

In the matter of:

**KB Home & KB Home Coastal Inc.  
Settler's Point Project, Lakeside, CA**

**Administrative Civil Liability  
Complaint No. R9-2016-0092**

Order No. R9-2017-0008  
Settlement Agreement and  
Stipulation for Entry of  
Administrative Civil Liability Order

## Section I: Introduction

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order ("Order") is entered into by and between the Assistant Executive Officer of the California Regional Water Quality Control Board, San Diego Region ("San Diego Water Board") on behalf of the San Diego Water Board Prosecution Staff ("Prosecution Staff"), KB HOME Coastal Inc.<sup>1</sup>, joined by its parent company KB Home, (collectively, "Discharger") (collectively, the "Parties"). The Order is presented to the San Diego Water Board, or its delegee, for adoption as an order by settlement pursuant to Government Code section 11415.60.

## Section II: Recitals

1. On April 22, 2016 the Assistant Executive Officer of the San Diego Regional Water Board issued Administrative Civil Liability Complaint No. R9-2016-0092 ("Complaint") to the Discharger, proposing \$866,822 in administrative civil liability. The Complaint is attached hereto as Attachment A. In the Complaint, the Assistant Executive Officer alleged that the Discharger violated Clean Water Act section 301 and Water Code section 13376 when it engaged in grading activities that resulted in the unauthorized discharge of fill and other construction materials in and damage to approximately 0.018 acres of an ephemeral drainage alleged to be jurisdictional waters of the United States and that the activity had occurred over a period of 161 days between December 5, 2014 and May 14, 2015.

<sup>1</sup> KB Home was named in the Administrative Civil Liability Complaint; however, KB HOME Coastal Inc. is the actual property owner and project developer.

2. Section 301 of the Clean Water Act (33 U.S.C. §1311) and Water Code section 13376 prohibit the unpermitted discharge of dredged or fill material to Waters of the United States.

3. In response, the Discharger stated that it had purchased the project in reliance on the seller's claims that all required permits had been obtained and on the environmental documents prepared by, and approval of the project by, the County of San Diego. The Discharger also provided evidence that, prior to purchasing the project site, it had hired a qualified environmental professional to conduct a due diligence review of that project, which had determined that that no Waters of the United States or Waters of the State would be impacted by the project. The Discharger also argued that the ephemeral drainage was not a Water of the United States and that the civil liability sought was excessive for the size of the area affected.

4. After the Parties completed briefing of the matter, they engaged in settlement negotiations. Based on those negotiations, the Parties agreed to fully settle the violations specifically alleged in the Complaint without further administrative proceedings or civil litigation.

5. The Parties have agreed that the Discharger shall be assessed \$316,456 in civil liability based on the potential liability that may be imposed pursuant to Water Code section 13350 and not Water Code section 13385. The reduction in liability is based on the risks inherent in litigation, and should not be interpreted as a limitation on the authority of the San Diego Water Board to seek to impose liability for other violations of this type and similar violations pursuant to Water Code section 13385. The liability amount agreed to by the Parties also reflects the following changes in the application of the liability methodology in the Enforcement Policy described in the Complaint: (1) a reduction of the "culpability" factor from 1.2 to 1.1 based on the amount of due diligence conducted by the Discharger in retaining environmental consultants to assess the project, and in relying on representations by the seller of the property and the County of San Diego that all environmental reviews had been completed and that no Clean Water Act permits were needed. However, the Discharger's agency relationship with its environmental consultants remains a factor and limits the reduction of Discharger's culpability to a neutral "1"; (2) an increase in the "cleanup and cooperation" factor from 1.0 to 1.1 based on the permanent use of the road as required by the County of San Diego Fire Protection Plan, State laws governing fire protection, and for public road uses; and (3) revising the economic benefit amount to \$42,676 to reflect the passage of time since issuance of the Complaint (see Attachment B). These changes are reflected in the revised liability methodology calculation spreadsheet shown as Attachment C to this Order.

6. The Prosecution Staff asserts that the resolution of the alleged violations is fair, reasonable, and fulfills its enforcement objectives, that no further action is warranted concerning the specific violations alleged in the Complaint except as provided in this Order, and that this Order is in the best interest of the public.

### **Section III: Stipulations**

The Parties stipulate to the following:

7. **Administrative Civil Liability:** The Discharger hereby agrees to pay the administrative civil liability totaling **THREE HUNDRED SIXTEEN THOUSAND FOUR HUNDRED AND FIFTY-SIX DOLLARS \$316,456**. Within thirty (30) days of the effective date of this Order, Discharger agrees to remit, by check, \$174,024, payable to the *Waste Discharge Permit Fund*, and shall indicate on the check the number of this Order. The Discharger shall send the original signed check referencing this Order number to the Division of Administrative Services ATTN: Accounting, State Water Resources Control Board, 1001 I Street 18<sup>th</sup> Floor, Sacramento, California 95814 and shall send a copy to the Prosecution Staff at the address listed below. The remaining \$142,432 in administrative civil liability will be satisfied through the payment of that amount to the San Diego River Park Foundation ("Foundation") for its implementation of the Supplemental Environmental Project ("SEP") described in Attachment D. The cost of the SEP will be referred to as the "SEP Amount" of the total administrative civil liability.

8. **Compliance with Applicable Laws:** The Discharger understands that payment of administrative civil liability in accordance with the terms of this Order does not relieve Discharger of its need to comply with applicable laws and that new violations of the type alleged in the Complaint may subject it to further enforcement, including additional administrative civil liability. The Discharger has reassessed its due-diligence processes to ensure that (1) a qualified consultant inspects the entire project for the presence of waters of the U.S. and/or State when conducting due diligence assessments; (2) available engineering documents that identify drainage structures will be provided to the consultant to assist the consultant in the identification of such waters; and (3) Discharger will include review of work at or near stream channels and the applicable permits in its pre-construction conferences with grading and storm drain contractors.

**9. Party Contacts for Communications related to the Order:**

**For the Prosecution Staff:**

Christopher Means  
Environmental Scientist  
California Regional Water Quality Control Board, San Diego Region  
2375 Northside Drive, Suite 100  
San Diego, California 92108

**For the Discharger:**

Philip Darrow, Esq.  
Vice President & Regional Counsel  
KB Home  
10990 Wilshire Boulevard  
Los Angeles, CA 90024-3907

10. **Supplemental Environmental Project:** The Parties agree that the payment to the Foundation will allow it to implement the SEP as described in Attachment D, and below.

A. **SEP Description:** The San Diego Water Board has worked with the Foundation on various projects to improve water quality. As described more fully in Attachment D, the San Diego River Park Foundation proposes to remove a stream crossing and culvert and restore a portion of the creek to a more natural state. This structure impacts the natural flow of the creek resulting in streambank erosion and undercutting through hydromodification. A limited number of non-native plants (Himalayan Blackberry) are in and adjacent to the project area, and they will be removed as will any diseased vegetation. The area will be seeded by hand with appropriate vegetation; also some willow poles and other plantings will be installed to support the seeding. In addition, the project proposes to conduct a study to map the hydromodification-inducing structures along Temescal Creek within the parcels owned by the Foundation. This study will form a basis for future removal of other man-made structures adversely impacting the stream and other potential improvements.



**B. Water Quality Benefits of the SEP:** The SEP will provide long-term water quality benefits to Temescal Creek, which is a tributary of the San Diego River. These benefits will improve both local and basin-wide water-quality conditions by restoring a portion of the creek to a more natural, hydrologically sustainable condition.

**C. Public Benefits of the SEP:** The SEP's water-quality benefits will provide benefits to the public by eliminating a man-made structure in the creek that contributes to the degradation of Temescal Creek.

**D. SEP Completion Date:** The SEP is intended to be completed in accordance with the timeline contained in Attachment D of this order.

**E. Agreement for the Discharger to Fund the SEP:** The Discharger represents that: (1) the SEP is not otherwise required by law; and (2) it will fund the SEP in the amount described in this Order. Following payment, the Discharger shall have no obligations related to the implementation, completion or success of the SEP.

**F. SEP Oversight:** The Foundation will oversee the implementation of the SEP as needed and its reasonable oversight costs were included and are satisfied by Discharger's payment of \$142,432, as described in Attachment D of this Order.

**G. Memorandum of Understanding:** A Memorandum of Understanding between the Prosecution Staff and Foundation is hereby incorporated as Attachment E. The Memorandum of Understanding will become effective upon adoption of this Order by the San Diego Water Board.

**H. SEP Publicity:** If the Discharger publicizes the SEP or results of the SEP, it will state without admission of liability, in a prominent manner that the project is being undertaken as part of a stipulated settlement of a San Diego Water Board enforcement action.

**11. Attorney's Fees and Costs:** As between the Parties, Discharger shall bear its own attorneys' fees and costs arising from its own counsel in connection with the matters set forth herein. The San Diego Water Board shall not seek and shall bear its own fees and costs beyond the amounts paid pursuant to this Order.

12. **Matters Addressed by Order:** Upon the San Diego Water Board's adoption of this Order, this Order represents a final and binding resolution and settlement of all the violations alleged in the Complaint, and all other claims, violations, or causes of action that could have been asserted against the Discharger, including any enforcement order related to the removal of the fill material at issue in this case (as the roadway is a permanent public road), as of the Effective Date of this Order based on the specific facts alleged in the Complaint or this Order ("Covered Matters"). The provisions of this Paragraph are expressly conditioned on the payment of the administrative civil liability and the funding of the SEP as provided above.

13. **Public Notice:** The Discharger understands that the San Diego Water Board will conduct a 30-day public review and comment period prior to consideration and adoption of the Order. If significant new information is received that reasonably affects the propriety of presenting this Order to the San Diego Water Board for adoption, the Assistant Executive Officer, after an opportunity to meet and confer is provided to the Discharger to discuss the effect of such significant information, may unilaterally declare this Order void and decide not to present it to the San Diego Water Board. The Discharger agrees that it may not rescind or otherwise withdraw its approval of this proposed Order.

14. **Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for the San Diego Water Board's adoption of the settlement by the Parties and review by the public, as reflected in this Order, will be adequate.

15. **Denial of Liability:** Neither this Settlement Agreement (including all attachments), nor any payment made pursuant to the Order, shall constitute evidence of, or be construed as, a finding, adjudication, or acknowledgement of any fact, law, or liability, and shall not be construed as an admission by the Discharger that it violated any law, rule, or regulation. However, this Order and/or any payments pursuant to this Order may constitute evidence in actions seeking compliance with this Order. This Order also may be used as evidence of a history of violations in future enforcement actions by the Water Boards against the Discharger.

16. **No Waiver of Right to Enforce:** The failure of the Prosecution Staff or the San Diego Water Board to enforce any provision of this Order shall in no way be deemed a waiver of such provision, or in any way affect the validity of the Order. The failure of the Prosecution Staff or San Diego Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Order.

17. **Procedural Objections:** The Parties agree that the procedure contemplated for adopting the Order by the San Diego Water Board and review of this Order by the public is lawful and adequate. In the event procedural objections are raised prior to the Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable.

18. **Interpretation:** This Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party.

19. **Modification:** This Order shall not be modified by any of the Parties by oral representation made before or after its execution. The Parties agree to meet and confer concerning any proposed modifications, and all modifications must be in writing, signed by all Parties, and approved by the San Diego Water Board.

20. **If Order Does Not Take Effect:** In the event that this Order does not take effect because it is not approved by the San Diego Water Board or is vacated in whole or in part by the State Water Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the San Diego Water Board, on a future date after reasonable notice and opportunity for preparation, to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in such a hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to:

A. Objections related to prejudice or bias of any of the San Diego Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the San Diego Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the complaint in this matter; or,

B. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.

21. **Waiver of Hearing:** The Discharger has been informed of the rights provided by California Water Code section 13323(b), and subject to this Paragraph 21 hereby waives its right to a hearing before the San Diego Water Board prior to the adoption of

the Order. This waiver will not apply if the Order does not take effect.

22. **Waiver of Right to Petition:** The Discharger hereby waives its right to petition the San Diego Water Board's adoption of the Order as written for review by the State Water Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court. This waiver will not apply if the Order does not take effect.

23. **Covenant Not to Sue:** Upon adoption of the Order, the Discharger covenants not to sue or pursue any administrative civil claim(s) against any State Agency or the State of California, its officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any Covered Matter, and the San Diego Water Board covenants not to sue or pursue any administrative civil claim(s) against the Discharger for the Covered Matters.

24. **Parties Not Liable:** Neither the San Diego Water Board members nor the San Diego Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by the Discharger, its directors, officers, employees, agents, representatives or contractors, or the Foundation, in carrying out activities pursuant to this Order; nor shall the Discharger be liable for any injury or damage to persons or property resulting from acts or omissions of the San Diego Water Board or the Foundation in carrying out activities under this Order or under the Attachments to this Order.

25. **Authority to Bind:** Each person executing this Order in a representative capacity represents and warrants that he or she is authorized to execute this Order on behalf of and to bind the entity on whose behalf he or she executes the Order.

26. **No Third Party Beneficiaries:** Except as described in this Order, the Order is not intended to confer any rights or obligations on any third party or parties, and no third party or parties shall have any right of action under this Order for any cause whatsoever.

27. **Effective Date:** This Order shall be effective and binding on the Parties on the date that the San Diego Water Board enters the Order. The Memorandum of Understanding, which is entered into by the Foundation and the Prosecution Staff and is incorporated into this Order as Attachment E, will become effective if and when this Order is adopted by the San Diego Water Board.

28. **Counterpart Signatures:** This Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.

29. **Severability:** The provisions of this Order are severable, and should any provision be found invalid, the remainder shall remain in full force and effect.

**IT IS SO STIPULATED**

California Regional Water Quality Control Board Prosecution Staff  
San Diego Region

By: 

James G. Smith, Assistant Executive Officer

Date: 25 May 2017

**KB Home**

By: 

Brian Woram  
Executive Vice President, General Counsel

Date: 5/23/17

**KB HOME Coastal Inc.**

By: 

Steve Ruffner  
Division President

Date: \_\_\_\_\_

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California Regional Water Quality Control Board Prosecution Staff  
San Diego Region

By: 

James G. Smith, Assistant Executive Officer

Date: 25 May 2017

**KB Home**

By: \_\_\_\_\_

Brian Woram

Executive Vice President, General Counsel

Date: \_\_\_\_\_

**KB HOME Coastal Inc.**

By: 

Steve Ruffner

Division President

Date: 5-23-2017

Order No. R9-2017-0008

Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order

ATTACHMENT A: ACL Complaint No. R9-2016-0092, Technical Analysis, and Appendices

ATTACHMENT B: Revised Economic Benefit Analysis

ATTACHMENT C: Revised Penalty Methodology Table

ATTACHMENT D: San Diego River Park Foundation SEP Project

ATTACHMENT E: SEP MOU between San Diego Water Board and Foundation.

**Section IV: Findings of the San Diego Water Board**

1. The San Diego Water Board incorporates Paragraphs 1 through 29 of the Order as if set forth fully herein.
2. In accepting this settlement, the San Diego Water Board has considered, where applicable, each of the factors prescribed in California Water Code sections 13327. The San Diego Water Board's consideration of these factors is based upon information obtained by the San Diego Water Board's staff in investigating the allegations in the Complaint or otherwise provided to the San Diego Water Board. In addition to these factors, this settlement recovers the costs incurred by the staff of the San Diego Water Board identified in Complaint No. R9-2016-0092.
3. This is an action to enforce the laws and regulations administered by the San Diego Water Board. The San Diego Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.
4. The San Diego Water Board's Executive Officer is hereby authorized to refer this matter directly to the Attorney General for enforcement if the Discharger fails to perform any of its obligations under this Order.
5. Fulfillment of the Discharger's obligations under the Order constitutes full and final satisfaction of any and all liability for each claim in the Complaint in accordance with the terms of the Order.
6. The Agreement between the Assistant Executive Officer and the Discharger is approved pursuant to Government Code section 11415.60 and is incorporated by reference into this Order.
7. The Board may modify the findings prior to the adoption of the Order, provided that the modifications do not change the terms of the Settlement Agreement other than as provided pursuant to Paragraph 19.



Order No. R9-2017-0008

Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order

I, David W. Gibson, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by delegated authority granted to me from the California Regional Water Quality Control Board, San Diego Region.

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DAVID W. GIBSON  
Executive Officer

Date: \_\_\_\_\_

## ATTACHMENT A

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

In the matter of:

KB Home  
Settler's Point Project, Lakeside Ca  
Unauthorized Discharge of Fill to Waters of  
the U.S./State

PIN: SM-453268

COMPLAINT NO. R9-2016-0092  
FOR  
ADMINISTRATIVE CIVIL LIABILITY

Noncompliance with  
California Water Code § 13376,

and

Clean Water Act § 301

April 22, 2016

#### KB HOME IS HEREBY GIVEN NOTICE THAT:

1. KB Home (Discharger) is alleged to have violated provisions of law for which the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) may impose civil liability pursuant to California Water Code (Water Code) section 13385.
2. This Administrative Civil Liability Complaint is issued under authority of Water Code section 13323.

#### Background

3. In May 2014, the Discharger began purchase negotiations for the Settler's Point property, located in Lakeside California in the eastern portion of the County of San Diego (Assessor Parcel Nos. 397-210-17, 397-212-01, 397-290-04, 397-291-01 and 397-291-03). The Discharger closed escrow on the property on September 2, 2014.
4. Directly adjacent and to the northwest of the Settler's Point property is the Brightwater Ridge property, currently under the ownership of Pulte Home Corporation. This undeveloped 76.23 acre property contains five unnamed ephemeral streams that, after passing through an existing County-owned storm drain system, drain to Los Coches Creek, a water of the U.S. in the San Diego Hydrologic Unit, Lower San Diego Hydrologic Area, Coches Hydrologic Subarea (907.14).
5. In August 2008, at the request of the County of San Diego, an offsite addition was made to the Settler's Point project. The County requested a "temporary street knuckle" to be constructed at the northwest corner of the Settler's Point project to provide secondary access to the Settler's Point project and connect the proposed onsite road to Wellington Hills Drive.

6. On December 5, 2014 the Discharger began grading activities that included the offsite street knuckle portion of the project. The grading activity resulted in the unauthorized discharge of fill and other construction material into waters of the U.S./State. The discharge of fill continued until final curb, gutter and paving for the street knuckle were completed on May 14, 2015. This constitutes an active discharge period of 161 days.
7. On March 10, 2015 Pulte Home Corporation submitted a Clean Water Act (CWA) Section 401 Water Quality Certification application package for the Brightwater Ranch project to the San Diego Water Board, to build 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 indicating the presence of waters of U.S./State in the street knuckle footprint.
8. The preliminary jurisdictional delineation was conducted by Helix Environmental Planning Inc. on November 7, 2014 and concluded that the site had 0.05 acre (685 linear feet) of waters of the U.S. and State (ephemeral dry wash) under the jurisdiction of the U.S. 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 76.23 acre site contains five unnamed ephemeral drainages that are tributary to Los Coches Creek (Hydrologic sub area 907.14).
9. In April 2015, during an initial San Diego Water Board review of the Pulte Home Corporation certification application, Google Earth aerial imagery revealed that grading had been conducted offsite of the Settler's Point project boundary, and had impacted jurisdictional waters on the Brightwater Ranch Project.
10. On July 1, 2015 staff from the USACE, San Diego Water Board, KB Home, Helix Environmental Planning, and County of San Diego met onsite to inspect the impacts and to verify the jurisdictional delineation. Results of the inspection confirmed that KB Home had not obtained any authorizations or permits from State (401 certification, Waste Discharge Requirements and Streambed Alteration Agreement) and Federal (404 permit) regulatory agencies prior to discharging fill into the ephemeral streams on the Brightwater property.
11. On July 7, 2015 KB Home's environmental consultant reported to the San Diego Water Board that the grading operations associated with construction of the offsite street knuckle impacted approximately 0.018 acre (278 linear feet) of jurisdictional waters of the U.S. and State.
12. On August 18, 2015 the discharger reported that an estimated 350 cubic yards of fill were used for construction of the off-site street knuckle. That equates to the discharge of 70,691 gallons of fill to waters of the U.S. and State.

13. The Water Quality Control Plan for the San Diego Basin (Basin Plan) designates the following beneficial uses for surface waters in Los Coches Creek and its tributaries:  
  
Industrial Service Supply (IND)  
Contact Water Recreation (REC-1)  
Non-contact Water Recreation (REC-2)  
Warm Freshwater Habitat (WARM)  
Wildlife Habitat (WILD)
14. On August 13, 2015 the San Diego Water Board issued Notice of Violation No. R9-2015-0154 to the Discharger for the unauthorized discharge of fill to waters of the U.S./State.

### **ALLEGED VIOLATIONS**

15. Section 301 of the Clean Water Act (33 U.S.C. § 1311) and Water Code Section 13376 prohibit the discharge of pollutants to surface water except in compliance with a permit for dredged and fill material.
16. The San Diego Water Board Prosecution Team alleges that the Discharger violated Section 301 of the Clean Water Act and Water Code Section 13376 for a period of 161 days for the active discharge of fill material into Waters of the U.S. and State without a permit or Clean Water Act Section 401 water quality certification. The unauthorized activity resulted in the discharge of approximately 70,691 gallons (or 350 cubic yards) of sediment and construction materials to Waters of the U.S./State.
17. The details of these violations are set forth in full in the accompanying Technical Analysis, which is incorporated herein by this reference as if set forth in full.

### **MAXIMUM LIABILITY**

18. Pursuant to Water Code section 13385, subdivision (a), a person who violates either Water Code section 13376, a waste discharge requirement, a basin plan prohibition, or a requirement of section 301 of the federal Clean Water Act is subject to administrative civil liability pursuant to Water Code section 13385, subdivision (c)

*...in an amount not to exceed the sum of both of the following:  
(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.*

*(2) 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.*

19. Pursuant to Water Code Section 13385 subdivision (c), and as detailed in the attached Technical Analysis, the maximum administrative civil liability for the alleged violation of Section 301 of the Clean Water Act and Water Code Section 13376 is **\$2,306,910**.

#### **MINIMUM LIABILITY**

20. Water Code section 13385, subdivision (e) requires that when pursuing civil liability under section 13385, "[a]t 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 Enforcement Policy (Enforcement Policy) further instructs the Regional Water Boards to assess liability against a violator at least ten percent higher than the economic benefit realized from the violation, such that liabilities are not construed as the cost of doing business, and provide a meaningful deterrent to potential violators.
21. As detailed in the accompanying Technical Analysis, and based on a calculated economic benefit of **\$38,601**, the minimum liability amount the San Diego Water Board may assess the Discharger is **\$42,461**.

#### **PROPOSED LIABILITY ASSESSMENT**

22. Pursuant to Water Code section 13385, subdivision (e), in determining the amount of any civil liability imposed under Water Code section 13385(c), the San Diego Water Board shall consider the nature, circumstances, extent, and gravity of the violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge; and with respect to the Discharger, the ability to pay, the effect on the Discharger's ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters as justice may require.
23. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code section 13385, subdivision (e). The required factors have been considered for the violations alleged herein using the methodology in the Enforcement Policy, as explained in detail in the Technical Analysis.



April 22, 2016

24. Based on consideration of the above facts, the applicable law, and after applying the penalty calculation methodology in section VI of the Enforcement Policy, the Prosecution Team recommends that the San Diego Water Board impose civil liability against the Discharger in the amount of **\$875,166** for the violations alleged herein and set forth in full in the accompanying Technical Analysis.
25. The assessed amount includes **\$16,996** for **299.75** hours of San Diego Water Board staff time to investigate and prepare the enforcement documents. Should this matter proceed to hearing, the San Diego Water Board may choose to increase the recommended liability to recover additional necessary staff costs accrued after this Complaint is issued and through the hearing.



JAMES G. SMITH  
Assistant Executive Officer

Signed pursuant to the authority delegated by the Executive Officer to the Assistant Executive Officer.

Attachment: Technical Analysis and Appendices

Party ID: 358094  
CIWQS Place ID: CW-826199  
SMARTS ID: SM-453268  
Violation IDs: 994273  
WDID No: 9 37C0552  
Enforcement ID: 405422

**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**

**Christopher Means  
Environmental Scientist  
Compliance Assurance Unit**

**April 22, 2016**

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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.



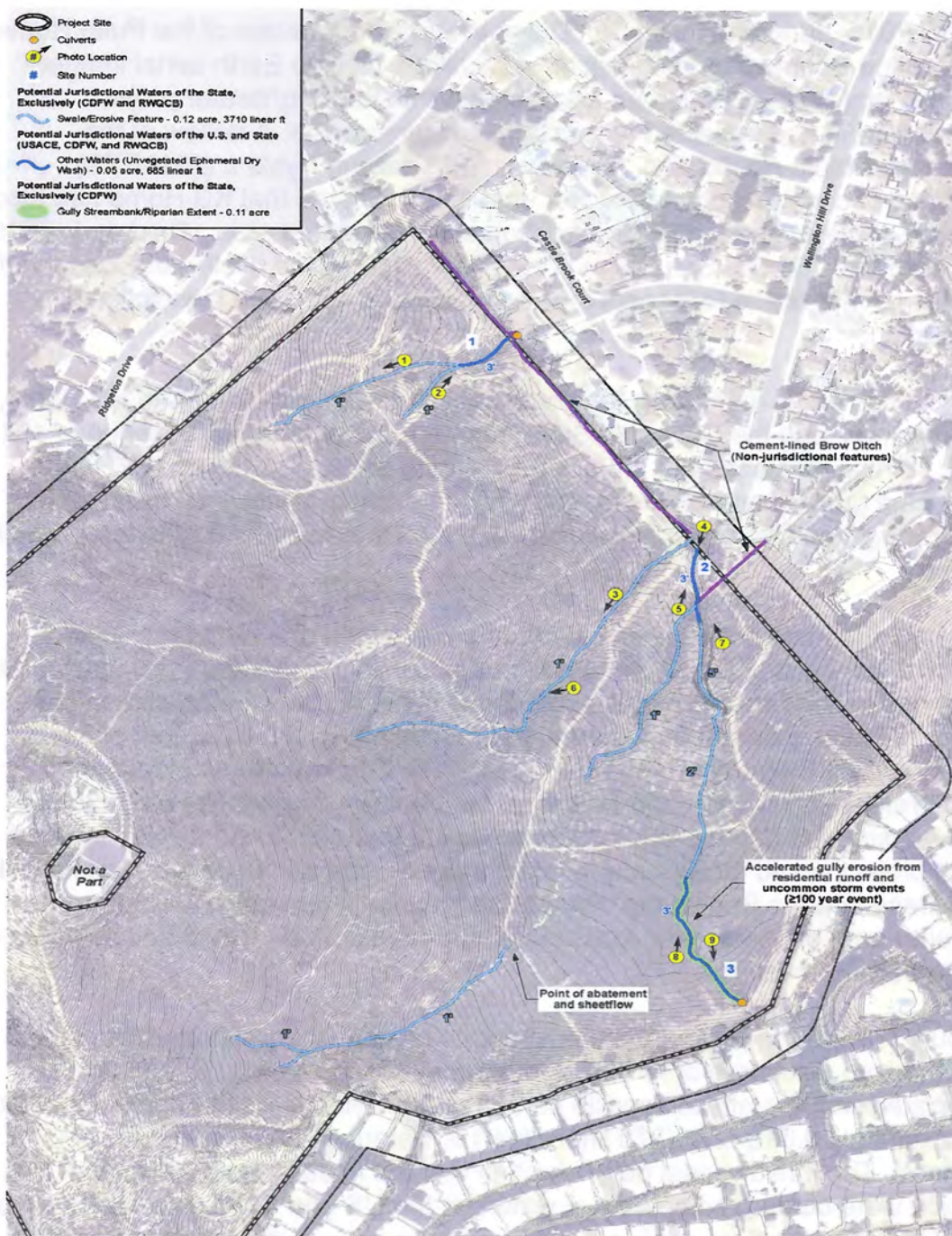


**Figure 1. Brightwater Ranch and Settlers Point projects, Lakeside CA (Modified version of March 10, 2015 Pulte Home 401 water quality certification application Figure 2, project vicinity map)**

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 Cochinos 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.**

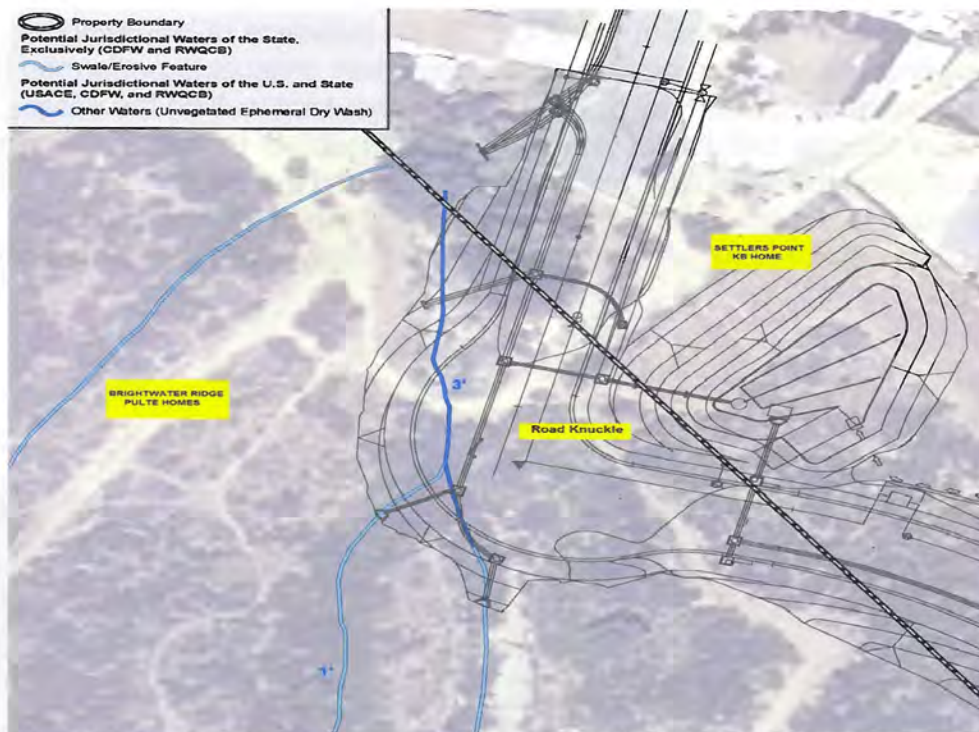


In April 2015, during an initial San Diego Water Board review of the Pulte Home Corporation Brightwater Certification application, Google Earth aerial imagery revealed that grading had been conducted within the Brightwater project boundary, and had impacted jurisdictional waters on-site. A review of 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 Boards<sup>1</sup> 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.

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<sup>1</sup> “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.<sup>2</sup>

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.

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<sup>2</sup> 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.<sup>3</sup> The proposed

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<sup>3</sup> 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.

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

### **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

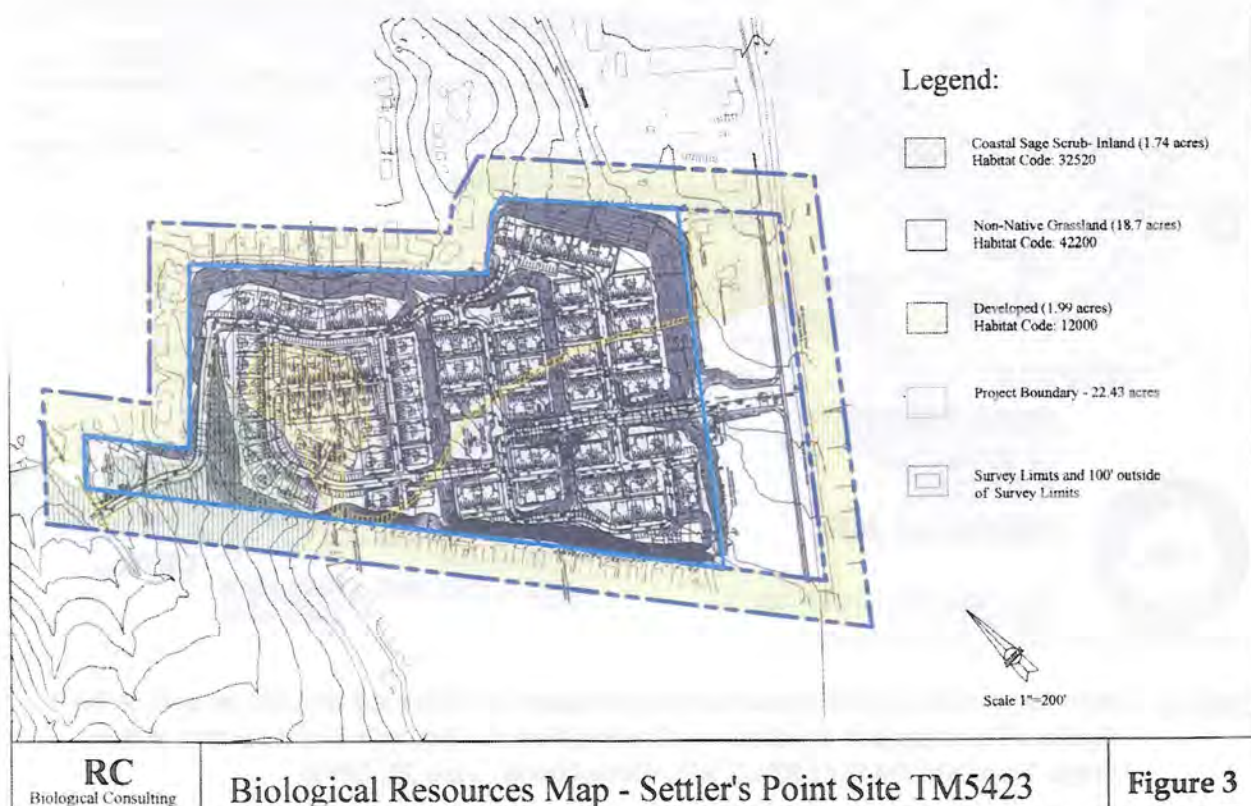
Appendix A	Chronology of Events: Settler's Point/Brightwater Ridge Projects
Appendix B	USEPA BEN Model Economic Benefit Analysis
Appendix C	Penalty Calculation Methodology Summary Sheet
Appendix D	July 1, 2015 San Diego Water Board Inspection Report
Appendix E	Notice of Violation R9-2015-0120

## Appendix A

### Chronology of Events: Settler's Point/Brightwater Ridge Projects

**February 2006:** The property owner of the Settler's Point Property (Centex Homes) is provided a revised *Biological Technical Report for Settler's Point Subdivision and Rezone* (prepared by RC Biological Consulting) for the proposed subdivision of a 22.4 acre parcel into 3 residential lots (one single-family residential lot, one HOA lot, and one multi-family condominium development). The stated purpose of the report was to conduct general biological surveys and sensitive plant surveys to document the property's existing condition, to provide an impact analysis based on the current project design, and to identify mitigation measures for the project to reduce those impacts below a level of significance.

The proposed property boundaries at the time contained no jurisdictional waters onsite, so the report did not address the need to perform jurisdictional delineations, or suggest that any permits were necessary for impacts to jurisdictional waters. The report did include rudimentary vegetative mapping 100 feet outside of the property boundary (see Figure 1) which noted the presence of coastal sage scrub habitat in a depressional feature that was the area of what would become the off-site street knuckle portion of the project.



**Figure 1.** 2006 Biological Resources map prepared by Robin Church. Biological Technical Report for Settler's Point Subdivision and Rezone (RC Biological Consulting).

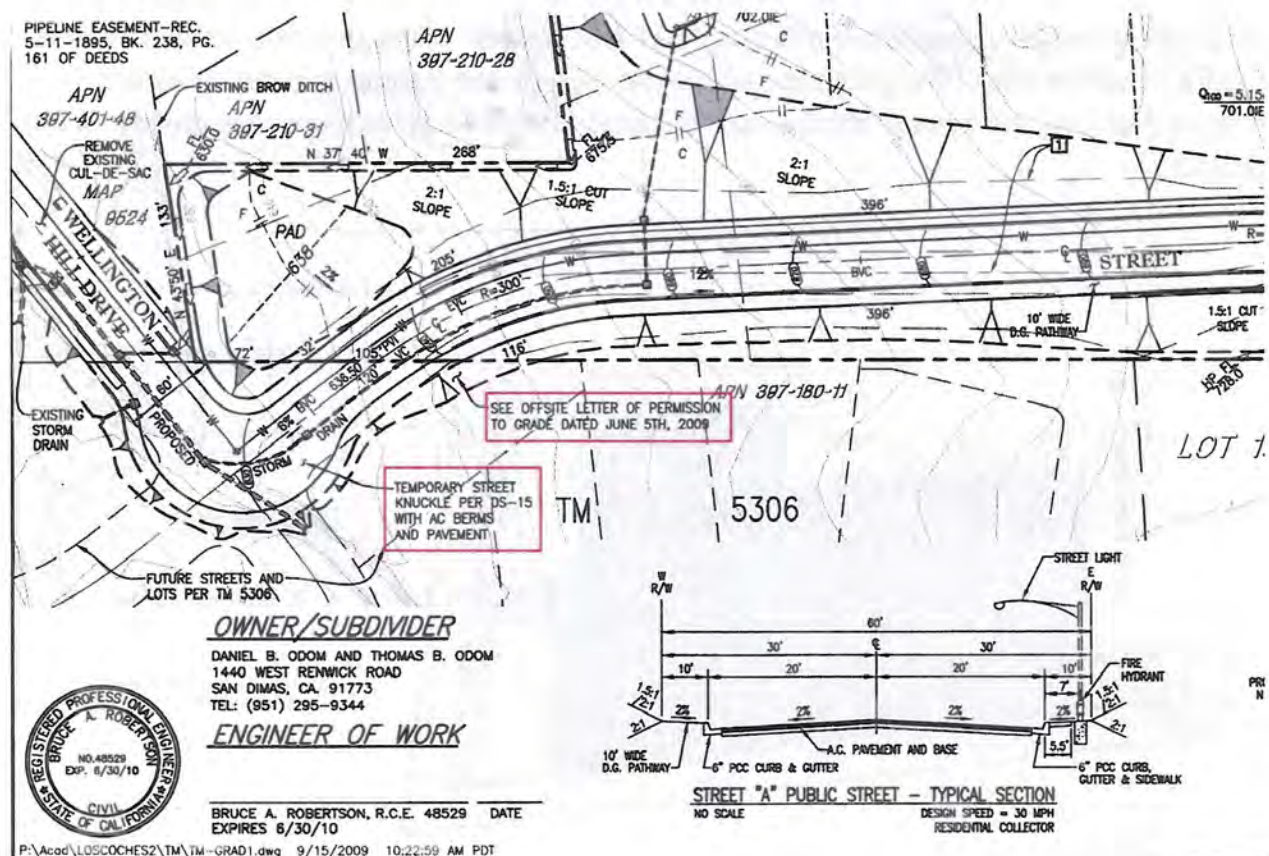


## Appendix A

### Chronology of Events: Settler's Point/Brightwater Ridge Projects

**August 2008:** At the request of the County of San Diego, an offsite addition is made to the Settler's Point project. The County requested a "temporary street knuckle" to be constructed at the northwest corner of the Settler's Point project (see Figure 2). The street knuckle was requested to provide secondary access to the Settler's Point project and connect the proposed onsite road to Wellington Hills Drive. The fire protection plan for the project required the project to have two way access and no dead end roads.

The offsite street knuckle was located on the adjacent Brightwater Ranch property. The street knuckle was deemed "temporary" because both the Settler's Point and Brightwater Ranch projects were working their way through the approval process independently, and it was unknown which project would receive approval to break ground and build the road first.



**Figure 2.** 2010 Engineering plans showing the anticipated off-site road knuckle as part of the Settler's Point project (Preliminary Grading Plan for Settler's Point County of San Diego Tract No. TM 5423 RPL3, REC Consultants, June 20, 2010).



## Appendix A

### Chronology of Events: Settler's Point/Brightwater Ridge Projects

---

**January 5, 2009:** REC Consulting provides the County of San Diego with an updated project description letter for the Settler's Point project on behalf of the Odom Trust (now owner of the Settler's Point property). The project updates consist of slight boundary adjustments (to a project size of 21.89 acres) and subdivision into four residential lots with a total of 266 residential units. Construction of the off-site road knuckle is acknowledged in the report, and slight project adjustments were made to address the anticipated coastal sage scrub impacts. REC Consulting relied exclusively on the 2006 RC Biological Consulting Biological Technical Report to document the potential impacts to resources, and unfortunately determined that:

"The original findings, impacts and mitigation recommendations remain largely the same, and do not necessitate the drafting of a new report. At this time no additional field work will be conducted."

**June 2009:** On behalf of the Odom Trust, REC Consulting prepares a Drainage Study for the Settlers Point project. The purpose of this study was to obtain the pre-project and post-project peak runoff rates resulting from the 100-year 6-hour storm. This is one of the first reports that incorporate the offsite street knuckle into the project. While the January 2009 REC Consulting biological update found the addition of the knuckle to be insignificant, the REC Consulting engineers that were looking at the flow of water onto and off of the site recognized the existence of a natural creek directly off-site. Section 3.1 of the drainage study noted:

"Most of the runoff to the north is conveyed by existing concrete ditches. Other areas runoff sheet flows over existing slopes that eventually drain into the existing streets and **ultimately into a natural creek at the northwest corner.**"

Had the engineering wing and biological wing of REC Consulting communicated better on their respective evaluations of the project site, it is possible that the existence of the natural creek would have precipitated further field work to ascertain the existence of jurisdictional features.

**June 5, 2009:** Centex Homes (now owner of the adjacent Brightwater Ranch property) provides the Odom Trust a letter of permission to conduct the off-site grading of the street knuckle.



## Appendix A

### Chronology of Events: Settler's Point/Brightwater Ridge Projects

---

**February 12, 2012:** The County of San Diego, acting as lead agency under CEQA issues the CEQA Initial Study and Draft Mitigated Negative Declaration for the Settler's Point project. In reviewing the Biological Resources impacts, the County relied on a desktop analysis of the County's Geographical Information System (GIS), the County's Comprehensive Matrix of Sensitive Species, site photos, and the 2006 Biological Technical Report. Had County staff taken more care in this desktop review, aerial photographs could have alerted them to the presence of jurisdictional streams directly off-site in the footprint of the proposed road knuckle (see Figure 3).



**Figure 3.** September 2010 Google Earth Aerial photograph

Building upon the errors of the past, and utilizing prior inadequate evaluations of the proposed project impacts, the County determined in the Initial Study that the proposed project would have less than significant impact in substantially altering existing drainage patterns through the alteration of the course of a stream.



## Appendix A

### Chronology of Events: Settler's Point/Brightwater Ridge Projects

---

**March 19, 2013:** REC Consulting provides another updated project description to the County of San Diego due to the acquisition of additional parcels. Again, they determined that no biological field work was deemed necessary for the update, relying on the 2006 Biological Technical Report and the 2009 updated project description.

**May 2014:** KB Home began purchase discussions for the Settler's Point property. The project was marketed as having all environmental approvals and required permits to begin construction.

**May 9, 2014:** Helix Environmental provides KB Home with a Due Diligence Assessment for the Settler's Point project. The assessment was based on a site reconnaissance on May 5, 2014 by a Helix biologist, a review of project files provided by KB Home, and regional planning documents<sup>1</sup>. The focus of this assessment was "to confirm that no significant changes or biological issues have occurred since project approvals and there are no constraints to development."

The May 5, 2014 site visit by a Helix biologist was the first time since 2006 that a site visit was conducted on the Settler's Point property to investigate the environmental impacts of the proposed project. It was KB Home's best opportunity to investigate the offsite impacts, but the Helix biologist only walked the original property boundary and did not review the offsite portion of the project.

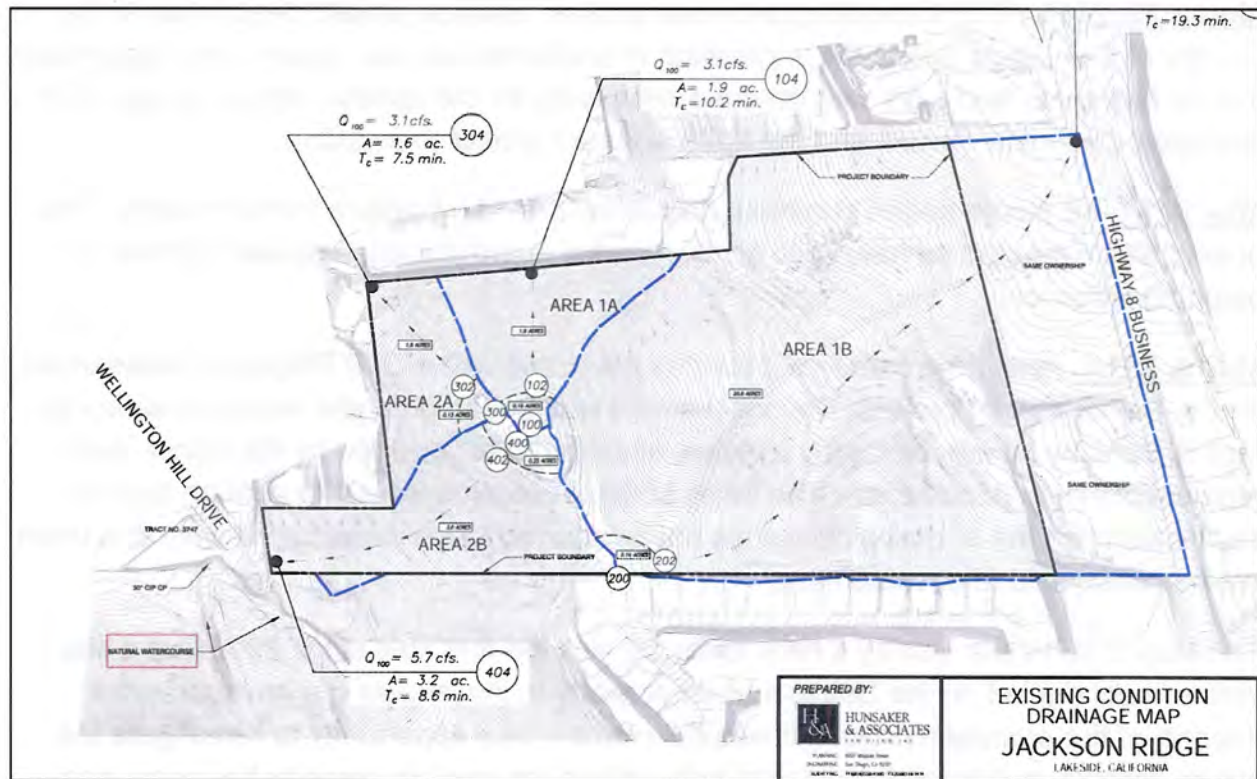
**August 12, 2014:** KB Home submits a Notice of Intent (NOI) to the State Water Resource Control Board to obtain coverage under Statewide Construction Stormwater Permit. Included in the submittal was an August 8, 2014 Stormwater Pollution Prevention Plan (prepared by Waterlogged Consulting) which noted in the *Existing Condition Drainage Map Sheet 1 of 2* the presence of a "natural watercourse" in the off-site area that would become the road knuckle (see Figure 4). Again, the engineers were able to identify that the offsite road knuckle footprint contained natural streams.

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<sup>1</sup> Resources reviewed included: 1) Biological Resources Report for Settler's Point. Robin Church. February 2006. 2) Biological Resources Report and Updated Project Description. REC Consultants. January 5, 2009. 3) Biological Resources Report and Updated Project Description. REC Consultants. March 19, 2013. 4) Initial Study for the Settler's Point Project. County of San Diego. February 10, 2012. 5) Final Negative Declaration for the Settler's Point Project. County of San Diego. February 10, 2012.

## Appendix A

### Chronology of Events: Settler's Point/Brightwater Ridge Projects



**Figure 4.** Drainage map from KB Home SWPPP showing location of natural watercourse (Storm Water Pollution Prevention Plan for Settler's Point Risk Level 2, Waterlogged, Certified Storm Water Professionals, August 8, 2014)

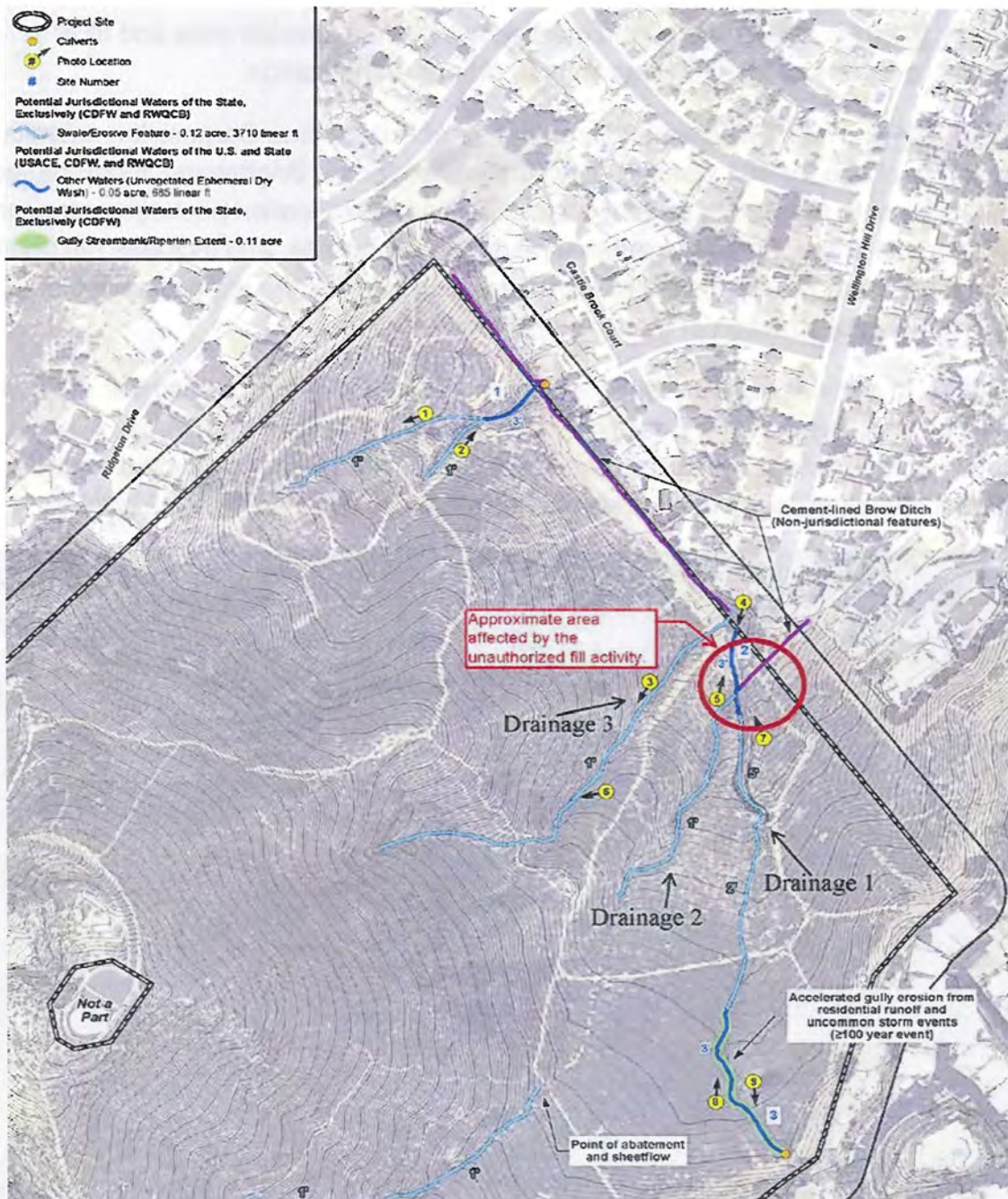
**September 2, 2014:** KB Home closes escrow on Settler's Point property.

**November 7, 2014:** Helix Environmental staff, on behalf of Pulte Home Corporation conducts a preliminary jurisdictional delineation of the Brightwater Ranch property. The preliminary work concludes that jurisdictional waters are present on site, including in the area of the proposed road knuckle. The Helix employee working on the Pulte Home Corporation delineation was a different person from the Helix staff hired by KB Home to perform the Due Diligence Assessment for the adjacent Settler's Point property. Unfortunately, there was no inter-office communication between them regarding the findings of the preliminary delineation (see Figure 5).



# Appendix A

## Chronology of Events: Settler's Point/Brightwater Ridge Projects



**Figure 5.** Preliminary jurisdictional delineation performed on November 7, 2014 by Helix Environmental Planning for Pulte Homes Brightwater Ridge Project.



## Appendix A

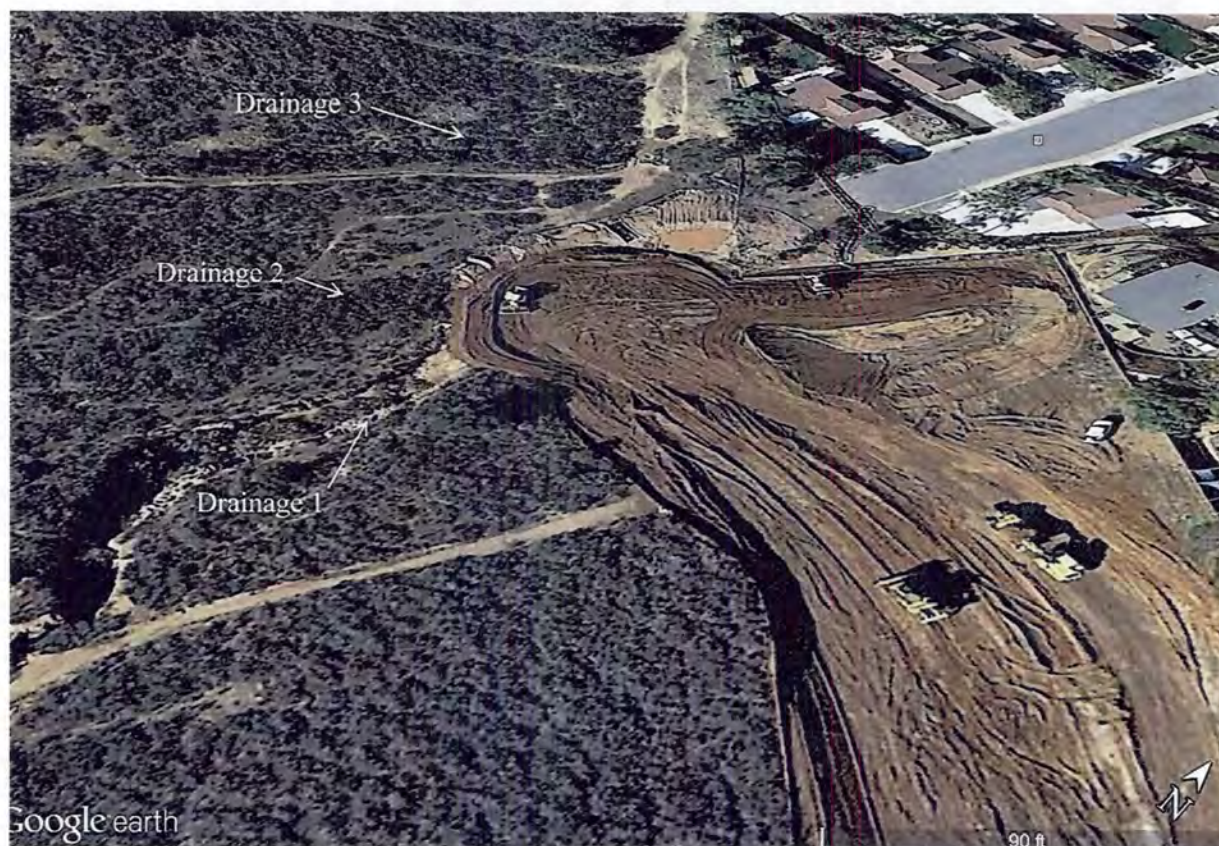
### Chronology of Events: Settler's Point/Brightwater Ridge Projects

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**December 5, 2014:** KB Home began grading activities in knuckle area and fill is discharged to waters of the US/State without proper authorization.

**March 10, 2015:** Helix Environmental, on behalf of Pulte Home Corporation submits an application package for 401 water quality certification for the Brightwater Ridge project, directly adjacent to the Settler's Point project. The 401 certification package proposes no avoidance of a majority of the ephemeral drainages on-site, and includes the impacts to the knuckle area. No mention is made in the application of the impacts associated with KB Home's construction of the temporary road knuckle.

**April 2015:** In early April 2015, Google Earth aerial imagery from December of 2014, reviewed by San Diego Water Board 401 staff during the initial Pulte Homes 401 application completeness review, showed that grading had been conducted on the Brightwater Ranch property in an area with jurisdictional resources (see Figure 6).



**Figure 6.** December 2014 Google Earth photo of initiation of grading activity for off-site road knuckle.

## **Appendix A**

### **Chronology of Events: Settler's Point/Brightwater Ridge Projects**

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**May 14, 2015:** Curb, gutter and paving work are completed, ending active discharge of fill to waters of the US/State on Brightwater Ranch Property.

**July 1, 2015:** San Diego Water Board staff conduct initial inspection of Brightwater Ridge site, accompanied by staff from the Army Corps of Engineers, County of San Diego, KB Home, Pulte Homes and Helix Environmental Planning.

**August 13, 2015:** San Diego Water Board issues NOV R9-2015-0120 to KB Home and Pulte Home Corporation.





# Appendix B

## Economic Benefit Analysis

KB Brightwater

Compliance Action	Capital Investment			One-Time Non-Depreciable Expenditure			Annual Cost			Non-Compliance Date	Compliance Date	Penalty Payment Date	Discount Rate	Benefit of Non-Compliance		
	Amount	Basis	Date	Delayed?	Amount	Basis	Date	Delayed?	Amount						Basis	Date
Failure to retain permitting consultant		ECI	1/1/2015	Y	\$ 23,500.00	ECI	10/19/2015	N		ECI	1/1/2015	12/4/2012	6/22/2016	6/22/2016	7.40%	\$ 16,889
Purchase of creation credits		ECI	1/1/2015	Y	\$ 28,750.00	GDP	9/30/2015	N		ECI	1/1/2015	3/4/2015	6/22/2016	6/22/2016	7.20%	\$ 18,481
401 Certification Application fee		ECI	1/1/2015	Y	\$ 4,649.00	GDP	2/10/2016	N		ECI	1/1/2015	12/4/2013	6/22/2016	6/22/2016	7.50%	\$ 3,221
<b>Income Tax Schedule:</b>																
<b>USEPA BEN Model Version:</b>																
<b>Assumptions:</b>																
Corporation      Analyst:      Bryan Elder																
Version S.5.0 (July 2015)      Date/Time of Analysis:      3/14/2016 8:41																
<b>Total Benefit:      \$      38,601</b>																
1 Consulting estimates for permitting obtained by RWMCB, SD, ranged from \$15,000 to \$32,000. An average expense of \$23,500 was used as the avoided cost. It is assumed that a consultant would have been retained at least two years prior to impacts.																
2 Based on last bank purchase (priorated to our average estimate) for purchase of 0.05 creation credits at SLR Bank at approximately 2:1 ratio. Purchase must be complete within 90 days of impacts.																
3 401 certification application fee is required at least one year prior to impacts.																
4 Streambed impacts were estimated at commencing on 12/4/2014																
5 Costs are assumed to be avoided.																
6 Penalty payment date estimated as tentative hearing date and is subject to change																

Income Tax Schedule:

USEPA BEN Model Version:

Assumptions:

- 1 Consulting estimates for permitting obtained by RWCCB, SD, ranged from \$15,000 to \$32,000. An average expense of \$23,500 was used as the avoided cost. It is assumed that a consultant would have been retained at least two years prior to impacts.
- 2 Based on last bank purchase (prorated to our acreage estimate) for purchase of 0.05 creation credits at SLR Bank at approximately 3:1 ratio. Purchase must be complete within 90 days of impacts.
- 3 401 certification application fee is required at least one year prior to impacts.
- 4 Streambed impacts were estimated at commencing on 12/4/2014.
- 5 Costs are assumed to be avoided.
- 6 Penalty payment date estimated as tentative hearing date and is subject to change.





**Appendix C**  
**Discharger: KB Home**

**Penalty Methodology Table**  
**Order No. R9-2016-0092**

Step 1: Potential Harm Factor				
Violations	Potential Harm to Beneficial Uses [ 0 - 5 ]	Physical, Chemical, Biological or Thermal Characteristics [ 0 - 4 ]	Susceptibility to Cleanup or Abatement [ 0 or 1 ]	Total Potential for Harm [ 0 - 10 ]
Discharge of Fill	5	2	0	7

Step 2: Assessments for Discharge Violations					
Days of Violation	Per Gallon Factor				Statutory/ Adjusted Max per Gallon [ \$ ]
	Potential for Harm [ 0 - 10 ]	Deviation from Requirement [ minor, moderate, major ]	Gallons	Gallon and Per Day Factor	
161	7	major	69,691	0.31	\$10.00

Step 3: Per Day Assessments for Non-Discharge Violations				
Violations	Per Day Factor			Statutory/ Adjusted Max [ \$ ]
	Potential for Harm [ 0 - 10 ]	Deviation from Requirement [ minor, moderate, major ]	Total Per Day Factor	
na	na	na	na	na

Step 4: Adjustments					
Violations	Culpability [ 0.5 - 1.5 ]	Cleanup and Cooperation [ 0.75 - 1.5 ]	History of Violations	Multiple Violations (Same Incident)	Multiple Day Violations
	1.2	1	1	no	yes

Step 5: Total Base Liability Amount
Sum of Steps 1- 4
\$858,170

Step 8: Economic Benefit
\$38,601

Step 6: Ability to Pay/Continue in Business
[ Yes, No, Partly, Unknown. ]
Yes

Step 9	
Minimum Liability Amount	Maximum Liability Amount
\$41,383	\$2,306,910

Step 7: Other Factors as Justice May Require	
Costs of Investigation and Enforcement Adjustment	Other
\$16,996	na

Step 10: Final Liability Amount
\$875,166



CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD - SAN DIEGO REGION  
WATERSHED PROTECTION PROGRAM

SECTION 401 WATER QUALITY CERTIFICATION  
INSPECTION REPORT

FACILITY: A. Brightwater Ranch, Lakeside CA INSPECTION DATE/TIME: 07/01/2015; 9:00 am  
B. Settler's Point/Jackson Ridge, Lakeside CA

SITE WDID No.: A. 9 000002822 CIWQS Place ID No.: A. 813830  
B. 9 37C370552

REPRESENTATIVE(S) PRESENT DURING INSPECTION:

Lisa Honma, Nicole Gergans, and Leah Anderson (SDRWQCB), Melanie Tymes (USACE), Beth Ehsan  
(County of San Diego), Karl Osmundson and Joshua Zinn (Helix Environmental Planning representing  
Pulte Home Corporation, Brightwater Ranch), Kurt Bausback (KB Homes, Settler's Point/Jackson Ridge),  
and Barry Jones (Helix Environmental Planning representing KB Homes, Settler's Point/Jackson Ridge).

A. Sohail Bokhari, Director  
NAME OF OWNER, AGENCY OR PARTY RESPONSIBLE FOR DISCHARGE

27101 Puerta Real, Ste. 300 Mission Viejo 92691  
OWNER MAILING ADDRESS

(949) 330-8537  
OWNER CONTACT NAME AND PHONE #

Pulte Home Corporation  
FACILITY OR DEVELOPER NAME (if different from owner)

Brightwater Ranch, Terminus of Wellington Hill Dr.  
FACILITY ADDRESS

B. Ron Mertz, VP of Land and Planning  
NAME OF OWNER, AGENCY OR PARTY RESPONSIBLE FOR DISCHARGE

36310 Inland Valley Drive, Wildomar, CA 92131  
OWNER MAILING ADDRESS

Kurt Bausback (KB Home Coastal, Inc.) (858) 877-4262  
OWNER CONTACT NAME AND PHONE #

KB Home  
FACILITY OR DEVELOPER NAME (if different from owner)

Wellington Hill Dr. & Jackson Hill Parkway  
FACILITY ADDRESS

C. County of San Diego, Dept. of Planning and Land Use  
NAME OF OWNER, AGENCY OR PARTY RESPONSIBLE FOR DISCHARGE

5510 Overland Ave. Ste. 310 San Diego 92123  
OWNER MAILING ADDRESS

Beth Ehsan, (858) 694-3103  
OWNER CONTACT NAME AND PHONE #

N/A  
FACILITY OR DEVELOPER NAME (if different from owner)

N/A  
FACILITY ADDRESS



Facility: Brightwater Ranch, Lakeside CA  
Inspection Date: 07/01/2015

**APPLICABLE WATER QUALITY LICENSING REQUIREMENTS:**

- |   |  |
|---|--|
| <input type="checkbox"/> MS4 URBAN RUNOFF REQUIREMENTS            | <input type="checkbox"/> GENERAL OR INDIVIDUAL WASTE DISCHARGE REQUIREMENTS OR NPDES |
| <input type="checkbox"/> CONSTRUCTION GENERAL PERMIT REQUIREMENTS | <input type="checkbox"/> GENERAL OR INDIVIDUAL WAIVER OF WASTE DISCHARGE             |
| <input type="checkbox"/> CALTRANS GENERAL PERMIT                  | <input checked="" type="checkbox"/> SECTION 401 WATER QUALITY CERTIFICATION          |
| <input type="checkbox"/> INDUSTRIAL GENERAL PERMIT                | <input type="checkbox"/> CWC SECTION 13264   |

**INSPECTION TYPE (Check One):**

- ☐ "A" TYPE COMPLIANCE--COMPREHENSIVE INSPECTION IN WHICH SAMPLES ARE TAKEN. (EPA TYPE S)
- ☒ "B" TYPE COMPLIANCE--A ROUTINE NONSAMPLING INSPECTION. (EPA TYPE C)
- ☐ NONCOMPLIANCE FOLLOW-UP--INSPECTION MADE TO VERIFY CORRECTION OF A PREVIOUSLY IDENTIFIED VIOLATION.
- ☐ ENFORCEMENT FOLLOW-UP--INSPECTION MADE TO VERIFY THAT CONDITIONS OF AN ENFORCEMENT ACTION ARE BEING MET.
- ☐ COMPLAINT--INSPECTION MADE IN RESPONSE TO A COMPLAINT.
- ☐ PRE-REQUIREMENT--INSPECTION MADE TO GATHER INFO. RELATIVE TO PREPARING, MODIFYING, OR RESCINDING REQUIREMENTS.
- ☐ COMPLIANCE ASSISTANCE INSPECTION - OUTREACH INSPECTION DUE TO DISCHARGER'S REQUEST FOR COMPLIANCE ASSISTANCE.

**INSPECTION FINDINGS:**

Y WERE VIOLATIONS NOTED DURING THIS INSPECTION? (YES/NO/PENDING SAMPLE RESULTS)

**I. COMPLIANCE HISTORY / PURPOSE OF INSPECTION**

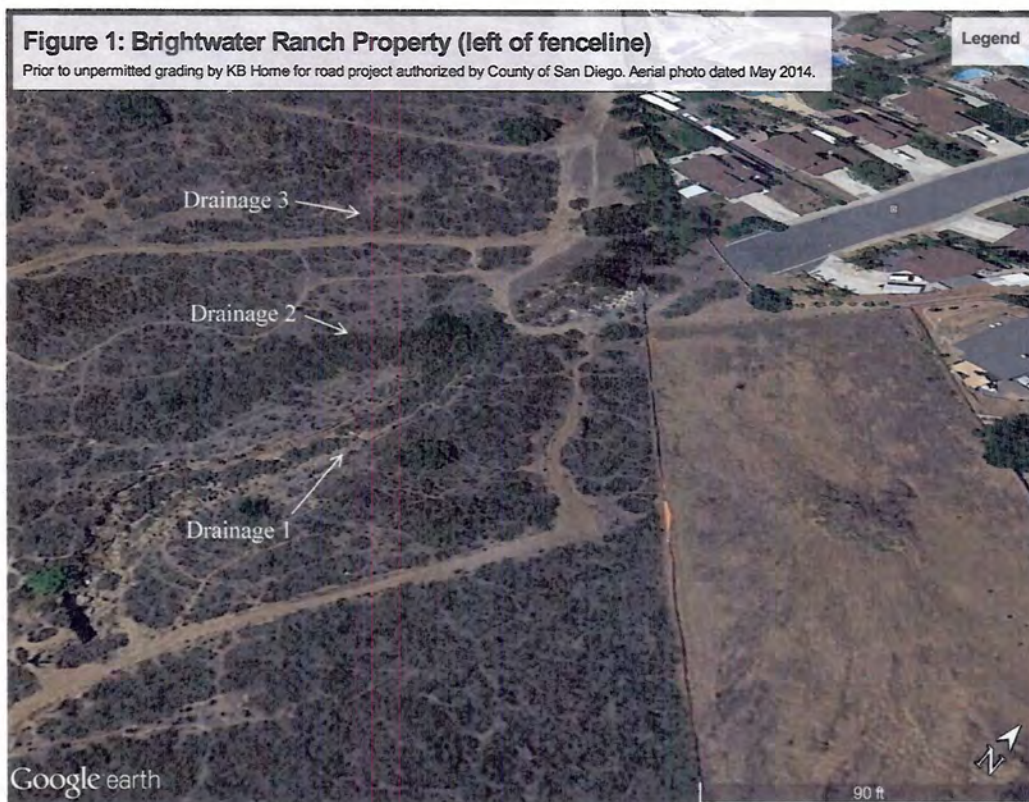
The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) has received a CWA Section 401 Water Quality Certification application for Pulte Home Corporation's Brightwater Ranch Residential Housing Development Project (File No. R9-2015-0052). The 76.23-acre project site contains five unnamed ephemeral streams that drain to Los Coches Creek (after passing through an existing storm drain system along Wellington Hill Drive) in the San Diego Hydrologic Unit, Lower San Diego Hydrologic Area, Coches Hydrologic Subarea (907.14). The purpose of the site inspection was to (1) verify Brightwater Ranch's preliminary jurisdictional delineation with the Army Corps of Engineers and (2) meet with representatives of KB Home, Pulte Home Corporation, and the County of San Diego to discuss the unauthorized fill of waters of the U.S. and/or State on the Brightwater Ranch property.

In early April 2015, Google Earth aerial imagery, reviewed during the initial application completeness review, showed that grading had been conducted on the Brightwater Ranch property in an area with jurisdictional resources some time between May 11, 2014 and December 22, 2014. Figures 1 and 2, below, present the Google Earth aerial images of the property line between Brightwater Ranch and KB Home's adjacent Settler's Point project in May 2014 and December 2014. Figure 3 is a map showing the preliminary jurisdictional delineation of the waters of the U.S. and/or State performed on November 7, 2014 by Joshua Zinn of Helix Environmental Planning and submitted to the San Diego Water Board as part of Brightwater Ranch's 401 certification application on March 10, 2015.

Facility: Brightwater Ranch, Lakeside CA  
Inspection Date: 07/01/2015

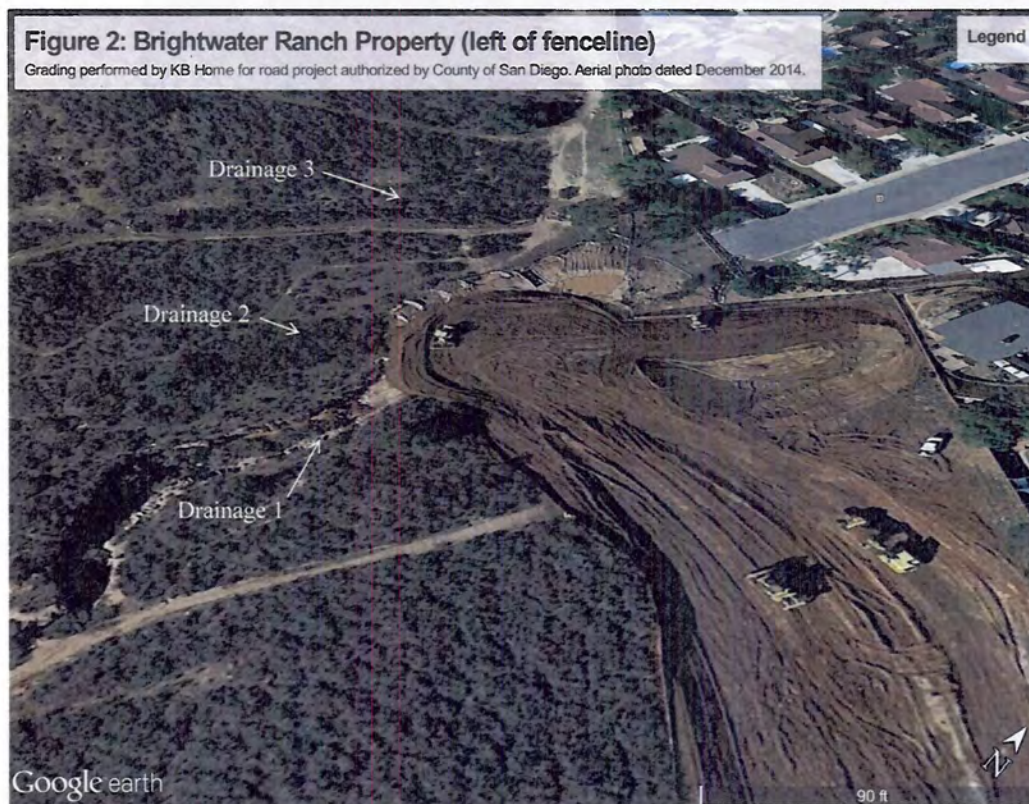
**Figure 1: Brightwater Ranch Property (left of fenceline)**

Prior to unpermitted grading by KB Home for road project authorized by County of San Diego. Aerial photo dated May 2014.



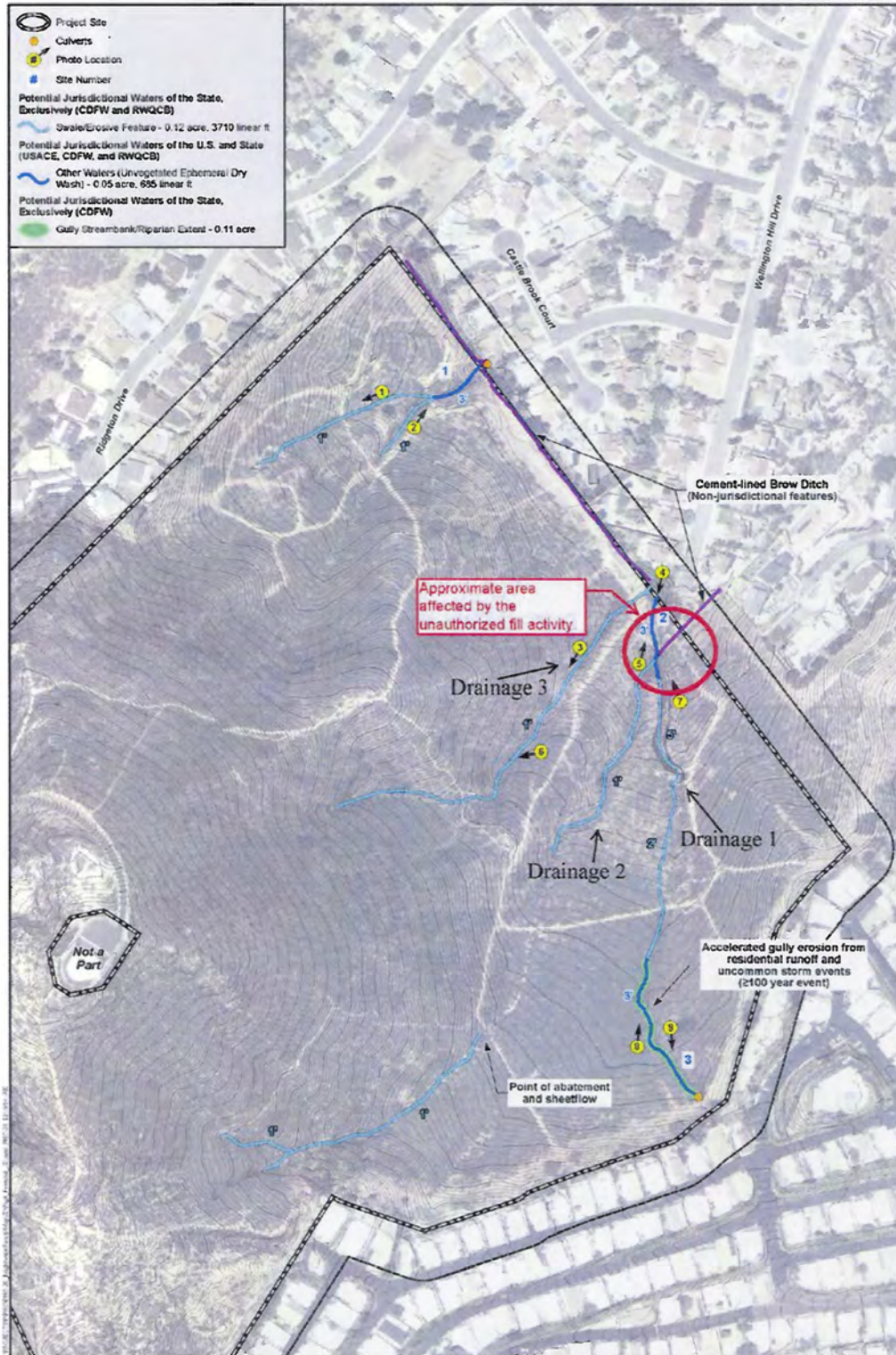
**Figure 2: Brightwater Ranch Property (left of fenceline)**

Grading performed by KB Home for road project authorized by County of San Diego. Aerial photo dated December 2014.





Facility: Brightwater Ranch, Lakeside CA  
 Inspection Date: 07/01/2015



Waters of the US/Waters of the State

BRIGHTWATER RANCH



**Facility:** Brightwater Ranch, Lakeside CA  
**Inspection Date:** 07/01/2015

KB Home's Settler's Point project reportedly started grading in December 2014 and has enrolled in the Statewide General Construction Storm Water Permit (GCP)(WDID 9 37C370552) as a Risk Level 2, but did not have a CWA Section 401 Water Quality Certification. In compliance with the GCP, KB Home had submitted a Storm Water Pollution Prevention Plan (SWPPP), dated August 8, 2014. Figures included in the SWPPP illustrate the existing site drainage (Figure 4, below) and the off-site road knuckle connecting the main road of the Settler's Point/Jackson Ridge Project to Wellington Hill Drive (Figure 5, below).

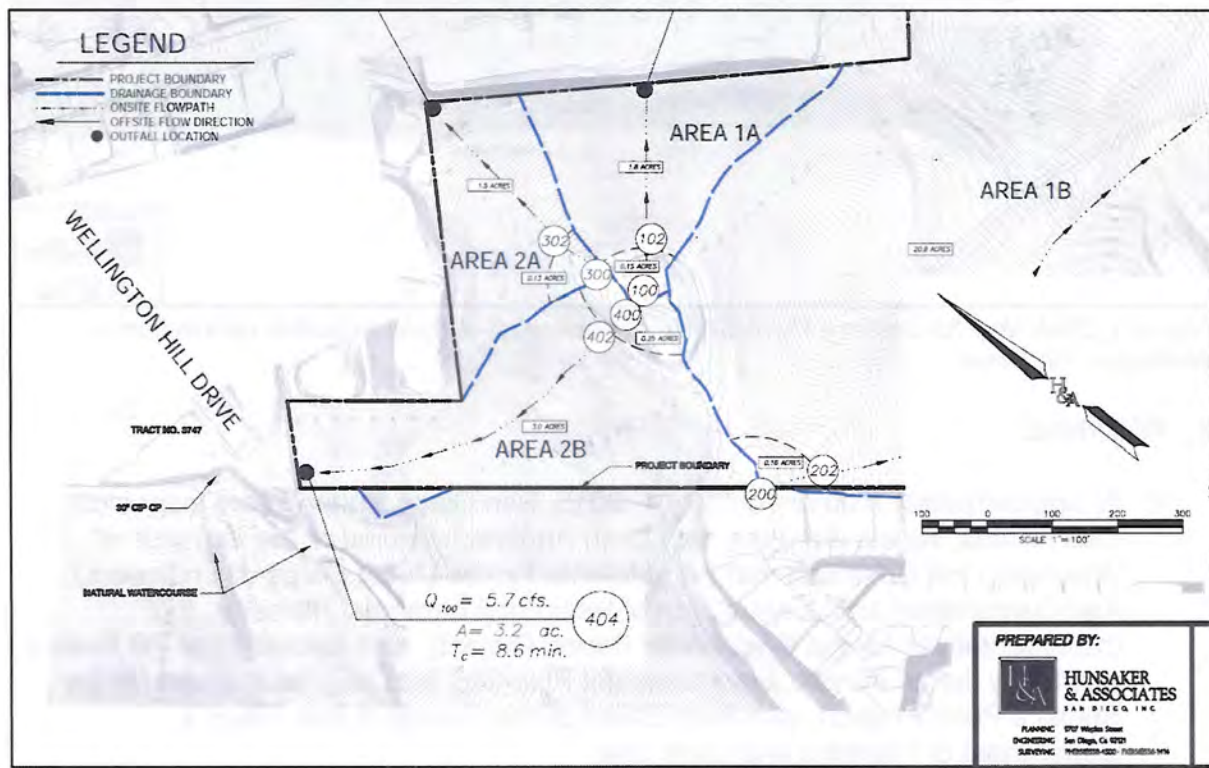


Figure 4: Excerpt of Existing Condition Drainage Map from KB Home's Settler's Point SWPPP. Note that "natural watercourses" are identified on the map in the lower left corner.

Facility: Brightwater Ranch, Lakeside CA  
 Inspection Date: 07/01/2015



Figure 5: DMA Map for Settler's Point SWPPP showing off-site road knuckle connection to Wellington Hill Drive.

## II. FINDINGS

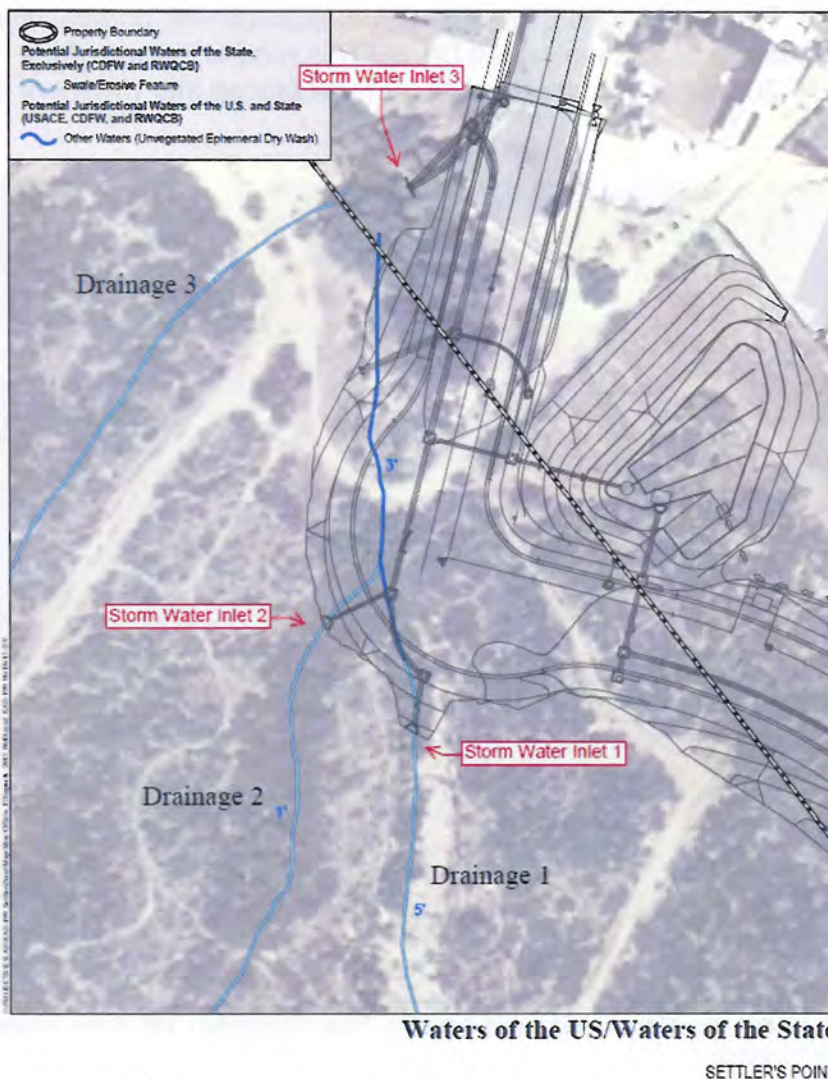
1. At approximately 9:00 am on July 1, 2015, San Diego Water Board inspectors Lisa Honma, Nicole Gergans, and Leah Anderson arrived at the terminus of Wellington Hill Drive and met with Melanie Tymes (Army Corps of Engineers), Karl Osmundson and Joshua Zinn of Helix Environmental Planning, Inc. (representatives for the Brightwater Ranch Project), Kurt Bausback of KB Homes and Barry Jones of Helix Environmental Planning, Inc. (representatives for the Settler's Point Project), and Beth Ehsan of the County of San Diego's Department of Planning and Land Use.
2. Representing KB Home, Barry Jones stated that Helix surveyed the Settler's Point Site and reviewed the biological assessment report for the road knuckle prior to construction insuring that KB Home had met their permitting requirements. Mr. Jones indicated that no jurisdictional features had been identified in those reports.
3. Kurt Bausback stated that KB Home had purchased the Settler's Point project assuming that all appropriate permits had been applied for and received by the previous owner. Mr. Bausback also stated that the County of San Diego required KB Home to build the road connection to Wellington Hill Drive, including the road knuckle.
4. Beth Ehsan confirmed that the County of San Diego required modification of the Settler's Point project to include off-site (on Brightwater Ranch property) construction of the road knuckle. As a result, the County of San Diego initiated



Facility: Brightwater Ranch, Lakeside CA  
Inspection Date: 07/01/2015

supplemental mapping that was performed by a different contractor from the initial site surveys. The contractor reported that the expanded footprint contained coastal sage scrub. Ms. Ehsan added that the report did not indicate that there were jurisdictional features present.

5. KB Home, Pulte Home Corporation, and the County of San Diego representatives acknowledged their responsibilities for grading activities in the grading of the road knuckle.
6. Mr. Jones provided a handout illustrating the area of impact to jurisdictional waters of the U.S. and/or State from the construction of road knuckle (Figure 6).



HELIX  
Environmental Planning



Figure 6: Map of impacts to jurisdictional resources on the Brightwater Ranch Property. Note that storm water inlets were installed to intercept flow from ephemeral drainages. Also note that the delineation is preliminary and has not been verified by the Army Corps.



Facility: Brightwater Ranch, Lakeside CA  
Inspection Date: 07/01/2015

7. Mr. Jones estimated that 0.018 acre and less than 300 linear feet of jurisdictional waters of the U.S. and/or State had been filled as a result of the road knuckle construction.
8. San Diego Water Board staff then walked the site to observe the unauthorized fill and impacts to ephemeral streams, as well as complete the site visit to verify the preliminary jurisdictional delineation for the Brightwater Ranch Project.
9. Photo 1 presents the road knuckle as it appeared on July 1, 2015; it was paved with curbs, gutters, and sidewalks and construction best management practices (BMPs) in place. The road was not open as it was blocked with construction barriers at the terminus of Wellington Hill Drive. This road is the top of the approximately 15-20 feet of unauthorized fill material placed into waters of the U.S. and/or State.



Photo 1: Looking in the direction of the road knuckle from Wellington Hill Drive towards the Brightwater Ranch Property.

10. Beginning with Drainage 1, Photo 2 shows the unauthorized fill and rip rap that has been placed in the waters of the U.S. and/or State prior to a new storm drain inlet (Photo 3). Sediment is visible in the inlet from the previous day's rain event. Photos 1, 2, and 3 all document that KB Home has discharged unauthorized fill into waters of the U.S. and/or State.



Facility: Brightwater Ranch, Lakeside CA  
 Inspection Date: 07/01/2015



Photo 2: Looking down from the top of the road knuckle into Drainage 1. Melanie Tymes of the Army Corps is approximately 5'4" in height.



Photo 3: Storm water inlet structure installed at the base of the fill in Drainage 1.



Facility: Brightwater Ranch, Lakeside CA  
Inspection Date: 07/01/2015

11. At Drainage 2, another storm water inlet was installed to receive flows (Photo 4). Again, rip rap was placed at the toe of the slope and in front of the inlet.



Photo 4: A second storm water inlet structure installed at the base of the fill at Drainage 2.

12. A third storm water inlet structure exists, which previously received flows from all three drainages were protected by rows of sand bags and silt fencing (see Photos 5 and 6). The fence line marks the property boundary. In an email correspondence on July 6, 2015, Ms. Ehsan confirmed that the area to right of the fence line in Photo 6 is on the property of the homeowner at 13106 Wellington Hill Drive.



Facility: Brightwater Ranch, Lakeside CA  
Inspection Date: 07/01/2015



Photo 5: The third storm water inlet structure with construction BMPs in place.



Photo 6: Looking down towards location of storm water inlet 3



Facility: Brightwater Ranch, Lakeside CA  
Inspection Date: 07/01/2015

13. Army Corps and San Diego Water Board staff were unable to verify the preliminary jurisdictional delineation of aquatic resources within the footprint of the unauthorized fill.
14. The unauthorized discharge of fill, including placement of sediment and rip rap, during road grading activities into unnamed ephemeral drainages on the off-site Brightwater property are discharges of waste to waters of the state and the United States in violation of Water Code sections 13260 and 13376 and waste discharge prohibitions contained in the Basin Plan.

### III. RECOMMENDATIONS

1. Pulte Home Corporation and KB Home should cease any additional planned work on the fill area and evaluate removal of the unauthorized fill.
2. Staff will issue a Notice of Violation to responsible parties and will refer further enforcement on this project to the San Diego Water Board's Compliance Assurance Unit.
3. Staff will evaluate the impacts of the unauthorized fill on Pulte Home Corporation's pending 401 Application.

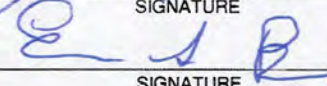
### IV. SIGNATURE SECTION

Lisa Honma  
STAFF INSPECTOR

  
SIGNATURE

07/01/2015  
INSPECTION DATE

Eric Becker  
REVIEWED BY SUPERVISOR

  
SIGNATURE

07/14/2015  
DATE

**California Regional Water Quality Control Board, San Diego Region**

August 13, 2015

**NOTICE OF VIOLATION  
No. R9-2015-0120**

Mr. Sohail Bokhari, Director  
Pulte Home Corporation  
27101 Puerta Real, Ste. 300  
Mission Viejo, CA 92691

Mr. Ron Mertz, VP of Land & Planning  
KB Home  
36310 Inland Valley Drive  
Wildomar, CA 92595-7511

**Violations of California Water Code  
Section 13260, 13376, and Water  
Quality Control Plan for the San Diego  
Basin (Basin Plan) Waste Discharge  
Prohibitions Nos. 1 and 14**

**Unauthorized discharge of fill to waters  
of the U.S./State at Brightwater Ranch,  
Lakeside CA, APN # 397-180-13**

**In reply refer to: "cmeans:CW-813830"**

**YOU ARE HEREBY NOTIFIED THAT:**

KB Home and Pulte Home Corporation (Pulte Home) (collectively Parties) are in violation of California Water Code (CWC) Section 13260(a) which requires that any person discharging waste or proposing to discharge waste within any region which could affect the quality of the waters of the State shall file a report of waste discharge (ROWD) containing the information that may be required by the regional board. As detailed below, the discharge of dredged or fill material by KB Home into waters of the U.S./State on Pulte Home's Brightwater Ranch property constitutes a discharge of waste that could affect the quality of waters of the State. KB Home did not file a ROWD prior to the initiation of the discharge, and while Pulte Home's application for Section 401 water quality certification may constitute a ROWD, it lacked the appropriate information regarding potential onsite impacts to waters of the US/State that would occur prior to the certification of the project.





Additionally, the Parties are in violation of CWC Section 13376 which prohibits the discharge of fill material, except as authorized by waste discharge requirements or fill material permits (i.e. Clean Water Act (CWA) Section 401 Water Quality Certification, or Certification). The State of California largely relies on Section 401 of the CWA (33 U.S.C. § 1341) to regulate discharges of dredged or fill material to waters of the U.S./State. Section 401 requires an applicant to obtain "Certification" from California that the project will comply with State water quality standards before certain federal licenses or permits may be issued. The permits subject to Section 401 include permits for the discharge of dredged or fill materials (CWA section 404 permits) issued by the U.S. Army Corps of Engineers (USACE). Neither of the Parties received a Section 401 certification prior to the discharge of fill material.

And lastly you are in violation of the Water Quality Control Plan for the San Diego Basin (San Diego Basin Plan), Waste Discharge Prohibitions Nos. 1 & 14, issued by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board).

Such violations subject you to possible enforcement action by the San Diego Water Board including administrative enforcement orders requiring you to cease and desist from violations, clean up waste and abate existing or threatened conditions of pollution or nuisance; pay administrative civil liability in amounts of up to \$10,000 per day per violation; referral to the State Attorney General for injunctive relief; and/or, referral to the District Attorney for criminal prosecution.

#### **A. Background**

The proposed Brightwater Ranch 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).

Directly adjacent to and northeast of the Brightwater Ranch project site is the KB Home "Settler's Point" residential housing project which comprises approximately 40.6 acres. The Settler's Point project area was purchased by KB Home in September of 2014. Active grading on the Settler's Point project began in December 2014, and construction activities are ongoing.

On March 10, 2015 Pulte Home Corporation submitted a Certification application package for the Brightwater Ranch project to the San Diego Water Board. The proposed project is 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 for the presence of waters of U.S./State.

The preliminary jurisdictional delineation was conducted on November 7, 2014 and concluded that the site held 0.05 acre (685 linear feet) of jurisdictional waters of the U.S./State (ephemeral dry wash) under the jurisdiction of the 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 76.23 acre site contains five unnamed ephemeral drainages that are tributary to Los Coches Creek (Hydrologic sub area 907.14).

In April 2015, during an initial San Diego Water Board review of the Pulte Home Corporation certification application, Google Earth aerial imagery revealed that grading had been conducted offsite of the Settler's Point project boundary, and had impacted jurisdictional waters on the Brightwater Ranch Project. On July 1, 2015 staff from the USACE, San Diego Water Board, KB Home, Helix Environmental Planning, and County of San Diego met onsite to inspect the impacts and to verify the jurisdictional delineation.

The findings of the inspection and subsequent correspondences with KB Home and the County of San Diego showed that an offsite road connection had been added to the Settler's Point project sometime in 2008 to provide emergency secondary access to the site. In June 2009 the previous owners of the Brightwater property (Centex Homes) provided a letter of permission to the Settler's Point property owners (The Odom Trust) to grade the offsite "knuckle" portion of the road on their property. The plans and subsequent Biological Report updates and CEQA documents that addressed construction of the Settler's Point project relied primarily on a 2006 Biological Technical Report (RC Biological Consulting) that only addressed the property boundary of the original Settler's Point property, and did not address the presence or absence of jurisdictional waters in the knuckle area.

On July 7, 2015 KB Home's environmental consultant reported that the unauthorized discharge of fill into jurisdictional waters of the U.S./State, associated with the offsite knuckle portion of the Settler's Point project was approximately 0.018 acre (278 linear feet).

## **B. Violations of CWA Section 13260 and 13376; Unauthorized Fill**

### **1. Failure to provide a Report of Waste Discharge for the Discharge of Fill to Waters of the State.**

#### **a. CWC Section 13260 (a)(1) states:**

"Each of the following persons shall file with the appropriate regional board a report of the discharge, containing the information that may be required by the regional board:

- (1) A person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system."



**2. Failure to Obtain a CWA Section 401 Water Quality Certification for Impacts to Waters of the US/State**

**a. CWC Section 13376 states in part:**

"A person who discharges pollutants or proposes to discharge pollutants to the navigable waters of the United States within the jurisdiction of this state or a person who discharges dredged or fill material or proposes to discharge dredged or fill material into the navigable waters of the United States within the jurisdiction of this state shall file a report of the discharge in compliance with the procedures set forth in Section 13260. Unless required by the state board or a regional board, a report need not be filed under this section for discharges that are not subject to the permit application requirements of the Federal Water Pollution Control Act, as amended..."

"...The discharge of pollutants or dredged or fill material or the operation of a publically owned treatment works or other treatment works treating domestic sewage by any person, except as authorized by waste discharge requirements or dredged or fill material permits, is prohibited."

**3. Observations:** Dredging, filling, or excavation within waters constitutes a discharge of waste to waters of the U.S./State, and prospective dischargers are required to submit a ROWD to the appropriate Regional Water Quality Control Board and obtain a certification and/or waste discharge requirements.

- a. KB Home discharged fill material into waters of the U.S./State without filing a ROWD or obtaining a Certification for the impacts.
- b. KB Home employed the same environmental consulting firm (Helix Environmental Planning) to ensure that the Settler's Point project complied with KB Home's regulatory responsibilities. KB Home's Stormwater Pollution Prevention Plan (SWPPP) (by Waterlogged Certified Stormwater Professionals) prior to the commencement of construction activities called out the knuckle area drainage features as "natural watercourses."
- c. Pulte Home identified the area of fill at the "knuckle" in their preliminary jurisdictional delineation (conducted by Helix Environmental Planning) and allowed the discharge of fill to occur on their property prior to their obtaining Certification/Waste Discharge Requirements for the fill.



4. **Conclusion:** The Parties did not exercise adequate due diligence prior to commencement of grading and fill at the knuckle area owned by Pulte Home. Had the Parties viewed aerial imagery or topographical maps, conducted a site visit of the offsite impacts, reviewed their own SWPPP, or discussed the preliminary jurisdictional delineation amongst themselves prior to grading, they would have been aware of the presence of a jurisdictional feature. The lack of communication and due diligence by the Parties resulted in the unauthorized discharge of fill to waters of the U.S./State in violation of CWC Sections 13260 and 13376.

**C. Violations of Basin Plan Waste Discharge Prohibitions**

**1. Failure to Comply with Basin Plan Waste Discharge Prohibition No.1**

- a. Discharge Prohibition No. 1 states:

"The discharge of waste into the water of the State in a manner causing, or threatening to cause, a condition of pollution, contamination or nuisance as defined in CWC Section 13050, is prohibited."

**2. Failure to Comply with Basin Plan Discharge Prohibition No.14**

- a. Discharge Prohibition No. 14 states:

"The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom depositions, turbidity or discoloration in waters of the State or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited."

3. **Observations:** A discharge of waste including earthen materials has occurred within waters of the State. The discharged material remains in waters of the State. The unnamed drainages are tributaries to Los Coches Creek. Beneficial Uses assigned to Los Coches Creek and its tributaries include Industrial Service Supply (IND), Contact Water Recreation (REC1), Non-contact Water Recreation (REC2), Warm Freshwater Habitat (WARM) and Wildlife Habitat (WILD). Construction of the project in and over the "unnamed drainages" has negatively impacted, if not eliminated, the Beneficial Uses in that location and resulted in a condition of pollution, contamination or nuisance.

**D. Summary of Potential Enforcement Options**

Failure to address these violations may subject you to additional enforcement by the San Diego Water Board or State Water Resources Control Board, including a potential civil liability assessment of up to \$10,000 per violation per day (Water Code section 13350 and 13385) and/or any of the following enforcement actions:

Other Potential Enforcement Options	Applicable Water Code Section
Technical or Investigative Order	Sections 13267
Cleanup and Abatement Order	Section 13304
Cease and Desist Order	Sections 13301-13303
Time Schedule Order	Sections 13300, 13308

In addition, the San Diego Water Board may consider referring the matter to other resource agencies, referring the matter to the State Attorney General for injunctive relief, and/or referral to the municipal or District Attorney for criminal prosecution.

Questions pertaining to this Notice of Violation should be directed to Christopher Means at (619) 521-3365 or [cmeans@waterboards.ca.gov](mailto:cmeans@waterboards.ca.gov). Written correspondence pertaining to this NOV should be sent to [sandiego@waterboards.ca.gov](mailto:sandiego@waterboards.ca.gov). In the subject line of any response, please include "**cmeans:CW-813830**."



Chiara Clemente  
Senior Environmental Scientist

CMC:cjm

Attachment: June 1, 2015 San Diego Water Board Inspection Report

Tech Staff Info & Use	
Violation ID	994273
Place ID	813830
KB Party ID	358094
Pulte Party ID	556378

Attachment B  
Order No. R9-2017-0008

Economic Benefit Analysis										
KB Brightwater										
Compliance Action		One-Time Non-Depreciable Expenditure				Non-Compliance Date	Compliance Date	Penalty Payment Date	Discount Rate	Benefit of Non-Compliance
		Amount	Basis	Date	Delayed?					
Failure to retain permitting consultant		\$ 23,500	ECI	10/19/2015	N	12/4/2012	3/8/2017	3/8/2017	7.40%	\$ 17,758
Purchase of creation credits		\$ 28,750	GDP	9/30/2015	N	3/4/2015	3/8/2017	3/8/2017	7.40%	\$ 19,503
WDR application fee		\$ 3,753	GDP	3/8/2017	N	12/4/2013	3/8/2017	3/8/2017	7.50%	\$ 2,693
WDR annual fee - 2014		\$ 900	GDP	3/8/2017	N	12/4/2014	3/8/2017	3/8/2017	7.50%	\$ 609
WDR annual fee - 2015		\$ 900	GDP	3/8/2017	N	12/4/2015	3/8/2017	3/8/2017	7.40%	\$ 572
WDR annual fee - 2016		\$ 900	GDP	3/8/2017	N	12/4/2016	3/8/2017	3/8/2017	7.30%	\$ 541
WDR annual fee - 2017		\$ 900	GDP	3/8/2017	N	12/4/2017	3/8/2017	3/8/2017	7.30%	\$ 513
WDR annual fee - 2018		\$ 900	GDP	3/8/2017	N	12/4/2018	3/8/2017	3/8/2017	7.30%	\$ 487
Income Tax Schedule:		Corporation	Analyst:		Bryan Elder		Total Benefit: \$ 42,676			
USEPA BEN Model Version:		Version 5.6.0 (April 2016)	Date/Time of Analysis:		11/30/2016 15:46					
Assumptions:		<p>1 Consulting estimates for permitting obtained by RWQCB-SD ranged from \$15,000 to \$32,000. An average expense of \$23,500 was used as the avoided cost. It is assumed that a consultant would have been retained at least two years prior to impacts.</p> <p>2 Based on last bank purchase (prorated to our acreage estimate) for purchase of 0.05 creation credits at SLR Bank at approximately 3:1 ratio. Purchase must be complete within 90 days of impacts.</p> <p>3 WDR application fee is required at least one year prior to impacts. Annual fees are assumed to be due each subsequent year for a minimum of five years.</p> <p>4 Streambed impacts were estimated at commencing on 12/4/2014.</p> <p>5 Costs are assumed to be avoided.</p> <p>6 Compliance date is irrelevant as the costs are avoided. BEN requires an input regardless of the action type. The date has no effect on the economic benefit.</p> <p>7 Penalty payment date estimated as tentative hearing date and is subject to change.</p>								



## Attachment C

Discharger: KB Home &amp; KB Coastal

## Penalty Methodology Table

Order No. R9-2017-0008

Step 1: Potential Harm Factor				
Violations	Potential Harm to Beneficial Uses [ 0 - 5 ]	Physical, Chemical, Biological or Thermal Characteristics [ 0 - 4 ]	Susceptibility to Cleanup or Abatement [ 0 or 1 ]	Total Potential for Harm [ 0 - 10 ]
Unauthorized discharge of fill	5	2	0	7

Step 2: Assessments for Discharge Violations					
Days of Violation	Per Gallon Factor				Statutory/ Adjusted Max per Gallon [ \$ ]
	Potential for Harm [ 0 - 10 ]	Deviation from Requirement [ minor, moderate, major ]	High Volume Discharges	Total Per Gallon Factor	
na	na	na	n/a	na	na

Step 3: Per Day Assesments for Non-Discharge Violations				
Violations	Per Day Factor			Statutory/ Adjusted Max [ \$ ]
	Potential for Harm [ minor, moderate, major ]	Deviation from Requirement [ minor, moderate, major ]	Total Per Day Factor	
161	7	major	0.31	\$5,000

Step 4: Adjustments					
Violations	Culpability [ 0.5 - 1.5 ]	Cleanup and Cooperation [ 0.75 - 1.5 ]	History of Violations	Multiple Violations (Same Incident)	Multiple Day Violations
	1.1	1.1	1	no	yes

Step 5: Total Base Liability Amount
Sum of Steps 1- 4
\$299,460

Step 6: Ability to Pay/Continue in Business
[ Yes, No, Partly, Unknown ]
Yes

Step 7: Other Factors as Justice May Require	
Costs of Investigation and Enforcement Adjustment	Other
\$20,700	na

Step 8: Economic Benefit
\$42,676

Step 9	
Minimum Liability Amount	Maximum Liability Amount
\$43,046	\$805,000

Step 10: Final Liability Amount
\$316,456

ATTACHMENT D

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION

**PROPOSED PROJECT APPLICATION FORM**

Name of Project: Temescal Creek Restoration

Project Applicant: The San Diego River Park Foundation

Applicant Contact Person: Sarah Hutmacher, Associate Director

Applicant Phone Number: (619) 297-7380, ext. 102

Applicant Email Address: sarah@sandiegoriver.org

**REQUIRED INFORMATION**

**Applications that do not contain a discussion regarding each of the following items will not be considered for inclusion.** If the item is included in a detailed supplemental report, please include the report and indicate where the information is located.

**Problem Statement:**

Temescal Creek is a tributary to the San Diego River. It is located in the upper reaches of the watershed near Julian (see Exhibit 1). The San Diego River Park Foundation (SDRPF) acquired property in 2016 which includes a portion of this creek.

On the property, several man-made structures, including large ponds, stream crossings and culverts have been constructed which adversely affect Temescal Creek through hydromodification. Hydromodification is generally defined as changes in channel form associated with alterations in flow and sediment due to past or proposed future land-use alteration. One of these structures is a rock and concrete crossing which restricts all flow under it through a 49" pipe. The crossing is approximately 33 ½ feet wide by 35' long (0.027 acre) (see Exhibit 2). This structure impacts the natural flow of the creek resulting in streambank erosion and undercutting.

The San Diego River Park Foundation proposes to remove this stream crossing and culvert. A limited number of non-native plants (Himalayan Blackberry) are in and adjacent to the project area, and they will be removed as will any diseased vegetation. The area will be seeded by hand with appropriate vegetation also some willow poles

## ATTACHMENT D

and other plantings will be installed to support the seeding. No irrigation will be installed. Total project area is approximately 100 feet by 100 feet. Necessary erosion control devices will be installed.

In addition, the project proposes to conduct a study to map the hydromodification inducing structures along Temescal Creek within the parcels owned by The San Diego River Park Foundation. This study will form a basis for future removal of other man-made structures adversely impacting the stream other potential improvements.

### **Work Plan containing tasks and deliverables compartmentalized into partial funding opportunities, if applicable.**

This proposal has been separated into several tasks:

#### **Task 1: Project Management / Permitting / CEQA**

It is anticipated that this project will be categorically exempt from CEQA or that a negative declaration will be prepared. The San Diego River Park Foundation would work with the State of California's San Diego River Conservancy for all permitting and CEQA. In addition, a CWA 404 permit, CWA 401 State Water Quality Certification, CDFW Section 1600 Consultation are anticipated. Supporting documents including a Biological Resources Survey, Wetland Delineation, Conceptual Stream Restoration Plan, Archaeological Survey and others will be completed as needed. This task also includes signing and administering a project agreement with the California Regional Water Quality Control Board and providing necessary documentation as defined by the agreement.

The budget for this includes, consulting fees, filing and permit fees and associated SDRPF expenses.

**Deliverable:** Copies of Notice of Determination and Any Required Permits, annual progress reports, and Final Report with summary of project and expenses.

#### **Task 2: Implementation / Construction**

##### **Construction Monitoring**

A contractor will be used to coordinate and supervise the activities of contracted field crews during implementation activities.



## ATTACHMENT D

### Grading and Hydromodification Removal

A sub-contractor will be used to remove the stream crossing and conduct minor grading. Spoils will be deposited on site away from sensitive locations as identified in the stream restoration plan. Any non-soil debris will be disposed at an approved disposal site.

### Erosion Control, Duff Salvage and Hand Seeding

Erosion control devices including fiber rolls, jute netting, straw bales, and silt fencing will be installed. Locally available natural materials will be incorporated into the erosional control design as much as possible (rock, woody debris, willow cuttings, etc.). Existing oak duff will be salvaged and distributed after grading to serve as a seed source, mulch, microbial source, and erosion control material. Revegetation will be accomplished via hand seeding and timed to benefit from seasonal rain and snow fall. Due to the nature of the existing riparian oak woodland habitat minimal weed source, further activities are not anticipated. This should be sufficient for revegetation of the site. Some willow cuttings or other native plants will be installed by volunteers to supplement the seeding to encourage community involvement and to expand the plant palette.

### Invasive and Diseased Vegetation Removal:

A limited number of invasive and diseased plants occur in the project area (see Exhibit 3). They will be removed to protect project site and assist with restoration. Hand tools will be used for removal and an appropriate herbicide will be applied under a Qualified Applicators License. Removed vegetation will be disposed of properly.

**Deliverable:** Report containing photo-documentation of construction area before, during, and after construction, a map of the project area, and describing implementation dates, quantities used, problems encountered, and any deviation from the Restoration Plan.

### **Task 3: Temescal Creek Hydromodification Removal Study**

A study will be completed to investigate man-made grade control, channel alignment and hard-scape structures along Temescal Creek within the San Diego River Park Foundation holdings (see Exhibit 4) that are resulting in hydrologic characteristics or sediment transport conditions which adversely affect the native ecosystem. The study will include hydromodification characteristics, location and strategies for removal. Included will be preliminary cost estimates for removal, analysis of permit issues and recommendations for future projects.

**Deliverable:** Temescal Creek Hydromodification Study

**Task 4: Monitoring and Maintenance:**

To document the success of the project, a monitoring program will be developed and implemented. Volunteers will be used to photo-document the sampling location(s) as well as to document pre and post project water quality including turbidity, dissolved oxygen, conductivity, temperature, nitrate and phosphate to provide a baseline of water quality. This will include pre-project bioassessment and the California Rapid Assessment Method (CRAM; CWMW 2013) to document conditions downstream of the structure. This will be supported by qualitative and quantitative monitoring in accordance with the Restoration Plan that will be submitted as part of the application for 401 certification. Site Maintenance to control invasive plants, and other maintenance activities will continue for 5 years post construction implementation.

Stream bioassessment and CRAM for the project will occur downstream of the project site and pre and post project construction. Stream bioassessment for the project will be conducted in accordance with the most recent State of California SWAMP Standard Operating Procedures (SOPs) for wadeable streams (Ode et al. 2016b, SWAMP-SOP-SB-2016-0001 or newer). Sampling will include benthic macroinvertebrates, algae, and full physical habitat in accordance with the SOP. Laboratory analysis of benthic macroinvertebrates will be conducted at a Southwest Association of Freshwater Invertebrate Taxonomists (SAFIT) level of II or IIa level (midges to subfamily) in accordance with the most recent State of California SOP for Laboratory Processing and Identification of Benthic Macroinvertebrates in California (Woodward et al. 2012). Laboratory identification and quantification of specimens in the benthic stream algal communities sampled will follow the SOP developed for California's SWAMP Program (Stancheva et al. 2015, SWAMP-SOP-2015-0003 or newer), which prescribes methods for separate analysis of 1) diatoms and 2) soft algae (including cyanobacteria).

Stream bioassessment chemistry and taxonomic data will be uploaded to the California Environmental Data Exchange Network (CEDEN) within 3 months of laboratory reporting. Benthic macroinvertebrate, soft algae, and diatom taxonomic data will be utilized to calculate scores for the California Stream Condition Index (Mazor et al. 2015) and algae indices of biotic integrity (S2, D18, H20, Fetscher et al. 2014). Laboratory results, index scores, and confirmation of data submittal to CEDEN will be provided to the San Diego Water Board.

Field sampling will be undertaken by properly trained personnel and conducted in accordance with the latest State of California SOPs in an unbiased manner representative of stream reach condition. Sampling will be consistent with the Surface Water Ambient Monitoring Program Quality Assurance Program Plan (SWAMPP QAPP) guidelines and requirements.

## ATTACHMENT D

CRAM will be used to assess riparian condition pre and post project. CRAM results will be entered into EcoAtlas (<http://www.cramwetlands.org/dataentry>) within 90 days of obtaining results and provided to the San Diego Water Board the subsequent annual progress report.

**Deliverable:** Monitoring and Restoration Plan, Monitoring Reports with photo-documentation of sampling area before, during, and after construction, CRAM results, bioassessment laboratory results and index scores. Confirmation of data submittal to CEDEN and EcoAtlas.

### **Task 5. Annual Project Progress Reports**

Project Progress Reports will be submitted annually, for five (5) years following the removal of the stream crossing. These reports will include monitoring results described in task 4 above, and describe compliance with the requirements of SEP MOU and the required 401 Certification to the San Diego Water Board and an accounting of project expenditures.

**Deliverable:** Annual Progress Reports

### **Timeline (from funding approval) with milestones and end dates.**

The timeline will be dependent on the start date and weather.

From the date of funding approval, the timeline by task is as follows:

#### **Task 1: Project Management / Permitting / CEQA**

6 Months: Permitting/CEQA Year 6: Final Report Provided

#### **Task 2: Implementation / Construction**

12 months: Work Completed; report containing summary of construction activities

#### **Task 3.**

12 months: Study Completed and submitted with annual progress report

#### **Task 4:**

12 months: Pre-project documentation and monitoring completed

Year 6: Work completed



## ATTACHMENT D

### Task 5:

Annually- Progress Reports demonstrating compliance with SEP MOU and 401 cert requirements

### Budget broken down into tasks.

<b>Task 1: Permitting and Project Management</b>	
Labor: President and CEO (180 hours at \$75.29/hour)	\$13,552
Materials	-
Expenses: permitting and contracts	\$34,661
<i>Task Total</i>	<b>\$48,213</b>
<b>Task 2: Implementation/Construction</b>	
Labor: Field Coordinator (48 hours at \$32/hour)	\$1,536
Materials: native plants, planting materials/tools, invasive removal protective gear, volunteer safety and support	\$1,705
Expenses: contracts, mileage, green waste disposal, invasive/diseased plant removal crew	\$35,098
<i>Task Total</i>	<b>\$38,339</b>
<b>Task 3: Temescal Creek Hydromodification Removal Study</b>	
Labor: Director (50 hours at \$51.06/hour)	\$2,553
Materials	-
Expenses: contract, mileage	\$30,368
<i>Task Total</i>	<b>\$32,921</b>
<b>Task 4: Monitoring and Maintenance</b>	
Labor: Volunteer Coordinator (32 hours at \$32/hour) and River Ecosystem Manager (184 hours at \$34/hour), Field Associate (120 hours x \$32/hour)	\$11,120
Materials: monitoring supplies including camera/GPS, replacement plan/seeds, tools, and herbicide	\$1,200
Expenses: bioassessment processing, monitoring crew, mileage	\$8,181
<i>Task Total</i>	<b>\$20,501</b>
<b>Task 5: Annual Project Progress Reports</b>	
Labor: Land Manager ((60 hours x \$34/hr)	\$2,040
Materials:	\$50
Expenses: Mileage	\$368
<i>Task Total</i>	<b>\$2,458</b>

**TOTAL PROJECT: \$142,432**

**Discuss all permitting requirements, including CEQA, and their status. If exempt, cite applicable statute.**

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It is anticipated that this project will receive a Negative Declaration for CEQA. We will work with The San Diego River Conservancy as our Lead Agency to file the appropriate documentations. We will also investigate if a Categorical Exemption is available for this project under section 15304 or other sections.

### **15304. Minor Alterations to Land**

We anticipate the following may be needed:

CWA 404 permit under the Nationwide No. 27 permit.

CWA 401 State Water Quality Certification either a pre-certified Small Habitat Restoration Permit or Low Impact Certification

CDFW 1600 Streambed Alteration Agreement

**Note:** Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

### **Watershed(s) affected.**

The proposed project is entirely in the San Diego River Watershed.

### **Describe if this project can be a basis for additional funding from other sources.**

This funding could be used as a starting point to expand efforts to restore, protect and monitor the health of Temescal Creek. Monitoring data collected can be used for future projects. The Temescal Creek Hydromodification Removal Study will provide a blueprint for additional work that can be accomplished as funding becomes available.

### **Monitoring, success criteria, and other tools to track long-term success.**

As part of this proposed project, a restoration plan will be developed with success criteria. We will monitor the following metrics to track our success:

- Measurement of re-growth of vegetation – height and ground coverage immediately downstream of springs. This will be tracked on an annual basis as a long-term success criteria.
- Successful removal of the stream crossing and culvert.

### **Description of how the project is resilient to climate change.**

Freshwater ecosystems are particularly sensitive to effects of climate change, including increase of surface water temperatures and changes in precipitation amounts and

## ATTACHMENT D

intensities. This project proposes to help restore ecological function to Temescal Creek. It is part of an interconnected system of open space areas which allow for wildlife movement. With climate change, it is important to have these connected systems so that wildlife has an opportunity to move to different areas in an effort to adapt to the effects of climate change.

This project increases the climate resilience of the ecosystems by protecting its environmental quality and function. In addition, by engaging the public in this solution, we hope to activate an engaged and responsible citizenry with the knowledge to act to protect habitat and water resources for the region.

### **Applicant's ability/authority to receive and distribute funds.**

The San Diego River Park Foundation is a 501(c)3 nonprofit organization, and has extensive experience in successfully executing contracts and performing on grants. In addition to many grants from private and corporate foundations, we have recently completed or are in contract on over \$1 million for restoration, community engagement, and conservation projects through SANDAG's TransNet EMP program, The U.S. Department of Fish and Wildlife, the State of California, the County Water Authority, and more.

### **Is the project to conduct work that is required by any entity/agency? (e.g. cleanup or mitigation)**

No.



## Project Location

Regional Map

Temescal Creek Hydromodification Removal



The San Diego River Park Foundation  
PO Box 80126; San Diego, CA 92138  
619-297-7380

## EXHIBIT 2



Downstream view of Stream crossing and culvert to be removed



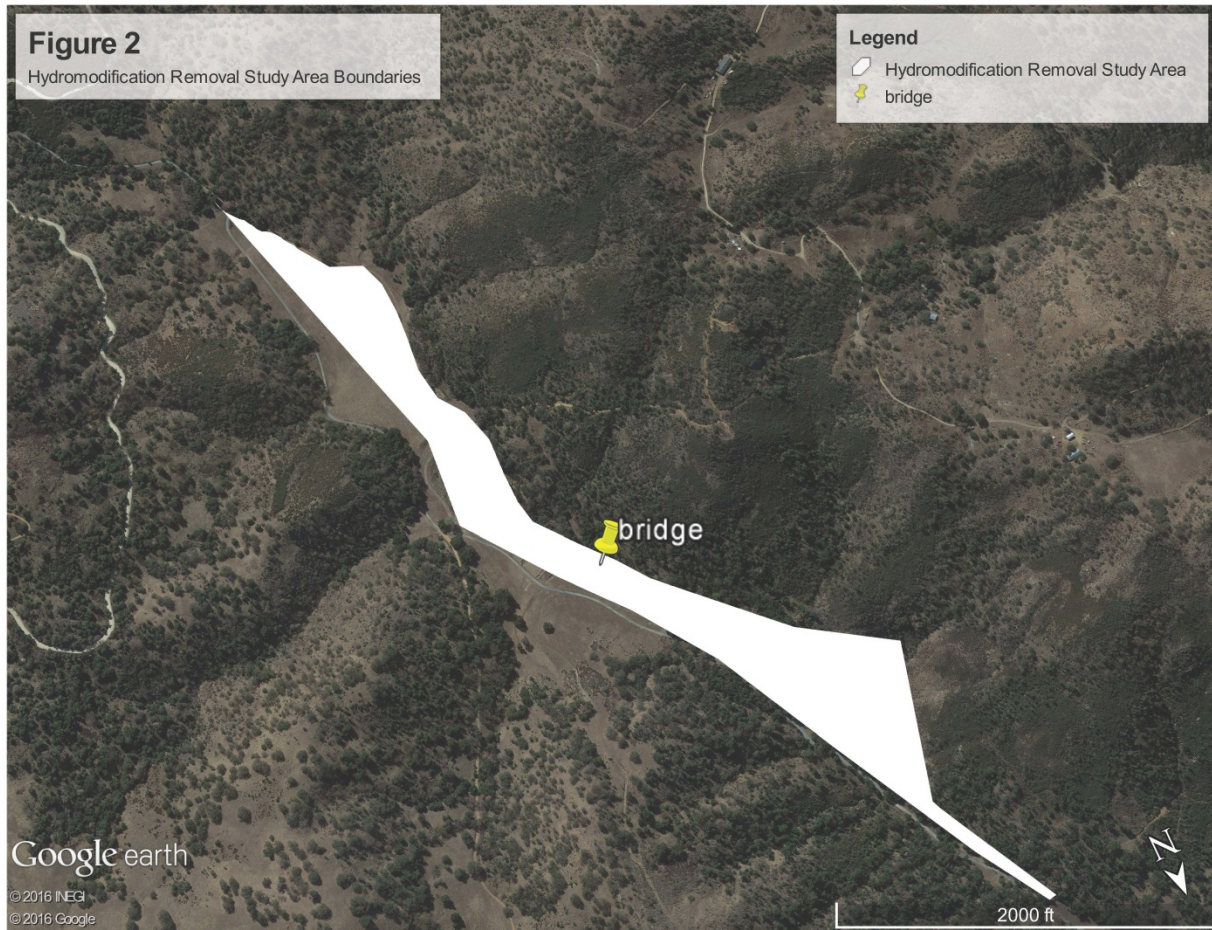
## Exhibit 3



Project Area



## Exhibit 4



## ATTACHMENT E – Memorandum of Understanding

**MEMORANDUM OF UNDERSTANDING**  
for  
**THE TEMESCAL CREEK SUPPLEMENTAL ENVIRONMENTAL PROJECT**  
between  
**THE SAN DIEGO REGIONAL WATER QUALITY  
CONTROL BOARD PROSECUTION STAFF**  
and  
**THE SAN DIEGO RIVER PARK FOUNDATION**

### INTRODUCTION

This Memorandum of Understanding ("MOU"), is made and entered into on the 5<sup>th</sup> day of May, 2017, by and among the California Regional Water Quality Control, San Diego Region Board (San Diego Water Board) Prosecution Staff, hereinafter referred to as "Prosecution Staff" and The San Diego River Park Foundation, a nonprofit organization in the State of California hereinafter referred to as "Foundation" (collectively Parties).

**WHEREAS**, Administrative Civil Liability Complaint R9-2016-0092 (Complaint) alleges that the Discharger (defined therein) placed fill or waste in a tributary to San Diego River without proper permits or resulting requirements to avoid, minimize, and mitigate impacts;

**WHEREAS**, Executive Order W-59-03 established State policy guidelines for wetlands conservation with the primary goal of ensuring no overall net loss and to achieve a long-term net gain in the quantity, quality, and permanence of wetland acreage in California;

**WHEREAS**, the Foundation, an independent third party from the Discharger has proposed to conduct a Supplemental Environmental Project (SEP)<sup>1</sup> to remove a culverted crossing from Temescal Creek, a tributary to the San Diego River, that is causing downstream erosion, and to develop a study to identify other restoration opportunities on site;

**WHEREAS**, the Discharger has agreed to remit payment of **\$142,432** to the Foundation to fund the Temescal Creek SEP as a condition of the Settlement Agreement with the San Diego Water Board to which this MOU is attached<sup>2</sup>;

**NOW, THEREFORE**, in consideration of promises, covenants, and agreements hereinafter set forth, the Parties hereby agree as follows:

### ARTICLE 1 - DEFINITIONS

"Waste Discharge Permit Fund" – the State Water Resources Control Board's Waste Discharge Permit Fund.

"Designated Water Board Representative" – the representative from the San Diego Water Board responsible for oversight of the SEP.

"SEP Completion Date" – the date by which the SEP will be completed in its entirety.

<sup>1</sup> Attachment D of Order No. R9-2017-0008

<sup>2</sup> Order No. R9-2017-0008



## **ATTACHMENT E – Memorandum of Understanding**

### **ARTICLE 2 –SEP DESCRIPTION**

The SEP entails removal of a culverted crossing from Temescal Creek, a tributary to the San Diego River, which is causing downstream erosion. This shall be followed by restoration of the construction area with native seeding, and maintenance and monitoring of the site for up to 5 years in accordance with Clean Water Act Section 401 water quality certification or waste discharge requirements that would be issued by the San Diego Water Board prior to project construction. The SEP also includes the completion of a study to map all the potential flow obstructions (i.e. culverts and dams) along Temescal Creek within the parcels owned by the Foundation, to form a basis for future restoration opportunities on site. The project will be completed in one year from the date of adoption of the Stipulated Order and monitoring and maintenance of the project will occur for 5 years after completion of the stream crossing removal.

Temescal Creek is located in the same watershed as the impacts alleged in the Complaint thereby providing a nexus to the area harmed. Furthermore, the removal of a culverted crossing will serve to restore similar functions and values as those lost as a result of the alleged unauthorized placement of a culverted crossing by the Discharger. Because the culverted crossing being removed is causing erosion and channel instability, it is anticipated that the removal of this culvert will further improve hydrology and water quality, thereby benefitting Waters of the State. Details regarding the SEP, including the tasks and budget, can be found in the Attachment D of Order No R9-2017-0008.

### **ARTICLE 3 - FUNDING**

Within 30 days of San Diego Water Board approval of the Stipulated Order, the Discharger has agreed to provide **\$142,432** to the Foundation to satisfy a Settlement Agreement requirement through the implementation of the proposed SEP. The cost of the SEP will be referred to as the SEP Amount and, following payment, the Discharger shall have no obligations related to the implementation or completion of the SEP, which shall be the sole obligation of the Foundation. The Foundation agrees to implement the SEP as described in the attached SEP Proposal.

### **ARTICLE 4 – REPRESENTATIONS AND AGREEMENTS REGARDING THE SEP**

1. The Foundation understands that its promise to implement the SEP, in its entirety and in accordance with the schedule for implementation, is a material condition of the settlement of liability between the Discharger and the San Diego Water Board.
2. The Foundation represents that it will utilize the funds outlined in Article 3 to implement the SEP in accordance with the schedule for implementation described in Article 2 and in the supporting SEP Proposal.
3. The Foundation will provide certified, written reports to the San Diego Water Board consistent with the terms of this MOU detailing the implementation of the SEP.
4. The Foundation agrees that the San Diego Water Board has the right to require an audit of the funds expended by it to implement the SEP.
5. The Foundation agrees to submit to the jurisdiction of the San Diego Water Board to enforce the terms of this MOU and the implementation of the SEP.



## **ATTACHMENT E – Memorandum of Understanding**

### **ARTICLE 5 – PUBLICITY**

Whenever the Foundation or its agents or subcontractors publicizes one or more elements of the SEP, they shall state in a prominent manner that the project is being undertaken as part of the settlement, without any admission of liability by the Discharger, of an enforcement action by the San Diego Water Board against the Discharger.

### **ARTICLE 6 – SUBMITTAL OF PROGRESS REPORTS**

Upon adoption of Order No. R9-2017-0008, the Foundation shall provide quarterly reports of progress to the Designated Water Board Representative in accordance with the following schedule:

<b>Reporting Period</b>	<b>Due Date</b>
January - March	April 30
April - June	July 31
July - September	October 31
October - December	January 31

### **ARTICLE 7 – AUDITS AND CERTIFICATION OF ENVIRONMENTAL PROJECT**

#### **1. Certification of Expenditures.**

Within 30 days from the completion of the SEP, the Foundation shall submit a certified statement by an official representing the Foundation, which documents the expenditures by the Foundation up to the completion period for the SEP. The expenditures may be external payments to outside vendors or contractors implementing the SEP. The expenditures may include the costs of internal staff resources, provided that such expenditures are directly related to development and implementation of the SEP. In making such certification, the official may rely upon normal company project tracking systems that capture employee time expenditures and external payments to outside vendors such as environmental and information technology contractors or consultants. The Foundation shall provide any additional information requested by the San Diego Water Board staff which is reasonably necessary to verify the Foundation's SEP expenditures. The certification need not address any costs incurred by the San Diego Water Board for oversight.

#### **2. Certification of Performance of Work**

Within 30 days from the completion of the SEP, the Foundation shall submit, under penalty of perjury, a Certification of Performance of Work, which shall state and demonstrate that the SEP has been completed in accordance with the terms of this MOU. Such documentation may include photographs, invoices, receipts, certifications, and other materials reasonably necessary for the San Diego Water Board to evaluate the completion of the SEP and the costs incurred by the Foundation.



## **ATTACHMENT E – Memorandum of Understanding**

### **3. Certification that Work Performed on SEP Met or Exceeded Requirements of CEQA and other Environmental Laws [Where Applicable].**

Within 30 days from the completion of the SEP, the Foundation shall submit documentation, if necessary, under penalty of perjury, stating that the SEP meets or exceeds the requirements of CEQA and or other environmental laws. The Foundation shall ensure compliance with CEQA where necessary, and provide the Water Board with the following documents from the lead agency:

- a) Categorical or statutory exemptions;
- b) Negative Declaration if there are no "significant" impacts;
- c) Mitigated Negative Declaration if there are potential "significant" impacts but revisions to the project have been made or may be made to avoid or mitigate those potential significant impacts;
- d) Environmental Impact Report (EIR) if there are "significant" impacts.
- e) Any required Resource Agency Permits (401 certification, 404 permit, Streambed Alteration Agreement)

### **4. Third Party Audit**

In addition to the certification, upon completion of the SEP and at the discretion of the Designated Water Board Representative, the Foundation, at its sole cost, shall submit a report prepared by an independent third party(ies) acceptable to the San Diego Water Board staff providing such party(ies)'s professional opinion that the Foundation has expended money in the amounts claimed by the Foundation. Such information shall be provided to the Designated Water Board Representative within three (3) months of the completion of the Foundation's SEP obligations. The audit need not address any costs incurred by the San Diego Water Board for oversight.

## **ARTICLE 8 – SAN DIEGO WATER BOARD ACCEPTANCE OF COMPLETED SEP**

Upon the Foundation's satisfaction of its obligations under this MOU, the completion of the SEP and any audits, the San Diego Water Board shall issue a "Satisfaction of Order." The issuance of the Satisfaction of Order shall terminate any further obligations of the Foundation under this MOU.

## **ARTICLE 9 – FAILURE TO EXPEND ALL FUNDS ON THE APPROVED SEP**

In the event that the Foundation is not able to demonstrate to the reasonable satisfaction of the San Diego Water Board Assistant Executive Officer that it has spent the entire SEP Amount for the completed SEP, the Foundation shall pay the difference between the amount of the SEP funded by the Discharger and the amount the Foundation can demonstrate it actually spent on the SEP (Unspent SEP Funds), as an administrative civil liability. Payment shall be made by the Foundation to the Waste Discharge Permit Fund.

## **ARTICLE 10 – FAILURE TO COMPLETE THE SEP**

If the SEP is not fully implemented within the SEP Completion Period required by this MOU or there has been a material failure to satisfy a project task or deliverable as stated in the SEP, the Designated Water Board Representative shall issue a Notice of Violation to the Foundation.



## **ATTACHMENT E – Memorandum of Understanding**

Receipt of such notice will jeopardize the Foundation's ability to receive funds related to other SEPs.

As a consequence, the Foundation shall be liable to pay the entire amount of the Unspent SEP Funds or, some portion thereof, or the Foundation may be compelled to complete the SEP. The Prosecution Staff may act as follows:

1. The Prosecution Staff elects for the payment or partial payment of the Unspent SEP Funds: The Foundation might not be entitled to any credit, or offset from the San Diego Water Board for tasks that are not completed. The amount of the Unspent SEP Funds owed shall be determined via a "Motion for Payment of Unspent SEP Funds" before the San Diego Water Board. Upon a determination by the San Diego Water Board of the amount of the Unspent SEP Funds, the amount owed shall be paid by the Foundation to the Waste Discharge Permit Fund within thirty (30) days after the service of the San Diego Water Board's determination. Payment of the assessed amount will satisfy the Foundation's obligations to implement the SEP.
2. The Prosecution Staff elects for the completion of the SEP: The Prosecution Staff shall file a Motion to Enforce the SEP before the San Diego Water Board against the Foundation. Upon the identification by the San Diego Water Board of the remaining work of the SEP to be performed, the Foundation agrees that the San Diego Water Board may order the Foundation to perform that work. In addition, the Foundation shall be liable for the San Diego Water Board's reasonable costs of enforcement, including but not limited to legal costs and expert witness fees.

### **ARTICLE 11 – WATER BOARD IS NOT LIABLE**

Neither the San Diego Water Board members nor the San Diego Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by the Foundation, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this MOU, nor shall the San Diego Water Board, its members or staff be held as parties to or guarantors of any contract entered into by the Foundation, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this MOU.

The Foundation covenants not to sue or pursue any administrative or civil claim or claims against the Discharger or any State Agency or the State of California, or their officers, employees, representatives, agents, or attorneys arising out of or relating to any matter expressly addressed by the ACL, this MOU or the SEP.

### **ARTICLE 12 – REQUEST FOR EXTENSION OF SEP DEADLINES**

If the Foundation cannot meet any one of the SEP Completion Dates due to circumstances beyond its anticipation or control, the Foundation shall notify the Prosecution Staff in writing within thirty (30) days of the date the Foundation first knew of the delay. The notice shall describe the reason for the nonperformance and specifically refer to this Article. The notice shall describe the anticipated length of time the delay may persist, the cause or causes of the delay, the measures taken or to be taken by the Foundation to prevent or minimize the delay, the schedule by which the measures will be implemented, and the anticipated date of



## **ATTACHMENT E – Memorandum of Understanding**

compliance. The Foundation shall adopt all reasonable measures to avoid and minimize such delays.

The determination as to whether the circumstances were beyond the reasonable control of the Foundation and its agents will be made by the Executive Officer. Where the Executive Officer concurs that compliance was or is impossible, despite the timely good faith efforts of the Foundation, due to circumstances beyond the control of the Foundation that could not have been reasonably foreseen and prevented by the exercise of reasonable diligence by the Foundation, a new compliance deadline shall be established and this Memorandum of Understanding will be revised accordingly. The Executive Officer will endeavor to grant a reasonable extension of time if warranted.

### **ARTICLE 13 - TERM OF AGREEMENT**

The term of this MOU shall be from adoption of the Stipulated Order by the San Diego Water Board to the date of the Satisfaction of Order is issued under Article 8 herein, unless terminated as provided under Article 10.

### **ARTICLE 14 - NON-WAIVER**

None of the provisions of this MOU shall be deemed waived unless expressly waived in writing. An omission or failure of either Party to demand or enforce strict performance of provisions of this MOU shall not be construed as a waiver or as a relinquishment of any rights. All provisions and rights shall continue and remain in full force and effect as if such omission or failure had not occurred.

### **ARTICLE 15 - SEVERABILITY**

Should any portion of this MOU be determined to be void or unenforceable, such shall be severed from the whole and the MOU will continue as modified.

### **ARTICLE 16 - TRANSFER OF INTEREST**

Neither Party shall assign or transfer this MOU in whole or in part without prior written consent of the other Party. The consent to assign or transfer shall not be unreasonably withheld.

### **ARTICLE 17 - ENTIRE AGREEMENT**

This MOU contains all of the representation and understandings of the parties here to and supersedes and/or incorporates any previous understandings proposals, or commitments, whether oral or written, and may be modified or amended only as herein before provided.

### **ARTICLE 18 - REPRESENTATIVES FOR THE PARTIES**

All notices shall be made in writing and may be given by email, mail or by personal delivery. Such notices sent by mail should be registered or certified and sent to the designated contact person for each Party and addressed as follows:

## ATTACHMENT E – Memorandum of Understanding

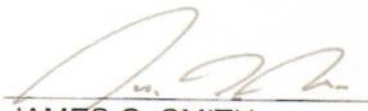
### FOR THE PROSECUTION STAFF

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San Diego Water Board Enforcement Coordinator  
San Diego Water Board  
2375 Northside Drive, Suite 100  
San Diego, CA 92108-2700  
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### FOR THE FOUNDATION

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San Diego River Park Foundation  
4891 Pacific Hwy #114  
San Diego, CA 92110  
[rhutsel@sandiegoriver.org](mailto:rhutsel@sandiegoriver.org)

### SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

 5 May 2017  
\_\_\_\_\_  
JAMES G. SMITH Date  
Assistant Executive Officer

### SAN DIEGO RIVER PARK FOUNDATION

 May 5, 2017  
\_\_\_\_\_  
Rob Hutsel Date  
President, CEO