

**CALIFORNIA REGIONAL WATER QUALITY CONTROL
BOARD
SAN DIEGO REGION**

**TECHNICAL ANALYSIS
for
Administrative Civil Liability
Contained in Complaint No. R9-2016-0092**

To

KB Home

For

Noncompliance with

Clean Water Act Section 301

And

California Water Code Section 13376

Prepared by

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A. INTRODUCTION

This technical analysis provides a summary of factual and analytical evidence that supports the findings in Administrative Civil Liability Complaint No. R9-2016-0092 (Complaint) and the recommended assessment of civil liability in the amount of **eight hundred seventy five thousand one hundred sixty-six dollars** (\$875,166) against KB Home (Discharger) for violations of Section 301 of the Clean Water Act (CWA) and California Water Code (CWC) Section 13376 from its unauthorized discharge of fill to unnamed ephemeral tributaries to Los Coches Creek in Lakeside California, San Diego County.

The proposed Brightwater Ranch development project (APN # 397-180-13) is located within the unincorporated community of Lakeside in San Diego County. The 76.23 acre site is located northwest of Business Route 8/East Main Street, and southwest of Los Coches Road (Latitude: 32.832479 ° N, Longitude: - 116.914554° W, Center Reading). The Brightwater Ranch property is currently owned by Pulte Home Corporation.

Directly adjacent to and northeast of the Brightwater Ranch project site is the 27.23 acre KB Home "Settler's Point" residential housing project (see Figure 1). In May of 2014, KB Home began negotiations to purchase the Settler's Point property with the previous owner, Dan Floit. The project was marketed as having all the necessary environmental approvals and a construction grading permit issued by the County of San Diego. As part of this purchase process the Discharger hired Helix Environmental Planning Inc. (Helix) to conduct a due diligence assessment which was provided to KB Home on May 9, 2014. The assessment was based on a single site reconnaissance by Helix staff on May 5, 2014 and a review of project files and regional planning documents provided by KB Home. On September 2, 2014 the Discharger finalized the purchase of the property. Active grading on the Settler's Point project began in December 2014. Homes were completed, and at the end of November 2015, families began to occupy homes that were purchased.



Figure 1. Brightwater Ranch and Settlers Point projects, Lakeside CA (Modified version of March 10, 2015 Pulte Home 401 water quality certification application Figure 2, project vicinity map)

On March 10, 2015 Pulte Home Corporation submitted a 401 water quality certification (Certification) application package for the adjacent Brightwater Ranch project to the San Diego Water Board. The project proposes a 66-unit single-family residential subdivision with four Homeowner Association-maintained lots, and 41.8 acres of open space. The application package included a preliminary jurisdictional delineation, identifying the presence of waters of U.S. and State.

The preliminary jurisdictional delineation was conducted by a separate Helix staff person, not affiliated with the Settler's Point project, on November 7, 2014, and concluded that the site contained 0.05 acre (685 linear feet) of waters of the U.S. and State (ephemeral streambed) under the jurisdiction of the United States Army Corps of Engineers (USACE), San Diego Water Board, and California Department of Fish & Wildlife (CDFW). The preliminary delineation identified an additional 0.12 acre (3,710 linear feet) of non-federal waters of the State onsite. The site contains five unnamed ephemeral drainages that are tributary to Los Cocheros Creek (Hydrologic sub area 907.14). (see Figure 2)

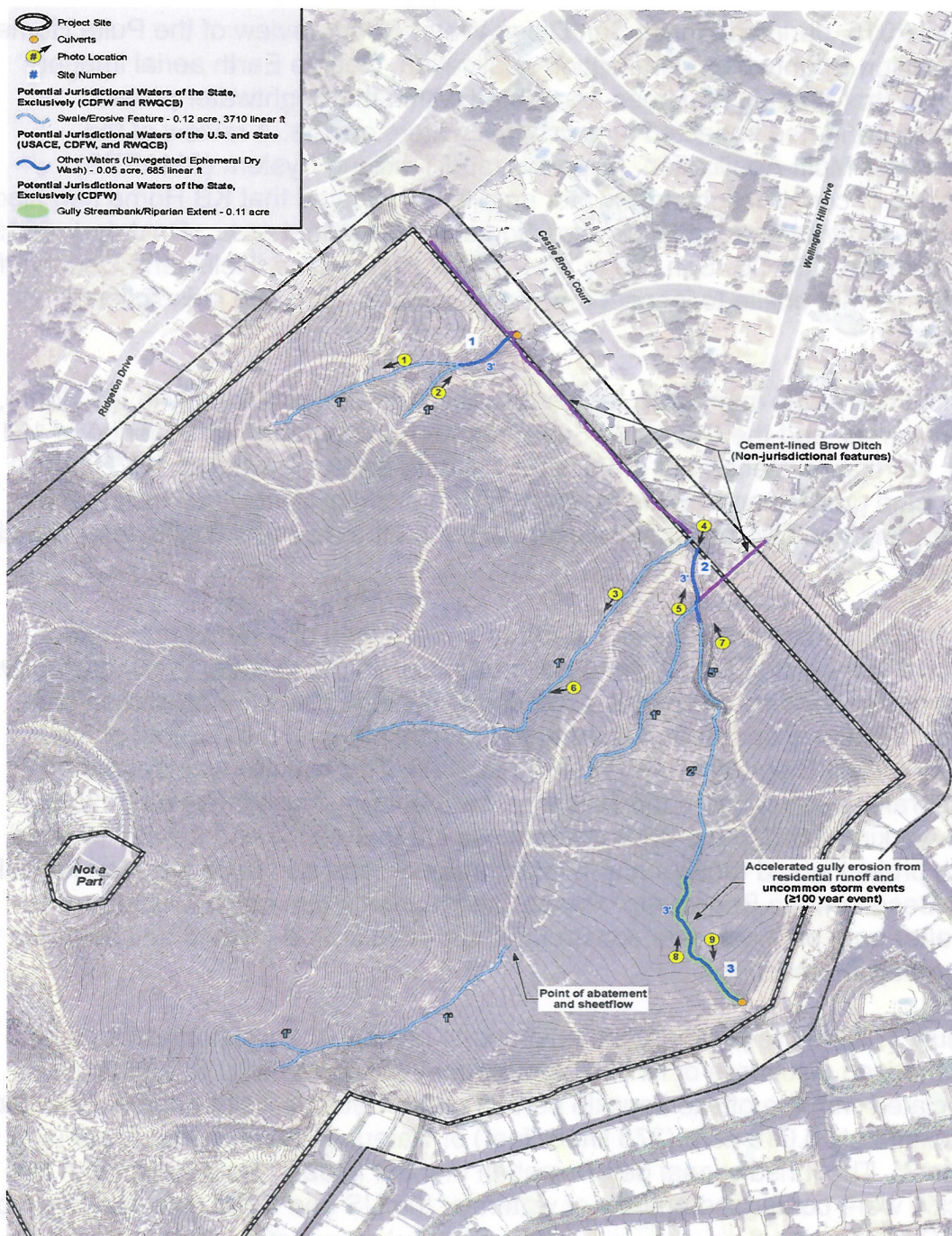


Figure 2. Map of Preliminary jurisdictional delineation for Brightwater Ranch. Taken from Pulte Homes March 10, 2015 401 Cert. application package Figure 8.

In April 2015, during an initial San Diego Water Board review of the Pulte Home Corporation Brightwater Certification application, Google Earth aerial imagery revealed that grading had been conducted within the Brightwater project boundary, and had impacted jurisdictional waters on-site. A review of the Stormwater Multi-Application, Reporting and Tracking System (SMARTS) database of construction stormwater enrollees indicated that KB Home had filed a Notice of Intent to conduct construction activities in that area. On July 1, 2015 staff from the USACE, San Diego Water Board, KB Home, Helix, and County of San Diego met onsite to inspect the impacts and to verify the jurisdictional delineation.

The findings of the inspection, and subsequent communications with KB Home, Pulte Homes, and the County of San Diego determined that, for a period of 161 days, starting on December 5, 2014 and ending on May 14, 2015, KB Home conducted grading operations for the Settler's Point project which included off-site grading and filling of jurisdictional waters on the adjacent Brightwater Ranch property.

The offsite grading activities included the construction of a temporary road "knuckle" connecting the Settler's Point project with the existing Wellington Drive to provide secondary access, in accordance with the site's fire protection plan. The road knuckle had been added to the project plans at the request of the County of San Diego sometime in August 2008. The knuckle was deemed "temporary" because both the Settler's Point and Brightwater Ranch projects were working through the approval process independently and it was unknown which project would receive approval to break ground and build the road knuckle first. Based on the Brightwater Ranch Certification submittal, it was proposed that after both projects were constructed, the road knuckle would be converted to a four-way intersection.

On July 7, 2015 the Discharger's environmental consultant reported that the unauthorized discharge of fill into jurisdictional waters of the U.S. and State, associated with the offsite knuckle portion of the Settler's Point project impacted approximately 0.018 acre (278 linear feet) of waters of the U.S. and State (see Figure 3). The jurisdictional determination that the impacts associated with the knuckle were comprised entirely of waters of the US and State was confirmed by the ACOE.

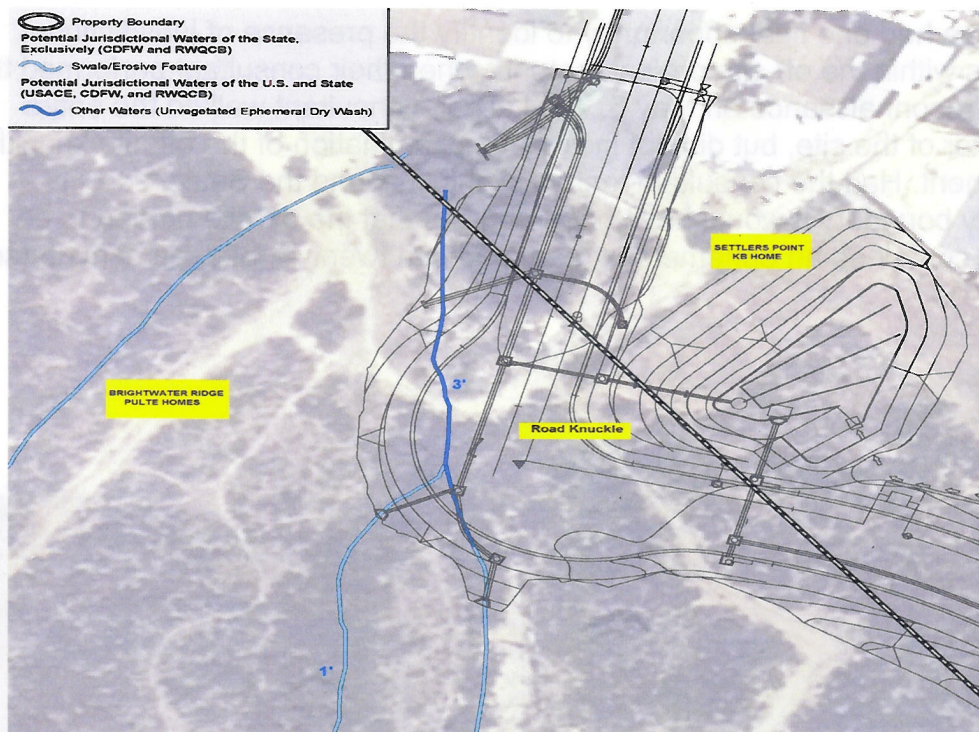


Figure 3. Unauthorized Impacts to Waters of the US/State. Diagram provided by Helix Environmental on behalf of KB Home, July 2015.

On August 13, 2015 the San Diego Water Board issued KB Home and Pulte Homes Notice of Violation (NOV) No. R9-2015-0120 for the unauthorized discharge of fill to ephemeral waters of the U.S. and State associated with the construction of the offsite knuckle portion of the Settler's Point project.

On July 10, 2015, at the request of Prosecution Team staff, Helix staff provided a timeline of events for the Discharger's involvement in procuring the Settler's Point property. Helix summarized the activity and concluded that "KB Home exercised due diligence in their efforts to confirm the project was in complete compliance with all local, state and federal regulations, as evidenced by the issuance of the grading for the project."

Subsequently, during the course of investigation, KB Home provided the Prosecution team with a May 9, 2014 due diligence report prepared by Helix. The purpose of the report was to perform a due diligence assessment of the property to confirm that no significant changes or biological issues had occurred to constrain the project. The assessment consisted of a single day site reconnaissance and a review of project files and regional planning documents provided by KB Home.

KB Home had one final opportunity to identify the presence of jurisdictional streams within the off-site project footprint when their consultant performed the on-site reconnaissance on May 5, 2014. Their consultant walked the entire perimeter of the site, but did not include an examination of the off-site knuckle component. Had the consultant looked slightly beyond the Settler's Point property boundary it would have been obvious that the off-site portion to be graded contained an ephemeral stream bed in a twenty-foot deep canyon (see Figure 4).



Figure 4. Ephemeral stream in highly eroded canyon, looking west from constructed off-site road knuckle. Photo by Lisa Honma, SDRWQCB, July 1, 2015.

The due diligence assessment concluded, in part, that:

“No potentially jurisdictional areas were observed within the project area. No signs of recent surface flow, no definable bed and bank or ordinary high-water mark, and no presence of wetland or riparian vegetation sufficient to constitute habitat were observed. Based on our assessment, there were no areas that could be considered jurisdictional under either U.S. Army Corps of Engineers (USACE) or California Department of Fish and Wildlife (CDFW) regulations.”

Subsequent to the issuance of the NOV, KB Home and the San Diego Water Board Prosecution team (Parties) held meetings on August 19, 2015 and October 26, 2015 to discuss the alleged violations, and entered into settlement discussions. The settlement discussions lasted until early November 2015, but the parties were unable to reach an agreement.

Summary

Beginning in December 2015, the Discharger initiated grading to construct the Settler's Point housing project. The Discharger's activity resulted in the filling of ephemeral streams tributary to Los Coches Creek and permanently removed the beneficial uses associated with those streams. The Discharger should have applied for the proper permits and authorizations from resource agencies prior to impacting the streams, including a CWA section 401 water quality certification from the San Diego Water Board, a CWA section 404 permit from the USACE and a Fish and Game Code section 1602 Streambed Alteration Agreement from CDFW. The Discharger failed to apply for and obtain any authorizations for the impacts to the ephemeral streams. By not applying for the CWA section 401 water quality certification, the San Diego Water Board was denied the opportunity to require avoidance and minimization measures. This includes evaluating alternatives where the impacts to ephemeral streams tributary to Los Coches Creek could be completely avoided.

The Prosecution Team asserts that the Discharger's due diligence review was wholly inadequate. The addition of the off-site road knuckle portion had been incorporated into the plans years before. Engineering plans for the project had incorporated the knuckle into drainage studies, and had taken into account the flows that would be generated from the unnamed streams as it designed the storm water infrastructure for the project. However, biological resource updates provided in the years after the inclusion of the off-site knuckle failed to find it necessary to do any additional field work to investigate whether the offsite portion of the project would result in impacts to off-site jurisdictional features. Attachment A of this technical analysis provides a detailed chronology of the history of the Settler's Point project and the missteps all along the way that led to the violations alleged.

Had the Discharger done any one of the following steps during its due diligence review, it could have identified jurisdictional impacts that warranted application for 401 Certification.

1. Reviewed the engineering drainage plans and Stormwater Pollution Prevention Plan (SWPPP) prepared for the project by their consultants, and prior owners.
2. Identified the proper project boundaries when conducting its field visits.
3. Looked at topographical maps or satellite images of the project footprint.
4. Established effective communication on the project between the engineering and biological sections of the planning teams.

The unauthorized impacts to waters of the US and State were due to a lack of due diligence on the part of KB Home and its consultant, as a result of their reliance on the inadequate biological analysis of the project, failure to properly validate the information, and lack of communication between the engineering and biological consultants associated with the project.

B. BENEFICIAL USES OF AFFECTED WATERS

The Water Quality Control Plan for the San Diego Basin (Basin Plan) designates beneficial uses for all surface and ground waters in the San Diego Region. These beneficial uses “form the cornerstone of water quality protection under the Basin Plan” (Basin Plan, Chapter 2). Beneficial uses are defined in the Basin Plan as “the uses of the water necessary for the survival or well-being of man, plants and wildlife.”

The un-named ephemeral streams impacted by the discharge of fill in conjunction with the construction of the road knuckle are tributary to Los Coches Creek. The Basin Plan has designated the following beneficial uses for Los Coches Creek:

- Industrial Service Supply (IND)
- Contact Water Recreation (REC1)
- Non-contact Water Recreation (REC2)
- Warm Freshwater Habitat (WARM)
- Wildlife Habitat (WILD)

C. ALLEGED VIOLATIONS

Failure to Obtain a CWA section 401 Water Quality Certification for Impacts to Waters of the US and State in violation of Clean Water Act section 301 and CWC section 13376

The discharge of dredge and fill material into waters of the United States without a permit under CWA section 404 and without obtaining state water quality certification pursuant to CWA section 401 constitutes a violation of CWA section 301.

These violations subject the Discharger to administrative civil liability pursuant to Water Code section 13385.

D. DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY

Pursuant to CWC section 13385, any person who violates waste discharge requirements issued pursuant to Chapter 5.5 of the CWC (i.e., NPDES Permits) shall be liable civilly.

Pursuant to CWC section 13385(c), the maximum civil liability that the San Diego Water Board may impose for a violation of an NPDES permit is ten thousand dollars (\$10,000) for each day the violation occurs and/or ten dollars (\$10) per gallon discharged but not cleaned up that exceeds 1,000 gallons.

CWC section 13385(e) requires the San Diego Water Board to consider specific factors in establishing discretionary liability amounts. These factors include:

“...the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.”

The State Water Board's Water Quality Enforcement Policy (Enforcement Policy), provides a penalty calculation methodology for Water Boards¹ to use in administrative civil liability cases. The penalty calculation methodology enables the Water Boards to fairly and consistently implement liability provisions of the Water Code for maximum enforcement impact to address, correct, and deter water quality violations. The penalty calculation methodology provides a consistent approach and analysis of factors to determine liability based on the applicable Water Code section.

The Enforcement Policy requires the Water Boards to determine an initial liability factor based on the Potential for Harm and the extent of Deviation from Requirements when there is a discharge violation. The Potential for Harm score is calculated by determining the actual or threatened impact to beneficial uses caused by the violation using a three-factor scoring system to quantify: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) the discharge's susceptibility to cleanup or abatement. These factors are used to determine a per day factor using the matrix set forth in the Enforcement Policy that is multiplied by the maximum per day amount allowed under the Water Code. An initial liability amount on a per gallon basis is determined using the Potential for Harm score and the extent of Deviation of Requirement of the violation.

The initial liability amount is then increased or decreased based on the following adjustment factors: culpability, cleanup and cooperation, and history of violations.

¹ “Water Boards” refers to the State Water Resources Control Board and the Regional Water Quality Control Boards.

Step 1 – Potential for Harm for Discharge Violations

Factor 1: Harm or Potential for Harm to Beneficial Uses

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 (negligible) and 5 (major) is assigned in accordance with the statutory factors of the nature, circumstances, extent and gravity of the violation.

The Prosecution Team has assigned a score of **5 (Major)** out of 5 to Factor 1 of the penalty calculation.

The Enforcement Policy defines **Major** potential for harm to beneficial uses as:

High 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)

The Prosecution Team assigned a **5 (Major)** because the unauthorized discharge of fill into waters of the United States has permanently eliminated, or at least significantly impacted, the beneficial uses assigned to the unnamed ephemeral streams in the footprint of the road knuckle. The undergrounding, armoring, and culverting of the impacted streams will result in an unmitigated loss of flood attenuation, groundwater recharge, pollutant assimilation, and biological productivity and diversity in the habitat lost.²

Furthermore, the failure of the Discharger to submit a CWA section 401 water quality certification application denied resource agencies the opportunity to evaluate the project in its entirety, and regulate the discharge by the avoidance, minimization, and subsequent mitigation of the remaining impacts to the streams. Thus, as the impacts are permanent, the actual harm to beneficial uses can be scored as nothing less than Major, as defined by the Enforcement Policy.

Factor 2: Physical, Chemical, Biological or Thermal Characteristics of the Discharge

This factor evaluates the physical, chemical, biological, and/or thermal nature of the discharge. A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material to potential receptors.

² Meyer, J. L., L. A. Kaplan, J. D. Newbold, D. L. Strayer, C. J. Woltemade, J. B. Zedler, R. Beilfuss, Q. Carpenter, R. Semlitsch, M.C. Watzin, and P. H. Zedler (2003): Where rivers are born: The scientific imperative for defending small streams and wetlands. *Sierra Club and American Rivers*.

The Prosecution Team assigns a score of **2** out of 4 (moderate) to Factor 2 of the penalty calculation. The Enforcement Policy defines **moderate** as:

Discharged material poses a moderate risk or threat to potential receptors (i.e, the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection).

The discharge of sediment, rip rap, pavement, storm water infra-structure and concrete to receiving waters poses a **moderate** level of concern regarding receptor protection because:

- a. The physical characteristics of the discharge of sediment, rip-rap, and concrete essentially eliminate the presence of many, if not all, potential receptors in the fill area.
- b. Sediment, rip-rap, and concrete, together in the form of hydromodification, diminish the physical quality of in-stream waterways by altering or obstructing flows, modifying sediment transport, and affecting existing riparian functions near the site and within the watershed.

Factor 3: Susceptibility to Cleanup and Abatement

Pursuant to the Enforcement Policy a score of 0 is assigned for this factor if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned to this factor if less than 50 percent of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the Discharger.

The road knuckle was identified as temporary, acknowledging that the impacted area will be subject to modification with the construction of the Brightwater project. Moreover, the Board has the discretion to issue a Cleanup and Abatement Order directing the Discharger to cleanup and abate the unauthorized fill. Therefore, more than 50 percent of the discharge is susceptible to cleanup or abatement. Accordingly, a score of **0 (zero)** is assigned to the penalty calculation for Factor 3.

Final Score – “Potential for Harm”

Based on the above determinations, the Potential for Harm final score for these discharge violations is **7 (seven)**.

Step 2 – Assessments for Discharge Violations

CWC section 13385 states that a Regional Water Board may impose civil liability on a daily basis, a per gallon basis, or both.

a. Extent of Deviation from Requirement

Where there is a discharge, the initial liability is determined on a per gallon basis using the same Potential Harm score from Step 1 and the Extent of Deviation from Requirement of the violation. The "Deviation from the Requirement" reflects the extent to which the violation deviates from the specific requirement. In this case, the requirement (CWA section 401 and 404) was to obtain the appropriate dredge and fill permit and associated state water quality certification prior to the initiation of the grading activities associated with the construction of the off-site road knuckle.

The Prosecution Team has assigned a Deviation from Requirement score of "major" because the requirement to obtain the appropriate authorizations prior to discharge of fill into waters of the U.S/State was rendered ineffective by the Discharger's actions.

The Enforcement Policy defines **major** for discharge violations as:

The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

b. Gallons Discharged

On August 18, 2015 the Discharger provided an estimate of the volume of fill placed into waters of the U.S. and State associated with construction of the off-site road knuckle. It estimated that 350 cubic yards of fill was discharged to fill the drainages and construct the road knuckle. For penalty calculation purposes, the total amount of unauthorized fill was converted to gallons and estimated to be 70,691 gallons.

CWC section 13385(c)(2) states:

"Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons."

In determining the per gallon liability in this case, the total gallons is calculated to be: 70,691 gallons – 1,000 gallons = **69,691** gallons.

c. Per Gallon and Per Day Assessment

Per Gallon Assessment for Discharge Violations

Using a “Potential for Harm” factor of **7** and “Deviation from Requirement” factor of “**Major**,” the “Per Gallon Factor” for the unauthorized discharge of fill into waters of the U.S. is **0.310** in Table 1 of the Enforcement Policy. Pursuant to CWC section 13385 the maximum civil liability for these violations is ten dollars (\$10.00) per gallon discharged (minus the first 1,000 gallons discharged).

Calculating the Per Gallon Assessment is achieved by multiplying:

$$\begin{aligned} &(\text{Gallons}) \times (\text{Per Gallon Factor}) \times (\text{Statutory Maximum Liability}) = \\ &(69,691) \times (0.310) \times (\$10.00) = \mathbf{\$216,042} \end{aligned}$$

Per Day Assessments for Discharge Violations

When there is a discharge, the initial liability is assessed on a per day basis using the same Potential Harm score from Step 1 and the Extent of Deviation from Requirements used in the per gallon analysis.

The Potential for Harm score is **7** and the Extent Deviation from Requirements is considered to be **Major**. Therefore the “per day” factor is **0.31** (as determined by Table 2 in the Enforcement Policy).

Although the days of violation resulting from the unauthorized discharge of fill are ongoing to the present, the Prosecution Team has limited its calculation of the discharge days to the period of time beginning with the initiation of grading activities to the conclusion of construction of the off-site road knuckle; a period totaling 161 days.

Calculating the Per Day Assessment is achieved by multiplying:

$$\begin{aligned} &(\text{Days of Discharge}) \times (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability}) = \\ &(161)(0.310) \times (\$10,000/\text{day}) = \mathbf{\$499,100} \end{aligned}$$

Step 3 – Per Day Assessments for Non-Discharge Violations

Step 3 does not apply to discharge violations.

Initial Amount of the ACL

The Total Combined Initial Liability is derived from the addition of the Per Gallon and Per Day initial liability amounts calculated in Step 2:

$$\begin{aligned} &(\text{Per Gallon Liability}) + (\text{Per Day Liability}) \\ &(\$216,042) + (\$499,100) = \mathbf{\$715,142} \end{aligned}$$

Step 4 – Adjustment Factors

There are three additional factors to be considered for modifications of the amount of initial liability: the violator's culpability, efforts to clean up and cooperate with regulatory authority, and the violator's compliance history.

Culpability

Higher liabilities should result from the lack of due diligence or negligent actions as opposed to violations beyond the control of the Discharger. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Prosecution Team has assigned a culpability multiplier of 1.2 out of a range from 0.5 to 1.5 for these violations because:

- a. KB Home ranks in the top five of the largest home builders in the nation. As such, it is, or should be, intimately aware of the regulatory requirements associated with developing projects within the State of California and in particular the County of San Diego, where it currently has multiple projects.
- b. The addition of the off-site road knuckle was not a last minute add-on to the proposed Settler's Point project. It had been a part of the project since 2009. A June 2009 drainage study had been completed analyzing the storm water infrastructure needs in association with the building of the off-site road knuckle, and noted a natural creek in the vicinity of the off-site portion of the project.
- c. Additionally, the Storm Water Pollution Prevention Plan developed by KB Home in 2014 for the Settler's Point project contained an exhibit that labeled the area of the off-site road knuckle as a "natural watercourse." The engineering side of the project development was in possession of the knowledge of the natural streams within the off-site knuckle area, and failed to communicate this information with the environmental consultants who were analyzing potential impacts resulting from the project.
- d. In May 2014, KB Home's environmental consultants conducted an assessment prior to purchase of the property, which included a file review and site visit to verify the conditions on the ground. This was another opportunity to determine that the off-site road knuckle construction would impact waters of the U.S. The consultant failed to inspect the off-site portion of the project. Had the consultant inspected the whole of the project it would have been obvious that jurisdictional waters were present in the off-site road knuckle area.

- e. The same environmental firm hired by the Discharger was also involved in the 401 certification application for the adjacent Pulte Homes Brightwater Ridge residential project that contained the off-site road knuckle. Different staff were responsible for each project. Unfortunately, there was no coordination between consultants on the resources present in the shared off-site knuckle area.

The Discharger's reliance on past flawed environmental studies and CEQA documents, and the lack of an appropriate level of due diligence while reviewing the property prior to its purchase increase the Discharger's level of culpability for the violations. A reasonably prudent person would have identified impacts to Waters of the US/State and would have sought permits accordingly. For this reason, the Prosecution Team has assigned a culpability factor of 1.2 in this case.

Cleanup and Cooperation

The Prosecution Team assigned a neutral cleanup and cooperation multiplier of **1.0** from a range of .75 to 1.5 for this violation. Although the Discharger was cooperative in providing requested information to characterize the violations and in discussing a path forward, no voluntary cleanup efforts have been undertaken.

History of Violation

The Prosecution Team assigned a neutral multiplier of **1.0** because the Discharger does not have a history of violations.

Step 5 – Determination of Total Base Liability Amount

The Total Base Liability amount for the violation is determined by multiplying the combined Per Gallon/Per Day Initial Amount computed in Step 3 with the adjustment factors as follows:

$$\begin{aligned} &(\text{Initial Liability Amount}) \times (\text{Culpability}) \times (\text{Cooperation}) \times (\text{History of Violation}) = \\ &(\$715,142) \times (1.2) \times (1.0) \times (1.0) = \mathbf{\$858,170} \end{aligned}$$

Step 6 – Ability to Pay and Ability to Continue In Business

The Discharger's ability to pay and continue in business must be considered when assessing administrative civil liabilities. As noted above, the Discharger is one of the leading homebuilders in the nation, and in its financial statements showed a gross operating profit of 492.66 million dollars, and a total net income of 86.64 million dollars for the year ending November 2015.³ The proposed

³ KB Home Financial Statement found at <http://investor.kbhome.com/financials-Statements.cfm>

penalty represents 1% of the Discharger's net income in 2015. The Discharger can pay the liability and remain in business.

Step 7 – Other Factors as Justice May Require

The cost of investigation and enforcement are “other factors as justice may require” and may be considered by the San Diego Water Board as an increase to the Total Base Liability Amount as a manner that serves as sufficient general and specific deterrent against future violations. The Prosecution Team recommends increasing the Total Base Liability Amount by \$16,996 in consideration of investigation and enforcement costs incurred in prosecuting this matter. Increasing the Total Base Liability Amount in this manner serves to create a more appropriate deterrent against future violations.

$$\begin{aligned} & \text{(Total Base Liability) + (Staff Costs)} \\ & (\$858,170) + (\$16,996) = \textbf{\$875,166} \end{aligned}$$

Step 8 – Economic Benefit

Pursuant to Water Code section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

The Prosecution Team has determined that the Discharger achieved an economic benefit from failing to retain a permitting consultant to process the necessary permits and authorizations required to impact jurisdictional waters associated with the off-site road knuckle construction, the failure to pay 401 Certification application fees, and the failure to mitigate and offset the permanent losses to waters of the US/State.

Based on the USEPA BEN model (see Attachment B), the Discharger avoided the cost of retaining a permitting consultant in the amount of **sixteen thousand eight hundred and eighty nine dollars (\$16,889)** during the violation period. The avoided 401 water quality certification application fees amount to **three thousand two hundred and twenty-one dollars (\$3,221)**.

In addition, the Discharger achieved an economic benefit by failing to properly mitigate the permanent impacts to the ephemeral streams associated with the construction of the off-site road knuckle. The economic benefit for this avoided cost is **eighteen thousand four hundred and ninety-one dollars (\$18,491)**.

The total economic benefit for this violation is **thirty eight thousand six hundred and one dollars (\$38,601)**.

This economic benefit calculation does not include calculations of the economic benefit the Discharger may have gained from not having to modify its project to avoid or minimize impacts as a result of the Certification evaluation process.

Step 9 – Maximum and Minimum Liability Amounts

Pursuant to CWC section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day and (b) ten dollars (\$10) for every gallon discharged, over one thousand gallons discharged, that was not cleaned up. CWC section 13385(d) requires that when pursuing civil liability under CWC section 13385, "At a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitutes the violation." If no economic benefit was derived from the violation, there is no minimum liability requirement.

The Prosecution Team is proposing the assessment of civil liability for the discharge of fill to waters of the US/State on a per day basis and a per gallon basis. Over a period of 161 days, 70,691 gallons of fill, including sediment, rip rap, asphalt and cement was discharged to waters of the US/State. Therefore, the maximum civil liability that could be assessed for this violation is **two million three hundred and six thousand nine hundred and ten dollars (\$2,306,910)**.

CWC section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent higher than the Economic Benefit Amount. Therefore, the minimum liability amount is calculated to be **forty-one thousand three hundred eighty-three dollars (\$41,383)**.

Step 10 – Proposed Civil Liability

Based on the penalty calculation methodology within Section VI of the Enforcement Policy, the total proposed liability amount for the violations addressed in Complaint No. R9-2016-0092 is for discharging sediment to waters of the US/State in violation of Section 301 of the Clean water Act and Section 13376 of the California Water Code is **eight hundred seventy five thousand one hundred and sixty six dollars (\$875,166)**.

E. DOCUMENTS RELIED UPON

Date	Title	Author	ECM Doc Handle
2003	Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands	Meyer et al.	2272547
02/2006	Biological Technical Report For Settler's Point Subdivision and Rezone	Robin Church	2270037
07/31/2008	Settlers Point Updated Project Description	REC Consultants	2270127
06/05/2009	Centex Homes Permission to grade letter	Centex Homes	2270249
06/2009	Drainage Study For Settlers Point	REC Consultants	2270566
02/10/2012	CEQA Initial Study for Settlers Point Project	County of San Diego	2270271
02/10/2012	CEQA Mitigated Negative Declaration for Settlers Point Project	County of San Diego	2270278
03/19/2013	Settlers Point Project No. PDS2013-STP-13-002 Updated Project Description	REC Consultants	2270078
05/09/2014	KB Home Due Diligence Assessment for Settlers Point Project	Helix Environmental Planning	2270438
08/18/2014	Stormwater Pollution Prevention Plan for Settlers Point	Waterlogged	2270509
03/10/2015	Pulte Home Request for Clean Water Act Section 401 Water Quality Certification, Application Package	Helix Environmental Planning	2270305
07/01/2015	San Diego Water Board Site inspection Report Brightwater Ranch/Settlers point	Lisa Honma	2270444
07/07/2015	Diagram of Impacted waters of the US/State, Brightwater Ridge Property	Helix Environmental Planning	2270538
07/10/2015	KB Home Timeline of Events	Helix Environmental Planning	2270516
07/14/2015	Pulte Home email to Eric Becker re discharge of fill on Brightwater Ridge Property	Pulte home	2271728
07/21/2015	Inspection photos, Road Knuckle	Christopher Means	2271636
08/13/2015	NOV R9-2015-0120 & Transmittal letter	Christopher Means	2270478, 2270482
08/18/2015	Estimation of Fill email	Procopio	2271595

APPENDICES

Appendix A	Chronology of Events: Settler's Point/Brightwater Ridge Projects
Appendix B	USEPA BEN Model Economic Benefit Analysis
Appendix C	Penalty Calculation Methodology Summary Sheet
Appendix D	July 1, 2015 San Diego Water Board Inspection Report
Appendix E	Notice of Violation R9-2015-0120