outstanding national resource.

(40 C.F.R. § 131.)

On April 19, 2012 the State Water Board notified ACOE that it had reviewed the ACOE's newly issued 50 NWP's, considered the comments it received, and had made a determination whether to certify, certify with conditions, or deny certification pursuant to Clean Water Act section 401. (PT Exhibit 53.) As a result of the review, the Executive Director of the State Water Board issued a certification for only 13 of the 50 NWP's--electing only to issue general certifications for projects that were of minimal impacts and would be exempt from CEQA analysis. NWP 14 and NWP 29 both received a denial without prejudice, thus requiring projects which intended to

proceed under these NWP's to apply for an individual, project-specific 401 water quality certification.

Had KB conducted itself in accordance with the laws of the State of California and applied for a 401 water quality certification for the Settler's Point Project, Water Board staff would have had a chance to exercise its regulatory authority over the project and through an analysis of the avoidance, minimization and mitigation of the proposed impacts, could have ensured that the proposed project would have complied with state water quality standards. Staff would have had the opportunity to evaluate the knuckle configuration as it related to the adjacent Brightwater Ranch project and determine if the cumulative impacts to ephemeral streams resulting from the both projects were certifiable or not. Simply because the ACOE has determined that it is in its interests to grant NWPs for these types of impacts does not mean the State of California has found these impacts to be minimal. The removal of an ephemeral stream and all the beneficial uses and ecological functions it supports, without the benefit of any compensatory mitigation for those losses, should not be considered minimal harm.

d. <u>The days of violation were calculated conservatively</u>

KB argues that the 161 days of alleged discharge should be recalculated or reduced by utilizing the multiple day violation reduction guidance in the Enforcement Policy. (Enforcement Policy, at p. 18.) The Board has discretion to apply the reduction if it can make at least one of three findings. (*Id.*) If one of these findings were made, the San Diego Water Board would have the discretion to reduce the days of discharge to a minimum of 11 days. However, as described below, even if one of the findings were applicable to the facts here, the multiple day reduction is ill-suited to this case.

The days of violation resulting from the unauthorized discharge of fill are ongoing (i.e. 650 days as of the September 14, 2016 Hearing date). Unless the Discharger removes the fill and restores the streams to their original condition, either voluntarily or via a Cleanup and Abatement Order, the fill will remain in perpetuity. In light of this, any discretionary reduction in days would be inappropriate.

For purposes of calculating a penalty, the Prosecution Team was conservative in alleging 161 days of discharge, focusing only on those days of discharge between the date of initial grading (December 5, 2014) and the date on which the road knuckle's curb and gutter were completed (May 14, 2015). While KB argues that the discharge ended when the grading was completed on January 15, 2016, the placement of the asphalt road, concrete curb, and gutter constitute additional days of discharging fill. This additional discharge of road, curb, and gutter made the task of removal and restoration all the more difficult and costly, and the resulting impacts more permanent. The days of violation should be reflective of these additional days of discharge.

In order to collapse the number of days of discharge as KB suggests by utilizing the guidance provided on page 18 of the Enforcement Policy, the Board must make express findings that the violation:

a. Is not causing daily detrimental impacts to the environment or the regulatory program;
b. Results in no economic benefit from the illegal conduct that can be measured on a daily basis; or,
c. Occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation.

No such findings should be made. The unmitigated discharge of fill into streams without the benefit of appropriate resource agency review, conditions, or approvals *does* cause daily detrimental impacts to both the environment and the regulatory program. The permanent removal of beneficial uses of the impacted streams causes daily detrimental impacts to the environment. And, by denying the San Diego Water Board the opportunity to work with an applicant to develop and approve a project that would avoid, minimize, and mitigate project impacts prior to construction, the violation also impacts the implementation of the Clean Water Act section 401 water quality certification for this, and the adjacent Brightwater Clean Water Act section 401 water quality certification application. Moreover, such a finding would propagate a dangerous mentality of "fill now, pay later" among the program's regulated community.

The violation in question also results in economic benefit to KB that continues to accrue on a daily basis. Had KB applied for, and potentially received a section 404 permit and 401certification, it would have been required to either avoid or minimize the impacts, and to

mitigate for the impacts. Such mitigation would have required at least 5 years of maintenance and monitoring, and a legal protection instrument for the mitigation area in perpetuity, requiring that additional costs be incurred. KB has taken no action to mitigate for the impacts and enjoys that economic benefit to this day. Finding (b) is not applicable in this case.

Finally, although KB claims it did not have the knowledge that its actions would be a violation at the time that the fill occurred, it certainly should have known, and preventing the violation was absolutely within its control. KB did have the ability to perform a proper due diligence assessment prior to grading the knuckle and failed to do so. Once KB became aware of the violation, it was also within its control to mitigate or eliminate the violation; but it did neither. Finding (c) is also not applicable.

Last, KB's cites the San Diego Water Board's past practice of collapsing of days of violation in the Matter of Jack Eitzen (KB Exhibit GG (Order No. R9-2011-0048)) and asks that it apply the same method here. However, in the Eitzen case the Board made a specific finding (No. 25) which stated:

> "The San Diego Water Board also finds that an adjustment to the Initial Base Liability for the per-day basis for liability is appropriate for violations lasting more than 30 days because the violation resulted in **no economic benefit from the illegal conduct that can be measured on a daily basis** (emphasis added). Therefore, it is appropriate to use the alternate approach to penalty calculation recommended by the Prosecution Team in the Technical Analysis to assess penalties for a total of 48 days. The number of adjusted days of violation is greater than the minimum adjusted number of days allowed because the minimum number of days is not an adequate deterrent. The appropriate adjusted days of violation is determined by assessing a violation on the first day of the violation, an assessment for each five day period of the violation until the 30th day, and then an assessment for each fifteen (15) days of violation, which totals 48 days of violation."

This case is markedly different from the facts in Eitzen, and the Board cannot make the same finding regarding economic benefit. The construction of the Knuckle was an integral piece of the Settler's Point Project, and without the secondary access it provided, the County would not have been able to grant final occupancy to homeowners who had closed escrow on their homes prior to the upcoming holiday season. It is possible that, had the San Diego Water Board issued a Cleanup and Abatement Order requiring the removal of the fill and the restoration of the streams, KB may have been in the position of needing to find alternative lodging for families until the matter

could be resolved. KB derived a daily economic benefit from the construction of the knuckle by being able to let the existing owners take possession of the homes they had purchased, and to be able to continue selling the additional homes on-site that had not already been purchased.

Based on the reasons provided above, the number of violation days alleged in the Complaint has been counted in a conservative manner, and reducing the number of days of violation is not warranted.

e. <u>A culpability factor of 1.2 is appropriate</u>

KB argues that a culpability score of 1.2 is too high because it proceeded in accordance with industry standards by relying on the approvals granted by the County and by hiring a recognized and qualified environmental consultant to conduct a due diligence review of the project. Although the Prosecution Team recognizes that the County's approval process was flawed, any violations attributable to the County would be handled through a separate enforcement proceeding. KB is ultimately responsible for compliance with the permitting requirements prior to the placement of dredged or fill material; it should not rely solely on the County's process, or prior consultants' reports. This seems to be precisely why KB retained a consultant to conduct a site visit and perform an independent due-diligence review of prior reports. Unfortunately, KB's due diligence exercise failed to identify any potential jurisdictional water features. A reasonably prudent person conducting a due diligence review would have: (a) Identified potential jurisdictional water features from the documents provided, including previous 2009 engineering drainage studies (PT Exhibit 11) that identified the area of the road knuckle as a natural watercourse; (b) Included a desktop review of areal images within and around those boundaries to identify potential jurisdictional water features; (c) Accurately identified the applicable project boundaries; and (d) Identified such obvious jurisdictional features during the site visit. Had any of these reasonably prudent measures been taken, the unauthorized discharge to waters of the U.S. could have been avoided. KB and its consultant failed to identify potential jurisdictional features when a reasonably prudent person in its position would have done so using the means described above. For these reasons, a culpability factor of 1.2 is appropriate.

CONCLUSION

The San Diego Regional Water Board has jurisdiction over this matter and authority to impose liability against KB pursuant to Water Code section 13385. The Prosecution Team has provided sufficient evidence to show that KB's discharge impacted a water of the U.S. and that the appropriate liability should be based on the number of "gallons" of fill (converted from the total amount of cubic yards of material discharged) using the days of violation from the initiation of grading until the time the road was complete. KB's contentions that it has received unfair treatment by the Prosecution Tem, in terms of the application of the Enforcement Policy, are not supported by a careful consideration of other similar cases. The Prosecution Team utilized the Enforcement Policy to determine a fair and conservative proposed liability given the conduct and violations alleged. The Prosecution Team respectfully requests that the San Diego Water Board impose the administrative civil liability in the amount proposed.

August 1, 2016

David Boyers
Assistant Chief Counsel, Office of Enforcement
State Water Resources Control Board

Evidence and Policy Submission

Exhibit No.	Date	Title	Author	ECM Doc Handle
1	2003	Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands	Meyer et al.	2272547
2	04/22/2016	ACLC R9-2016-0092, KB Home, transmittal letter	San Diego Water Board	2293328
3	04/22/2016	ACLC R9-2016-0092, KB Home	San Diego Water Board	2293323
4	04/22/2016	ACLC R9-2016-0092, KB Home, Technical Analysis	San Diego Water Board	2293336
5	04/22/2016	ACLC R9-2016-0092, KB Home, Technical Analysis Appendices	San Diego Water Board	2293343
6	04/25/2016	KB Home ACLC certified mail receipt	USPS	2278946
7	04/22/2016	Email dissemination of ACL complaint package to interested parties	San Diego Water Board	2278377
8	02/2006	Biological Technical Report for Settler's Point Subdivision and Rezone	Robin Church	2270037
9	07/31/2008	Settlers Point Updated Project Description	REC Consultants	2270127
10	06/05/2009	Centex Homes Permission to grade letter	Centex Homes	2270249
11	06/2009	Drainage Study for Settlers Point	REC Consultants	2270566
12	02/10/2012	CEQA Initial Study for Settlers Point Project	County of San Diego	2270271
13	02/10/2012	CEQA Mitigated Negative Declaration for Settlers Point Project	County of San Diego	2270278
14	03/19/2013	Settlers Point Project No. PDS2013-STP-13-002 Updated Project Description	REC Consultants	2270078
15	05/09/2014	KB Home Due Diligence Assessment for Settlers Point Project	Helix Environmental Planning	2270438
16	03/10/2015	Pages 126-154, Preliminary Jurisdictional Delineation Report from Pulte Home Request for Clean Water Act Section 401 Water Quality Certification. The rest of the Application Package is incorporated by reference.	Helix Environmental Planning	2270305
17	04/09/2015	Pulte Home Brightwater Ranch 401 cert. application incomplete letter	Lisa Honma	2296991
18	07/01/2015	San Diego Water Board Site Inspection Report Brightwater Ranch/Settlers point	Lisa Honma	2270444
19	07/01/2015	07/01/2015 Inspection Photos Brightwater Ranch/Settlers Point	Lisa Honma	2296963
20	07/10/2015	KB Home Timeline of Events	Helix Environmental Planning	2270516

Evidence and Policy Submission

Exhibit No.	Date	Title	Author	ECM Doc Handle
21 a & b	08/13/2015	NOV R9-2015-0120 & Transmittal letter	Christopher Means	2270478, 2270482
22	07/07/2015	Diagram of Impacted waters of the US/State, Brightwater Ridge Property (Cropped)	Helix Environmental Planning	2270538
23	07/01/2015	Knuckle diagram with SW inlets identified	Lisa Honma	2299678
24	07/14/2015	Pulte Home email to Eric Becker, re discharge of fill on Brightwater Ridge Property	Pulte home	2271728
25	07/16/2015	Email chain regarding request for 2009 drainage study for Settler's Point	Barry Jones, Christopher Means	2297019
26	08/18/2014	Stormwater Pollution Prevention Plan for Settlers Point. PDF provided, Incorporated by reference into hard copy	Waterlogged	2270509
27	07/21/2015	Inspection photos, Road Knuckle	Christopher Means	2271636
28	08/2015	County of San Diego Design Standard DS-15 for Street Knuckle	County of San Diego	2297277
29	07/15/2015	Information request email to County of San Diego	Christopher Means, Beth Ehsan	2297080
30	08/11/2015	County of San Diego response to questions about knuckle review and CEQA process	County of San Diego	2297305
31	07/07/2015	Diagram of Impacted waters of the US/State, Brightwater Ridge Property, (original)	Helix Environmental Planning	2293291
32	02/06/2014	Settlers Point Mitigation Purchase Crestridge Conservation Bank	J Whalen Assoc.	2293244
33	03/2006	Cultural Resource Evaluation of Settlers Point property. PDF available. Incorporated by reference into hard copy.	Affinis	2293250
34	06/2009	Settlers Point Stormwater Management Plan, 2009. PDF available. Incorporated by reference into hard copy.	REC Consultants	2293268
35	07/06/2015	Helix Environmental email confirming knuckle acres of impact and linear feet	Barry Jones, Lisa Honma	2297043
36	10/30/2015	Helix Environmental memorandum of alternative fill volume calculation	Helix Environmental Planning	2271531
37	03/14/2016	BEN Model economic benefit analysis	Bryan Elder	2305650
38	10/30/2015	KB Home Construction notes on road knuckle	KB Home	2771534

Evidence and Policy Submission

Exhibit No.	Date	Title	Author	ECM Doc Handle
39	07/01/2015	Brightwater Ranch, Inspection notes re jurisdictional delineation verification	Lisa Honma	2294973
40	08/29/2015	Sign in sheet for August 19, 2015 meeting with KB Home	Christopher Means	2297271
41	08/18/2015	Estimation of Fill email	Procopio	2271595
42	07/02/2015	KB Home Meeting request email	Helix Environmental Planning	2297033
43	03/15/2016	Staff costs spreadsheet	San Diego Water Board	2305598
44	06/24/2015	Order No. R9-2015- 0041, Resolution to Support Restoration of Aquatic Ecosystems in the San Diego Region. Available on web at: www.waterboards.ca.gov/sandiego/. Incorporated by reference.	San Diego Water board	n/a
45	08/28/2012	San Diego Water Board Basin Plan, Available on wed at : www.waterboards.ca.gov/sandiego/. Incorporated by reference.	San Diego Water board	n/a
PROSECUTION TEAM AUGUST 1, 2016 REBUTTAL EVIDENCE				
46	12/10/2015	Final Preliminary Jurisdictional Delineation for Brightwater Ranch fill site	Army Corps of Engineers	2350181
47	8/1/2016	Map of Flow from KB Home Fill to Traditional Navigable Waters	San Diego Water Board	2350182
48	5/30/2007	Jurisdictional Determination Form Instructional Guidebook	Army Corps of Engineers	2350184
49	June 2012	Final Report on Bioassessment in Nonperennial Streams	Southern California Coastal Water Research Project	2350185
50	10/27/2015	ACL Complaint No. R4-2015-0207, City of Industry Follows Camp, Azusa, California	Los Angeles Regional Water Quality Control Board	2350187
51	5/17/2016	ACL Complaint No. R2-2016-1008, Point Buckler Island, Solano County, California	San Francisco Bay Regional Water Quality Control Board	2350189
52	7/10/2015	People vs. James Tong et al., No. RG15777482	County of Alameda Superior Court	2350193

Evidence and Policy Submission

53	4/19/2012	Clean Water Act Section 401 Water Quality Certification of 2012 Nationwide Permits	State Water Resources Control Board	2350199