

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

**SETTLEMENT AGREEMENT
ORDER NO. R9-2017-0184
IN THE MATTER OF
COLRICH CALIFORNIA, LLC AND CAMPUS FOR LIFE, LP**

**CHABAD CAMPUS PROJECT
SAN DIEGO COUNTY**

INTRODUCTION

This Settlement Agreement and Stipulated Order (“Stipulated 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 Team (“Prosecution Team”), Campus of Life, LP and ColRich California, LLP (collectively, the “Developers”), and is presented to the San Diego Water Board, or its delegate, for adoption as an order, by settlement, pursuant to Government Code section 11415.60. San Diego Water Board, Prosecution Team and/or Developers shall be collectively referred to herein as the “Parties” or individually as “Party.”

RECITALS

1. The Developers are completing construction of a private educational campus for 800 students, which will include a kindergarten through twelfth grade school, rabbinical seminar, sports facilities and a maximum of 280 housing units for students and faculty, referred to herein as the “Chabad Campus” or “Project” located on twenty-seven (27) acres within the Scripps Mesa Ranch Community Plan area of the City of San Diego at Pomerado Road and Chabad Center Driveway (the “Property”).
2. The Project developers are Campus of Life, LP and ColRich California, LLP. Campus of Life LP owns the Property that makes up the Project.
3. According to data uploaded into the statewide Storm Water Multiple Application and Tracking System (WDID#37C371640) , Project grading began in December of 2014.
4. On March 15, 2016, the San Diego Water Board conducted a routine storm water quality inspection at the Property, and requested a copy of the Clean Water Act section 401 Water Quality Certification (“401 Certification”) from the construction superintendent. The San Diego Water Board was informed that the Project had not obtained a 401 Certification.

5. On March 30, 2016, the San Diego Water Board conducted an inspection of the Property to evaluate the potential unauthorized discharge of fill (placement of stream into pipe) to waters of the United States and/or State.
6. On April 15, 2016, the San Diego Water Board issued a 401 Certification Inspection Report (the "Inspection Report"), alleging that waters of the United States and/or State were filled without authorization. The Inspection Report included certain recommendations and a notification that a Notice of Violation would be issued.
7. On June 1, 2016, the Developers responded to the Inspection Report, articulating their belief that the actions taken on the Property and Chabad Campus did not result in noncompliance with 401 Certification requirements for a number of technical and legal reasons.
8. The San Diego Water Board issued to the Developers Notice of Violation ("NOV") No. R9-2016-0132 on July 27, 2016.
9. On August 8, 2016, the U.S. Army Corps of Engineers, Los Angeles District, Carlsbad Field office ("Corps"), notified Developers by U.S. Certified Mail that it had received a report alleging discharge of fill material into waters of the United States without a Department of the Army ("DA") permit on the Property. Under Sections 301 [33 U.S.C. 1311] and 404 [33 U.S.C. 1344] of the Clean Water Act and Corps regulations promulgated pursuant thereto, the discharge of dredged and/or fill material into the waters of the United States is unlawful unless such discharge has been specifically authorized pursuant to section 404 of the Act by the Secretary of the Army through a Corps permit.
10. On August 10, 2016, the Developers responded to the NOV requesting clarification of the alleged violations and providing supplemental information regarding the legal reasons the Developers believe the Property is not in noncompliance with the California Water Code ("Water Code") and Clean Water Act ("CWA").
11. On November 2, 2016, representatives of the Developers met with representatives of the San Diego Water Board to address allegations in the NOV.
12. The Developers are alleged to have violated provisions of law for which the San Diego Water Board may impose civil liability pursuant to sections 13350 or 13385 of the Water Code.
13. The Parties have engaged in confidential settlement negotiations and agree to resolve the alleged violations set forth in the Stipulated Order without formal administrative proceedings.

The Prosecution Team alleges the following violation, set forth in full in the NOV, attached hereto as Exhibit A, to have been committed by the Developers.

14. Alleged Violation No. 1: Appropriate Permitting Authority Was Not Obtained for Project Discharges. At least two (2) unpermitted discharges of fill material occurred on the Property: (i) the installation of a culvert structure in an unnamed tributary to Carroll Canyon creek; and (ii) discharge of construction debris and fill into an unnamed tributary to Carroll Canyon Creek. The Discharges of the fill material from the Project into two (2) surface water drainages, Carroll Canyon Creek and the unnamed tributary (“Eastern Drainage”) required permitting under the CWA and/or the Water Code. Carroll Canyon Creek and the Eastern Drainage are waters of the United States and/or State, and therefore the Parties were required to obtain a CWA Section 404 Dredge and Fill Permit (“Section 404 Permit”) and a 401 Certification from the San Diego Water Board prior to any placement of fill in the Eastern Drainage, diversion of the flow of the Eastern Drainage and discharges of construction debris to Carroll Canyon Creek. Even if the Eastern Drainage is not a jurisdictional water of the United States, it is a water of the State, and the Developers should have submitted a report of water discharge (“ROWD”) and obtained waste discharge requirements in accordance with Water Code section 13260. Developers are in violation of Water Code sections 13260, 13265, and 13376 and CWA sections 301 and 401.

STIPULATIONS

The Parties stipulate to the following:

15. Party Contact Information:

For the San Diego Water Board: Chiara Clemente
Senior Environmental Scientist
San Diego Regional Water Quality Control
Board
2375 Northside Drive, Suite 100
San Diego, California 92108
Chiara.Clemente@waterboards.ca.gov

For Campus of Life, LP: Kirk Philo
Campus for Life, LP
444 Beech Street, Suite 300
San Diego, California 92101
kirkp@Colrich.com

For ColRich California, LLC: Rita Mahoney
ColRich California, LLC
444 Beech Street, Suite 300
San Diego, California 92101
RitaM@Colrich.com

With a Copy to:

John E. Ponder
Sheppard, Mullin, Richter & Hampton LLP
501 W. Broadway, 19th Floor
San Diego, California 92101
JPonder@SheppardMullin.com

16. Economic Benefit. Because the Developers have agreed to pay staff costs and conduct habitat restoration in excess of what would have been required through the standard permitting process, no economic benefit has been gained by the discharger as a result of the alleged violation.
17. Staff Costs. Developers shall reimburse the San Diego Water Board for staff costs which total \$11,759.
18. Payment and Costs. The Developers shall pay the staff costs amount within thirty (30) days of adoption of this Stipulated Order executed by the San Diego Water Board. Payment shall be made by check to the "State Water Resources Control Board Waste Discharge Permit Fund Account." The Developers shall indicate on the check the number of this Stipulated Order (R9-2017-0184) and send it to:

State Water Resources Control Board
DAS Accounting Office
Attn: Penalty Payment
P.O. Box 1888
Sacramento, California 95812-1888

The Developers shall send a copy of the check to the designated San Diego Water Board Party Contact.

19. Matters Addressed by Stipulation. Upon adoption of this Stipulated Order by the San Diego Water Board, this Stipulated Order represents a final and binding resolution to settle, as set forth herein, all claims, violations, or causes of action as alleged. The provisions of this paragraph are expressly conditioned on the Developers' full satisfaction of the obligations described in this Stipulated Order. In consideration of the Developers' compliance with this Stipulated Order, the Prosecution Team and the San Diego Water Board hereby covenant not to bring any further administrative or judicial enforcement action against the Developers, either individually or jointly, whether under California or federal law, concerning the specific violation alleged in this Stipulated Order.
20. Habitat Mitigation. The Project has permanently impacted 0.054 acres (785 linear feet) of ephemeral non-wetland waters of the State located in an area of non-native eucalyptus woodland. Punitive mitigation to offset the permanent loss of jurisdictional waters will be achieved through the Developers' purchase of re-establishment mitigation bank credits from the Brook Forest Mitigation Bank (Bank) no later than thirty (30) days after adoption of this Stipulated Order by the

San Diego Water Board. Mitigation credit parcels, purchased from the Bank to satisfy mitigation requirements, are required to be protected, monitored, and maintained in perpetuity by the Bank pursuant to a federal and State approved bank enabling instrument and a recorded conservation easement.

21. Mitigation Ratio. Punitive mitigation shall be provided at a ratio of 10:1.
22. Proof of Purchase. No later than thirty (30) days after adoption of this Stipulated Order by the San Diego Water Board, Developers must provide documentation to the San Diego Water Board verifying the purchase of at least 0.54 acres of re-establishment credits to waters of the U.S. and/or State from the Brook Forest Mitigation Bank. The use of an alternate mitigation bank to provide mitigation must be approved by the San Diego Water Board before the credits are secured.
23. Permits. The Developers shall submit a ROWD and obtain waste discharge requirements ("General WDRs") for any further activity involving the discharge of waste or fill to waters of the State.
24. Compliance With Storm Water Permit. The Developers will implement construction and post-construction best management practices in accordance with permit requirements of State Water Resources Control Board Construction General Permit Order No. 2009-0009-DWQ (as amended by 2010-0014-DWQ and 2012-0006-DWQ).
25. Federal and State Permits. Because the Developers are purchasing Bank credits, no State permits will be required to implement the Stipulated Order, including, but not limited to, WDRs.
26. Compliance with Applicable Laws. The Developers understand that compliance with this Stipulated Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged in this Stipulated Order may subject them to further enforcement, including administrative civil liability or further mitigation.
27. Attorneys' Fees and Costs. Except as otherwise provided herein, each Party shall bear its attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.
28. No Admission of Liability. If this Stipulated Order does not take effect or is vacated in whole or in part, the Developers' signatures become void and the Developers do not admit or stipulate to any of the findings or allegations in this Stipulated Order, the Inspection Report and/or the NOV, or that they have been or are in violation of the Water Code, or any other federal, State, or local law or ordinance.
29. Public Notice. The Developers understand that the San Diego Water Board will conduct a thirty (30) day public review and comment period prior to the consideration and adoption of the Stipulated Order. If significant new information

is received that reasonably affects the propriety of presenting this Stipulated Order to the San Diego Water Board, or its delegate, for adoption, the Assistant Executive Officer may unilaterally declare this Stipulated Order void and decide not to present it to the San Diego Water Board. The Developers agree that they may not rescind or otherwise withdraw their approval of this Stipulated Order.

30. Addressing Objections Raised During Public Comment Period. The Parties agree that the procedures for adopting this Stipulated Order by the San Diego Water Board and review of this Stipulated Order by the public are lawful and adequate. In the event procedural objections are raised prior to the adoption of this Stipulated Order, the Parties agree to meet and confer concerning any such objections and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.
31. No Waiver of Right to Enforce. The failure of the Prosecution Team of the San Diego Water Board to enforce any provisions of this Stipulated Orders shall in no way be deemed a waiver of such provision, or in any way affect the validity of this Stipulated Order. The failure of the Prosecution Team or San Diego Water Board to enforce such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order.
32. Interpretation. This Stipulated Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party.
33. Modification. This Stipulated Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the San Diego Water Board, or its delegate.
34. If Stipulated Order Does Not Take Effect. In the event this Stipulated Order does not take effect because it is not approved by the San Diego Water Board, or its delegate, or is vacated in whole or in part by the State Water Resources Control Board, the AEO or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the San Diego Water Board and/or a hearing panel 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 the hearing pursuant to Evidence Code section 1152 evidentiary objections, 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 this

Stipulated Order, and, therefore, may have formed impressions or conclusions prior to any contested evidentiary hearing on the violations alleged in this Stipulated Order; 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.
35. Waiver of Hearing. The Developers have been informed of the rights provided by Water Code section 13323(b), and hereby waive their right to a hearing before the San Diego Water Board prior to the adoption of this Stipulated Order by the San Diego Water Board.
36. Waiver of Right to Petition. The Developers hereby waive their right to petition the San Diego Water Board's adoption of this Stipulated Order for review by the State Water Resources Control Board, and further waive their right, if any, to appeal the same to a California Superior Court and/or any California appellate level court.
37. Covenant Not to Sue. The Developers covenant not to sue or pursue an administrative or civil claim(s) against any State Agency or the State of California, or its officers, Board Members, employees, representatives, agents or attorneys arising out of or related to any matter addressed herein.
38. San Diego 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 Developers, their directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulated Order, 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 Developers, their directors, officers, employees, agent, representatives or contractors in carrying out activities pursuant to this Stipulated Order.
39. Authority to Bind. Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Stipulated Order on behalf of, and to bind the entity on whose behalf he or she executes this Stipulated Order.
40. Necessity for Written Approvals. All approvals and decisions for the San Diego Water Board under the terms of this Stipulated Order shall be communicated to the Developers in writing. No oral advice, guidance, suggestions or comments by employees or officials of the San Diego Water Board regarding submissions of notices shall be construed to relieve the Developers of its obligation to obtain any final written approval required by this Stipulated Order.
41. No Third Party Beneficiaries. This Stipulated 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 Stipulated Order for any cause whatsoever.

42. Effective Date. This Stipulated Order shall be effective and binding on the Parties upon the date the San Diego Water Board adopts this Stipulated Order.
43. Counterpart Signatures. This Stipulated 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 the document.
44. Severability. The provisions of this Stipulated Order are severable; 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, San Diego Region, Prosecution Team

By:



JAMES G. SMITH
Assistant Executive Officer

Date:

7 Nov 2017

Campus of Life, LP

By:



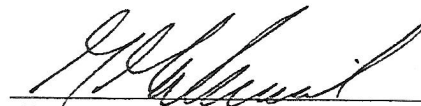
Rabbi Yonah Fradkin
Authorized Representative

Date:

10.31.2017

ColRich California, LLC

By:



Graeme Gabriel
Authorized Representative

Date:

11/9/17

Approved as for Form:

By: 
JOHN E. PONDER
Counsel for Developers

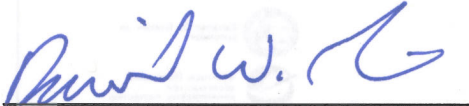
Date: 11/06/2017

**FINDINGS OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD,
SAN DIEGO REGION**

45. The terms of the foregoing Settlement Agreement are fully incorporated herein and made part of this Stipulated Order of the San Diego Water Board.
46. The San Diego Water Board finds that the Recitals set forth herein are true.
47. The proposed Stipulated Order was noticed for public comment for a minimum of thirty (30) days prior to the San Diego Water Board's consideration.
48. The Stipulated Order is severable. Should any provision be found invalid, the remainder shall remain in full force and effect.
49. In adopting this Stipulated Order, the San Diego Water Board has considered, where applicable, each of the factors prescribed in Water Code sections 13327 and 13385(e). The consideration of these factors is based upon information and comments obtained by the San Diego Water Board's staff in investigating the allegations herein or otherwise provided to the San Diego Water Board or its delegate by the Parties and members of the public.
50. 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 Stipulated 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.
51. The San Diego Water Board's Executive Officer is hereby authorized to refer this matter directly to the Attorney General for enforcement if the Developers fail to perform any of the obligations under the Stipulated Order.
52. Fulfillment of the Developers' obligations under this Stipulated Order constitutes full and final satisfaction of any and all liability for each allegation in this Stipulated Order in accordance with the terms of this Stipulated Order.
53. The agreement between the Assistant Executive Officer and the Developers is approved pursuant to Government Code Section 11415.60 and is incorporated by reference into this Order.
54. The San Diego Water Board may modify the findings prior to the adoption of the Order, provided that the modifications do not change the terms of the Stipulated Order.

Pursuant to Water Code sections 13323 and 13385 and Government Code section 11415.60, IT IS HEREBY ORDERED by the California Regional Water Quality Control Board, San Diego Region.

I, David Gibson, Executive Officer, do hereby certify that the forgoing 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.

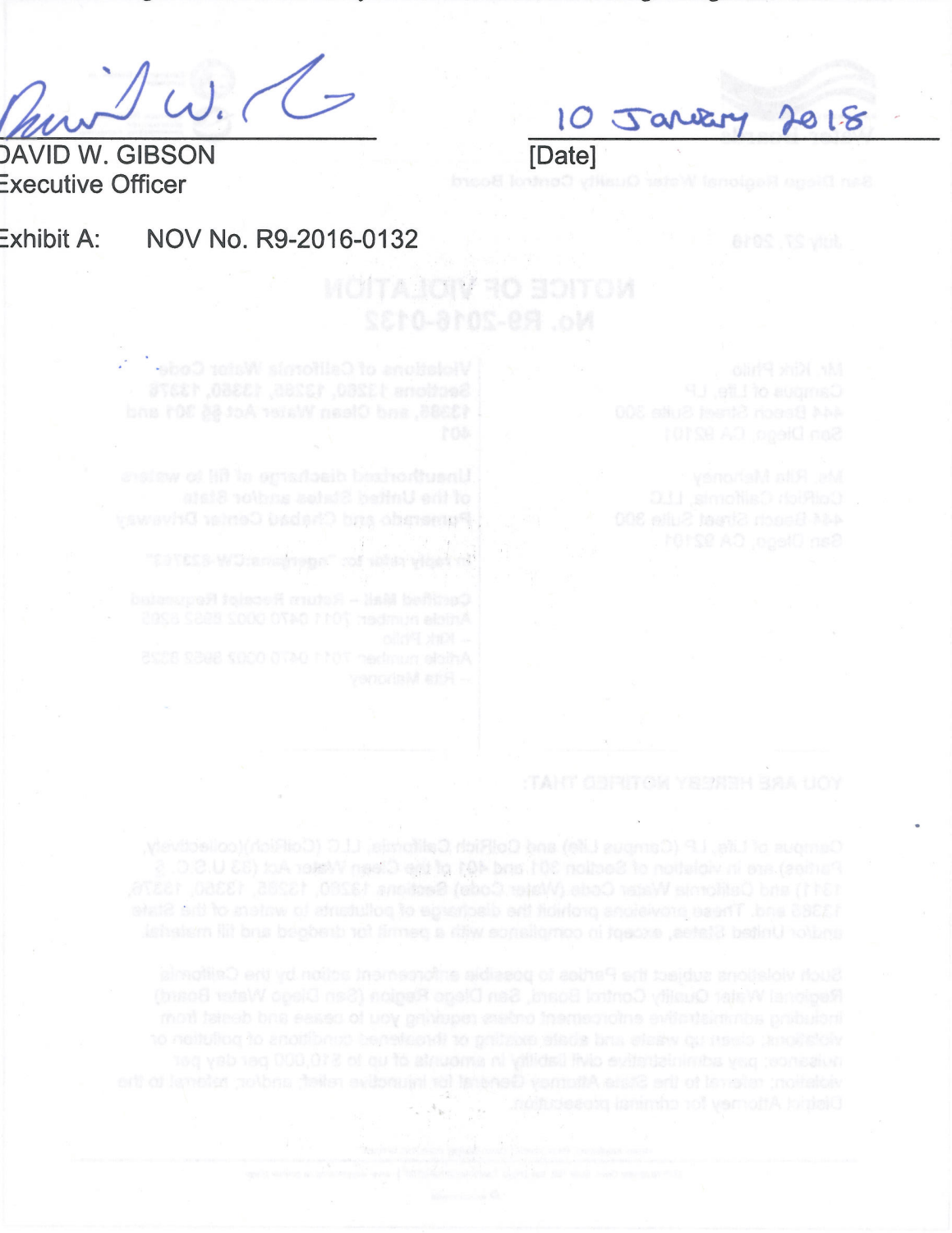


DAVID W. GIBSON
Executive Officer

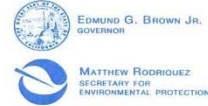
10 January 2018

[Date]

Exhibit A: NOV No. R9-2016-0132



**EXHIBIT A
NOV R9-2016-0132**



San Diego Regional Water Quality Control Board

July 27, 2016

**NOTICE OF VIOLATION
No. R9-2016-0132**

Mr. Kirk Philo
Campus of Life, LP
444 Beech Street Suite 300
San Diego, CA 92101

Ms. Rita Mahoney
ColRich California, LLC
444 Beech Street Suite 300
San Diego, CA 92101

**Violations of California Water Code
Sections 13260, 13265, 13350, 13376
13385, and Clean Water Act §§ 301 and
401**

**Unauthorized discharge of fill to waters
of the United States and/or State
Pomerado and Chabad Center Driveway**

In reply refer to: "ngergans: CW-823763"

Certified Mail – Return Receipt Requested
Article number: 7011 0470 0002 8952 8295
-- Kirk Philo
Article number: 7011 0470 0002 8952 8325
-- Rita Mahoney

YOU ARE HEREBY NOTIFIED THAT:

Campus of Life, LP (Campus Life) and ColRich California, LLC (ColRich)(collectively, Parties) are in violation of Section 301 and 401 of the Clean Water Act (33 U.S.C. § 1311) and California Water Code (Water Code) Sections 13260, 13265, 13350, 13376, 13385 and. These provisions prohibit the discharge of pollutants to waters of the State and/or United States, except in compliance with a permit for dredged and fill material.

Such violations subject the Parties to possible enforcement action by the California Regional Water Quality Control Board, San Diego Region (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.

HENRY ABARBANEL, PH.D., CHAIR | DAVID GIBSON, EXECUTIVE OFFICER
2375 Northside Drive, Suite 100, San Diego, California 92108-2700 | www.waterboards.ca.gov/sandiego



A. Background

The Chabad Educational Center (Project) is within the City of San Diego in San Diego County. The Project site is located south of Pomerado Road and east of Chabad Center Driveway. According to data uploaded into the statewide Storm Water Multiple Application and Report Tracking System (SMARTS), the construction site (WDID 37C371640) is owned by Campus of Life, LP with Mr. Kirk Philo as the primary contact.

According to SMARTS, Project grading began in December of 2014.

On March 15, 2016, San Diego Water Board staff Christina Arias of the Storm Water Management Unit conducted a routine storm water inspection of the Chabad Education Campus construction site (WDID 37C371640). Mr. Frank Gonzalez of ColRich, superintendent for the Project, was present and represented the owner during the inspection.

Ms. Arias observed and documented that an unnamed tributary to Carroll Canyon Creek had been diverted underground into a concrete pipe. She asked Mr. Gonzalez if the Project had a Clean Water Act Section 401 Water Quality Certification (401 Certification) or San Diego Water Board waste discharge requirements (WDRs) needed prior to placing fill into waters of the United States and/or State. Mr. Gonzalez acknowledged the Project did not have a 401 Certification and directed San Diego Water Board staff to speak with Ms. Rita Mahoney of ColRich for more details. Ms. Arias provided the information to San Diego Water Board Wetland and Riparian Protection Unit staff Eric Becker and Nicole Gergans.

Ms. Gergans contacted both Ms. Mahoney and Mr. Conan Murphy of the City of San Diego (City) to request additional details on the Project. Ms. Gergans discussed the lack of 401 Certification with Mr. Murphy the week of March 28, 2016. According to Mr. Murphy, the Project was originally permitted for development by the City of San Diego in 1967 and the City assumed that it was exempt from permitting requirements for dredge and fill activities in waters of the United States and/or State because the date of the permit occurred prior to the adoption of the California Environmental Quality Act.

On March 30, 2016 Ms. Gergans and other San Diego Water Board staff conducted an inspection of the Project site to evaluate the unauthorized discharge of fill (placement of stream into pipe). Representatives on behalf of ColRich and the City of San Diego were present. During this inspection, San Diego Water Board staff re-confirmed that an unnamed tributary to Carroll Canyon Creek had been placed underground into a concrete pipe. The unnamed tributary to Carroll Canyon Creek is a water of the United States and/or State and the Parties should have obtained 401 Certification from the San Diego Water Board prior to installing the culvert and diverting the unnamed tributary to an underground pipe.

An inspection report was issued on April 15, 2016 (attached) with recommendations and findings. On April 29, 2016, a follow up email was sent to the Parties requiring a response to recommendations by May 15, 2016. On May 3, 2016, correspondence was sent from Mr. John E. Porter of Sheppard, Mullin, Richter and Hampton LLP

representing the Parties. Mr. Porter acknowledged receipt of the inspection report and requested that future correspondence be addressed to Ms. Rita Mahoney of ColRich. Mr. Porter also requested that the Water Board delay issuing a Notice of Violation until the Parties could submit additional information. Mr. Eric Becker of the San Diego Water Board granted an extension until June 1, 2016. A letter via email was received by the San Diego Water Board on June 1, 2016 from Mr. Porter. The letter was reviewed by San Diego Water Board Staff and State Water Resources Control Board Office of Enforcement attorneys.

B. Response to June 1, 2016 Letter from Mr. Porter

(i) Discharges

There are at least two unpermitted discharges of fill material that occurred on the Project site: the installation of the culvert structure and diversion of an unnamed tributary to Carroll Canyon Creek to the pipe inlet, and the Project construction activities and debris discharged to Carroll Canyon Creek.

(ii) Appropriate Permitting Authority Was Not Obtained for the Project Discharges Described Above

The discharges of fill material from the Project into the two surface water drainages, Carroll Canyon Creek and the unnamed tributary of Carroll Canyon Creek¹ required permitting under either the Clean Water Act (CWA) or the Water Code. Carroll Canyon Creek and the unnamed tributary to Carroll Canyon Creek are a waters of the United States and/or State, and therefore the Parties were required to obtain a CWA section 404 dredge and fill permit (33 U.S.C.A. § 1344), and also a CWA section 401 state water quality certification from the San Diego Water Board (33 U.S.C.A. § 1341; Wat. Code, § 13376) prior to any placement of fill in the unnamed tributary to Carroll Canyon Creek, diversion of flow of the unnamed tributary, and discharges of construction debris to Carroll Canyon Creek. Even if the unnamed tributary to Carroll Canyon Creek is not a jurisdictional water of the United States, it is a water of the State, and the Parties should have submitted a report of waste discharge (ROWD) and obtained waste discharge requirements. (Wat. Code, § 13260 subd. (a)(1)). Regardless of the designation of the two waterways, the Parties will be required to implement compensatory mitigation for temporal/permanent impacts and may be subject to administrative civil liabilities.

Despite counsel's assertions to the contrary, the development of the Project does not create a vested right that exempts the Project from permitting under either the CWA or the Water Code. First, the Water Code expressly prevents the creation of vested rights. No discharges into waters of the State create a vested right; all discharges of waste are

¹ The Parties sometimes refer to this tributary as the "Eastern Drainage."

privileges not rights. (Wat. Code, § 13263). Second, the Vested Rights Doctrine applies primarily to zoning laws. The CWA and the Water Code are not zoning laws - neither controls or expressly prohibits construction or development of property. Rather, these statutes regulate the manner in which waste can be discharged into waters of the United States or State, respectively. Third, the exemption to permit certification under CWA section 401(a)(6) only applied to "actual construction of a facility" commenced prior to April 3, 1970. This limited exemption to certification terminated April 3, 1973. The Chabad Campus is not exempted from certification, because construction of the Chabad Campus did not commence until some point after 1995. The City of San Diego's issuance of conditional use permit CPU-133 for the Project site in 1967 does not serve to comply with the Clean Water Act and/or Water Code's permitting requirements.

C. San Diego Water Board Alleged Violations:

Dredging, filling, or excavation within waters constitutes a discharge of waste to waters of the United States and/or State, and prospective dischargers are required to submit a ROWD to the appropriate Regional Water Quality Control Board and obtain a 401 Certification and/or waste discharge requirements. The Parties discharged fill material into waters of the United States and/or State without filing a ROWD or obtaining a 401 Certification for those discharges and impacts. The activities of the Parties resulted in the unauthorized discharge of fill to waters of the United States and/or State in violation of Water Code sections 13260, 13265, 13350, 13376, 13385 and sections 301 and 401 of the Clean Water Act (33 U.S.C. § 1311, 1341).

The Parties did not exercise adequate due diligence prior to commencement of grading and discharge of fill. The Parties did not accurately review the regulations that require a permit to place fill into waters of the United States and/or State. In addition, the Parties did not review aerial imagery or topographical maps to identify jurisdictional features, conduct any preliminary jurisdictional delineation prior to grading, or contact the responsible agencies to determine if the Project would impact waters of the United States and/or State.

D. Summary of Potential Enforcement Options

The Parties may be subject to administrative civil liability pursuant to Water Code sections 13350 and 13385 for failing to obtain state water quality certification, waste discharge requirements, and for the unauthorized discharge of fill to waters of the State and United States. In addition to administrative civil liability, the Parties may be subject to the following enforcement actions to address the impacts, remediate harm, or implement compensatory mitigation:

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.

The San Diego Water Board staff would like to meet with the Parties to discuss the alleged violations, impacts to waters of the United States and State, and potential administrative civil liabilities. Please contact me at (619) 521-3364 or Eric.Becker@waterboards.ca.gov to coordinate a day and time for an in-person meeting and if you have any questions pertaining to this notice of violation.

Written correspondence pertaining to this NOV should be sent to sandiego@waterboards.ca.gov. In the subject line of any response, please include "ngergans: CW-823763."



Eric Becker, P.E.
Senior Water Resources Control Engineer
Wetland and Riparian Protection Unit

ESB:ng

Attachment: April 15, 2016 San Diego Water Board Inspection Report

cc: Mr. John Ponder
Sheppard Mullin Richter and Hampton LLP
jponder@sheppardmullin.com

Ms. Melanie Tymes
Army Corps of Engineers
Melanie.B.Tymes@usace.army.mil

Ms. Kelly Fisher
Kelly Fisher
Kelly.fisher@wildlife.ca.gov

Tech Staff Info & Use	
Violation ID	1010632
Place ID	823763
Party ID	558330
Party ID	558332

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

**SECTION 401 WATER QUALITY CERTIFICATION
INSPECTION REPORT**

FACILITY: Chabad Educational Campus , San Diego CA **INSPECTION DATE/TIME:** 03/30/2016; 1:00 pm

SITE WDID No.: 9 37C371640

CIWQS Place ID No.: 823763

REPRESENTATIVE(S) PRESENT DURING INSPECTION:

Nicole Gergans, Christina Aria, Alan Monji (SDRWQCB), multiple representatives of the City of San Diego, and multiple representatives of ColRich.

Kirk Philo
NAME OF OWNER, AGENCY OR PARTY RESPONSIBLE FOR DISCHARGE

Campus of Life LP
FACILITY OR DEVELOPER NAME (if different from owner)

444 Beach Street Suite 300 San Diego CA 92101
OWNER MAILING ADDRESS

Pomerado Road and Chabad Center Driveway San Diego
FACILITY ADDRESS

(858) 603-4357
OWNER CONTACT NAME AND PHONE #

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 | <input type="checkbox"/> GENERAL OR INDIVIDUAL WAIVER OF WASTE DISCHARGE REQUIREMENTS |
| <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)

Facility: Chabad Education Campus
Inspection Date: 03/30/2016

I. COMPLIANCE HISTORY / PURPOSE OF INSPECTION

On March 15, 2016, California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) staff Christina Arias of the Storm Water Management Unit conducted a routine storm water inspection of the Chabad Education Campus construction site (WDID 37C371640). Mr. Frank Gonzalez of Colrich, superintended for the project, was present and represented the owner during the inspection.

Ms. Arias observed and documented that a stream on the project had been placed underground into a concrete pipe. She asked Mr. Gonzalez if the project had a Clean Water Act Section 401 Water Quality Certification (401 Certification) required to fill waters of the United States and/or State. Mr. Gonzalez acknowledged the project did not have a 401 Certification and directed San Diego Water Board staff to speak with Ms. Rita Mahoney of ColRich for more details. Ms. Arias provided the information to San Diego Water Board Wetland and Riparian Protection Unit staff Eric Becker and Nicole Gergans.

Ms. Gergans contacted both Ms. Mahoney and Conan Murphy of the City of San Diego (City) to request additional details on the project. Ms. Gergans discussed the lack of 401 Certification with Mr. Murphy the week of March 28, 2016. According to Mr. Murphy, the project was originally permitted in 1967 and assumed that the it was exempt from the Clean Water Act Section 401 requirements for dredge and fill activities in waters of the United States and/or State.

On March 30, 2016 Ms. Gergans and other San Diego Water Board staff conducted an inspection of the site to evaluate the unauthorized discharge of fill (placement of stream into pipe).

II. FINDINGS

1. At approximately 1:00 PM on March 30, 2016, San Diego Water Board inspectors Nicole Gergans, Christina Arias, and Alan Monji arrived at the construction site and met with representatives of both the Colrich and the City.
2. San Diego Water Board inspectors walked the site to observe the areas in which unauthorized fill and impacts to waters of the United States and/or State had occurred.
3. The area showing the pipe inlet is shown below in Photo 1, Photo 2, and Photo 3 below. The stream was an unnamed tributary to Carrol Canyon Creek.

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Photo 1 – Pipe inlet from above. Direction of flow in red.



Photo 2 – Pipe inlet looking northwest. Direction of flow in red.

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Photo 3 – Unnamed tributary entering pipe inlet. Direction of flow in red.

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4. The area showing the pipe outlet is shown below in Photo 4 and Photo 5.



Photo 4 – Pipe outlet, photo facing northwest.

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Photo 5 – Pipe outlet with outfall flowing north.

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5. Area in which the outfall flows into the tributary shown in Photo 6 below.



Photo 6 – Area in which pipe outfall flows north into tributary. Direction of flow in red.

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6. Area in which material from construction site was entering adjacent tributary is shown below in Photo 7.



Photo 7 –Construction activities and debris have entered entering waters of the United States and/or State.

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- San Diego Water Board staff were not able to verify the exact footprint of the unauthorized fill. An estimate of the construction site is highlighted below in red and a rough outline in blue of where the tributary might have been located is highlighted in below in Figure 1.

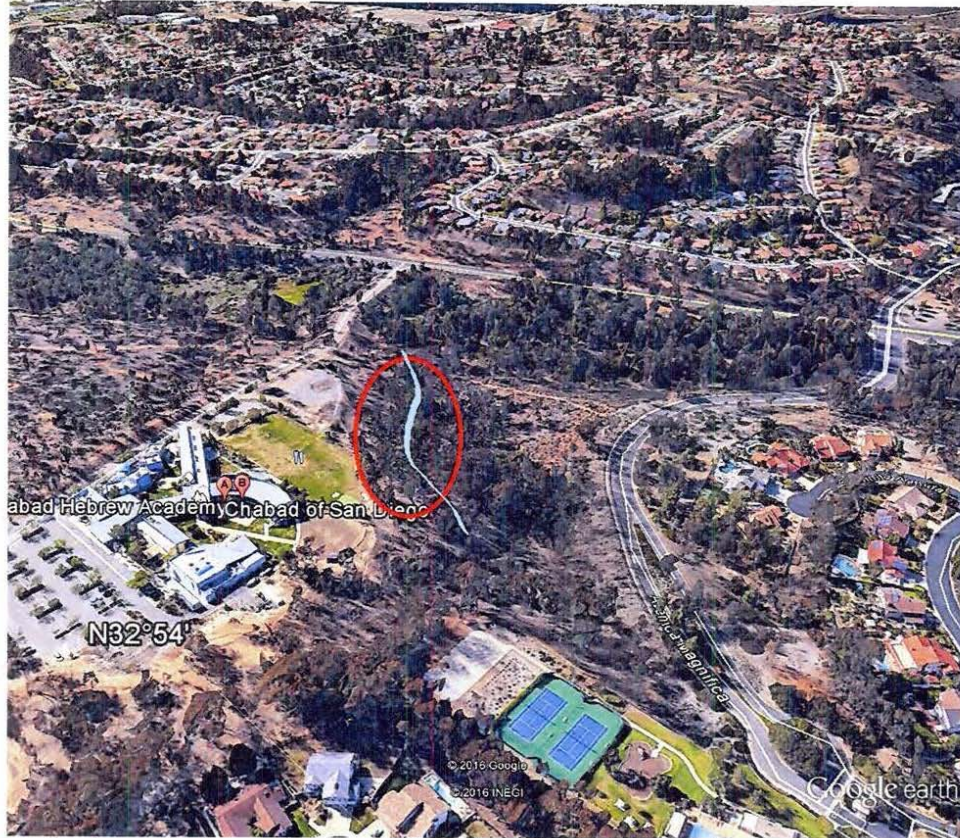


Figure 1 – Approximate construction site in red and filled tributary in blue.

- The unauthorized discharge of fill into an unnamed tributary are illegal discharges of waste to waters of the United States and/or State in violation of Water Code sections 13260 and 13376 and waste discharge prohibitions contained in the Basin Plan.

III. RECOMMENDATIONS

- Campus of Life LP and Kirk Philo shall determine the type, extent, and quantity of impacts from the illegal fill in waters of the United States and/or State. Impacts shall be reported in both area and in linear feet.

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2. San Diego Water Board 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. Campus of Life LP and Kirk Philo will ensure that additional construction site materials are contained on and not discharged to waters of the United States and/or State

IV. SIGNATURE SECTION

Nicole Gergans		4/15/2016
STAFF INSPECTOR	SIGNATURE	INSPECTION DATE
Eric Becker		4/15/2016
REVIEWED BY SUPERVISOR	SIGNATURE	DATE