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July 6, 2016

BY HAND

Catherine Hagan, Esq.
Senior Staff Counsel
San Diego Regional Water Quality Control Board
2375 North Side Drive, Suite 100
San Diego, CA 92108

Re: Administrative Civil Liability Complaint No. R9-2016-0092
Submission of Evidence and Policy Statements by KB Home, Inc.

Dear Ms. Hagan:

In accordance with the Revised Hearing Procedure ("Procedure"), enclosed please find two (2) hard copies and one (1) electronic copy of the following as the Evidence and Policy Statements submitted on behalf of KB Home, Inc. ("KB"):

1. Legal and Technical Arguments and Analysis in Opposition to Administrative Civil Liability Complaint No. R9-2016-0092 (Brief with Exhibits attached)
2. List of Exhibits. The Exhibits include the following declarations:
 - a. Barry Jones
 - b. Kurt Bausback
 - c. Mike Klinefelter

KB also requests that the following documents already in the public files be included as part of KB's evidence and exhibits:

1. ACL Complaint No. R9-2015-0110, its Technical Analysis and all attachments (ACL Complaint package) previously submitted by the Prosecution Team.
2. State Water Resources Control Board Water Quality Enforcement Policy, Effective May 20, 2010.

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http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_f inal111709.pdf

3. Any State Water Resources Control Board or Regional Board actions cited in the documents submitted for which a hard copy has not been provided.
4. Any judicial decisions cited in the documents submitted for which a hard copy has not been provided.

KB reserves the right to call the following witnesses if necessary at the hearing. Each potential witness will be present to confirm his respective declaration.:

Witness	Subject of Testimony	Time Estimated
Kurt Bausback	KB's due diligence process and the oversight of the project by the County	5 minutes
Barry Jones	Expert testimony concerning the use of preliminary jurisdictional delineations, the ordinary high water mark and the other issues addressed in the declaration.	10 minutes
Mike Klinefelter	Expert testimony concerning the use of preliminary jurisdictional delineations, the ordinary high water mark and the other issues addressed in the declaration.	10 minutes

Barry Jones and Mike Klinefelter would appear as expert witnesses. Their qualifications are provided in their respective declarations.

CDs of the documents submitted have been provided to Ms. Clemente for the use of the Prosecution Team.

Sincerely,



John J. Lormon

Enclosures



cc without enclosures:

Naomi Kaplowitz, State Water Resources Control Board, naomi.kaplowitz@waterboards.ca.gov

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7
8 **CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**
9 **SAN DIEGO REGION**

10
11 IN THE MATTER OF:

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

**KB HOME'S LEGAL AND
TECHNICAL ANALYSIS
IN OPPOSITION TO THE REGIONAL
BOARD'S COMPLAINT FOR
ADMINISTRATIVE CIVIL LIABILITY
NO. R9-2016-0092**

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1 **I. INTRODUCTION**

2 KB Home (“KB”) strongly opposes the Prosecution Team’s attempt to impose a \$875,166
3 penalty for KB’s construction of an emergency access road to serve the Settler’s Point residential
4 project in Lakeside (“Project”). The County of San Diego (“County”) required that the road
5 “knuckle” be built for fire-safety purposes, and the County’s review of the Project under the
6 California Environmental Quality Act (“CEQA”) and its subsequent approvals of the Project did
7 not identify any impacts to regulated waters from its construction. That finding was confirmed by
8 a due-diligence review prepared for KB by its third-party environmental experts. The Complaint
9 for Administrative Civil Liability (“ACL”) seeks a significant penalty even though the construction
10 impacted only 0.018 acres (784 square feet) and 278 linear feet of an ephemeral drainage.

11 The San Diego Regional Water Quality Control Board (“Board”) should reject the
12 Prosecution Team’s attempt to impose this excessive and unfair penalty on KB for any of the
13 numerous legal and equitable reasons discussed below. As a general matter, the ACL is legally
14 invalid because it alleges that KB violated the Federal Clean Water Act (“FCWA”) Section 404
15 “dredged and fill” program, but ignores the fact that the State of California has no legal authority to
16 enforce that program. In addition, no proof have been presented that the ephemeral drainage is a
17 Water of the United States (“Water of the US”). Even if it assumed to be a Water of the US, the
18 penalty is excessive because the number of “gallons” used to calculate the penalty erroneously
19 includes material placed outside the ordinary high water mark (“OHWM”) of the drainage.

20 The Prosecution Team also has failed to show that the penalty is fair and consistent with
21 the State Water Resources Control Board’s May 2010 “Water Quality Enforcement Policy”
22 (“Policy”) and with the Section 13385(e) penalty factors.¹ The Prosecution Team has improperly
23 characterized the fill of 0.018 acres of an ephemeral drainage as a “Major” harm based solely on
24 the fact that the fill has been in place for more than five days. But under that interpretation of the
25 Policy, the fill of 0.018 acres of an ephemeral drainage causes as much harm as the fill of 50 acres
26 of pristine wetlands. Such an interpretation ignores the statutory requirement that the “nature,
27 circumstances, extent, and gravity of the violation” be considered in assessing a penalty. It also is

28 ¹ Unless otherwise noted, all references to statutory section are to the California Water Code.

1 inconsistent with how the “Harm” factor has been calculated in other matters involving more-
2 serious impacts.

3 The Prosecution Team also should have reduced the alleged days of violation from 161 to
4 11 under the Policy’s “multiple-days” calculation to be consistent with other regional board
5 actions. Raising the culpability factor to 1.2 also was improper because KB justifiably relied on
6 the County’s approvals of the Project and on the due-diligence report of its experts.

7 Intertwined with these legal and policy considerations is a basic question of fairness: given
8 KB’s due diligence, the size of the fill, and the resource affected, does the alleged violation deserve
9 an \$875,166 penalty? The answer is “no.” While KB is a large company, the “ability to pay”
10 factor in the Policy is intended to reduce a base-level penalty not to justify excessive ones.
11 Likewise, if the penalty is intended to “send a message” for deterrence purposes, the Policy does
12 not list that “goal” as a factor to be considered when setting a penalty, except for repeat violators.
13 The ACL admits that KB has no history of past violations.

14 Consequently, the Board cannot assess the penalty sought in the ACL because the ACL is
15 legally invalid and not supported by evidence. The Board should dismiss the ACL with prejudice.

16 Without admitting the legal basis for or allegations in the ACL, KB position is that a fair
17 and consistent application of the Policy should result in a penalty that does not exceed \$75,213.
18 KB has calculated that amount by (1) retaining the excessive “Potential for Harm” factor of 0.31;
19 (2) calculating a “per-gallon” penalty of \$24,117 based on the OHWM and a “per-day” penalty for
20 the 11 days of violation of \$34,100 based on the “multiple-days” method; and (3) adding \$16,996
21 for staff costs from the ACL. The \$75,213 exceeds the minimum penalty of \$42,461 in the ACL.
22 KB also requests that the Board direct staff to work with KB so that it can obtain approvals if any
23 are needed for the emergency access road to remain in place.

24 **II. FACTUAL SUMMARY**

25 This factual summary is provided as a convenience to the Board and as a reference to some
26 of the relevant facts in this matter. A more-detailed discussion of these facts with citations to
27 supporting documents is provided in Section IV below.

28

- 1 • The County required that the road knuckle be added at the location to provide secondary
2 and emergency access from the Project to Wellington Hills Drive in accordance with the
3 Fire Protection Plan and County and state laws governing for fire protection.
- 4 • Studies of the Project conducted by environmental consultants approved by the County did
5 not identify the ephemeral drainage as being a Water of the US or a Water of the State.
- 6 • The 2010 engineering plans for the road knuckle did not identify any jurisdictional waters
7 that would be impacted by its construction.
- 8 • The County's 2012 Initial Study and Mitigated Negative Declaration ("MND") for the
9 Project did not identify any Waters of the US/State that the Project would impact.
- 10 • The County Planning Commission approved the Tentative Map for the Project in 2012 and
11 adopted a grading permit which included the road knuckle, finding that the Project was
12 consistent with County resource-protection laws.
- 13 • The County approved final grading plans in 2014 that included the road and the installation
14 of storm drains under the road knuckle.
- 15 • In the Notice of Violation issued to the County in August of 2015 ("County NOV"), the
16 Regional Board admitted that the County's approval of the Project "led to the unauthorized
17 discharge of fill to waters of the U.S./State by KB Home."
- 18 • KB did not own the property and had no involvement with the Project at the time that the
19 County prepared and approved the Initial Notice, MND, and grading permit.
- 20 • The property was marketed as having "all the necessary environmental approvals and a
21 construction grading permit issued by the County."
- 22 • KB purchased the property at fair-market value, and would not have purchased it when it
23 did if it was aware that additional environmental approvals were needed.
- 24 • The due-diligence report prepared by Mr. Jones and Helix Environmental Planning, Inc.
25 ("Helix") based on their review of documents and a site inspection concluded that "no
26 potentially jurisdictional areas were observed within the project area."
- 27 • KB purchased the property in September of 2014 and began grading the road knuckle on
28 December 5, 2014. Rough grading of the road ended on January 13, 2015.

- 1 • A County Inspector was present during the grading and installation of the storm drains to
- 2 ensure that the work was completed in accordance with the approved grading plans.
- 3 • The Regional Board’s site inspection report from July 1, 2015, states that staff and the
- 4 Army Corps “were unable to verify the preliminary jurisdictional delineation of aquatic
- 5 resources within the footprint of the unauthorized fill.”
- 6 • After the installation of the road knuckle, stormwater from the ephemeral drainage still
- 7 flows into a storm drain pipe under Wellington Hills Drive, but starts 278 feet sooner.
- 8 • KB met with the Prosecution Team at least three times to try and resolve the matter, but the
- 9 parties were not able to agree on a resolution.

10 **III. SUMMARY OF LEGAL ARGUMENTS**

- 11 • The ACL impermissibly seeks to enforce alleged violations of the FCWA Section 404
- 12 permit program that the State is not authorized to implement or to enforce.
- 13 • The ACL improperly seeks a penalty under Section 13385 for alleged discharges to Waters
- 14 of the State, but that provision only applies to discharges to Waters of the US.
- 15 • The ACL improperly alleges that KB violated Section 13376 by failing to file a “report of
- 16 the discharge,” but that filing requirement is void under Section 13372 because the State is
- 17 not authorized to implement or to enforce the FCWA Section 404 permit program.
- 18 • The ACL improperly alleges that KB violated FCWA Section 301 by failing to obtain a
- 19 federal Section 404 permit, but the State has no authority to determine if a federal Section
- 20 404 permit was required.
- 21 • The Prosecution Team has failed to prove that the ephemeral drainage is a Water of the US.
- 22 • Even if it was, a penalty based on the “gallons” of all solid materials used to build the road
- 23 is improper because the term “gallons” only applies to liquid discharges.
- 24 • The 70,691 “gallons” allegedly discharged is vastly overstated because it includes areas
- 25 outside the OHWM of the ephemeral drainage, which are not a Water of the US.
- 26 • Based on an average OHWM of 1.5 feet, the total volume of the ephemeral drainage below
- 27 the OHWM is only 1,176 cubic feet (43.5 cubic yards) or 8,796 liquid gallons.
- 28

- 1 • The argument that the Policy requires that a “Potential for Harm” factor of “Major” be
2 applied because the fill is “permanent” ignores the language of the Policy and does not
3 consider the “nature, circumstances, extent, and gravity” of the harm as required.
- 4 • The use of the “Major” factor conflicts with the way the factor has been calculated in other
5 water board actions, resulting in an unfair and inconsistent application of the Policy.
- 6 • The Policy has not been applied consistently and fairly because the alleged 161 days of
7 violation has not been reduced to 11 days using the Policy’s “multiple-days” methodology
8 applied in numerous other matters.
- 9 • The penalty sought exceeds those sought in numerous other matters involving more-serious
10 environmental impacts.
- 11 • The culpability factor applied to increase the proposed penalty ignores KB’s justifiable and
12 reasonable reliance on the County’s approvals of the Project and the due-diligence
13 assessment of the environmental professionals hired by KB.

14 **IV. EXTENDED FACTUAL BACKGROUND**

15 **A. The County’s Review and Approval of the Project Did Not Find That the** 16 **Project Would Impact any Regulated Waters**

17 The Project site is located in the unincorporated community of Lakeside, east of El Cajon
18 and north of Interstate 8. As shown in the photographs in the ACL and the TA, the Project site is
19 in a developed area, and is generally surrounded by other residential developments.

20 Previous owners had proposed various residential projects on the Property, and had
21 prepared environmental reviews needed to obtain the entitlements. A Biological Technical Report
22 prepared by RC Biological Consulting, Inc. (“RC”) in 2006 to support the subdivision and rezoning
23 of the property identified impacts to biological resources that the development would cause, and
24 proposed mitigation for those impacts. The RC report did not identify waters on the property or in
25 off-site areas that were Waters of US or Waters of the State.

26 Two years later, in a July 31, 2008, letter to the County, REC Consultants, Inc. (“REC”)
27 provided an updated description of the project and analysis of its potential the impacts to on-site
28 and off-site biological resources. (Exh. A.) The REC report noted that the off-site work included

1 the construction of a “road knuckle” to connect the Project to Wellington Hills Drive. (*Id.* at pg.
2 4.) The REC report confirmed that the impacts to resources identified by RC and the
3 recommended mitigation remained the same and that no additional field work was needed.

4 The County required that the road knuckle be added to the Project to satisfy a requirement
5 in its Fire Protection Plan that the Project include two means of access and no dead-end roads.
6 (ACL Technical Analysis (“TA”), App. A at pg. A-2.) The 2010 engineering plans for the road
7 knuckle included with the ACL did not identify any jurisdictional waters that would be impacted
8 by the construction of the road. (*Id.*) The design of the road knuckle was required by the County
9 to ensure that fire vehicles would be able to navigate the turn.

10 Neither the County’s Initial Study nor MND for the Project, both dated February 10, 2012,
11 identified any Waters of the US or Waters of the State that the Project would impact. The MND
12 specifically referred to the road knuckle connecting to Wellington Hills Drive (Exh. B, MND at
13 pgs. 10, 16), and the Initial Study found that the Project “will not alter any drainage patterns of the
14 site or area on- or off-site.” (Exh. C, Initial Study at pg. 40.) The Initial Study also stated that the
15 County’s staff biologist had concluded that the Site “does not contain any wetlands as defined by
16 Section 404 of the Clean Water Act, including but not limited to marsh, vernal pool, stream, lake,
17 river or water of the U.S.” (*Id.* at pg. 20, emphasis added.)

18 The County Planning Commission approved the Tentative Map for the Project at its
19 meeting on February 10, 2012. (Exh. D.) The Planning Commission also adopted the 2009
20 grading permit, which included the road knuckle. (*Id.* at pg. 2.) The Planning Commission found
21 that the Project (1) was “not likely to cause substantial environmental damage or substantially and
22 unavoidably injure fish or wildlife or their habitat,” (2) was consistent with the County’s Resource
23 Protection Ordinance, and (3) would comply with the County Watershed Protection, Stormwater
24 Management, and Discharge Control Ordinances. (*Id.* at pgs. 16-17.)

25 The Regional Board has admitted that the County’s Initial Study did not identify the
26 “presence of jurisdictional water of the U.S./State associated with the offsite road improvements.”
27 (Exh. E, County NOV at pg. 2.) The Regional Board also admitted that the County’s approval of
28

1 the proposed development “led to the unauthorized discharge of fill to waters of the U.S./State by
2 KB Home.” (*Id.* at pg. 3.)

3 The Prosecution Team now claims that, had “County staff taken more care in this desktop
4 review, aerial photographs could have alerted them to the presence of the jurisdictional streams
5 directly off-site in the footprint of the proposed road knuckle.” (TA, App. A at pg. A-4.) But, the
6 Google Earth photograph provided in the ACL to support that claim does not show clear evidence
7 that there are jurisdictional waters in that area. (*Id.*) The aerial photograph actually shows a dirt
8 road crossing the area of the ephemeral drainage (above where the word “streams” is written),
9 indicating the lack of any significant drainage in the area. (*Id.*)

10 More importantly, the Prosecution Team is not seeking to impose a significant penalty on
11 the County for its failure to “take more care.” Rather, the Prosecution Team has issued an ACL
12 only to KB, which justifiably and reasonably relied on the County’s review and approvals of the
13 Project. Again, KB did not own and had no involvement with the Project when the County
14 prepared and approved the CEQA documents, the Tentative Map, and the grading permit.

15 In a letter dated March 19, 2013, REC provided another updated Project description to the
16 County. (Exh. F.) Once again, REC concluded that no further biological field work was needed.
17 The County did not change its previous findings when it approved the final grading permit for the
18 project in February of 2014. (Exh. G.) The approved grading permit and grading plans addressed
19 both the grading for the road and the installation of storm drain pipes under the road knuckle to
20 connect with the existing storm drain under Wellington Hills Drive. (*Id.*)

21 **B. KB Properly Relied on its Due Diligence**

22 In May of 2014, KB began its review of the Project, which the ACL acknowledges was
23 marketed as having “all the necessary environmental approvals and a construction grading permit
24 issued by the County.” (TA at pg. 3.) KB met with the County to find out if any other approvals
25 were required. (Exh. H, Declaration of Kurt Bausback ¶ 5.) The County confirmed that all
26 required approvals had been obtained and that KB could be substituted as the permittee on the
27 approved grading permit. (*Id.*)

28

1 Following KB's standard practice, KB also hired environmental experts, Mr. Jones and
2 Helix to conduct additional environmental due diligence of the Project. (*Id.* ¶¶ 6-7.) KB had
3 worked with Mr. Jones on a number of other projects, and KB had relied on his experience with
4 environmental permitting requirements. (*Id.* ¶ 7.) Mr. Jones has lengthy experience with
5 regulatory and environmental matters throughout southern California, including matters involving
6 jurisdictional waters. (Exh. I, Declaration of Barry Jones ¶¶ 3-4.)

7 KB received the due-diligence assessment in a May 9, 2014, letter from Mr. Jones. It stated
8 that the assessment had been prepared "to confirm that no significant changes or biological issues
9 have occurred since project approvals and there are no constraints on development." (Exh. J at
10 pg. 1.) The letter stated that the due-diligence assessment was based on "a site reconnaissance on
11 May 5, 2014, by HELIX biologist Jasmine Bakker" and on his review of "project files provided by
12 KB Home and regional planning documents," including the REC reports, the Initial Study, and the
13 MND. (*Id.*) KB provided Ms. Bakker's field notes and the aerial photograph that she used during
14 the site inspection the Regional Board. (Exh. K.) Again, this aerial photograph does not make
15 clear that there were jurisdictional waters in the road knuckle area. (*Id.*)

16 Based on the document review and the site inspection, Mr. Jones' letter concluded, in
17 relevant part, that "[n]o potentially jurisdictional areas were observed within the project area. No
18 signs of recent surface flow, no definable bed and bank or ordinary high water mark, and no
19 presence of wetland or riparian vegetation sufficient to constitute habitat were observed." The
20 letter stated that "based on our assessment there were no areas that can be considered jurisdictional
21 under either U.S. Army Corps of Engineers (USACE) or California Department of Fish & Wildlife
22 (CDFW Regulations). (Exh. J at pg. 3.) Ms. Bakker's field notes from her site inspection also
23 stated: "no jurisdiction features observed." (Exh. K.)

24 The due-diligence letter also confirmed that all environmental mitigation requirements had
25 been satisfied by the previous owner. (Exh. J at pg. 4.) The letter finished by stating that the "only
26 potential constraint to development would be the requirement to avoid grading within 300 feet of
27 Diegan coastal sage scrub between March 1 and August 15." (*Id.*)
28

1 The Prosecution Team characterizes KB's due diligence as being "wholly inadequate" and
2 claims that other steps could have been taken to identify the alleged jurisdictional waters. (TA at
3 pg. 9.) But, KB's due-diligence efforts included meeting with the County and hiring
4 environmental experts to conduct further environmental review. KB justifiably and reasonably
5 relied on the County's approvals of the Project and the conclusions of Mr. Jones, with whom KB
6 had worked with for years. (Exh. H, Bausback Declaration ¶ 7.) KB would not have purchased
7 the Property when it did if it had been required to obtain additional approvals, which is why it hired
8 Mr. Jones and Helix to conduct the due diligence. (*Id.* ¶ 4.) That review provided another reason
9 for KB to believe that no additional environmental approvals were needed before it could begin
10 construction of the road knuckle and the rest of the Project.

11 KB completed its purchase of the Property in September of 2014. Grading activities for the
12 road knuckle area began on December 5, 2014, and the rough grading was completed on January
13 13, 2015. (Exh. E at pg. 3; Exh. H, Bausback Declaration ¶ 11.) Even though the grading took
14 only 39 days, the ACL alleges that the "discharge of fill continued until final curb, gutter and
15 paving for the street knuckle were completed on May 15, 2015" or 161 days. (ACL ¶ 6.)

16 Prior to the start of grading, KB and its grading contractor met with an inspector from the
17 County to discuss the work and the limits and conditions in the approved grading permit. (Exh. H,
18 Bausback Declaration ¶ 10.) A County Inspector was on site during the grading of the road
19 knuckle and the installation of the storm drains to ensure that the work was completed in
20 accordance with the County-approved Grading Plans. (*Id.*) The County Inspector did not stop the
21 road knuckle from being completed.

22 Following the installation of the storm drains, stormwater from the ephemeral drainage still
23 flows into the same storm drain pipe under Wellington Hills Drive, except that the pipe now starts
24 278 feet sooner. As a result, the limited flows in the ephemeral drainage have not been
25 permanently disrupted. The new drainage system also may provide better flood protection for
26 residents on Wellington Hills Drive by more-effectively managing possible severe storm flows.

1 **C. The Issuance of the NOV and the ACL**

2 The Regional Board became involved when Pulte Home, Inc. (“Pulte”) submitted a Section
3 401 water quality certification application in March of 2015 for the adjacent Brightwater project.
4 The application included a preliminary jurisdictional delineation letter report prepared by Helix for
5 Pulte dated December 30, 2014 (“PJD Report”). (Exh. L.)

6 The PJD Report concluded there were “potential” Waters of the US on the Pulte property,
7 including in the area where the road knuckle had been constructed. (*Id.* at pg. 1.) But, the PJD
8 Report stated that it was not an official determination of whether there are Waters of the US but
9 rather a “nonbinding advisement that potential waters of the U.S. (including wetlands) *may* be
10 present within a site.” (*Id.* at pg. 13.) In fact, the photographs included in the PJD Report show
11 little evidence of an OHWM in a lengthy portion of the ephemeral drainage, and it even describes
12 the OHWM in those areas as being “underdeveloped.” (*Id.*, photos 4 and 5.) KB was not aware of
13 the PJD Report until after it was contacted by the Regional Board. Mr. Jones also was not aware of
14 any of the studies being done for the Brightwater project. (Exh. I, Jones Declaration ¶ 8.)

15 KB was notified by the Regional Board that it was reviewing the construction of the road
16 knuckle. On July 1, 2015, representatives of KB and Mr. Jones met with staff from the County, the
17 Regional Board, the Army Corps and Helix at the Property to discuss the issue. (ACL at pg. 2.)
18 Although the ACL claims that the meeting also was “to verify the jurisdictional delineation” (ACL
19 ¶ 10), the Regional Board’s Inspection Report confirms that “Army Corps and San Diego Water
20 Board staff were unable to verify the preliminary jurisdictional delineation of aquatic resources
21 within the footprint of the unauthorized fill.” (Prosecution Team, “Evidence and Policy
22 Statements” (“PT Evidence”), Exh. 18 at pg. 12.) At the conclusion of the meeting, the parties
23 agreed to continue discussions.

24 In subsequent correspondence, Regional Board staff contacted Beth Ehsan of the County to
25 ask if the County had required installation of the road knuckle and “why the offsite Knuckle
26 creation was approved and permitted by all the parties involved.” (Exh. M at pg. 2.) The Regional
27 Board’s e-mail concluded that “REC’s decision not to conduct any additional field work when the
28 plans changed seems to be, in hindsight, a costly error.” (*Id.*)

1 In a July 15, 2015, response, Ms. Ehsan admitted that the County had required that the road
2 knuckle be added to the Project to comply with the Project's Fire Protection Plan, the County Fire
3 Code and state law. (*Id.*) Ms. Ehsan also elaborated on this and other responses in the August 11,
4 2015, document also included in Exh. M. Ms. Ehsan acknowledged that the road knuckle had been
5 part of the Project "as far back as September 2008" and in her August 11th explanation she stated
6 that the size of the knuckle was required by the County's Public Road standards to allow fire trucks
7 and passenger vehicles to safely negotiate the turn. (*Id.*)

8 Ms. Ehsan's e-mail response also acknowledged that the REC biologist who had prepared
9 the earlier reports was on the "County's approved consultant list" which allowed the County to
10 "substantially rely on their fieldwork and analysis." (*Id.* at pg. 1.) In her longer response, she
11 stated that the County will not accept a biology report from a consultant not on the list, and
12 confirmed that a consulting biologist is required to identify jurisdictional waters for a project, but
13 that had not been done in this instance. (*Id.* at pgs. 2-3.)

14 But even though the Regional Board had this information, on August 13, 2015, it issued a
15 Notice of Violation to KB and Pulte ("KB/Pulte NOV") alleging the "unauthorized discharge of fill
16 to waters of the US/State." Although Pulte was named in the NOV and the Regional Board issued
17 the County an NOV, only KB is named in any ACL.

18 After the NOV was issued, KB sought to cooperate with the Regional Board by providing
19 staff with relevant, including the Helix due-diligence letter, field notes, and the aerial photograph
20 used during the inspection, as well the earlier environmental reports, and the Project approval
21 documents. (*See, e.g.,* Ex h. K.) Mr. Jones also provided staff with an estimate that the depth of
22 the material used to construct the road was 12 feet, which the Prosecution Team relied on to allege
23 that 350 cubic yards of material has been discharged. (Exh. I, Jones Declaration ¶ 12.) The parties
24 met in August, October and November of 2015, but no agreement was reached. (TA at pg. 9.)

25 **V. LEGAL ANALYSIS**

26 **A. The Allegations in the ACL Are Improper as a Matter of Law**

27 The ACL seeks \$875,166 under Section 13385(c) for alleged violations of Section
28 13385(a). Specifically, the ACL alleges that:

- 1 • “Section 301 of the Clean Water Act . . . and Water Code Section 13376 prohibit the
2 discharge of pollutants to surface water except in compliance with a permit for dredged and
3 fill material.”
- 4 • KB “violated” Section 301 and Section 13376 “for a period of 161 days for the active
5 discharge of fill material into Waters of the U.S. and State without a permit or Clean Water
6 Act Section 401 water quality certification.”
- 7 • The “unauthorized activity resulted in the discharge of approximately 70,691 gallons (or
8 350 cubic yards) of sediment and construction materials to Waters of the U.S./State.”

9 (ACL ¶¶ 15-16.)

10 Based on these alleged violations, the ACL claims that KB’s maximum liability is
11 \$2,306,910, even though the minimum liability based on the calculated economic benefit (plus
12 10%) is only \$42,461. (ACL ¶¶ 19, 21.) In calculating the alleged economic benefit to KB, the
13 Prosecution Team claims that KB avoided approximately \$20,000 in fees to process a FCWA
14 Section 401 water quality certification and another \$18,491 in costs “by failing to properly mitigate
15 the permanent impacts to the ephemeral streams associated with the construction of the off-site
16 road knuckle.” (TA at pg. 18.) The \$875,166 fine sought is more than 20 times the alleged
17 economic benefit and nearly 50 times the cost of mitigating the alleged impacts. The Prosecution
18 Team claims that the amount is based on its “consideration of the above facts, the applicable law,
19 and after applying the penalty calculation methodology in Section VI of the Enforcement Policy.”

20 (ACL ¶ 24.)

21 The allegations in the ACL are improper as a matter of law for a number of reasons. The
22 ACL improperly refers to Waters of the State, but Section 13385 only applies to Waters of the US.
23 The ACL also erroneously claims that KB violated Section 13376, which requires a report of the
24 discharge to be filed, but only if the State is authorized to implement and enforce the FCWA
25 Section 404 program. (Section 13372.) The State does not have that authority. That lack of
26 authority also undermines the claims that KB violated FCWA Section 301 and state law by failing
27 to obtain a FCWA Section 404 permit. Not only are the allegations unclear and difficult to respond
28 to, the ACL fails as a matter of law to support the assessment of penalties under Section 13385.

1 **1. Section 13385 Only Applies to Waters of the US**

2 The Prosecution Team has framed the allegations in the ACL to “hedge its bets.” That is
3 because the ACL repeatedly asserts, with emphasis added, that the construction of the road knuckle
4 resulted in fill being placed in “waters of the U.S. and State” (ACL ¶ 16) or in “waters of the U.S.
5 and State” (*id.* ¶ 12) or in “waters of the U.S./State.” (*Id.* ¶ 14.) But, because the ACL seeks a
6 penalty under Water Code Section 13385, it is irrelevant whether the ephemeral drainage could be
7 considered a “Water of the State.”

8 Water Code Section 13385 is in Chapter 5.5 of the Water Code, which was enacted by the
9 Legislature “to authorize the state to implement the provisions” of the FCWA. Chapter 5.5 applies
10 “only to actions required under the Federal Water Pollution Control Act and acts amendatory
11 thereof or supplementary thereto.” (Sections 13370(c), 13372.) Chapter 5.5 “shall be construed to
12 ensure consistency” with the FCWA and terms like “navigable waters” and “discharge” have the
13 same meaning under state law as they do under the FCWA. (*Id.* §§ 13372-73.) Under the FCWA,
14 the term “navigable waters” means Waters of the US.

15 The Prosecution Team alleges violations of Section 13385(c) to seek a penalty based on
16 both the number of days of violation and the volume of the discharge. Such “double dipping” is
17 not allowed under the sections of the Water Code governing Waters of the State, which allow
18 penalties to be sought based on either the number of days of violation or the volume of the
19 discharge. (*See, e.g.*, Section 13350(e).) The “per-day” fines also are higher under Section 13385.

20 Under Section 13385, penalties can be sought only for “discharges” to Waters of the US.
21 Because the Prosecution Team has chosen to proceed under Section 13385, all references to Waters
22 of the State are irrelevant and prejudicial.

23 **2. KB Could Not Have Violated Section 13376**

24 The allegation that KB violated Water Code Section 13376 ignores the clear language of
25 Section 13372. (ACL ¶¶ 15-16.) While Section 13376 states that a person discharging “dredged or
26 fill material” into a Water of the US must “file a report of the discharge” in accordance with the
27 provisions of Section 13260, the requirement to file that report is explicitly deleted by Section
28 13372(b), which states, with emphasis added, that

1 the provisions of Section 13376 requiring the filing of a report for the discharge of
2 dredged or fill material and the provisions of this chapter relating to the issuance of
3 dredged or fill material permits by the state board or a regional board shall be
4 applicable only to discharges for which the State has an approved permit program, in
accordance with the provisions of the Federal Water Pollution Control Act, as
amended, for the discharge of dredged or fill material.

5 Section 13372 shows that the “filing” requirement in Section 13376 was enacted in the event that
6 the State assumed authority to implement and to enforce the FCWA Section 404 permit program.
7 That has not occurred, and the State does not have an “approved permit program.” Because
8 Section 13372 voids the “filing” requirement in Section 13376, KB cannot have violated Section
9 13376. The Board should reject this claim outright.

10 3. The State Has No Authority to Enforce FCWA Section 301

11 The ACL alleges that KB violated FCWA Section 301 by failing to obtain a FCWA Section
12 404 permit or a Section 401 water quality certification. (ACL ¶¶ 15-16, 18.) FCWA Section 301
13 prohibits the “discharge of any pollutant” except in “compliance with this section and sections
14 1312, 1316, 1317, 1328, 1342, and 1344 of this title” and does not reference FCWA Section 401.
15 (33 U.S.C. § 1311(a).) The ACL does not identify which of the statutory provisions listed in
16 Section 301 KB allegedly violated, but KB speculates that the reference is to FCWA Section 1344,
17 the Section 404 permit program. If so, the allegation fails for the same reason discussed above:
18 the State has not assumed the authority to implement the Section 404 program.

19 FCWA Section 1344(h) establishes the requirements for a state to assume authority to
20 implement and enforce the FCWA Section 404 program. That process requires that a state submit
21 an application showing it has authority under state law to issue permits and to enforce violations of
22 the permit program and issued permits for the review and approval of the United States
23 Environmental Protection Agency. ((33 U.S.C. § 1344(h)(1)(G)), (h)(2).) Without EPA approval,
24 a state has no authority to implement or to enforce the FCWA Section 404 program.

25 Again, Section 13372 makes clear that the provisions of Chapter 5.5, including Sections
26 13376 and 13385 do not apply to FCWA Section 404 permits unless the State “has an approved
27 permit program, in accordance with the provisions of the Federal Water Pollution Control Act, as
28 amended, for the discharge of dredged or fill material.” Consequently, the claim that KB’s alleged

1 failure to obtain a federal Section 404 permit constitutes a violation of Section 13385 is both an
2 illegal attempt to preempt federal and an improper reading of Section 13372.² Under the
3 Prosecution Team’s expansive but legally flawed reading of Section 13385, the State could allege
4 that a person had violated FCWA Section 301 (and Section 13385) by not obtaining a Section 404
5 permit even if the federal government concluded that a Section 404 permit was not required. That
6 cannot be the case. Because there is no evidence that a FCWA Section 404 permit was required,
7 there is no basis for an allegation that KB needed a Section 401 water quality certification.

8 Not only is the legal basis for these claims invalid, but as discussed below, the evidentiary
9 basis also is missing. Given these problems with the ACL, fairness and due process require that
10 the ACL be dismissed entirely.

11 **B. The Prosecution Team Has Not Proved that the Ephemeral Drainage Is a**
12 **Water of the US**

13 **1. The Prosecution Team Bears the Burden of Proof**

14 Even if one assumes that the violations alleged in the ACL are legally valid, the ACL still is
15 legally deficient based on the lack of evidence to support the claims. For example, the ACL alleges
16 that KB violated Section 13385 through an “active discharge of fill materials into Waters of the
17 U.S.” (ACL ¶ 16.) But, the Prosecution Team has not met its burden of proving that the ephemeral
18 drainage even is a Waters of the US, another fatal flaw.

19 The court in *Stoeco Development, Ltd. v. Department of the Army*, 792 F.Supp. 339 (D.N.J.
20 1992) directly addressed the burden of proof issue in a FCWA enforcement case. (See Exhibit LL
21 for a copy of *Stoeco* and other cases cited.) In *Stoeco*, the Army Corps had issued a cease and
22 desist order that required the defendant to remove fill allegedly placed illegally in wetlands the
23 Army Corps claimed were Waters of the US or to seek an after-the-fact permit. (*Id.* at 340.) The
24 defendant argued that it did not have to take either action because the wetland at issue was not a
25 Water of the US.

26
27 _____
28 ² The State of California has been granted the authority to implement and to enforce the FCWA Section 402
National Pollutant Discharge Elimination System (“NPDES”) permit program. The ACL does not allege
violations of the NPDES permit program and that is not at issue here.

1 The main issue before the *Stoeco* court was who had the burden of proving that the
2 wetlands were (or were not) subject to federal jurisdiction under the FCWA. In a holding that is
3 applicable here, the *Stoeco* court rejected the Army Corps' argument that its determination that the
4 area filled was subject to jurisdiction under the FCWA must be accepted unless the court found the
5 determination to be arbitrary and capricious. The court held that to accept the Army Corps'
6 position "would turn the normal of burden of proof at trial on its head." (*Id.* at 343.) As the court
7 put it, to "hold that the Corps may subject a property owner to such staggering losses without
8 having to prove the existence of wetlands by a preponderance of the evidence seems contrary to
9 basic principles of fairness." (*Id.*; see also *Leslie Salt Co. v. U.S.*, 660 F.Supp. 183 (N.D. Cal. 1987
10 (issue of whether there is a Water of the US determined by the court).)

11 Under *Stoeco*, the Prosecution Team has the burden of proving that the ephemeral drainage
12 is a Water of the US to make claims under Section 13385. The Prosecution Team has not satisfied
13 that burden of proof.

14 **2. The PJD Does Not Satisfy the Burden of Proof**

15 The PT Evidence submitted includes no evidence that the ephemeral drainage has been
16 determined to be a Water of the US. Rather, the ACL simply claims that the "jurisdictional
17 determination that the impacts associated with the knuckle were comprised entirely of waters of the
18 US and State was confirmed by the ACOE." (TA at 6.)

19 But that claim ignores the Regional Board's own admission that the "Army Corps and San
20 Diego Water Board staff were unable to verify the preliminary jurisdictional delineation of aquatic
21 resources within the footprint of the unauthorized fill." (PT Evidence, Exh. 18 at pg. 12, emphasis
22 added.) The PT Evidence includes no definitive document or other proof that the Army Corps has
23 "confirmed" that the ephemeral drainage is a Water of the US. The only proper evidence would be
24 the Army Corps' preparation of an "Approved JD." The PJD prepared for Pulte included in the
25 submittal (*id.*, Exh. 16) is not sufficient to prove that the ephemeral drainage is a Water of the US.

26 First, the PJD was prepared for Pulte, not for KB. KB has not accepted and is not bound by
27 any conclusions in the PJD. As the PJD Report itself states, a PJD is not a binding determination
28 that there are waters of the US. (Exh. L at pg. 13.) Developers often use a PJD to negotiate with

1 the Army Corps over the extent of Waters of the US that might be impacted by a project to
2 expedite project approvals. (Exh. N, Declaration of Mike Klinefelter ¶¶ 5-7.) The Pulte PJD is not
3 sufficient evidence in an enforcement action against KB that there are Waters of the US.

4 Second, the Army Corps confirms that a PJD is not sufficient to prove that a drainage is a
5 Water of the US, especially in an enforcement action. An Approved JD is an official Army Corps'
6 finding that jurisdictional waters are present or absent on a site, but a PJD is simply an indication
7 that there may be waters of the US on a particular site and is “nonbinding.” (Exh. O, Regulatory
8 Guidance Letter (“RGL”) No. 08-02 at pg. 3.) The RGL confirms that “a permit applicant [like
9 Pulte] may elect to use a PJD in order to move ahead expeditiously to obtain a Corps permit
10 authorization where the party determines that it is in his or her best interest to do so.” (*Id.*) A
11 permit decision based on a PJD treats “all waters and wetlands that would be affected in any way
12 by the permitted activity on the site as if they are jurisdictional waters of the U.S.” (*Id.*)

13 In a PJD, the Army Corps makes no “legally binding determination of any type regarding
14 whether CWA/RHA [Rivers and Harbors Act] jurisdiction exists over a particular water body or
15 wetland in question.” (*Id.*) The RGL specifically requires that the Army Corps “support an
16 enforcement action with an approved JD unless it is impracticable to do so under the
17 circumstances, such as where access to the site is prohibited.” (*Id.*) That is not the case here.

18 This crucial distinction between a PJD and an Approved JD was highlighted in the recent
19 unanimous decision in *Army Corps v. Hawkes Co., Inc.*, __ U.S. __, 136 S.Ct. 1807 (2016). The
20 case addressed whether companies that sought to mine peat on their property were required to
21 obtain a FCWA Section 404 permit before discharging materials from the activities into wetlands
22 on the property. (*Id.* at 1812.) The Army Corps had issued an Approved JD requiring a Section
23 404 permit, and the Supreme Court held that the issuance of the Approved JD was a “final agency
24 action” subject to judicial review. (*Id.* at 1813.)

25 In the opinion, the Supreme Court explained the difference between a preliminary JD and
26 an Approved JD by stating that while “preliminary JDs merely advise a property owner “that there
27 *may* be waters of the United States on a parcel,” approved JDs definitively “stat[e] the presence or
28 absence” of such waters. [Citing 33 C.F.R. § 331.2]. Unlike preliminary JDs, approved JDs can be

1 administratively appealed and are defined by regulation to constitute “final agency action.”
2 *Hawkes*, 136 S.Ct. at 1812 (emphasis in original.) The fact that the Supreme Court highlighted the
3 important difference between a PJD and an Approved JD confirms that a PJD, at best, only shows
4 that the ephemeral drainage may be a Water of the US not that it is a Water of the US.

5 Similarly in *Sackett v. EPA*, __ U.S. __, 132 S.Ct. 1367 (2012), the Supreme Court again
6 held unanimously that a person could seek judicial review of the jurisdictional basis for a
7 compliance order under Section 404 as a “final agency action.” (*Id.* at 1374.) But here, because
8 the Prosecution Team is improperly attempting to enforce federal law, KB cannot challenge the
9 underlying issue of whether the ephemeral drainage is a Water of the US because there is no final
10 federal agency action. That directly conflicts with the holding in *Sackett*.

11 The Prosecution Team has not provided evidence that the ephemeral drainage is a Water of
12 the US. Without such evidence, the Section 13385 claims are invalid.

13 **3. There is No Evidence That the Ephemeral Drainage Has a Significant**
14 **Nexus Under the FCWA**

15 An Approved JD is needed to show that the ephemeral drainage is a Water of the US
16 because the ephemeral drainage is not *per se* a Water of the US under federal law. The only non-
17 wetland watercourses that are *per se* Waters of the US are (1) a Traditional Navigable Water
18 (“TNW”), which is “navigable-in-fact,” or (2) a non-navigable tributary of a TNW where that
19 tributary is a “relatively permanent water” (“RPW”), defined as tributaries that “typically flow
20 year-round or have continuous flow at least seasonally.” (Exh. P at pg. 3.) The unnamed,
21 ephemeral drainage here is not a TNW or a RPW. (Exh. N, Klinefelter Declaration ¶ 9; Exh. I,
22 Jones Declaration ¶ 27.)

23 At best, the ephemeral drainage is a “non-navigable tributary” that is a Water of the US
24 only if it has a “significant nexus” to a TNW. (Exh. P at pg. 3; Exh. N, Klinefelter Declaration
25 ¶ 10; Exh. I, Jones Declaration ¶¶ 23-24.) As Justice Kennedy explained in *Rapanos*, a “mere
26 hydrologic” connection is not sufficient to show that a non-navigable tributary has a significant
27 nexus with a TNW to be a Water of the US because that connection “may be too insubstantial for
28 the hydrologic linkage to establish the required nexus with navigable waters as traditionally

1 understood.” (*Rapanos v. United States* (2006) 547 U.S. 715, 784-85.) As a result, “absent a
2 significant nexus, jurisdiction under the Act [FCWA] is lacking.” (*Id.* at 767.)

3 A “significant nexus” showing requires, at the minimum, an analysis of the volume,
4 duration and frequency of flow in a non-navigable tributary as well as its proximity to a TNW, and
5 an explanation “that demonstrates whether or not the aquatic resource has more than an
6 insubstantial or speculative effect on the chemical, physical, or biological integrity of the TNW.”
7 (Exh. Q, Army Corps “Jurisdictional Determination Form Instructional Guidebook” (“Guidebook”)
8 at pg. 55.) The Prosecution Team has presented no evidence to show that a “significant nexus”
9 exists between the ephemeral drainage and the nearest TNW, which the Army Corps identifies as
10 being near the Pacific Ocean. (Exh. R at pg. 2.)

11 The Fourth Circuit Court of Appeals has addressed the evidence required to prove that a
12 significant nexus exists. In that case, a developer challenged a Corps’ determination that a 4.8-acre
13 wetland was a Water of the US because it had a significant nexus to a TNW. (*Precon Development*
14 *Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 293 (4th Cir. 2011).) The *Precon* court held
15 that *Rapanos* “clearly intended for some evidence of both a nexus and its significance to be
16 presented.” (*Id.* at 294.) While the court agreed that the Army Corps could use both quantitative
17 and qualitative evidence to support such a determination, it rejected the Corps’ argument that
18 simply providing evidence of flow in a tributary was sufficient to prove the required nexus. (*Id.*)

19 The *Precon* court also rejected the Army Corps’ argument that the court should defer to the
20 agency’s position on whether a significant nexus existed. Instead, the Court held that it was a
21 “legal determination” as to whether the factual evidence provided by the Corps was “adequate to
22 support the ultimate conclusion that a significant nexus exists” and so the court was not required to
23 defer to the Army Corps’ determination. (*Id.* at 296.) In *Precon*, the Army Corps actually
24 presented evidence at trial to prove there was a significant nexus. By contrast, the Prosecution
25 Team has provided no physical or other evidence to prove that the required significant nexus exists.

26 Similarly, in *Environmental Protection Information Center v. Pacific Lumber Co.*, 469
27 F.Supp.2d 803 (N.D. Cal. 2007) (“*EPIC*”), the court rejected claims by a non-profit group that the
28 defendant had violated the FCWA. The court agreed that there was hydrological connection

1 between the streams at issue and Bear Creek, a navigable water. But, the court held that the
2 “significant nexus” test required that the group “demonstrate that these streams have some sort of
3 significance for the water quality of Bear Creek” and held that it had provided “no evidence that
4 the streams ‘significantly affect the chemical, physical, and biological integrity of other covered
5 waters.” (*Id.* at 823-824, quoting *Rapanos*, 126 S.Ct. at 2248.)

6 *EPIC* confirmed that more than a mere hydrologic connection between a non-navigable
7 tributary and a TNW is required to show a “significant nexus” under *Rapanos*. These cases show
8 that the Prosecution Team has not proved that the ephemeral drainage is a Water of the US.

9 In fact, the ephemeral drainage arguably is an “erosional feature” that is not subject to
10 regulation under the FCWA at all. The Guidebook states that “[c]ertain geographic features are not
11 jurisdictional waters” and lists as examples “swales, erosional features (e.g. gullies) and small
12 washes characterized by low volume, infrequent, and short duration flow.” (Exh. Q at pg. 16).
13 The ephemeral drainage at issue here looks exactly like the “gully” shown in the Guidebook as an
14 example of a non-jurisdictional erosional feature. (*Id.* at pg. 39.)

15 Because there is no proof that the ephemeral drainage is a Water of the US, there is no valid
16 claim under Section 13385. For that reason as well, the ACL should be dismissed.

17 **C. The ACL Improperly Used “Gallons” of Fill to Assess the Penalty**

18 Even if the Prosecution Team could prove that the ephemeral drainage is a Water of the US,
19 its attempt to levy a penalty based on the “gallons” of fill allegedly discharged to a Water of the US
20 also is flawed. Section 13385 allows penalties to be assessed based on the “gallons” discharged,
21 but there is no evidence that the Legislature intended the word “gallon” to be applied to measure
22 the type of solid, non-waste construction materials used to construct the road.

23 Such an interpretation ignores the rule that the first step in interpreting a statute is to “look
24 first to the words of the statute, giving them their usual and ordinary meaning.” (*Committee of*
25 *Seven Thousand v. Superior Court* (1988) 45 Cal. 3d 491, 501.) The usual and ordinary meaning
26 of the word “gallons” is a volumetric measure of liquid. Black’s Law defines the word “gallon” as
27 a “liquid measure” as do many other sources. (*See, e.g.,* <http://www.yourdictionary.com/gallon>;

28

1 <http://thelawdictionary.org/gallon/>). In common parlance and industry, people speak of soil and
2 rock in terms of cubic yards, acres, or feet not gallons. (Exh. N, Klinefelter Declaration ¶ 12.)

3 The National Institute of Standards and Technology in United States Department of
4 Commerce also does not use the term “gallon” when identifying appropriate measures for solids.
5 (Exh. S, Handbook 44, “Specifications, Tolerances, and Other Technical Requirements for
6 Weighing and Measuring Devices” at pgs. 4-35-37.) The State has adopted those standards as
7 well. (*Id.*, 4 C.C.R. § 4000.)

8 Even the State Board’s 2015-2016 Fee Schedule for waste discharge requirements reflects
9 this distinction. For “fill” discharges, the application fee is set as the “discharge length in feet”
10 times the base fee amount. (Exh. T, 22 C.C.R. § 2200(a)(3).) The State Board’s rule states that
11 discharges will be assessed the higher of the fee based on the discharge length in feet or the
12 “discharge area in acres.” (*Id.*, emphasis added.) The State Board’s rule also establishes a flat fee
13 for “low impact discharges” which are defined, in part, as having a “discharge size” of “0.1 acre,
14 and 200 linear feet.” (*Id.*, emphasis added.)

15 For these common-sense reasons, the word “gallons” in Section 13385 does not apply to the
16 solid material at issue here. The Board should reject the Prosecution Team’s square-peg-round-hole
17 misinterpretation of the statute.

18 **D. The Prosecution Team Has Improperly Calculated the “Gallons” of Fill**

19 The ACL seeks a per-gallon penalty for the placement of 350 cubic yards of fill, which it
20 claims was the amount of fill that the “discharger” estimated. (ACL ¶ 12.) But while KB may have
21 provided an estimate of the quantity of all the material used to construct the road knuckle, the
22 amount required to build the road is not the proper measure of the gallons allegedly “discharged” to
23 a Water of the US under Section 13385. The allegation that KB discharged 350 cubic yards to
24 Waters of the US ignores the jurisdictional limits defined by the OHWM.

25 Section 13385(c)(2), with emphasis added, allows a regional board to assess a penalty “not
26 to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged
27 but not cleaned up exceeds 1,000 gallons.” Section 13385(d) defines the term “discharge” as a
28 discharge “to navigable waters of the United States” as defined in the FCWA.

1 The rules of Army Corps confirm that its jurisdiction under the FCWA over navigable
2 waters “extends to the ordinary high water mark.” (33 C.F.R. § 328.4(c)(1).) That jurisdiction
3 “includes all the land and waters below the ordinary high water mark.” (*Id.* § 329.11(a), emphasis
4 added.) The area below the OHWM is the extent of “navigable waters” and regulatory jurisdiction
5 under the FCWA. (*See, e.g., United States v. Hubenka*, 438 F.3d 1026, 1034 (10th Cir. 2006)
6 (“Corps may regulate dredge and fill activities below the ordinary high water mark”).)

7 Physical evidence identifies the OHWM, and evidence from extraordinary events is
8 discounted because it does not show the “ordinary” high water mark. (Exh. U, RGL No. 05-05 at
9 pg. 3.) The Army Corps’ Guidebook includes photographs showing examples of OHWMs and the
10 limits of FCWA jurisdiction. (Exh. S at pgs. 22-23.) Those examples clearly show that the
11 Prosecution Team has ignored the fact that the placement of fill outside the OHWM does not
12 constitute a “discharge” for which penalties can be levied under Section 13385.

13 **1. The Volume Below the OHWM is Only 43.5 Cubic Yards**

14 The ACL claims that 70,691 gallons were “discharged” to Waters of the US, and based on
15 the amount in excess of 1,000 gallons, seeks \$216,042. (ACL ¶ 12.) The Prosecution Team
16 arrived at that amount by converting 350 cubic yards of solid material into gallons by multiplying
17 the cubic yards of this solid material by the number of gallons of liquid in a cubic yard.

18 There is no validity to the claim that 350 cubic yards of fill was placed in Waters of the US.
19 (Exh. N, Klinefelter Declaration ¶¶ 11-15.) The ACL states that 0.018 acre of the ephemeral
20 drainage was filled. That equals 784 square feet or approximately 87 square yards. For there to be
21 350 cubic yards of fill, the OHWM would have to be 12-feet deep throughout the 278-foot length.
22 Common sense indicates that the ordinary flow in an ephemeral drainage with a small watershed
23 like this one is not 12-feet deep, and the photographs in the PJD confirm that is not the case.

24 The OHWM in the ephemeral drainage actually is estimated conservatively to be 1.5 to two
25 feet high. (*Id.* at ¶¶ 14-15; Exh. I., Jones Declaration ¶¶ 15-16.) That includes the area with the
26 “underdeveloped” OHWM shown in the PJD. The Prosecution Team knows that the OHWM is
27 not 12 feet high, (*id.* ¶ 17), but refuses to apply the law properly.

28

1 Based on an average of 1.5 feet, the actual amount of material discharged to Waters of the
2 US is 1,176 cubic feet or 43.5 cubic yards. (Exh. N, Klinefelter Declaration ¶ 15.) Even using the
3 faulty liquid conversion method, that is only 8,796 gallons. (*Id.*) After reducing that amount by
4 1,000 gallons, the maximum “per-gallon” penalty is \$77,796. Even applying the excessive 0.31
5 per-gallon “factor” used in the ACL, the maximum per-gallon penalty under Section 13385 would
6 be \$24,117. That assumes that the Prosecution Team can prove that the ephemeral drainage is a
7 Water of the US and that Section 13385 allows a penalty to be levied based on the “gallons” of
8 solid materials allegedly discharged. Even assuming that those showings are made, the Board still
9 must reduce the amount sought to \$24,117 or less in recognition of the fact that the OHWM is the
10 limit of any Water of the US in this matter.

11 **E. The Policy Has Not Been Applied in a Fair and Consistent Manner**

12 The Prosecution Team also has failed to apply the Policy in a fair and consistent manner.
13 That failure has affected the penalty the Prosecution Team is seeking under either the “per-gallon”
14 assessment discussed above or the “per-day” assessment discussed below.

15 The failure to apply the Policy in a fair and consistent manner violates the State Board’s
16 directive that Water Boards “shall strive to be fair, firm, and consistent in taking enforcement
17 actions throughout the State, while recognizing the unique facts of each case.” (Policy at pg. 2.)
18 The Policy establishes a state-wide requirement that enforcement actions “be suitable for each type
19 of violation, providing consistent treatment for violations that are similar in nature and have similar
20 water quality impacts.” (*Id.*) State Board decisions have confirmed that the Policy “provides that
21 similar violations should result in similar liability so that dischargers have some idea of their
22 potential liability.” (*In the Matter of the Petition of Carl and Carole Boyett/Boyett Petroleum*
23 (*State Board Order WQO 2004-0006*) at pg. 4 (overturning a regional board’s assessment of
24 \$1,305,000 fines as being “greatly disproportionate to the alleged violations”).) The excessive fine
25 sought here ignores the primary rationale for the Policy and the State Board’s directive that
26 penalties be fair and consistent.

27 The Policy also does not eliminate the need to comply with the statutory penalty factors on
28 which the Policy is based. Section 13385(e) requires that “[i]n determining the amount of any

1 liability imposed under this section, the regional board . . . shall take into account the nature,
2 circumstances, extent and gravity of the violation or violations” as well as the other factors listed.
3 The Prosecution Team’s interpretation and application of the Policy ignores those statutory
4 requirements to impose this unfair and excessive penalty. The Prosecution Team has (1)
5 misinterpreted the Policy’s “Potential for Harm” factor, (2) erroneously failed to apply the
6 “minimum-days” calculation to reduce the number of days of violation, and (3) applied a
7 culpability factor that ignores the evidence discussed above concerning the County’s approvals and
8 KB’s due diligence. As a result, the Prosecution Team seeks a penalty for impacts to 0.018 acre of
9 an ephemeral drainage that ignores the “nature, circumstances, extent and gravity” of any impacts
10 and that exceeds amounts recovered in actions involving more-serious environmental harms.

11
12 **1. The ACL Used the Wrong “Potential for Harm” Factor to Calculate the Penalty**

13 The Policy states that, to calculate liability, the first step is to “determine an initial liability
14 factor based on the Potential for Harm and the extent of Deviation from Requirements when there
15 is a discharge violation.” (TA at pg. 11.) Under the Policy, the three factors used to calculate the
16 “Potential for Harm for Discharge Violations” factor are

- 17 • **Factor 1:** the “harm or potential for harm to beneficial uses”
- 18 • **Factor 2:** the “physical, chemical, biological or thermal characteristics of the discharge”
- 19 • **Factor 3:** the discharge’s “susceptibility to cleanup or abatement.”

20 (Policy at pgs. 12-13.) Once the “Potential for Harm” factor is determined based on these three
21 factors, the “Deviation from Requirements” factor is calculated, and Table 1 of the Policy is used
22 to find where the factors intersect. The decimal “factor” obtained from Table 1 then is used to
23 calculate the per-gallon and per-day penalty. (*Id.* at pgs. 14-15.)

24 Based on the three factors listed above, the Prosecution Team calculated a “Potential for
25 Harm” factor (Factor 1) of “7” for KB’s actions, and concluded that the “Deviation from
26 Requirements” was “Major.” As a result, it used a per-gallon and per-day factor of 0.31 derived
27 from Table 1 to calculate the proposed final penalty. (ACL at pg. 15.)

1 The most-glaring problem with the Prosecution Team’s “Potential for Harm” factor is its
2 conclusion that the Policy mandates that the fill of 0.018 acre of an ephemeral drainage be
3 considered a “Major” harm under Factor 1. Factor 1 of the Policy requires consideration of the
4 “harm that may result from exposure to the pollutants or contaminants in the illegal discharge, in
5 light of the statutory factors of the nature, circumstances, extent and gravity of the violation or
6 violations.” (Policy at pg. 12.) The Policy requires that a score be assigned based on a
7 “determination of whether the harm or potential for harm is negligible (0), minor (1), below
8 moderate (2), moderate (3), above moderate (4), or major (5).” (*Id.*)

9 The Prosecution Team argues that the harm in this case must be identified under Factor 1 as
10 “Major” and a score of “5” assigned because the “unauthorized discharge of fill into waters of the
11 United States has permanently eliminated, or at least significantly impacted, the beneficial uses
12 assigned to the unnamed ephemeral streams in the footprint of the road knuckle.” (TA at pg. 12.)
13 The claim is that, because the “impacts are permanent, the actual harm to beneficial uses can be
14 scored as nothing less than Major, as defined by the Enforcement Policy.” (*Id.*)

15 The Prosecution Team bases this conclusion on the language in the Policy that defines a
16 “Major” harm as creating a “high threat to beneficial uses (i.e., significant impacts to aquatic life or
17 human health, long term restrictions on beneficial uses (e.g., more than five days), high potential
18 for chronic effects to human or ecological health). (Policy at pg. 12, emphasis added.) The
19 Prosecution Team focuses solely on the language referring to “long-term restrictions on beneficial
20 uses (e.g., more than five days)” to support its argument. No evidence has been provided that the
21 construction of the road knuckle caused “significant impacts to aquatic life or human health” or
22 generated a “high potential for chronic effects to human or ecological health.”

23 **a. The Prosecution Team Has Misinterpreted the Policy Language**

24 The first problem with the assertion that the Policy requires any permanent fill to be a
25 “Major” harm under the Policy (requiring a score of “5”) is that it misinterprets the language of the
26 Policy. The Policy modifies the phrase “high threat to beneficial uses” with three criteria:
27 (1) significant impacts to aquatic life or human health, (2) long term restrictions on beneficial uses
28 (e.g., more than five days), (3) high potential for chronic effects to human or ecological health). To

1 reach its conclusion, the Prosecution Team must read that provision as if it contained the word “or”
2 before the third criteria in the list rather than the word “and.”

3 The more-logical interpretation is that a “Major” harm (the highest possible harm) must
4 satisfy all of the listed criteria. That is consistent with the descriptions of the other levels of harm in
5 the Policy. For example, an “Above moderate” harm is defined as “more than moderate threat to
6 beneficial uses (i.e., impacts are observed or likely substantial, temporary restrictions on beneficial
7 uses (e.g., less than five days), and human or ecological health concerns).” (Policy at pg. 12,
8 emphasis added.) It makes no sense to argue that the Policy requires that an “above moderate”
9 harm satisfy all three criteria but that a “Major” harm satisfy only one.

10 **b. The Interpretation of the Policy Ignores the Statutory Factors**

11 The second problem is that the Prosecution Team’s reading of the intent of the Policy
12 ignores that Section 13385(e) requires that, when assessing a penalty, a regional board must
13 consider the “nature, circumstances, extent and gravity of the violation or violations.” But if any
14 fill lasting more than five days must be identified as a “Major” harm, that would eliminate the need
15 to consider those statutory factors. Under the Prosecution Team’s reading of the Policy, any fill
16 would be a “Major” harm whether it was to 0.018 acre of an ephemeral drainage or to 50, 100, or
17 more acres of pristine wetlands, vernal pools, or other critical aquatic resource. The argument that
18 the Policy does not allow the value of a resource allegedly harmed to be considered impermissibly
19 deletes from consideration the required statutory factors.

20 The four statutory factors in Section 13385(e) were taken verbatim from the FCWA. (33
21 U.S.C. § 1319(g)(3).) Consequently, EPA’s interpretation of those four statutory penalty factors is
22 relevant because Chapter 5.5 of the Water Code must be “construed to ensure consistency with the
23 requirements for state programs implementing” the FCWA. (Section 13370(c).) In applying those
24 statutory factors to violations of FCWA Section 404, EPA does not assume that all fill activities
25 cause the same harm when seeking penalties.

26 Rather, the EPA “Revised CWA Section 404 Settlement Penalty Policy” requires that it
27 first consider the “harm to human health or welfare” based on whether the fill activity “has
28 adversely impacted drinking water supplies, has resulted in (or is expected to result in) flooding,

1 impaired commercial or sport fisheries or shellfish beds, or otherwise has adversely affected
2 recreational, aesthetic and economic values.” (Exh. V at pg. 10.) The fill here did not cause any of
3 those impacts. EPA considers the size of the area filled, but notes that a “small impact to a unique
4 or critical water may have high environmental significance.” (*Id.* at pg. 11.) While there is no
5 “unique or critical water” at issue here, that language also shows that, in assessing the “nature,
6 characteristics, extent and gravity” of a violation, the value of the resource must be considered.

7 EPA also assesses the “Severity of Impacts to the Aquatic Environment” and the
8 “Uniqueness/Sensitivity of the Affected Resource.” (*Id.*) Those titles show the focus on the value
9 of the area filled. For the latter factor, EPA states that the “more scarce the impacted ecosystem,
10 the higher the value” assigned in assessing a penalty. (*Id.*) While EPA does consider if a fill is
11 permanent, only 20% of the assessed harm is based on the duration of the violation. (*Id.* at pg. 12.)

12 The only reference to the resource values of the ephemeral drainage in the ACL is the
13 listing of its designated beneficial uses based on the tributary rule, specifically IND, REC-1, REC-
14 2, WARM, and WILD. (ACL ¶ 13.) But the Prosecution Team provides no evidence that any of
15 those “designated” uses were actual uses in the ephemeral drainage. In fact, it is unlikely that the
16 ephemeral drainage, with its infrequent and limited flows, has sufficient water to support industrial
17 uses (IND), contact or non-contact recreational uses (REC-1 and REC-2), warm water fisheries
18 (WARM), or habitat (WILD). (Exh. I, Jones Declaration ¶ 26.) The ACL also claims that the
19 construction of the road knuckle resulted in the “unmitigated loss of flood attenuation, groundwater
20 recharge, pollutant assimilation, and biological productivity and diversity in the habitat lost,” but it
21 provides no site-specific evidence to support any of these generalized allegations. (TA at pg. 12.)

22 The Prosecution Team’s calculation of the “Harm” factor directly conflicts with the plain
23 meaning of the Policy, and ignores the statutory factors in Section 13385(e). Given the resource
24 value of the ephemeral stream, the “Harm” factor should “Moderate” or even less and the per-
25 gallon and per-day penalty factor From Table 1 of the Policy should have been 0.15 not 0.31.

1 Creek's OHWM." (*Id.* at pg. 2, emphasis added.) The rock appears to have been in place from at
2 least mid-September to late October (more than five days) (*id.* at pg. 5), and the creek was flowing
3 and supported a trout fishery and other beneficial uses. Conversely, the Prosecution Team has
4 assigned a Major" harm factor although only 43.5 cubic yards of fill was placed below OHWM of
5 the ephemeral drainage and the drainage does not support those types of sensitive uses.

6 In another matter, the unauthorized discharge of 8,207,560 gallons of potable water
7 containing residual chloramines killed "at least 276 fish in San Mateo Creek, including 70 rainbow
8 trout/steelhead, 94 Sacramento sucker, 96 sculpin and 16 stickle-back." (Exh. Y, *California Water*
9 *Service Company Unauthorized Discharge of Chloraminated Potable Water to Polhemus and San*
10 *Mateo Creeks* (Complaint R2-2014-1030) at pg. 2.) The discharge also caused "significant bank
11 erosion and sedimentation at the discharge site and downstream" that increased turbidity and
12 deposited sediment downstream. (*Id.*) But, even though the discharge killed 276 fish (a permanent
13 impact) and caused severe damage to the affected watercourses, the regional board only assessed a
14 "Harm" score of "4" for "above moderate" harm. (*Id.*) The Prosecution Team has not shown that
15 "harm" allegedly caused by KB's actions included the kill of any fish or an increase in
16 sedimentation of downstream watercourses to be assessed as a "Major" harm.

17 In one of this Board's matters, it settled an ACL issued to the Santa Margarita Water
18 District for its discharge of 2,293,000 gallons of raw sewage to Tijeras Creek, a Water of the US
19 for \$890,000, although the ACL had recommended a \$1,731,970 penalty. (Exh. Z, *Santa*
20 *Margarita Water District* (Order No. R9-2011-0057).) The key reason for the reduction was the
21 Prosecution Staff's recommendation that the "Harm" factor be lowered "from a score of 4.5
22 (between 'above moderate' and 'major') to a score of 4 ('above moderate' harm.)" (*Id.* at pg. 2.)

23 The reason cited for the reduction is relevant here. The Prosecution Staff found that the
24 "construction of the earthen berm to impound the raw sewage" discharged to the creek "negatively
25 impacted beneficial uses of the Creek for well over five days." Given that fact, the Prosecution
26 Staff stated that "the penalty calculation methodology guidelines would allow for a finding of
27 major harm in Step 1" (*Id.* at pg. 2, emphasis added.) That is an admission that the Policy
28 does not require a "Major" harm designation for such violations. (TA at pg. 12.)

1 In the *Matter of the City of Huntington Beach* (Complaint No. R8-2010-0004) (Exh. AA),
2 the City constructed a library from which the sewer lines had been improperly connected to the
3 storm drain. (*Id.* at pg. 2.) The City had inspected the construction work, and confirmed that the
4 work had been completed according to plans and specifications approved by the City Engineer in
5 1999. (*Id.* at pgs. 2-3.) The fact that the sewer line had been installed improperly was discovered
6 in 2009, meaning that for 4,854 days, raw sewage had been discharged directly to the storm
7 drain. (*Id.* at pg 5.) But, even though the City illegally discharged raw sewage for 10 years, the
8 per-day factor used to assess the penalty was only 0.1. (*Id.* at pg. 6.) It is not clear how the factor
9 was calculated, but the factor used here (0.31) is more than three times higher.

10 Other relevant matters contradict the Prosecution Team's position, and also require that the
11 Harm factor be reduced.

- 12 • *City of Escondido Hale Avenue Resource Recovery Facility* (Order No. R9-2014-0008) -
13 discharge of 180,700 gallons of raw sewage to Escondido Creek resulted in warning signs
14 being posted at Cardiff State Beach and along access points on Escondido Creek and San
15 Elijo Lagoon for several days. (*Id.* at pg. 2.) But, the Board assigned a Harm factor of "3"
16 concluding that the discharges resulted in only a "moderate" threat. (Exh. BB.)
- 17 • *Matter of Irvine Ranch Water District* (Complaint No. R8-2010-0059) – discharge of
18 20,875 gallons of raw sewage into the Pacific Ocean into an Area of Special Biological
19 Significance caused the closure of Little Corona Del Mar Beach for three days but the
20 regional board found that the "impact on beneficial use is considered as moderate" and
21 scored it a "3." (*Id.* at pgs. 3-4.) The fine was only \$45,925. (*Id.* at pg. 5.) (Exh. CC.)
- 22 • *City of Carlsbad Agua Hedionda Creek Emergency Dredge Project* (Order No. R9-2010-
23 0008) – the ACL alleged that the City failed to complete mitigation for 814 days for a
24 potential fine of \$8.14 million, but the final penalty was only \$47,647, although the project
25 resulted in permanent impacts to 0.5 acres of wetlands and the temporary impact to 3.06
26 acres of wetlands. Based on the number of days of violation, the assessed penalty was
27 approximately \$60 per day. (Exh. DD.)

28

- 1 • *State Route 108 East Sonora Bypass Stage 2 Project* (Complaint R5-2013-0589) (Exh. EE)
2 Caltrans failed to install adequate BMPs resulting in the discharge of at least 822,701
3 gallons of sediment-laden stormwater into a Water of the US over 24 days. The sediment
4 “settled in the creek channel and banks” and impacted benthic organisms, an important food
5 source for fish, and “was observed over a relatively long stretch of the stream, at least one
6 mile from the project site.” (*Id.* at pg 2.) Even though the sediment remained in the water
7 for more than five days, a “moderate” Harm factor of “3” was assigned. (*Id.* at 12.)
- 8 • Approximately 100,000 gallons of highly turbid, sediment-laden construction water was
9 pumped during dry weather into an off-site storm drain which discharged to an unnamed
10 tributary of Los Peñasquitos Creek. (*Scripps Mesa Developers, Inc.* (Order No. R9-2014-
11 0044) (Exh. FF.) Although discharges impacted a Section 303(d) impaired water body for
12 sediment/silt, the discharge was assigned a “Harm” factor of “3” for “moderate” harm.

13 Based on the resolution of these matters as well, the Policy does not require that the alleged
14 violation be defined as a “Major” harm. The maximum assigned “Harm” factor should not exceed
15 “3” or moderate, and the per-day and per-gallon factors should be reduced to at least 0.15.

16 17 **2. The Number of Days of Violation Should be Reduced By Applying the 18 Multiple-Days Policy**

19 The ACL alleges 161 days of violation from December 4, 2014, when the grading began,
20 to May 14, 2015, when the paving of the road knuckle was completed. (ACL ¶ 16.) But the
21 Prosecution Team admits that the grading was completed on January 15, 2016, approximately 42
22 days. (Exh. E at pg. 3; Exh. H, Bausback Declaration ¶ 11.) Any fill to Waters of the US below
23 the OHWM ended long before any of those dates, but 42 days is more reasonable.

24 The Policy also states that for a violation that lasts more than 30 days, the number of days
25 of violation may be reduced by counting the first day and then every fifth day until the 30th day and
26 then every 30th day after that. (Policy at pg. 18.) This process is appropriate if a regional board
27 finds that the violation is:

- 28 (1) “not causing daily detrimental impacts to the environment or the regulatory program,”

1 (2) “[r]esults in no economic benefit from the illegal conduct that can be measured on a
2 daily basis,” or

3 (3) “[o]ccurred without the knowledge or control of the violator”

4 (*Id.*, emphasis added.) If any one of these requirements is satisfied, the “multiple-day” calculation
5 can be used. For KB, its use would reduce the 161 days of alleged violation to 11 days. While the
6 Policy does not provide specific guidance on how to determine if a factor has been satisfied, the
7 “multiple-day” policy has been applied in a number of matters.

8 The discussion of this Board’s application of the multiple-days calculation in the *Matter of*
9 *Jack Eitzen* (Exh. GG, Order No. R9-2011-0048) provides insight. In *Eitzen*, this Board found the
10 defendant had illegally discharged earthen materials to Waters of the State for 645 days and that
11 the discharged material “remained in state waters through the date of the Complaint.” (*Id.* at pg.
12 2.) Even so, the Board reduced the days of violation to 48, finding that the “violation resulted in no
13 economic benefit from the illegal conduct that can be measured on a daily basis.” (*Id.* at pg. 5.)³

14 The illegal discharges from Eitzen’s construction were larger and more-frequent than those
15 related to the road knuckle. The Eitzen discharges also continued in spite of repeated warnings by
16 the regional board. Consequently, this Board’s finding that Mr. Eitzen’s continuing violations
17 during the construction work did not result in an “economic benefit measurable on a daily basis”
18 applies even more so to KB’s construction of the road knuckle. Like Mr. Eitzen and the entities
19 discussed below, KB receives no daily economic benefit from the alleged violation.

- 20 • In *Matter of Balcolm Ranch* (Exh. II, Complaint No. R4-2010-0023R) at Attachment A, pg.
21 4) – on remand from a court ruling that a \$193,850 fine was “so excessive as to constitute a
22 violation of the due process clauses of the California and United States Constitutions,” the
23 regional board reduced the number of days of violation from 1,222 to 42 and the fine to
24 \$51,045 based on a finding that no economic benefit could be measured on a daily basis.

25
26
27 ³ In a companion action, the Board reduced the number of days of violation from 211 to 24 days for
28 Mr. Eitzen’s failure to implement an adequate Stormwater Pollution Prevention Plan, a non-discharge
violation. (Exh. HH, Order No. R9-2011-0049 at pg. 3.) Again, the Board found that the violation had
resulted in no economic benefit measurable on a daily basis. (*Id.*)

- 1 • *Matter of California Dept. of Transportation I-215 Widening Project* (Exh. JJ, Complaint
2 No. R8-2010-0050) - number of days of non-discharge violations reduced from 1240 to 85
3 because they “did not cause daily detrimental impacts to the environment or the regulatory
4 program.” (*Id.* at pg. 18.) A per-day penalty factor of 0.1 was used even though sediment-
5 laden storm water was discharged for 108 days. (*Id.* at pg. 17.)

6 The multiple-days policy also applies because the violations occurred without KB’s
7 knowledge that additional approvals were required as in the following:

- 8 • In *City of Huntington Beach*, the 4,854 days of violation (maximum liability of
9 \$48,540,000) was reduced to 167 days. (Exh. AA at pgs. 4-6.) The justification was that
10 the City was “unaware of the discharge” under Criteria 3, even though the City had paid for
11 the construction of the library and had inspected the work and deemed it to have been
12 completed in accordance with City-approved plans. (*Id.*) The City’s final liability for 10
13 years of illegal discharges of raw sewage was only \$150,750. Here, KB justifiably relied
14 on the County approvals of the Project and the due-diligence assessment of its experts. If
15 the City qualified, KB also qualifies under criteria 3.
- 16 • *Eastern Municipal Water District* (Exh. KK, Order No. R9-2015-0048) – violation for
17 discharge of raw sewage for 84 days reduced to eight days because the “violation occurred
18 without the knowledge of the District” even though the manhole from which the discharge
19 flowed was located “in a landscaped median between Winchester Road and an adjacent
20 pedestrian sidewalk.” (*Id.* at pg. 2.)

21 KB qualifies under the Policy because the alleged violations have not resulted in an
22 economic benefit that can be measured on a daily basis and because KB’s knowledge of the
23 violation was no greater than in the *City of Huntington Beach* and other matters discussed above.
24 The Board should apply the “multiple days” calculation to reduce number of alleged days of
25 violation from 161 to 11 days.

26 3. The Penalty Exceeds Others Levied by Regional Boards

27 Consistent application of the Policy also should result in similar fines based on the impact
28 of the alleged violation on the environment. The Prosecution Team seeks nearly \$900,000 from

1 KB for impacts to 0.018 acre of an ephemeral drainage. In addition to the matters discussed above,
2 where the fines assessed were significantly less, the penalty is not consistent with the fines (1) of
3 \$70,680 against the City of Laguna Beach for the discharge of 590,000 gallons of untreated sewage
4 to the ocean (Order No. R9-2009-0168); and (2) of \$770,184 for the discharge of 2,585,000 gallons
5 of raw sewage into Buena Vista Creek, Buena Vista Lagoon, and the Pacific Ocean (*Matter of City*
6 *of Oceanside* (Order No. R9-2013-0004).

7 **F. The Culpability Factor is Too High**

8 The Prosecution Team also increased the penalty by assigning a culpability factor of 1.2
9 based on the allegation that KB “ranks in the top five of the largest home builders in the nation”
10 and “is, or should be, intimately aware” of regulatory requirements. (TA at pg. 16.) While KB
11 acknowledges that it is aware of regulatory requirements, it proceeded in accordance with industry
12 standards by relying on the approvals granted by the County and by hiring recognized and qualified
13 environmental consultants, Mr. Jones and Helix, to complete a due-diligence review of the Project.
14 (Exh. H, Bausback Declaration ¶¶ 4-8.) The due-diligence reviews determined that no additional
15 permits or approvals were required to complete the grading in the road knuckle area.

16 The Prosecution Team also argues that an increase is proper because the construction of the
17 road knuckle was not an “add-on” to the Project. (*Id.*) But that only reinforces the KB’s position:
18 because the road knuckle was part of the Project since 2008 as the County confirmed, and was part
19 of the environmental reviews of the project by REC that were reviewed and approved by the
20 County. KB was not involved with those reviews by the County or with the County approvals and
21 KB certainly did not add this feature to the Project.

22 In the *Irvine Ranch* matter (Exh. CC), a culpability factor of 0.9 was used, even though the
23 City installed a pipe fitting that did not comply with the City’s requirements and the fitting failed
24 and caused the discharge of more than 20,000 gallons of raw sewage and a beach closure. (*Id.* at
25 pg. 4.) Likewise, in the *City of Huntington Beach* matter, a culpability factor of 1.0 was used even
26 though the City had approved the construction work that resulted in the illegal discharge of raw
27 sewage for 10 years. Based on those matters and the facts of this case, the maximum culpability
28 factor that should be assigned is 1.0.

1 **VI. CONCLUSION**

2 The penalty sought by the Prosecution Team is not legally valid, fair, consistent with the
3 Policy, or reflective of the statutory factors that require that the value of the resource affected be
4 considered. KB's due diligence was appropriate and adequate because KB met with the County,
5 and hired qualified environmental experts to assess whether additional environmental approvals
6 were needed for the Project. These experts and the County failed to state that additional approvals
7 might be needed to construct the road knuckle, and KB justifiably relied on their findings.

8 The Board should dismiss the legally invalid ACL with prejudice. But, without admitting
9 the validity of the legal arguments or the evidence submitted by the Prosecution Team, KB's
10 position is that a fair and consistent application of the Policy should result in a penalty of no more
11 than \$75,213.

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**EVIDENCE AND POLICY SUBMISSION
OF KB HOME, INC.
ACL NO. R9-2016-0092
EXHIBIT LIST**

Exhibit No.	Date	Title	Author
A	07/31/2008	Settlers Point Updated Project Description	REC
B	02/10/2012	CEQA Mitigated Negative Declaration for Settlers Point Project	County of San Diego
C	02/10/2012	CEQA Initial Study for Settlers Point Project	County of San Diego
D	02/10/2012	Resolution of San Diego County Conditionally Approving Tentative Map No. 3100 5423 (TM)	County of San Diego
E	08/27/2015	Notice of Violation No. R9-2015-0130	San Diego Water Board
F	03/19/2013	Settlers Point Project No. PDS2013-STP-13-002 Updated Project Description	REC Consultants
G	02/26/14	County of San Diego Letter re Grading Permit L-PDS2013 LDGRMJ-00006	County of San Diego
H	07/05/2016	Declaration of Kurt Bausback	
I	07/05/2016	Declaration of Barry Jones	
J	05/09/2014	KB Home Due Diligence Assessment for Settlers Point Project	Helix Environmental Planning
K	09/11/2015	Ms. Bakker's Field Notes and Aerial Photograph of Site; Previous Environmental Reports	KB Home
L	12/30/2014	Brightwater Ranch Jurisdictional Delineation Letter Report and Preliminary Jurisdictional Determination Report	Helix Environmental Planning
M	07/15/2015 08/11/2015	Emails re Settler's Point/Jackson Ridge	Beth Ehsan (County of San Diego)
N	06/29/2016	Declaration of Michael Klinefelter	
O	06/26/2008	Regulatory Guidance Letter No. 08-02 re Jurisdictional Determinations	US Army Corps of Engineers
P		Approved Jurisdictional Determination Form	US Army Corps of Engineers
Q	05/30/2007	Jurisdictional Determination Form Instructional Guidebook	US Army Corps of Engineers
R	03/23/2016	Navigable Waters in Los Angeles District Table	US Army Corps of Engineers
S	2016	Specification, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices 40 C.C.R.-4000	National Institute of Standards and Technology / California Department of Food & Agriculture
T	2015-16	Fee Schedules 22 C.C.R. § 2200(a)(3)	State Water Board
U	12/07/2005	Regulatory Guidance Letter No. 05-05 re Ordinary High Water Mark Identification	US Army Corps of Engineers

Exhibit No.	Date	Title	Author
V	12/21/2001	Revised CWA Section 404 Settlement Penalty Policy	United States Environmental Protection Agency
W		Excerpts of Decision Document for Nationwide Permit 14	US Army Corps of Engineers
X	10/16/2015	In the Matter of Los Angeles Department of Water and Power (Order No. R6V-2015-0018)	Lahontan Water Board
Y	11/17/2014	California Water Service Company Unauthorized Discharge of Chloraminated Potable Water to Polhemus and San Mateo Creeks (Complaint R2-2014-1030)	San Francisco Bay Water Board
Z	09/19/2011	Santa Margarita Water District (Order No. R9-2011-0057)	San Diego Water Board
AA	07/29/2010	In the Matter of the City of Huntington Beach (Complaint No. R8-2010-0004)	Santa Ana Water Board
BB	08/20/2011	City of Escondido Hale Avenue Resource Recovery Facility (Order No. R9-2014-0008)	San Diego Water Board
CC	11/09/2010	Matter of Irvine Ranch Water District (Complaint No. R8-2010-0059)	Santa Ana Water Board
DD	05/12/2010	City of Carlsbad Agua Hedionda Creek Emergency Dredge Project (Order No. R9-2010-0008)	San Diego Water Board
EE		State Route 108 East Sonora Bypass Stage 2 Project (Complaint R5-2013-0589)	
FF	12/12/2014	Scripps Mesa Developers, Inc. (Order No. R9-2014-0044)	San Diego Water Board
GG	10/12/2011	Matter of Jack Eitzen (Order No. R9-2011-0048)	San Diego Water Board
HH	10/12/2011	Matter of Jack Eitzen (Order No. R9-2011-0049)	San Diego Water Board
II	01/08/2016	In Matter of Balcolm Ranch (Complaint No. R4-2010-0023R)	Los Angeles Water Board
JJ	11/09/2010	Matter of California Dept. of Transportation I-215 Widening Project (Complaint No. R8-2010-0050)	Santa Ana Water Board
KK	04/25/2015	Eastern Municipal Water District (Order No. R9-2015-0048)	San Diego Water Board
LL		Judicial Decisions Cited	Westlaw

EXHIBIT A



Civil Engineering - Environmental

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January 21, 2008 July 31, 2008

Daniella Rosenberg Larry Hofreiter and Beth Ehsan
County of San Diego
Department of Planning and Land Use
5201 Ruffin Road, Suite B
San Diego, CA 92123

Subject: Settlers Point TM 5423, R05-004, S05-064, ER 04-14-009
Updated Project Description

Dear Ms. Rosenberg Mr. Hofreiter and Ms. Ehsan:

This letter is being submitted to inform you of an updated project description for the 21.89 acre Settlers Point project site located in Lakeside, San Diego County, California. The proposed project is located near the community of Lakeside in the County of San Diego. The project is located within the metro-Lakeside Jamul Segment of the County's Subarea Plan of the MSCP and part of the MSCP Pre-approved Mitigation Area (PAMA) or Biological Resource Core Area (BRCA). Please see the attached previously drafted Biological Technical Report prepared by RC Biological Consulting (October 2005, revised February 2006).

This 2006 report outlined biological resources onsite, the significance of impacts to those resources, and mitigation requirements. The original findings, impacts and mitigation recommendations all remain largely the same and do not necessitate the drafting of a new report. At this time, no additional field work will be conducted. The findings of the report are summarized in this letter along with the new project description.

Please note that the 2006 RC Biological Consulting report described the project acreage as 22.4 acres, and the current proposed Tentative Map is 21.89 acres. This discrepancy exists because since 2006, there has been a Boundary Adjustment to the southern-most project boundary between the Settlers Point project and the Los Coches Self Storage and commercial site to the south (Document #2007-0758216). This document is attached for your reference. This Boundary Adjustment accounts for the change in project acreage of 0.51 acre.

Due to the Boundary Adjustment and slight refinements in the engineering of the site, habitat acreage calculations and impact amounts have changed minimally. Please see the table on page four of this letter for further clarification of habitat and impact acreages.

2006 BIOLOGY REPORT SUMMARY

As documented by the 2006 RC Biological Consulting report, the biological resources onsite include three habitat types: coastal sage scrub, non-native grassland, and developed. The coastal sage scrub habitat occurs in the northwest portion of the property on northwest facing slopes. Plant species in this habitat area include flat-top buckwheat (*Eriogonum fasciculatum*), coast sagebrush (*Artemisia californica*), white sage (*Salvia apiana*), deerweed (*Lotus scoparius*) and broom baccharis (*Baccharis sarothroides*). The non-native grassland onsite is dominated by non-native grasses including red-stem filaree (*Erodium cicutarium*), cheeseweed (*Malva parviflora*), and black mustard (*Brassica nigra*). Other species located in this area include tocalote (*Centaurea melitensis*), narrow-leaved filago (*Filago gallica*), rancher's fiddleneck (*Amsinckia menziesii*), wild radish (*Raphanus sativus*), miniature lupine (*Lupinus bicolor*) and scarlet pimpernel (*Anagalis arvensis*). The developed habitat area contains several non-native species including African fountain grass (*Pennisetum setaceum*), California fan palm (*Washingtonia filifera*), Canary Island date palm (*Phoenix canariensis*), castor bean (*Ricinus communis*), and tree tobacco (*Nicotiana glauca*).

A total of 87 plant species were observed onsite. Additionally, 34 wildlife species were observed.

No state or federally listed plant or animal species were observed onsite. However, one sensitive wildlife species, the Cooper's hawk (*Accipiter cooperii*) was observed onsite. The Cooper's hawk is a federal and/or state species of concern. In addition, three sensitive species were observed on an adjacent site. One sensitive plant, San Diego sunflower (*Viguiera laciniata*), a Group D species was found. Two bird species were observed: the federally threatened and California Species of Special Concern California Gnatcatcher (*Poliophtila californica*) and California Species of Special Concern American kestrel (*Falco sparverius*). The California Gnatcatcher was observed offsite on an adjacent property. Although a protocol survey for California gnatcatcher was not conducted, the project site is considered occupied. A focused survey for the Quino checkerspot butterfly was conducted in 2000-2005 with negative results. Per the 2005 survey report, the potential for the Quino checkerspot butterfly to occur onsite was low due to the lack of the butterfly's main host plant, dwarf plantain (*Plantago erecta*). Two individuals of the secondary host plant were found onsite, purple owl's clover (*Castilleja exserta*); however, this would not be sufficient to support the Quino checkerspot butterfly onsite.

Per the 2006 RC Biological Consulting report and based on the project description under consideration at that time, implementation of the project will would result in 100% impact to the approximately 1.74 acres of coastal sage scrub, 18.7 acres of non-native grassland and 1.99 acres of developed land onsite. Additionally, offsite impacts to 0.11 acre of coastal sage scrub, 0.63 acre of non-native grassland and 0.15 acre of developed land will would occur as a result of project implementation. The RC Biological

Consulting report indicated that mitigation land be purchased through the Crestridge Mitigation Bank.

Mitigation for a 1.85 acre impact to a total of 2.78 acres of coastal sage scrub ~~will~~ would be achieved at a 1.5:1 ratio through the purchase of 2.78 acres of coastal sage scrub habitat within a County approved mitigation bank. In addition, 19.33 acres of non-native grassland ~~will~~ would be mitigated at a 0.5:1 ratio for a total of 9.67 acres purchased within a County approved mitigation bank. Potential impacts to sensitive animal species ~~will~~ would be mitigated by the habitat based mitigation in accordance with the Biological Mitigation Ordinance (BMO). The loss of the developed habitat would not be considered biologically significant. Implementation of these mitigation measures ~~will~~ would reduce impacts to below a level of significance.

UPDATED PROJECT DESCRIPTION

The project is located northwest of the intersection of ~~Business Route 8~~ Hwy. 8 Business and Los Coches Road. The site is comprised of Assessor Parcel Numbers 397-210-17, 397-212-01, 397-290-04, 397-291-01 and 397-291-03. The proposed project is located within Lakeside, California in the eastern portion of the County of San Diego (Figures 1 and 2). The project site is located on the El Cajon USGS 7.5' Quadrangle in Sections 29 and 30 in Township 15 South, Range 1 East (Figure 2). Topography includes a hilltop and the majority of the site is on a southeast-facing slope. Elevation onsite ranges from approximately 600 feet above mean sea level at the southern portion of the site to approximately 700 feet above mean sea level.

The site is surrounded by residential development with a large undeveloped area to the west. Current land uses onsite included a single family home which was demolished in 2007, a driveway and undeveloped land. The site is dominated by a hill where the house was located and its associated slopes to the east and west. A proposed self storage project is located directly to the southwest of the Settlers Point project (Los Coches Self Storage S04-009), adjacent to ~~Business Route 8 Hwy. 8 Business~~. ~~In January 2008, this self storage project is set to go out for public review and comment. It is anticipated that the site plan for the self storage project will be approved in summer of 2008.~~ An undeveloped commercial site is located directly to the southeast of the Settlers Point project. No development applications are pending on this property at this time. All of these properties are under the same family ownership.

The 2006 RC Biological Consulting report describes the proposed subdivision of the 22.4 acre Settlers Point site into three residential lots. The property was proposed to be subdivided into one single-family residential lot, one HOA lot and one lot for a multi-family condominium development. The proposed multi-family residential lot was proposed to be developed with 233 condominium units, an active recreation area and passive recreation areas.

The proposed 21.89 acre Settlers Point project is now pursuing a Tentative Map with four lots proposed for future residential development. Of the four residential lots proposed for Settlers Point, the largest is 7.19 acres and the smallest is 3.92 acres. Grading of each of the pads is proposed to provide future residential development potential. A total of 266 residential units may be possible given the current zoning and density assigned to each of the lots.

One additional 2.09 acre lot is reserved for the 60 foot wide public street ("Street A") to access the project from ~~Business Route 8~~ Hwy. 8 Business and to provide secondary access for the Brightwater Ranch (TM 5306) residential project to the northwest of Settlers Point. Street improvements are proposed for ~~Business Route 8~~ Hwy. 8 Business including stormdrains and five feet of public street dedication. A 10' decomposed granite (D.G.) trail runs the length of the project's access road.

The project also includes offsite impacts due to fire clearing, frontage improvements along Hwy. 8 Business, utility lines, and drainage structures. At this time it is unknown if Brightwater Ranch (TM 5306) will obtain its Tentative Map prior to Settlers Point. Therefore, impacts resulting from a road knuckle on the property of Brightwater Ranch are also included as offsite impacts.

As with the earlier project proposal, 100 percent of the site is proposed to be impacted by the development by the construction of flat pads, slopes, retaining walls, access road, and stormwater and drainage improvements (earthen swales, temporary siltation basins, etc.).

Due to the change in project acreage resulting from the Boundary Adjustment and further engineering refinements of the plan habitat acreages and impact acreages are detailed in the table below. ~~the only biological impact acreage and mitigation requirement that changes is related to the non-native grassland habitat. This change will reduce impacts to the non-native grassland habitat onsite from 18.7 acres to 18.19 acres and will therefore slightly reduce the quantity of mitigation acreage needed for this habitat type. Approximately 9.1 acres of non-native grassland habitat will be required for mitigation. All other impact and mitigation calculations remain the same as the 2006 report.~~

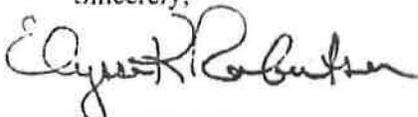
<u>Habitat Type (Habitat Code)</u>	<u>Total Acreage Onsite</u>	<u>Acres Impacted Onsite</u>	<u>Acres Impacted Offsite</u>	<u>Mitigation Ratio</u>	<u>Offsite Mitigation Purchase</u>
<u>Coastal Sage Scrub (32500)</u>	<u>1.69</u>	<u>1.69</u>	<u>0.47</u>	<u>1.5:1</u>	<u>3.24</u>
<u>Non-native Grassland (42200)</u>	<u>18.21</u>	<u>18.21</u>	<u>1.51</u>	<u>0.5:1</u>	<u>9.86</u>
<u>Developed (12000)</u>	<u>1.99</u>	<u>1.99</u>	<u>0.69</u>	<u>0</u>	<u>NA</u>
<u>TOTAL</u>	<u>21.89</u>	<u>21.89</u>	<u>2.67</u>		

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The 2006 RC Biological Consulting report proposed mitigation to occur at the Crestridge Mitigation Bank. However, because the appropriate habitat is now sold out at the Crestridge Mitigation Bank, new mitigation options are being researched. The mitigation land will be purchased from another County approved mitigation bank.

Please contact REC Consultants, Inc. with any questions or concerns regarding the new project description.

Sincerely,



Elyssa K. Robertson
Principal

EXHIBIT B



ERIC GIBSON
DIRECTOR

County of San Diego

DEPARTMENT OF PLANNING AND LAND USE

5201 RUFFIN ROAD, SUITE B, SAN DIEGO, CALIFORNIA 92123-1666
INFORMATION (858) 694-2960
TOLL FREE (800) 411-0017
www.sdcounty.ca.gov/dplu

MITIGATED NEGATIVE DECLARATION

February 10, 2012

Project Name: Settlers Point

Project Number(s): 3100 5423 (TM); 3910 05-14-009 (ER)

**This Document is Considered Draft Until it is Adopted by the Appropriate
County of San Diego Decision-Making Body.**

This Mitigated Negative Declaration is comprised of this form along with the Environmental Initial Study that includes the following:

- a. Initial Study Form
 - b. Environmental Analysis Form and attached extended studies for
1. California Environmental Quality Act Mitigated Negative Declaration Findings:

Find, that this Mitigated Negative Declaration reflects the decision-making body's independent judgment and analysis, and; that the decision-making body has reviewed and considered the information contained in this Mitigated Negative Declaration and the comments received during the public review period; and that revisions in the project plans or proposals made by or agreed to by the project applicant would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur; and, on the basis of the whole record before the decision-making body (including this Mitigated Negative Declaration) that there is no substantial evidence that the project as revised will have a significant effect on the environment.

2. Required Mitigation Measures:

Refer to the attached Environmental Initial Study for the rationale for requiring the following measures:

A. TRANSPORTATION

1. The payment of the Transportation Impact Fee, which will be required at issuance of building permits, in combination with other components of this program, will mitigate potential cumulative traffic impacts to less than significant.
2. Intersection configuration proposed at the project driveway Street "A" and Highway 8 Business Loop which will include the following: Southbound – one exclusive left-turn lane and one exclusive right-turn lane; Eastbound – one left turn lane and one through lane; Westbound – one right turn lane and one through lane. County sight-distance standards will be met at the intersection with Highway 8 business loop.
3. The project will include a 10 foot wide pathway along the west side of Street "A" composed of decomposed granite.

B. BIOLOGY

1. Prior to the approval of any plans, issuance of any permit, and approval of any final map(s), provide evidence to the satisfaction of the Director of Public Works (DPW) that the following "Specific Environmental Notes" have been placed on the grading, and or improvement plans:
 - a. "Restrict all brushing, clearing and/or grading such that none will be allowed within 300 feet of coastal sage scrub habitat during the breeding season of the California gnatcatcher. This is defined as occurring between March 1 and August 15."
2. Prior to the approval of any plans, issuance of any permit, and approval of any final map(s), provide evidence to the satisfaction of the Director of Planning and Land Use that 3.24 acres of Tier I or II habitat has been preserved in perpetuity through one of the methods described below:
 - a. **Option 1:** If purchasing Mitigation Credit the mitigation bank shall be either the Crestridge Mitigation Bank or another mitigation bank approved by the California Department of Fish & Game, located within the Multiple Species Conservation Program. The following evidence of purchase shall include the following information to be provided by the mitigation bank:

1. A copy of the purchase contract referencing the project name and numbers for which the habitat credits were purchased.
 2. If not stated explicitly in the purchase contract, a separate letter must be provided identifying the entity responsible for the long-term management and monitoring of the preserved land.
 3. To ensure the land will be protected in perpetuity, evidence must be provided that a dedicated conservation easement or similar land constraint has been placed over the mitigation land.
 4. An accounting of the status of the mitigation bank. This shall include the total amount of credits available at the bank, the amount required by this project and the amount remaining after utilization by this project.
- b. **Option 2:** If habitat credit cannot be purchased in a mitigation bank, then the applicant shall provide for the conservation of habitat of the same amount and type of land located within the Multiple Species Conservation Program in a Biological Resource Core Area as indicated below:
1. The type of habitat and the location of the proposed mitigation, should be pre-approved by [DPLU, PCC] before purchase or entering into any agreement for purchase.
 2. A Resource Management Plan (RMP) shall be prepared and approved pursuant to the County of San Diego Biological Report Format and Content Requirements to the satisfaction of the Director of DPLU. If the offsite mitigation is proposed to be owned and/or managed by DPR, the RMP shall also be approved by the Director of DPR.
 3. An open space easement over the land shall be dedicated to the County of San Diego or like agency to the satisfaction of the Director of DPLU. The land shall be protected in perpetuity.
 4. The final RMP cannot be approved until the following has been completed to the satisfaction of the Director of DPLU: The land shall be purchased, the easements shall be dedicated, a Resource Manager shall be selected, and the RMP funding mechanism shall be in place.

5. In lieu of providing a private habitat manager, the applicant may contract with a federal, state or local government agency with the primary mission of resource management to take fee title and manage the mitigation land. Evidence of satisfaction must include a copy of the contract with the agency, and a written statement from the agency that (1) the land contains the specified acreage and the specified habitat, or like functioning habitat, and (2) the land will be managed by the agency for conservation of natural resources in perpetuity.
3. Prior to the approval of any plans, issuance of any permit, and approval of any final map(s), provide evidence to the satisfaction of the Director of Planning and Land Use that 10.02 acres of Tier III habitat has been preserved in perpetuity through one of the methods described below:
 - a. **Option 1:** If purchasing Mitigation Credit the mitigation bank shall be either the Crestridge Mitigation Bank or another mitigation bank approved by the California Department of Fish & Game, located within the Multiple Species Conservation Program. The following evidence of purchase shall include the following information to be provided by the mitigation bank:
 1. A copy of the purchase contract referencing the project name and numbers for which the habitat credits were purchased.
 2. If not stated explicitly in the purchase contract, a separate letter must be provided identifying the entity responsible for the long-term management and monitoring of the preserved land.
 3. To ensure the land will be protected in perpetuity, evidence must be provided that a dedicated conservation easement or similar land constraint has been placed over the mitigation land.
 4. An accounting of the status of the mitigation bank. This shall include the total amount of credits available at the bank, the amount required by this project and the amount remaining after utilization by this project.
 - b. **Option 2:** If habitat credit cannot be purchased in a mitigation bank, then the applicant shall provide for the conservation of habitat of the same amount and type of land located within the

Multiple Species Conservation Program in a Biological Resource Core Area as indicated below:

1. The type of habitat and the location of the proposed mitigation, should be pre-approved by [DPLU, PCC] before purchase or entering into any agreement for purchase.
2. A Resource Management Plan (RMP) shall be prepared and approved pursuant to the County of San Diego Biological Report Format and Content Requirements to the satisfaction of the Director of DPLU. If the offsite mitigation is proposed to be owned and/or managed by DPR, the RMP shall also be approved by the Director of DPR.
3. An open space easement over the land shall be dedicated to the County of San Diego or like agency to the satisfaction of the Director of DPLU. The land shall be protected in perpetuity.
4. The final RMP cannot be approved until the following has been completed to the satisfaction of the Director of DPLU: The land shall be purchased, the easements shall be dedicated, a Resource Manager shall be selected, and the RMP funding mechanism shall be in place.
5. In lieu of providing a private habitat manager, the applicant may contract with a federal, state or local government agency with the primary mission of resource management to take fee title and manage the mitigation land. Evidence of satisfaction must include a copy of the contract with the agency, and a written statement from the agency that (1) the land contains the specified acreage and the specified habitat, or like functioning habitat, and (2) the land will be managed by the agency for conservation of natural resources in perpetuity.

C. CULTURAL RESOURCES

1. Prior to the approval of any plans, issuance of any permit, and approval of any final map(s), provide evidence to the satisfaction of the Director of Public Works (DPW) that the following "Specific Environmental Notes" have been placed on the grading, and or improvement plans:

- a. "The County approved Project Archaeologist, the Native American Monitor, and the DPLU Permit Compliance Coordinator (PCC), shall attend the pre-construction meeting with the contractors to explain and coordinate the requirements of the monitoring program."
- b. "The Project Archaeologist (and Native American Monitor, if contracted) shall monitor original cutting of previously undisturbed deposits in all areas identified for development including off-site improvements."
- c. "During the original cutting of previously undisturbed deposits, the Project Archaeologist and Native American monitor shall be onsite as determined necessary by the Project Archaeologist. Inspections will vary based on the rate of excavation, the materials excavated, and the presence and abundance of artifacts and features. The frequency and location of inspections will be determined by the Project Archaeologist in consultation with the Native American monitor. Monitoring of cutting of previously disturbed deposits will be determined by the Project Archaeologist."
- d. "In the event that previously unidentified potentially significant cultural resources are discovered, the Project Archaeologist shall have the authority to divert or temporarily halt ground disturbance operations in the area of discovery to allow evaluation of potentially significant cultural resources. At the time of discovery, the Project Archaeologist shall contact the DPLU Staff Archaeologist. The Project Archaeologist, in consultation with the Staff Archaeologist, shall determine the significance of the discovered resources. Construction activities will be allowed to resume in the affected area only after the Staff Archaeologist has concurred with the evaluation. For significant cultural resources, a Research Design and Data Recovery Program to mitigate impacts shall be prepared by the Project Archaeologist and approved by the Staff Archaeologist, then carried out using professional archaeological methods."
- e. "If any human bones are discovered, the Project Archaeologist shall contact the County Coroner. If the remains are determined to be of Native American origin, the Most Likely Descendant, as identified by the Native American Heritage Commission, shall be contacted by the Project Archaeologist in order to determine proper treatment and disposition of the remains."

- f. "The Project Archaeologist shall submit monthly status reports to the Director of Planning and Land Use starting from the date of the notice to proceed to termination of implementation of the grading monitoring program. The reports shall briefly summarize all activities during the period and the status of progress on overall plan implementation. Upon completion of the implementation phase, a final report shall be submitted describing the plan compliance procedures and site conditions before and after construction."
- g. "Prior to rough grading inspection sign-off for each phase, the Project Archaeologist shall provide evidence that the field grading monitoring activities have been completed. Evidence shall be in the form of a letter to the Director of the Department of Planning and Land Use."
- h. "Prior to Final Grading Release for each phase, submit to the satisfaction of the Director of Planning and Land Use, a final report that documents the results, analysis, and conclusions of all phases of the Archaeological Monitoring Program. The report shall include the following:"
 - (1) "Department of Parks and Recreation Primary and Archaeological Site forms."
 - (2) "Evidence that all cultural resources collected during the grading monitoring program have been submitted to a San Diego curation facility that meets federal standards per 36 CFR Part 79, and, therefore, would be professionally curated and made available to other archaeologists/researchers for further study. The collections and associated records, including title, shall be transferred to the San Diego curation facility and shall be accompanied by payment of the fees necessary for permanent curation. Evidence shall be in the form of a letter from the curation facility stating that archaeological materials have been received and that all fees have been paid."
 - (3) "If no cultural resources are discovered, a brief letter to that effect and stating that the grading monitoring activities have been completed, shall be sent to the Director of Planning and Land Use by the Project Archaeologist."

2. Prior to recordation of the final map(s) TM 5423 and prior to approval of any grading or improvement plans or issuance of any grading or construction permits, the subdivider shall implement the following conditions relating to the grading monitoring program to mitigate potential impacts to undiscovered buried archaeological resources on the Project site. The following conditions shall be implemented to the satisfaction of the Director of the Department of Planning and Land Use:
 - a. Provide evidence that a County approved archaeologist ("Project Archaeologist") has been contracted to implement a grading monitoring and potential data recovery program that complies with the County of San Diego Guidelines for Determining Significance and Report Format and Content Requirements, to the satisfaction of the Director of Planning and Land Use. Also, provide evidence that a Native American Monitor has been contracted to monitor grading, or evidence that no Native American Monitor was available, in which case the Project Archaeologist shall perform that function.
 - b. The Contract shall include a cost estimate of the required monitoring; this estimate shall be submitted to the Director of Public Works and included in the Bond Cost Estimate for the required Grading.

D. NOISE

1. On the Final Map, grant to the County of San Diego a perpetual Noise Protection Easement, as shown on Tentative Map TM5423. The easement shall be placed over the first 285 feet from the centerline of Interstate 8 Business Route on portions of Lots 3 and 4, to the satisfaction of the Director of Public Works. The easement is for the mitigation of present and anticipated future excess noise levels on residential uses of the affected Parcel.

"Said Noise Protection easement requires that before the issuance of any building or grading permit for any residential use within the noise protection easement located on portions of Lots 3 and 4", the applicant shall:

- a. Complete to the satisfaction of the Director of the Department of Planning and Land Use, an acoustical analysis performed by a County approved acoustical engineer, demonstrating that the present and anticipated future noise levels for the interior and exterior of the residential dwelling will not exceed the allowable

sound level limit of the Noise Element of the San Diego County General Plan [exterior (60 dB CNEL), interior (45 dB CNEL)]. Future traffic noise level estimates for Interstate 8 Business Route shall use a traffic flow equivalent to a Level of Service "C" traffic flow for a Major road that is the designated General Plan Circulation Element buildout roadway classification.

- b. Incorporate to the satisfaction of the Director of the Department of Planning and Land Use all of the recommendations or mitigation measures of the acoustical analysis into the project design and building plans.

3. Critical Project Design Elements That Must Become Conditions of Approval:

The following project design elements were either proposed in the project application or the result of compliance with specific environmental laws and regulations and were essential in reaching the conclusions within the attached Environmental Initial Study. While the following are not technically mitigation measures, their implementation must be assured to avoid potentially significant environmental effects.

PLANS AND SPECIFICATIONS

(Street Improvements and Access)

1. Standard Conditions 1 through 9 and 11.

SPECIFIC CONDITIONS:

2. Improve or agree to improve and provide security for Highway 8 Business (SA 895) (Old Highway 80) fronting Boundary/Certification B/C 07-0031, Parcels B, C, and D, to Public Major Road (plus bike lane) Standards, to a minimum one-half graded width of fifty-five feet (55') with a minimum of forty-five feet (45') of asphaltic concrete pavement over approved base with portland cement concrete curb, gutter, and sidewalks with curb at a minimum of forty-five feet (45') from centerline. This includes transitions, tapers, traffic striping, street lights and A.C. dike to the existing pavement. Provide additional grading and improvements for a dedicated eastbound left turn lane and a dedicated westbound right turn lane on Highway 8 Business (SA 895) at Street "A" intersection. Provide additional grading and improvements to accommodate dedicated east bound left turn lane and dedicated west bound right turn at project access, Street "A". All of the foregoing shall be to the satisfaction of the Director of Public Works.
3. Improve or agree to improve and provide security for Street "A" from the improved intersection with Highway 8 Business (SA 895) to the northwesterly

project boundary in accordance with Public Residential Collector Road Standards, to a graded width of sixty feet (60') with forty feet (40') of asphalt concrete pavement over approved base with Portland cement concrete curb, gutter, and sidewalk on one side and a 10 foot wide disintegrated granite (DG) pathway on the other side with face of curb at twenty feet (20') from centerline to the satisfaction of the Director of Public Works.

4. Improve or agree to improve and provide security for the off-site Street "A" to Public Residential Collector Road Standards from northwesterly property line to the proposed knuckle intersection with Wellington Hill Drive, to a graded width of sixty feet (60') with forty feet (40') of asphalt concrete pavement over approved base with Portland cement concrete curb, gutter, and sidewalk on one side and a 10 foot wide disintegrated granite (DG) pathway on the other side with face of curb at twenty feet (20') from centerline. The improvements shall correspond to the recommendations of approved TIA for this segment of Street "A" and its intersection with Wellington Hill Drive. All to the satisfaction of the Director of Public Works.
5. Improve or agree to improve and provide security for the off-site Street "A" and Wellington Hill Drive intersection, in accordance with Public Road Standards by means of a knuckle (DS-15) and/or as approved by TIA for this segment of Wellington Hill Drive and Street "A" intersection and to the satisfaction of the Director of Public Works.
6. Improve or agree to improve and provide security for off-site Wellington Hill Drive intersection with Street "A" knuckle northeasterly to the existing improved terminus of Wellington Hill Drive, in accordance with Public Residential Collector Road Standards, to a graded width of sixty feet (60') with forty feet (40') of asphalt concrete pavement over approved base with Portland cement concrete curb, gutter, and sidewalk on one side and a 10 foot wide disintegrated granite (DG) pathway on the other side with face of curb at twenty feet (20') from centerline. The improvements shall correspond to the recommendations of approved TIA for this segment of Wellington Hill Drive and Street "A" intersection. All to the satisfaction of the Director of Public Works.
7. Asphalt concrete surfacing material shall be hand-raked and compacted to form smooth tapered connections along all edges including those edges adjacent to soil. The edges of asphalt concrete shall be hand-raked at 45 degrees or flatter, so as to provide a smooth transition next to existing soil, including those areas scheduled for shoulder backing. The above shall be done to the satisfaction of the Director of Public Works.
8. A Registered Civil Engineer, Registered Traffic Engineer, or Licensed Land Surveyor shall provide a certified signed statement that, "Physically, there is a

minimum unobstructed sight distance in both directions along Highway 8 Business (SA 895) from Street "A", for the prevailing operating traffic speed on Highway 8 Business (SA 895) per the Design Standards of Section 6.1.F of the County of San Diego Public Road Standards (approved March 3, 2010)", to the satisfaction of the Director of Public Works. If the lines of sight fall within the existing public road right-of-way, the engineer or surveyor shall further certify that, "said lines of sight fall within the existing right-of-way and a clear space easement is not required."

9. Where height of downsloping bank for a 2:1 slope is greater than twelve feet (12'); or where height of downsloping bank for a 1.5:1 slope is greater than ten feet (10'), guardrail shall be installed per CALTRANS standards to the satisfaction of the Director of Public Works.
10. The subdivider shall construct to the satisfaction of the Director of Public Works, a public street lighting system that complies with the following conditions: [DPW - Development Review Section]
 - a. All fixtures shall use a high pressure sodium vapor light source.
 - b. Deposit with the County of San Diego, through the Department of Public Works, a cash deposit sufficient to:
 - Energize, maintain and operate the street lighting system until tax revenues begin accruing from the subdivision for those purposes.
 - Pay the cost to process lighting district administration of this project. After recording of the Final Map, the subdivision shall be transferred without notice or hearing, to Zone A of the lighting district to operate and maintain the system.

(Drainage and Flood Control)

11. Standard Conditions 13 through 18.

SPECIFIC CONDITIONS:

12. ~~Specific Conditions:~~
 - a. The ~~private storm drain system~~ shall be privately maintained by a private maintenance mechanism such as a homeowners association or other private entity acceptable to the satisfaction of the Director of Public Works.

- b. The detention basin system shall be maintained by category 2 storm water maintenance (to ensure perpetual maintenance) according to category 2 post-construction BMPs (see 17 below) to the satisfaction of the Director of Public Works.
13. Impact of discharge to the drainage structures Master Facilities 27, 28, 29, 30 and 35 within Zone 2 shall be reviewed and re-analyzed at final engineering for impacts to said facilities to the satisfaction of the Director of Public Works.
14. The 100-year flood line of the natural channels crossing all lots with drainage watersheds in excess of twenty-five (25) acres shall be clearly delineated on the non-title information sheet of the Final Map to the satisfaction of the Director of Public Works.

(Storm Water Management)

15. To the satisfaction of the Director of Public Works, Low Impact Development (LID) requirements apply to all priority projects as of January 24, 2008. These requirements are found on page 19 (Section D.1.d. (4) a and b) of the Municipal Storm Water Permit:

http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/sd_permit/r9_2007_0001/2007_0001final.pdf

The draft LID Handbook is a source for LID information and is to be utilized by County staff and outside consultants for implementing LID in our region. You can access the Handbook at the following DPLU web address:

<http://www.sdcounty.ca.gov/dplu/docs/LID-Handbook.pdf>.

The handbook gives an overview of LID. Section 2.2 reviews County of San Diego Department of Public Works planning strategies as they relate to requirements from the Municipal Permit. The Fact Sheets in the Appendix may be useful for information on all of the engineered techniques. Additional information can be found in the extensive Literature Index. For more information contact Stephanie Gaines, Department of Public Works Watershed Planning Division, at (858) 694-3493 or at the following e-mail address: [Stephanie.Gaines@sdcounty.ca.gov].

16. On January 24, 2007, the San Diego Regional Water Quality Control Board (SDRWQCB) issued a new Municipal Storm Water Permit under the National Pollutant Discharge Elimination System (NPDES). The requirements of the Municipal Permit were implemented beginning January 25, 2008. *Project design shall be in compliance with the new Municipal Permit regulations.* The Low

Impact Development (LID) Best Management Practices (BMP) Requirements of the Municipal Permit can be found at the following link on Page 19, Section D.1.d (4), subsections (a) and (b):

http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/sd_permit/r9_2007_0001/2007_0001final.pdf

To the satisfaction of the Director of Public Works, all priority projects must minimize directly connected impervious areas and promote biofiltration. D.1.d(4) subsections (a) and (b) are the minimal site design requirements that project applicants must address and implement. These can be summarized into the following four requirements:

- 1) Disconnect impervious surfaces.
- 2) Design impervious surfaces to drain into properly designed pervious areas.
- 3) Use pervious surfaces wherever appropriate.
- 4) Implement site design BMP's.

The applicant / engineer must determine the applicability and feasibility of each requirement for the proposed project and include them in the project design, unless it can be adequately demonstrated which (if any) of the requirements do not apply.

17. The project includes Category 2 post-construction BMP's. The applicant will be required to establish a maintenance agreement / mechanism (to include easements) to assure maintenance of these BMPs and to provide security to back up maintenance pursuant to the County Maintenance Plan Guidelines to the satisfaction of the Director of Public Works.

(Grading Plans)

18. Standard Conditions 19 (a through e)
19. WELL DESTRUCTION AND SEPTIC REMOVAL [DEH]
 - a. Prior to the approval of any plans, issuance of any permit, and approval of any final map(s), provide evidence to the satisfaction of the Director of Public Works (DPW) that the following "Specific Environmental Notes" have been placed on the grading, and or improvement plans:

1. Prior to the completion of grading, any water well on the property must be properly destroyed. Water well destruction is required to be performed by a licensed and bonded C-57 well contractor through permit approval with the Department of Environmental Health.
2. Prior to approval of the grading plan, the septic tank that served the existing residence must be pumped and backfilled by a permitted septic pumper and verified by DEH staff.

(Sanitation)

20. Standard Condition 21

21. Specific Conditions.

- a. The County Facility Plan Study (CFPS) for Alpine and Lakeside Sanitation District (District) as confirmed by the Settlers Point projects (CSFS) has identified downstream reaches of Woodside Interceptor 1 (8-inch sewer pipe) within Los Coches Road that exceeds the District's 50% design criteria for Peak Dry Weather Flow (PDWF). To meet the operational requirements for ultimate flow conditions, Capital Improvement Projects (CIP) are scheduled within the next five to six years to replace the following segments of the sewer line downstream of the proposed project:

1. Woodside Interceptor 1 – Installing approximately 3,682 LF of 12-inch PVC and approximately 375 LF of 15-inch PVC sewer pipe.

A reimbursement agreement between the District and the developer will be required if the project precedes construction of the downstream improvements by the District and/or item 1 above is implemented by the developer.

- b. Plans and Specifications for the installation of the sewer system serving each lot must be approved by the Lakeside Sanitation District and shall be contingent upon:
 1. Construction of required off-site sewer improvements to mitigate impacts by the project on the existing downstream sewer facilities.
 2. Dedication by the developer of all necessary easements and right-of-way.
- c. A commitment to serve each parcel must be obtained from the Lakeside Sanitation District. In addition, to the capacity commitment fees, the

developer shall pay all the appropriate fees at time of issuance of the Wastewater Discharge Permit.

- d. The applicant shall install the sewer system and shall dedicate the sewer system that is to be public as shown on the approved plans and specifications.
- e. The developer may be required to grade an access road to maintain any public sewers constructed within easements and may be required to dedicate additional access easements to maintain the public sewers.

SPECIFIC CONDITIONS:

- 22. Comply with all applicable storm water regulations at all times. The activities proposed under this application are subject to enforcement under permits from the San Diego Regional Water Quality Control Board (RWQCB) and the County of San Diego Watershed Protection, Storm Water Management, and Discharge Control Ordinance (Ordinance No. 9589) and all other applicable ordinances and standards. This includes requirements for materials and wastes control, erosion control, and sediment control on the project site. Projects that involve areas 1 acre or greater require that the property owner keep additional and updated information onsite concerning storm water runoff. This requirement shall be to the satisfaction of the Director of Public Works.

DEVELOPMENT IMPACT FEES

SPECIFIC CONDITIONS:

- 23. Deposit with the County Department of Public Works sufficient funds to cover the cost of inspection of the development improvements.

FINAL MAP RECORDATION

(Streets and Dedication)

- 24. Standard Conditions 25, 26, 27 and 28.

SPECIFIC CONDITIONS:

- 25. Cause to be granted offsite Highway 8 Business (SA 895) (Old Highway 80) fronting Boundary/Certification B/C 07-0031, Parcels B, C, and D, to Public Major Road (plus bike lane) Standards, to a one-half width of fifty-five feet (55'). Provide additional right-of-way as necessary for a dedicated eastbound left turn lane and a dedicated westbound right turn lane on Highway 8 Business (SA 895)

- at Street "A" intersection together with right to construct and maintain slopes and drainage facilities. All of the foregoing shall be to the satisfaction of the Director of Public Works.
26. Dedicate on the Final Map, Street "A," from the improved intersection with Highway 8 Business (SA 895) northwesterly to the project boundary, in accordance with Public Residential Collector Road Standards, to a width of sixty feet (60'), together with right to construct and maintain slopes and drainage facilities. All of the foregoing shall be to the satisfaction of the Director of Public Works.
 27. Caused to be granted off-site Street "A" to Public Residential Collector Road Standards from northwesterly property line to the proposed knuckle at intersection with Wellington Hill Drive, to a width of sixty feet (60') for this segment of Street "A", together with right to construct and maintain slopes and drainage facilities. All of the foregoing shall be to the satisfaction of the Director of Public Works.
 28. Relinquish access rights onto Street "A" from improved intersection with Highway 8 Business (SA 895) northwesterly to project southeastern boundary, to the satisfaction of the Director of Public Works.
 29. Caused to be granted off-site Street "A" and Wellington Hill Drive intersection, in accordance with Public Road Standards by means of a knuckle (DS-15), together with right to construct and maintain slopes and drainage facilities. All of the foregoing shall be to the satisfaction of the Director of Public Works.
 30. Caused to be granted off-site Wellington Hill Drive intersection with Street "A" knuckle northeasterly to the existing improved terminus of Wellington Hill Drive, to a width of sixty feet (60'), together with right to construct and maintain slopes and drainage facilities. All of the foregoing shall be to the satisfaction of the Director of Public Works.
 31. Prior to approval of improvement and/or grading plans, issuance of excavation permits, and issuance of any further grant of approval, the owners of this project will be required to sign a statement that they are aware of the County of San Diego, Department of Public Works, Pavement Cut Policy and that they have contacted all adjacent property owners and solicited their participation in the extension of utilities, to the satisfaction of the Director of Public Works.
 32. The Basis of Bearings for the Subdivision Map shall be in terms of the California Coordinate System Zone 6 NORTH AMERICAN DATUM OF 1983 by use of existing Horizontal Control, to the satisfaction of the Director of Public Works. **To be in compliance with the Public Resources Code, all Subdivision Map**

surveys performed after January 1, 2000 must use a Basis of Bearings established from existing Horizontal Control Stations with first order accuracy.

33. If conducted prior to January 1, 2000, a survey for any Subdivision Map that is to be based on state plane coordinates shall show two measured ties from the boundary of the subject property to existing Horizontal Control station(s) having California coordinate values of Third order accuracy or better, as published in the County of San Diego's Horizontal Control book. These tie lines to the existing control shall be shown in relation to the California Coordinate System (i.e. Grid bearings and Grid distances). All other distances shown on the map are to be shown as ground distances. A combined factor for conversion of Ground-to-Grid distances shall be shown on the map, all to the satisfaction of the Director of Public Works (Ref. San Diego County Subdivision Ordinance Section 81.506(j)).

If conducted after December 31, 1999, a survey for any Subdivision Map that is to be based on state plane coordinates shall show two measured ties from the boundary of the subject property to existing Horizontal Control station(s) having California Coordinate values of first order accuracy or better, as published in the County of San Diego's Horizontal Control book. These tie lines to the existing control shall be shown in relation to the California Coordinate System (i.e. Grid bearings and Grid distances). All other distances shown on the map are to be shown as Ground distances. A combined factor for conversion of Grid-to-Ground distances shall be shown on the map.

For purposes of this section, the date of survey for the field observed connections shall be the date of survey as indicated in the surveyor's/engineer's certificate as shown on the final map.

34. ~~(HYDROMODIFICATION NOTE: [DPW, LDR] [MA])~~

Intent: In order to acknowledge future processing requirements for projects which were deemed complete, pursuant to Subdivision Map Act Section 66474.2, prior to January 8, 2011, a note shall be placed on the map. This project has provided acknowledge from the owner and professional that hydromodification needs have been reviewed, based on the project's technical studies, and can be accommodated on the project. Furthermore the acknowledgement states that hydromodification requirements will be complied with prior to development of the lots and that any changes that result from implementing hydromodification requirements may require changes to the project design or processing a revision. Description of requirement: The following note shall be shown as the first note in the Non-Title sheet of the map and labeled "Hydromodification Note".

"Approval of a final map does not guarantee that subsequent governmental permits and approvals needed to develop the property can be issued based on laws, regulations or standards in place at the time the subdivision was approved. Changes in the law, regulations or standards that occur or become effective prior to the time development permits are sought can adversely impact the ability to develop a subdivision. In some instances, it may be necessary to redesign or remap a subdivision to address these changes, which can be a costly and time consuming process."

Without limiting the generality of the foregoing, it is specifically noted that starting on January 8, 2011 updated storm water requirements required by the California Regional Water Quality Control Board, San Diego Region, became applicable to priority development projects in the County pursuant to Regional Board Order No. R9-2007-0001, NPDES No. CAS0108758. Subdivisions in process prior to this date may not have been designed to address these new requirements. In order to issue grading, building and other development permits, it may be necessary to address these new requirements even if such considerations were not required to approve the final map."

Documentation: The applicant shall add the Hydromodification Note on the Non-Title sheet of the map as indicated above. **Timing:** Prior to the approval of the map, the note shall be shown on the map. **Monitoring:** The [DPW, LDR] shall verify that the note has been added to the map pursuant to this condition:

ADOPTION STATEMENT: This Mitigated Negative Declaration was adopted and above California Environmental Quality Act findings made by the:

Planning Commission

on February 10, 2010



David Sibbet, Planning Manager
Project Planning Division

EXHIBIT C



ERIC GIBSON
DIRECTOR

County of San Diego

DEPARTMENT OF PLANNING AND LAND USE

5201 RUFFIN ROAD, SUITE B, SAN DIEGO, CALIFORNIA 92123-1666
INFORMATION (858) 694-2960
TOLL FREE (800) 411-0017
www.sdcounty.ca.gov/dplu

February 10, 2012

CEQA Initial Study - Environmental Checklist Form (Based on the State CEQA Guidelines, Appendix G Rev. 10/04)

1. Title; Project Number(s); Environmental Review Number:

Settlers Point; 3100 5423 (TM); 3910 05-14-009 (ER)

2. Lead agency name and address:

County of San Diego, Department of Planning and Land Use
5201 Ruffin Road, Suite B,
San Diego, CA 92123-1666

3. a. Contact Larry Hofreiter, Project Manager
b. Phone number: (858) 694-8846
c. E-mail: larry.hofreiter@sdcounty.ca.gov.

4. Project location:

The project site is located along the north side of Highway I-8, approximately 550 feet south of the Los Coches Road intersection, in the unincorporated community of Lakeside within the County of San Diego. The development of the site affects Assessor Parcel Numbers 397-210-17, 397-212-01, 397-291-02, 397-291-15 through 17.

Thomas Brothers Coordinates: Page 1232, Grid C/7

5. Project Applicant name and address:

Thomas Odom
1440 West Renwick Road
San Dimas, CA 91733

6. General Plan Designation
Community Plan: Lakeside
Land Use Designations: VR-4.3 Village Residential (4.3 du/acre)
VR-15 Village Residential (15 du/acre)
7. Zoning (on 2.25 acres)
Use Regulation: RS
Minimum Lot Size: 10,000 S.F.
Building Type: C (Single Family Detached)
Height: G (35 ft. 2 stories)
Setback: H
- Zoning (on 19.64 acres)
Use Regulation: RV
Minimum Lot Size: 6,000 S.F.
Building Type: K (Multi-Family)
Height: G (35 ft. 2 stories)
Setback: H

8. Description of project: The project is a residential subdivision that would create four lots and one street lot on a 21.89-acre site that is zoned for multi-family housing. The project is located off Old Highway 80 approximately 550 feet west of the Los Coches Road / Highway 80 intersection within the Lakeside Community Planning Area within the unincorporated area of San Diego County. The four residential lots would range in size from 7.19 acres to 4.72 acres. The CEQA Analysis assumed 266 units given the sites topography and other site specific constraints. The analysis assumed Lot 1 would allow 85 units, Lot 2 would allow 56 units, Lot 3 would allow 68 units and Lot 4 would allow 57 units.

The site is subject to the Village Regional Category, with a Land Use Designation of (VR-15) Village Residential-(15 du/acre) on 19.64 acres of the project site and a (VR-4.3) Village Residential (4.3 du/acre) on the remaining 2.25 acres. Current zoning for 19.64 acres of the project site is (RV) Variable Family Residential with a 6,000 square foot minimum lot size. The remaining 2.25 acres is zoned (RS) Single Family Residential with a 10,000 square foot minimum lot size. The project would take access from Highway 8 Business and would connect to Wellington Hill Drive in the north.

The following intersection configuration is proposed at the project driveway (Street "A") at Highway 8 Business Loop:

- Southbound – one exclusive left-turn lane and one exclusive right-turn lane.
- Eastbound – one left-turn lane and one thru lane.
- Westbound – one right-turn lane and thru lane.

- Ensure County sight distance standards are met at the intersection with Highway 8 Business Loop.

The proposed project would include a 10 foot wide pathway along the west side of Street "A" composed of decomposed granite.

Sewer service will be provided by the Lakeside Sanitation District and water will be provided by Helix Water District. The entire project site is proposed to be impacted by the development from construction of flat pads, slopes, retaining walls, access roads and stormwater and drainage improvements. Grading will consist of 218,000 cubic yards of cut and fill material. All slopes will be treated with hydroseed as part of the projects' erosion control Best Management Practices (BMPs). The project also includes off-site impacts due to fire clearing, frontage improvements along Highway 8 Business Loop, utility lines, and drainage structures.

9. Surrounding land uses and setting:

The proposed project is bordered on the southeast by Old Highway 80 also known as the I-8 Business Loop (Service Commercial). Single-family residences are located to the east and northeast of the project site. To the northwest of the project site is undeveloped open space consisting primarily of coastal sage scrub. To the southwest, the project site is bordered by a mobile home park. The proposed project is visible from Highway 8 Business Loop and the Interstate 8 corridor. The Interstate 8 corridor is designated a Second Priority Scenic Route in the Scenic Highway Element of the San Diego County General Plan.

The proposed project site topography includes a hilltop and the majority of the site is on a southeast-facing slope. Elevation onsite ranges from approximately 612 feet above mean sea level at the southern portion of the site to approximately 740 feet above mean sea level. Current land uses onsite include a single family home and undeveloped land. Habitat onsite includes coastal sage scrub, non-native grassland and disturbed/developed land. The coastal sage scrub habitat occurs in the northwest portion of the property on the northwest facing slopes.

10. Other public agencies whose approval is required (e.g., permits, financing approval, or participation agreement):

Permit Type/Action	Agency
Tentative Map	County of San Diego
Site Plans	County of San Diego
Grading Permit	County of San Diego
Improvement Plans	County of San Diego
General Construction Stormwater Permit	RWQCB
County Right-of-Way Permits Construction Permit	County of San Diego

Excavation Permit Encroachment Permit	
National Pollutant Discharge Elimination System (NPDES) Permit	RWQCB
Water District Approval	Helix Water District
Sewer District Approval	Lakeside Sanitation District
Fire District Approval	Lakeside Fire Protection District

ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED: The environmental factors checked below would be potentially affected by this project and involve at least one impact that is a "Potentially Significant Impact" or a "Less Than Significant With Mitigation Incorporated," as indicated by the checklist on the following pages.

- | | | |
|---|--|---|
| <input type="checkbox"/> <u>Aesthetics</u> | <input type="checkbox"/> <u>Agriculture and Forest Resources</u> | <input type="checkbox"/> <u>Air Quality</u> |
| <input checked="" type="checkbox"/> <u>Biological Resources</u> | <input checked="" type="checkbox"/> <u>Cultural Resources</u> | <input type="checkbox"/> <u>Geology & Soils</u> |
| <input checked="" type="checkbox"/> <u>Greenhouse Gas Emissions</u> | <input type="checkbox"/> <u>Hazards & Haz. Materials</u> | <input type="checkbox"/> <u>Hydrology & Water Quality</u> |
| <input type="checkbox"/> <u>Land Use & Planning</u> | <input type="checkbox"/> <u>Mineral Resources</u> | <input checked="" type="checkbox"/> <u>Noise</u> |
| <input type="checkbox"/> <u>Population & Housing</u> | <input type="checkbox"/> <u>Public Services</u> | <input type="checkbox"/> <u>Recreation</u> |
| <input checked="" type="checkbox"/> <u>Transportation/Traffic</u> | <input type="checkbox"/> <u>Utilities & Service Systems</u> | <input checked="" type="checkbox"/> <u>Mandatory Findings of Significance</u> |

DETERMINATION: (To be completed by the Lead Agency)

On the basis of this initial evaluation:

- On the basis of this Initial Study, the Department of Planning and Land Use finds that the proposed project COULD NOT have a significant effect on the environment, and a NEGATIVE DECLARATION will be prepared.
- On the basis of this Initial Study, the Department of Planning and Land Use finds that although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because revisions in the project have been made by or agreed to by the project proponent. A MITIGATED NEGATIVE DECLARATION will be prepared.
- On the basis of this Initial Study, the Department of Planning and Land Use finds that the proposed project MAY have a significant effect on the environment, and an ENVIRONMENTAL IMPACT REPORT is required.



 Signature
 Larry Hofreiter

 Printed Name

February 10, 2012

 Date
 Land Use/Environmental Planner

 Title

INSTRUCTIONS ON EVALUATION OF ENVIRONMENTAL IMPACTS

1. A brief explanation is required for all answers except "No Impact" answers that are adequately supported by the information sources a lead agency cites in the parentheses following each question. A "No Impact" answer is adequately supported if the referenced information sources show that the impact simply does not apply to projects like the one involved (e.g., the project falls outside a fault rupture zone). A "No Impact" answer should be explained where it is based on project-specific factors as well as general standards (e.g., the project will not expose sensitive receptors to pollutants, based on a project-specific screening analysis).
2. All answers must take account of the whole action involved, including off-site as well as on-site, cumulative as well as project-level, indirect as well as direct, and construction as well as operational impacts.
3. Once the lead agency has determined that a particular physical impact may occur, then the checklist answers must indicate whether the impact is potentially significant, Less Than Significant With Mitigation Incorporated, or less than significant. "Potentially Significant Impact" is appropriate if there is substantial evidence that an effect may be significant. If there are one or more "Potentially Significant Impact" entries when the determination is made, an EIR is required.
4. "Less Than Significant With Mitigation Incorporated" applies where the incorporation of mitigation measures has reduced an effect from "Potentially Significant Impact" to a "Less Than Significant Impact." The lead agency must describe the mitigation measures, and briefly explain how they reduce the effect to a less than significant level.
5. Earlier analyses may be used where, pursuant to the tiering, program EIR, or other CEQA process, an effect has been adequately analyzed in an earlier EIR or negative declaration. Section 15063(c)(3)(D). In this case, a brief discussion should identify the following:
 - a) Earlier Analysis Used. Identify and state where they are available for review.
 - b) Impacts Adequately Addressed. Identify which effects from the above checklist were within the scope of and adequately analyzed in an earlier document pursuant to applicable legal standards, and state whether such effects were addressed by mitigation measures based on the earlier analysis.
 - c) Mitigation Measures. For effects that are "Less Than Significant With Mitigation Incorporated," describe the mitigation measures that were incorporated or refined from the earlier document and the extent to which they address site-specific conditions for the project.
6. Lead agencies are encouraged to incorporate into the checklist references to information sources for potential impacts (e.g., general plans, zoning ordinances). Reference to a previously prepared or outside document should, where appropriate, include a reference to the page or pages where the statement is substantiated.
7. The explanation of each issue should identify:
 - a) The significance criteria or threshold, if any, used to evaluate each question; and
 - b) The mitigation measure identified, if any, to reduce the impact to less than significance

I. AESTHETICS -- Would the project:

a) Have a substantial adverse effect on a scenic vista?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: A vista is a view from a particular location or composite views along a roadway or trail. Scenic vistas often refer to views of natural lands, but may also be compositions of natural and developed areas, or even entirely of developed and unnatural areas, such as a scenic vista of a rural town and surrounding agricultural lands. What is scenic to one person may not be scenic to another, so the assessment of what constitutes a scenic vista must consider the perceptions of a variety of viewer groups.

The items that can be seen within a vista are visual resources. Adverse impacts to individual visual resources or the addition of structures or developed areas may or may not adversely affect the vista. Determining the level of impact to a scenic vista requires analyzing the changes to the vista as a whole and also to individual visual resources.

Based on a site visit completed by Larry Hofreiter on August 23, 2009, the proposed project is located near or within the viewshed of a scenic vista. The viewshed and visible components of the landscape within that viewshed, including the underlying landform and overlaying landcover, establish the visual environment for the scenic vista. The visual environment of the subject scenic vista extends from Interstate 8 to the north and from the surrounding hilltops. The visual composition consists of vegetated rolling foothills, and commercial and residential development.

The proposed project is proposing to subdivide four (4) lots ranging in size from 7.19 acres to 4.72 acres for future residential development. One additional 2.09 acre lot is reserved for the 60 foot wide public street (Street "A"). Grading will consist of 218,000 cubic yards of cut and fill material. Cut slopes approximately 48 feet in height and retaining walls up to 5'4" in height are proposed. All of the graded slopes are over 15%. The proposed slopes would cover 25% of the project site.

A Visual Resources Report for the proposed project, dated August 2008, was prepared by REC Consultants. Based on the results of the visual resources analysis, the project has been determined to be compatible with the existing visual environment in terms of visual character and quality for the following reasons. First, the project site is located within a residential and commercially developed area and is surrounded by residential and commercial development to the south, east and west. Provision of additional residential development within an area already developed with residential uses would provide visual continuity with adjacent off-site uses. Second, the manufactured slopes would be hydroseeded pursuant to the Stormwater Management Plan (SWMP).

Hydroseeding with native seed mixes would foster quicker re-growth (and therefore also visual cover of cut areas), returning the disturbed slopes to a condition more consistent with abutting slopes more quickly than would reliance on natural re-growth. Therefore, minimizing visual breaks of vegetation and maintaining visual context for the project and surrounding hillside. Third, the tentative map will be conditioned to attain approval of a site plan or have a "B" Special Area designator placed in the zone box for each of the newly created lots. A "B" designator would require any future development to submit a Site Plan for review and approval prior to the issuance of any building permits. A Site Plan is the mechanism that enables the County and Lakeside Design Review Board to review development proposals for compliance with the Lakeside Design Guidelines. Therefore, any future development would be subject to further design review to ensure future buildings would be designed to be compatible in scale and character with the surrounding community.

The project will not result in cumulative impacts on a scenic vista because the proposed project viewshed and past, present and future projects within that viewshed were evaluated to determine their cumulative effects. Refer to XVII. Mandatory Findings of Significance for a comprehensive list of the projects considered. Those projects listed in Section XVII are located within the scenic vista's viewshed and will not contribute to a cumulative impact because the proposed projects identified are similar to existing development patterns in this area. These development patterns are in conformance with the County's adopted General Plan and are in accordance with the approved land uses within the surrounding area. Therefore, the project will not result in adverse project or cumulative impacts on a scenic vista.

b) Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: State scenic highways refer to those highways that are officially designated by the California Department of Transportation (Caltrans) as scenic (Caltrans - California Scenic Highway Program). Generally, the area defined within a State scenic highway is the land adjacent to and visible from the vehicular right-of-way. The dimension of a scenic highway is usually identified using a motorist's line of vision, but a reasonable boundary is selected when the view extends to the distant horizon. The scenic highway corridor extends to the visual limits of the landscape abutting the scenic highway.

A Visual Resources Report for the proposed project, dated August 2008, was prepared by REC Consultants. Based on the results of the visual resources analysis, the project is located near or visible within the composite viewshed of a potential state scenic

highway. Interstate 8 is designated as part of the County's Scenic Highway System in the Conservation and Open Space Element of the General Plan. The preservation of the visual integrity of this corridor is recommended. Views from the highway include prominent knolls, vegetated riparian corridors and steep slopes covered with dense upland native vegetation and rocky outcroppings. The project may be viewed for short durations by motorists traveling along the highway corridor; however, existing vegetation, topography and structures create blockages to the view onto the project site. Views of the project site while traveling east on Interstate 8 are approximately 14 seconds when traveling at the posted speed limit. Westbound travelers experience approximately the same view duration at the same speed.

The project is compatible with the Interstate 8 viewshed in terms of visual character and quality for the following reasons. First, as stated above, views of the project site from Interstate 8 are brief and limited due to existing vegetation, topography and structures. Second, the manufactured slopes would be hydroseeded pursuant to the Stormwater Management Plan (SWMP). Hydroseeding with native seed mixes would foster quicker re-growth (and therefore also visual cover of cut areas), returning the disturbed slopes to a condition more consistent with abutting slopes more quickly than would reliance on natural re-growth. Therefore, minimizing visual breaks of vegetation and maintaining visual context for the project and surrounding hillside. Third, the proposed lots will need to attain Site Plan approval prior to the issuance of any building permits to ensure future development is designed in accordance with the Lakeside Design Guidelines. The Lakeside Design Guidelines specify open space and planting requirements for front yards, interior yards and street trees for multi-family residential development projects.

The project will not result in cumulative impacts on a scenic vista because the proposed project viewshed and past, present and future projects within that viewshed were evaluated to determine their cumulative effects. Refer to XVII. Mandatory Findings of Significance for a comprehensive list of the projects considered. Those projects listed in Section XVII are located within the scenic vista's viewshed and will not contribute to a cumulative impact because the proposed projects identified are similar to existing development patterns in this area. These development patterns are in conformance with the County's adopted General Plan and are in accordance with the approved land uses within the surrounding area. Therefore, the project will not result in any adverse project or cumulative level effect on a scenic resource within a State scenic highway.

c) Substantially degrade the existing visual character or quality of the site and its surroundings?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: Visual character is the objective composition of the visible landscape within a viewshed. Visual character is based on the organization of the pattern elements line, form, color, and texture. Visual character is commonly discussed in terms of dominance, scale, diversity and continuity. Visual quality is the viewer's perception of the visual environment and varies based on exposure, sensitivity and expectation of the viewers. The existing visual character and quality of the project site and surrounding can be characterized as rolling foothills interrupted with residential development near the highway and more continuous natural landscape in the distant portions of the viewshed.

A Visual Resources Report for the proposed project, dated August 2008, was prepared by REC Consultants. Based on the results of the visual resources analysis, the project has been determined to be compatible with the existing visual environment in terms of visual character and quality for the following reasons. First, the project site is located within a residential and commercially developed area and is surrounded by residential and commercial development to the south, east and west. Provision of additional residential development within an area already developed with residential uses would provide visual continuity with adjacent off-site uses. Second, the manufactured slopes would be hydro-seeded pursuant to the Stormwater Management Plan (SWMP). Hydroseeding with native seed mixes would foster quicker re-growth (and therefore also visual cover of cut areas), returning the disturbed slopes to a condition more consistent with abutting slopes more quickly than would reliance on natural re-growth. Therefore, minimizing visual breaks of vegetation and maintaining visual context for the project and surrounding hillside. Third, the proposed lots will need to attain Site Plan approval prior to the issuance of any building permits to ensure future buildings would be designed to be compatible in scale and character with the surrounding.

The project will not result in cumulative impacts on a scenic vista because the proposed project viewshed and past, present and future projects within that viewshed were evaluated to determine their cumulative effects. Refer to XVII. Mandatory Findings of Significance for a comprehensive list of the projects considered. Those projects listed in Section XVII are located within the scenic vista's viewshed and will not contribute to a cumulative impact because the proposed projects identified are similar to existing development patterns in this area. These development patterns are in conformance with the County's adopted General Plan and are in accordance with the approved land uses within the surrounding area. Therefore, the project will not result in any adverse project or cumulative level effect on visual character or quality on-site or in the surrounding area.

d) Create a new source of substantial light or glare, which would adversely affect day or nighttime views in the area?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The proposed project will use outdoor lighting and is located within Zone B as identified by the San Diego County Light Pollution Code. However, it will not adversely affect nighttime views or astronomical observations, because the project will conform to the Light Pollution Code (Section 59.101-59.115), including the Zone B lamp type and shielding requirements per fixture and hours of operation limitations for outdoor lighting and searchlights.

The project will not contribute to significant cumulative impacts on day or nighttime views because the project will conform to the Light Pollution Code. The Code was developed by the San Diego County Department of Planning and Land Use and Department of Public Works in cooperation with lighting engineers, astronomers, land-use planners from San Diego Gas and Electric, Palomar and Mount Laguna observatories, and local community planning and sponsor groups to effectively address and minimize the impact of new sources light pollution on nighttime views. The standards in the Code are the result of this collaborative effort and establish an acceptable level for new lighting. Compliance with the Code is required prior to issuance of any building permit for any project. Mandatory compliance for all new building permits ensures that this project in combination with all past, present and future projects will not contribute to a cumulatively considerable impact. Therefore, compliance with the Code ensures that the project will not create a significant new source of substantial light or glare, which would adversely affect daytime or nighttime views in the area, on a project or cumulative level.

II. AGRICULTURAL AND FORESTRY RESOURCES -- Would the project:

a) Convert Prime Farmland, Unique Farmland, or Farmland of Statewide or Local Importance (Important Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency, or other agricultural resources, to non-agricultural use?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project site has land designated as Prime Agricultural Soils. As a result, the proposed project was reviewed by a DPLU Agricultural Specialist and was determined not to have significant adverse project or cumulative level impacts related to the conversion of Prime Farmland, Unique Farmland, Farmland of Statewide Importance, or Farmland of Local Importance to a non-agricultural use because the prime agricultural soil on-site compromises of approximately 1 acre at the southwest corner of the subject property. There is no active agriculture on the subject site or on any of the adjacent properties, nor is there evidence of any active agriculture in the recent past. Subsequently, the project is not converting

farmland into a non-farmland use, nor does it impact surrounding active agriculture because it does not exist. Therefore, no potentially significant project or cumulative level conversion of Prime Farmland, Unique Farmland, Farmland of Statewide Importance or Farmland of Local Importance to a non-agricultural use will occur as a result of this project.

b) Conflict with existing zoning for agricultural use, or a Williamson Act contract?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project site is zoned RS and RV, which are not considered to be agricultural zones. Additionally, the project site's land is not under a Williamson Act Contract. Therefore, the project does not conflict with existing zoning for agricultural use, or a Williamson Act Contract.

c) Conflict with existing zoning for, or cause rezoning of, forest land (as defined in Public Resources Code section 12220(g)), or timberland (as defined by Public Resources Code section 4526), or timberland zoned Timberland Production (as defined by Government Code section 51104(g))?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project site including offsite improvements do not contain forest lands or timberland. The County of San Diego does not have any existing Timberland Production Zones. In addition, the project is consistent with existing zoning and a rezone of the property is not proposed. Therefore, project implementation would not conflict with existing zoning for, or cause rezoning of, forest land, timberland or timberland production zones.

d) Result in the loss of forest land , conversion of forest land to non-forest use, or involve other changes in the existing environment, which, due to their location or nature, could result in conversion of forest land to non-forest use?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project site including any offsite improvements do not contain any forest lands as defined in Public Resources Code section 12220(g), therefore project implementation would not result in the loss or conversion of forest land to a non-forest use. In addition, the project is not located in the vicinity of offsite forest resources.

- e) Involve other changes in the existing environment, which, due to their location or nature, could result in conversion of Important Farmland or other agricultural resources, to non-agricultural use?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project site and surrounding area within a radius of 1 mile have land designated as Prime Farmland. As a result, the proposed project was reviewed by a DPLU Agricultural Specialist and was determined not to have significant adverse impacts related to the conversion of Prime Farmland, Unique Farmland, Farmland of Statewide Importance or Farmland of Local Importance to a non-agricultural use for the following reasons: The prime agricultural soil on-site comprises approximately 1 acre at the southwest corner of the subject property. There is no active agriculture on the subject site or on any of the adjacent properties, nor is there evidence of any active agriculture in the recent past. Subsequently, the project is not converting farmland into a non-farmland use, nor does it impact surrounding active agriculture because it does not exist. Therefore, no potentially significant project or cumulative level conversion of Prime Farmland, Unique Farmland, Farmland of Statewide Importance, or Farmland of Local Importance to a non-agricultural use will occur as a result of this project.

III. AIR QUALITY -- Where available, the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to make the following determinations. Would the project:

- a) Conflict with or obstruct implementation of the San Diego Regional Air Quality Strategy (RAQS) or applicable portions of the State Implementation Plan (SIP)?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project involves a Tentative Map to allow up to 266 multi-family residential dwelling units on approximately 21.89 acres. As discussed

in the Air Quality Study, dated August 28, 2008, prepared by Urban Crossroads on file with the Department of Planning and Land Use as Environmental Review Number 05-14-009, the Lakeside Subregional Area (SRA) consists of approximately 5,000 total multi-family dwelling units (2007) and in the year 2020 will increase to approximately 8,500. Therefore, approximately 3,500 additional units will need to be provided in the Lakeside SRA by 2020. The proposed project, along with reasonably foreseeable projects in the vicinity is expected to develop approximately 458 multi-family residential dwelling units. Since the proposed multi-family dwelling units do not exceed the planned growth projections for the area, the project conforms to the RAQS and SIP. Operation of the project will result in emissions of ozone precursors that were considered as a part of the RAQS based on growth projections. As such, the proposed project is not expected to conflict with either the RAQS or the SIP. In addition, construction and operational emissions from the project are below the screening levels, and subsequently will not violate ambient air quality.

b) Violate any air quality standard or contribute substantially to an existing or projected air quality violation?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: In general, air quality impacts from land use projects are the result of emissions from motor vehicles, and from short-term construction activities associated with such projects. The San Diego County Land Use Environment Group (LUEG) has established guidelines for determining significance which incorporate the San Diego Air Pollution Control District's (SDAPCD) established screening-level criteria for all new source review (NSR) in APCD Rule 20.2. These screening-level criteria can be used as numeric methods to demonstrate that a project's total emissions (e.g. stationary and fugitive emissions, as well as emissions from mobile sources) would not result in a significant impact to air quality. Since SDAPCD does not have screening-level criteria for emissions of volatile organic compounds (VOCs), the screening level for reactive organic compounds (ROC) from the South Coast Air Quality Management District (SCAQMD) for the Coachella Valley (which are more appropriate for the San Diego Air Basin) are used.

The project proposes a Tentative Map to develop 266 multi-family residential dwelling units on approximately 21.89 acres. Grading operations associated with the construction of the project would be subject to County of San Diego Grading Ordinance, which requires the implementation of dust control measures. As discussed in the Air Quality Study, dated August 28, 2008, prepared by Urban Crossroads on file with the Department of Planning and Land Use as Environmental Review Number 05-14-009, emissions from the construction phase would result in pollutant emissions below the screening-level criteria established by the LUEG guidelines for determining significance

with the proposed project design measures. These design measures include three daily applications of water on disturbed soils, covering haul vehicles, replanting disturbed areas as soon as possible, restricting vehicle speed to 15 mph or less to control vehicle dust. Other measures include the project design include keeping construction equipment well maintained to ensure proper timing and tuning of engines, equipment maintenance records and equipment design specification data sheets shall be kept on-site during construction activity, ensuring that equipment will not idle for more than 5 minutes, ensure use of low-sulfur diesel fuel in construction equipment and ensure that rough grading activity does not overlap with other phases of construction. With the implementation of these project design measures, the project would not exceed the Screening Level Thresholds (SLTs) for construction and would have a less than significant impact.

In addition, the vehicle trips generated from the project will result in 2,128 Average Daily Trips (ADTs). The emissions associated with the operation of the project were analyzed in the Air Quality Study prepared by Urban Crossroads and determined to be less than significant. Operational emissions were modeled and included emissions from vehicle combustion, landscape maintenance, architectural coatings and fugitive dust related to vehicle travel and were determined to be below the SLTs for operational emissions; therefore, the project would have a less than significant impact.

c) Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is non-attainment under an applicable federal or state ambient air quality standard (including releasing emissions which exceed quantitative thresholds for ozone precursors)?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: San Diego County is presently in non-attainment for the 1-hour concentrations under the California Ambient Air Quality Standard (CAAQS) for Ozone (O₃). San Diego County is also presently in non-attainment for the annual geometric mean and for the 24-hour concentrations of Particulate Matter less than or equal to 10 microns (PM₁₀) and Particulate Matter less than or equal to 2.5 microns (PM_{2.5}) under the CAAQS. O₃ is formed when volatile organic compounds (VOCs) and nitrogen oxides (NO_x) react in the presence of sunlight. VOC sources include any source that burns fuels (e.g., gasoline, natural gas, wood, oil); solvents; petroleum processing and storage; and pesticides. Sources of PM₁₀ and PM_{2.5} in both urban and rural areas include: motor vehicles, wood burning stoves and fireplaces, dust from construction, landfills, agriculture, wildfires, brush/waste burning, and industrial sources of windblown dust from open lands.

Air quality emissions associated with the project include emissions of PM₁₀, PM_{2.5}, NO_x and VOCs from construction/grading activities, and also as the result of increase of traffic from project implementation. An Air Quality Study was prepared for the project to determine whether the project would have a significant effect on air quality. The study included a review of cumulative projects in close proximity to the proposed project's construction activities to determine whether the project would exceed the SLTs established by the County of San Diego Land Use Environmental Group (LUEG) Guidelines for Determining Significance for Air Quality. The study indicates that PM₁₀ concentrations decrease by 90 percent from the project boundary within 50 meters (165 feet) of the source. At 100 meters (330 feet) PM₁₀ concentrations decrease by 99 percent, beyond 100 meters concentrations approach zero. Therefore, no cumulative contribution of PM₁₀ beyond 150 meters would be physically possible. In addition, construction emissions are short-term in nature and typically settle out in close proximity to the source. In order for a cumulative impact to occur, the proposed project would have to be undergoing construction simultaneously with a project within 150 meters of the site. The likelihood of a cumulatively considerable contribution to PM₁₀ from the proposed project in conjunction with adjacent projects is highly unlikely due to the proximity of other cumulative projects to the Settlers Point project. The project also proposes design measures that would reduce construction emissions and cumulative considerable contributions of PM₁₀ and PM_{2.5}. These measures include the applying water three times a day during construction activities, covering haul vehicles, replanting disturbed areas as soon as practicable, maintaining construction equipment, ensuring construction equipment does not idle more than five minutes, and ensuring rough grading will not overlap with other phases of construction. Based upon the Air Quality Study prepared by Urban Crossroads, the project would have a less than significant cumulatively considerable impact.

Refer to XVII. Mandatory Findings of Significance for a comprehensive list of the projects considered. The proposed project as well as the past, present and future projects within the surrounding area, have emissions below the screening-level criteria established by the LUEG guidelines for determining significance, therefore, the construction and operational emissions associated with the proposed project are not expected to create a cumulatively considerable impact nor a considerable net increase of PM₁₀, PM_{2.5} or any O₃ precursors.

d) Expose sensitive receptors to substantial pollutant concentrations?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: Air quality regulators typically define sensitive receptors as schools (Preschool-12th Grade), hospitals, resident care facilities, or day-

care centers, or other facilities that may house individuals with health conditions that would be adversely impacted by changes in air quality. The County of San Diego also considers residences as sensitive receptors since they house children and the elderly.

The project is not near any schools, hospitals, resident day care facilities, or day-care centers. However, the project will introduce new residences into the project area. Based on the Air Quality Study prepared by Urban Crossroads, the project proposes to place residences within a quarter-mile (the radius determined by the SCAQMD in which the dilution of pollutants is typically significant) of any identified point source of significant emissions. In evaluating sensitive receptors, the two primary emissions of concern are CO and diesel particulate matter. The study included a CO hotspot analysis by using information from the Settlers Point Traffic Impact Study. The traffic study indicates that none of the study-area intersections will result in a LOS E or worse and intersection volumes exceeding 3,000 peak hour trips. Thus, the project is not expected to result in a significant impact with regard to the creation of a CO hotspot. A health risk assessment conducted for construction emissions concluded that the project would not lead to a significant cancer or non-cancer risk to receptors. In addition, the project will not contribute to a cumulatively considerable exposure of sensitive receptors to substantial pollutant concentrations because proposed project as well as the listed projects have emissions below the screening-level criteria established by the LUEG guidelines for determining significance.

e) Create objectionable odors affecting a substantial number of people?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project could produce objectionable odors, which would result from vehicle and dust emissions during the construction and operation phase of the project. However, given the location of the project and the nature of the odors, these impacts are not expected to affect a substantial number of people for the following reasons: the construction emissions associated with the project would be temporary and would typically settle out in close proximity to the project site. As such, impacts as a result of odors generated by the proposed project will be less than significant. Moreover, the affects of objectionable odors are localized to the immediate surrounding area and will not contribute to a cumulatively considerable odor. A list of past, present and future projects within the surrounding area were evaluated and none of these projects create objectionable odors.

IV. BIOLOGICAL RESOURCES -- Would the project:

a) Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in

local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?

- | | |
|--|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input checked="" type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less than Significant with Mitigation Incorporated: Based on an analysis of the County's Geographic Information System (GIS) records, the County's Comprehensive Matrix of Sensitive Species, site photos, a Biological Resources Report dated February 2006 prepared by Robin Church, and an updated project description submitted March 10, 2009 prepared by Elyssa K Robertson, County staff biologist Beth Ehsan has determined that the site supports sensitive vegetation, namely, coastal sage scrub and non-native grassland.

The 21.89 acre site is largely covered by non-native grassland (18.21 acres) but also includes 1.69 acres of coastal sage scrub and 1.99 acres of developed habitat. The site is in the Metro-Lakeside-Jamul segment of the MSCP, and the northwestern corner of the property is designated as Pre-Approved Mitigation Area (PAMA), qualifying the site as a Biological Resource Core Area (BRCA). Although the California gnatcatcher has not been observed on-site, it has been observed on the adjacent property, and is assumed to occur on-site. One other sensitive species, the Cooper's hawk, was observed on-site.

Protocol surveys for the Quino checkerspot butterfly (*Euphydryas editha quino*) were conducted by Darren Smith (permit #TE-07628) from February 23 through April 17, 2005. The primary host plant, Dwarf plantain (*Plantago erecta*) was not observed on-site, and only two individuals of secondary host plant purple owl's clover (*Castilleja exserta*) were observed. The Quino checkerspot butterfly was not observed on-site and has a low potential to occur because the nearest siting was approximately 2 miles away in the City of Santee. The site was also assessed for potential to support Stephen's kangaroo rat (*Dipodomys stephensi*) and San Diego fairy shrimp (*Branchinecta sandiegoensis*) and found to have a low potential due to lack of suitable habitat. The burrowing owl (*Athene cunicularia hypugea*) has a low potential to occur since no burrows were observed on-site.

Eleven sensitive species have a high potential to occur on-site; the aforementioned California gnatcatcher (*Polioptila californica*), northern red-diamond rattlesnake (*Crotalus ruber ruber*), orange-throated whiptail (*Cnemidophorus hyperythrus*), San Diego banded gecko (*Coleonux variegatus abbotti*), San Diego ringneck snake (*Diadophus punctatus similes*), silvery legless lizard (*Anniella pulchra pulchra*), Dulzura pocket mouse (*Chaetodipus californicus femoralis*), southern grasshopper mouse (*Onychomys torridus Ramona*), black-shouldered kite (*Elanus caeruleus*), loggerhead shrike (*Lanius ludovicianus*), and turkey vulture (*Cathartes aura*).

Habitat-based mitigation in conformance with the BMO will mitigate for impacts to California gnatcatcher, Cooper's hawk, and other sensitive species with a potential to occur on-site. Impacts to 2.16 acres of coastal sage scrub (including 0.47 acres off-site) will be mitigated at a 1.5:1 ratio with 3.24 acres of Tier I or II habitat in Crestridge Mitigation Bank or another County-approved mitigation bank within the approved MSCP. Impacts to 20.04 acres of non-native grassland (including 1.83 acres off-site) will be mitigated at a 0.5:1 ratio with 10.02 acres of Tier III habitat in Crestridge Mitigation Bank or another County-approved mitigation bank within the approved MSCP. In addition, all brushing, grading, and clearing within 300 feet of coastal sage scrub habitat will be conditioned to occur outside of the California gnatcatcher breeding season, March 1 to August 15. With these mitigation measures, the project will not result in substantial adverse effects, either directly or through habitat modifications, to any candidate, sensitive, or special status species and the impact is less than significant.

Moreover, the project has been found to comply with the County's Multiple Species Conservation Program (MSCP). The MSCP was designed to compensate for the loss of biological resources throughout the program's region. As such, projects that conform to the MSCP, as specified in the Subarea Plan and BMO would not result in cumulatively considerable impacts for those resources adequately covered by the program. Staff has prepared MSCP Findings demonstrating how TM 5423 will contribute to the goals of the MSCP. Other proposed projects in this ecoregion are also expected to meet the findings and goals of the County's MSCP and BMO. As such, the potential direct and indirect impacts discussed above would not be cumulatively considerable.

- b) Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Game or US Fish and Wildlife Service?

- | | |
|--|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input checked="" type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less than Significant with Mitigation Incorporated: Based on an analysis of the County's Geographic Information System (GIS) records, the County's Comprehensive Matrix of Sensitive Species, site photos, a Biological Resources Report dated February 2006 prepared by Robin Church, and an updated project description submitted March 10, 2009 prepared by Elyssa K. Robertson, County staff biologist Beth Ehsan has determined that the site supports sensitive habitat, namely, coastal sage scrub and non-native grassland.

The 21.89 acre site is largely covered by non-native grassland (18.21 acres) but also includes 1.69 acres of coastal sage scrub and 1.99 acres of developed habitat. The site is in the Metro-Lakeside-Jamul segment of the MSCP, and the property is designated as Pre-Approved Mitigation Area (PAMA). There is no riparian habitat on-site.

Habitat-based mitigation in conformance with the BMO will mitigate for impacts to coastal sage scrub and non-native grassland. Impacts to 2.16 acres of coastal sage scrub (including 0.47 acres off-site) will be mitigated at a 1.5:1 ratio with 3.24 acres of Tier I or II habitat in Crestridge Mitigation Bank or another County-approved mitigation bank within the approved MSCP. Impacts to 20.04 acres of non-native grassland (including 1.83 acres off-site) will be mitigated at a 0.5:1 ratio with 10.02 acres of Tier III habitat in Crestridge Mitigation Bank or another County-approved mitigation bank within the approved MSCP. With these mitigation measures, project impacts to any riparian habitat or sensitive natural community identified in the County of San Diego Multiple Species Conservation Program, County of San Diego Resource Protection Ordinance, Natural Community Conservation Plan, Fish and Game Code, Endangered Species Act, Clean Water Act, or any other local or regional plans, policies or regulations will be less than significant.

Moreover, the project has been found to comply with the County's Multiple Species Conservation Program (MSCP). The MSCP was designed to compensate for the loss of biological resources throughout the program's region. As such, projects that conform to the MSCP, as specified in the Subarea Plan and BMO, would not result in cumulatively considerable impacts for those resources adequately covered by the program. Staff has prepared MSCP Findings demonstrating how TM 5423 will contribute to the goals of the MSCP. Although the northwest corner of the property is designated as PAMA and qualifies as a BRCA, the project site is surrounded by development on most sides. All mitigation will occur within the Crestridge Mitigation Bank, or another approved mitigation bank within the MSCP. All mitigation banks would also be within a BRCA and would provide equal or better mitigation for the projects impacts. Other proposed projects in this ecoregion are also expected to meet the findings and goals of the County's MSCP and BMO. As such, the potential direct and indirect impacts discussed above would not be cumulatively considerable.

- c) Have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: Based on an analysis of the County's Geographic Information System (GIS) records, the County's Comprehensive Matrix of Sensitive Species, site photos, a Biological Resources Report dated February 2006 prepared by Robin Church, and an updated project description submitted March 10, 2009 prepared by Elyssa K Robertson, County staff biologist Beth Ehsan has determined that the site does not contain any wetlands as defined by Section 404 of the Clean Water Act, including, but not limited to, marsh, vernal pool, stream, lake, river or water of the U.S., that could potentially be impacted through direct removal, filling, hydrological interruption, diversion or obstruction by the proposed development. Therefore, no impacts will occur to wetlands defined by Section 404 of the Clean Water Act and under the jurisdiction of the Army Corps of Engineers.

- d) Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less than Significant Impact: Based on an analysis of the County's Geographic Information System (GIS) records, the County's Comprehensive Matrix of Sensitive Species, site photos, a Biological Resources Report dated February 2006 prepared by Robin Church, and an updated project description submitted March 10, 2009 prepared by Elyssa K Robertson, County staff biologist Beth Ehsan has determined that the site does not support wildlife corridors due to its surroundings of dense residential development in all directions. Wildlife could enter the property from the northwest corner, which connects to undeveloped habitat, but this entrance is largely blocked by the existing single-family home, and there is no outlet in any other direction. The established wildlife corridor in the area is the Lakeside Archipelago, which crosses the I-8 southwest of the project site. Therefore, the project will not interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors. In addition, although no specific native wildlife nursery sites have been identified onsite, the project will be conditioned to avoid grading or clearing during the California gnatcatcher breeding season.

- e) Conflict with the provisions of any adopted Habitat Conservation Plan, Natural Communities Conservation Plan, other approved local, regional or state habitat conservation plan or any other local policies or ordinances that protect biological resources?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Incorporated

Discussion/Explanation:

Refer to the attached Ordinance Compliance Checklist for further information on consistency with any adopted Habitat Conservation Plan, Natural Communities Conservation Plan, other approved local, regional or state habitat conservation plan, including, Habitat Management Plans (HMP), Special Area Management Plans (SAMP), or any other local policies or ordinances that protect biological resources including the Multiple Species Conservation Program (MSCP), Biological Mitigation Ordinance, Resource Protection Ordinance (RPO), Habitat Loss Permit (HLP).

V. CULTURAL RESOURCES -- Would the project:

a) Cause a substantial adverse change in the significance of a historical resource as defined in 15064.5?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: Based on an analysis of records and a survey of the property by a County of San Diego certified archaeologists, Tim Gross, Principal Archaeologist, Matt Sivba, Field Director, and project historian Steven R. Van Wormer on February 17, 2006, it has been determined that there is one historical resource within the project site. This resource is a Mediterranean style house, built between 1901 (not shown on the 1901 USGS map) and 1928, where the 1928 aerial photograph clearly shows the house. It is not associated with early pioneer families in the region. Evidence suggests that David and Cora Hutton built the house as a retirement home some time in the early to mid 1920's. The building is typical of the thousands of small to mid-sized Mediterranean style homes built throughout Southern California during this period.

An historical resources report titled, "*Cultural Resource Evaluation of the Settlers Point Property County of San Diego, California*", dated March 2006 prepared by G. Timothy Gross, Principal Archaeologist, and Matt Sivba with Affinis, evaluated the significance of the historical resources based on a review of historical records including 1901 USGS map of the area, the 1928 aerial photograph, chain of title and an architectural evaluation. Based on the results of this study, it has been determined that the historic resource is not significant pursuant to the State of California Environmental Quality Act (CEQA) Guidelines, Section 15064.5. Moreover, if the resources are not considered significant historic resources pursuant to CEQA Section 15064.5 loss of these resources cannot contribute to a potentially significant cumulative impact.

b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to 15064.5?

- | | |
|--|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input checked="" type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant With Mitigation Incorporated: Based on an analysis of records and a survey of the property by a County of San Diego certified archaeologists G. Timothy Gross, Principal Archaeologist, and Matt Sivba with Affinis, it has been determined that the project site does not appear to contain any archaeological resources. The results of the survey are provided in an archaeological survey report titled, "*Cultural Resource Evaluation of the Settlers Point Property County of San Diego, California*", dated March 2006 prepared by G. Timothy Gross, Principal Archaeologist, and Matt Sivba with Affinis, dated March 2006. The archaeological survey was conducted September 13, 2005.

The project is not expected to have an impact on prehistoric resources. However, because 16 archaeological and historic sites have been identified and recorded within one mile of the project site, the amount of proposed grading (218,000 cubic yards) and the fact that ground visibility was poor during both surveys, archaeological monitoring will be required during any construction grading.

c) Directly or indirectly destroy a unique geologic feature?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: San Diego County has a variety of geologic environments and geologic processes which generally occur in other parts of the state, country, and the world. However, some features stand out as being unique in one way or another within the boundaries of the County. The site does not contain any unique geologic features that have been listed in the County's Guidelines for Determining Significance for Unique Geology Resources nor does the site support any known geologic characteristics that have the potential to support unique geologic features. Additionally, based on a site visit by Larry Hofreiter on August 23, 2009, no known unique geologic features were identified on the property or in the immediate vicinity.

d) Directly or indirectly destroy a unique paleontological resource or site?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
|---|---|

- Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

No Impact: A review of the County's Paleontological Resources Maps indicates that the project is located entirely on plutonic igneous rock and has no potential for producing fossil remains. A review of the paleontological maps provided by the San Diego Museum of Natural History indicates that the project is located on igneous rock and has no potential for producing fossil remains.

- e) Disturb any human remains, including those interred outside of formal cemeteries?

- Potentially Significant Impact Less than Significant Impact
 Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

No Impact: Based on an analysis of records and a survey of the property by a County of San Diego certified archaeologist, G. Timothy Gross, Principal Archaeologist, and Matt Sivba with Affinis,, it has been determined that the project will not disturb any human remains because the project site does not appear to include a formal cemetery or any archaeological resources that might contain interred human remains. The results of the survey are provided in an archaeological survey report titled, "*Cultural Resource Evaluation of the Settlers Point Property County of San Diego, California*", dated March 2006 prepared by G. Timothy Gross, Principal Archaeologist, and Matt Sivba with Affinis, dated March 2006.

VI. GEOLOGY AND SOILS -- Would the project:

- a) Expose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving:
- i. Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42.

- Potentially Significant Impact Less than Significant Impact
 Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

No Impact: The project is not located in a fault rupture hazard zone identified by the Alquist-Priolo Earthquake Fault Zoning Act, Special Publication 42, Revised 1997, Fault-Rupture Hazards Zones in California. Also, a staff geologist has reviewed the project and has concluded that no other substantial evidence of recent (Holocene) fault activity is present within the project site. Therefore, there will be no impact from the exposure of people or structures to adverse effects from a known hazard zone as a result of this project.

ii. Strong seismic ground shaking?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: To ensure the structural integrity of all buildings and structures, the project must conform to the Seismic Requirements as outlined within the California Building Code. The County Code requires a soils compaction report with proposed foundation recommendations to be approved before the issuance of a building permit. Therefore, compliance with the California Building Code and the County Code ensures the project will not result in a potentially significant impact from the exposure of people or structures to potential adverse effects from strong seismic ground shaking.

iii. Seismic-related ground failure, including liquefaction?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The geology of the project site is identified as Cretaceous Plutonic. This geologic environment is not susceptible to ground failure from seismic activity. In addition, the site is not underlain by poor artificial fill or located within a floodplain. Therefore, there will be no impact from the exposure of people to adverse effects from a known area susceptible to ground failure.

iv. Landslides?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project site is not within a "Landslide Susceptibility Area" as identified in the County Guidelines for Determining Significance for Geologic Hazards. Landslide Susceptibility Areas were developed based on landslide risk profiles included in the *Multi-Jurisdictional Hazard Mitigation Plan, San Diego, CA* (URS, 2004). Landslide risk areas from this plan were based on data including steep slopes (greater than 25%); soil series data (SANDAG based on USGS 1970s series); soil-slip susceptibility from USGS; and Landslide Hazard Zone Maps (limited to western portion of the County) developed by the California Department of Conservation, Division of Mines and Geology (DMG). Also included within Landslide Susceptibility Areas are gabbroic soils on slopes steeper than 15% in grade because these soils are slide prone. Since the project is not located within an identified Landslide Susceptibility Area and the geologic environment has a low probability to become unstable, the project would have no impact from the exposure of people or structures to potential adverse effects from landslides.

b) Result in substantial soil erosion or the loss of topsoil?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: According to the Soil Survey of San Diego County, the soils on-site are identified as Fallbrook-Vista sandy loams, Vista coarse sandy loam, Ramona sandy loam, and Visalia sandy loam that has a soil erodibility rating of "moderate" and "severe" as indicated by the Soil Survey for the San Diego Area, prepared by the US Department of Agriculture, Soil Conservation and Forest Service dated December 1973. However, the project will not result in substantial soil erosion or the loss of topsoil for the following reasons:

- The project will not result in unprotected erodible soils; will not alter existing drainage patterns; is not located in a floodplain, wetland, or significant drainage feature; and will not develop steep slopes.
- The project has prepared a Storm water Management Plan, dated July 2009, prepared by REC Consultants. The plan includes the following Best Management Practices to ensure sediment does not erode from the project site.
- The project involves grading. However, the project is required to comply with the San Diego County Code of Regulations, Title 8, Zoning and Land Use Regulations, Division 7, Sections 87.414 (DRAINAGE - EROSION PREVENTION) and 87.417 (PLANTING). Compliance with these regulations minimizes the potential for water and wind erosion.

Due to these factors, it has been found that the project will not result in substantial soil erosion or the loss of topsoil on a project level.

In addition, the project will not contribute to a cumulatively considerable impact because all the of past, present and future projects included on the list of projects that involve grading or land disturbance are required to follow the requirements of the San Diego County Code of Regulations, Title 8, Zoning and Land Use Regulations, Division 7, Sections 87.414 (DRAINAGE - EROSION PREVENTION) and 87.417 (PLANTING); Order 2001-01 (NPDES No. CAS 0108758), adopted by the San Diego Region RWQCB on February 21, 2001; County Watershed Protection, Storm Water Management, and Discharge Control Ordinance (WPO) (Ord. No. 9424); and County Storm water Standards Manual adopted on February 20, 2002, and amended January 10, 2003 (Ordinance No. 9426). Refer to XVII. Mandatory Findings of Significance for a comprehensive list of the projects considered.

- c) Will the project produce unstable geological conditions that will result in adverse impacts resulting from landslides, lateral spreading, subsidence, liquefaction or collapse?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project is not located on or near geological formations that are unstable or would potentially become unstable as a result of the project. On a site visit conducted by Larry Hofreiter on August 23, 2009, no geological formations or features were noted that would produce unstable geological conditions as a result of the project. For further information refer to VI Geology and Soils, Question a., i-iv listed above.

- d) Be located on expansive soil, as defined in Table 18-1-B of the Uniform Building Code (1994), creating substantial risks to life or property?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project is located on expansive soils as defined within Table 18-1-B of the Uniform Building Code (1994). This was confirmed by staff review of the Soil Survey for the San Diego Area, prepared by the US Department of Agriculture, Soil Conservation and Forest Service dated December 1973. The soils on-site are Fallbrook-Vista sandy loams, Vista coarse sandy loam, Ramona sandy loam, and Visalia sandy loam. However the project will not have any significant impacts because the project is required to comply the improvement requirements identified in the 1997 Uniform Building Code, Division III – Design Standard for Design of Slab-On-Ground Foundations to Resist the Effects of Expansive Soils and Compressible Soils,

which ensure suitable structure safety in areas with expansive soils. Therefore, these soils will not create substantial risks to life or property.

- e) Have soils incapable of adequately supporting the use of septic tanks or alternative wastewater disposal systems where sewers are not available for the disposal of wastewater?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project will rely on public water and sewer for the disposal of wastewater. A service availability letter dated March 23, 2005 has been received from the Lakeside Sanitation District indicating that the facility has adequate capacity for the projects wastewater disposal needs. No septic tanks or alternative wastewater disposal systems.

VII. GREENHOUSE GAS EMISSIONS – Would the project

- a) Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment?

- | | |
|--|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input checked="" type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: With Mitigation Incorporated

Greenhouse Gas (GHG) Emissions are said to result in an increase in the earth's average surface temperature commonly referred to as global warming. This rise in global temperature is associated with long-term changes in precipitation, temperature, wind patterns, and other elements of the earth's climate system, known as climate change. These changes are now broadly attributed to GHG emissions, particularly those emissions that result from the human production and use of fossil fuels.

GHGs include carbon dioxide, methane, hydrofluorocarbons (HFCs), and nitrous oxide, among others. Human induced GHG emissions are a result of energy production and consumption, and personal vehicle use, among other sources. A regional GHG inventory prepared for the San Diego Region¹ identified on-road transportation (cars and trucks) as the largest contributor of GHG emissions in the region, accounting for

¹ San Diego County Greenhouse Gas Inventory: An Analysis of Regional Emissions and Strategies to Achieve AB 32 Targets. University of San Diego and the Energy Policy Initiatives Center (EPIC), September 2008.

46% of the total regional emissions. Electricity and natural gas combustion were the second (25%) and third (9%) largest regional contributors, respectively, to regional GHG emissions.

Climate changes resulting from GHG emissions could produce an array of adverse environmental impacts including water supply shortages, severe drought, increased flooding, sea level rise, air pollution from increased formation of ground level ozone and particulate matter, ecosystem changes, increased wildfire risk, agricultural impacts, ocean and terrestrial species impacts, among other adverse effects.

In 2006, the State passed the Global Warming Solutions Act of 2006, commonly referred to as AB 32, which set the greenhouse gas emissions reduction goal for the State of California into law. The law requires that by 2020, State emissions must be reduced to 1990 levels by reducing greenhouse gas emissions from significant sources via regulation, market mechanisms, and other actions.

According to the San Diego County Greenhouse Gas Inventory (2008), the region must reduce its GHG emissions by 33 percent from "business-as-usual" emissions to achieve 1990 emissions levels by the year 2020. "Business-as-usual" refers to the 2020 emissions that would have occurred in the absence of the mandated reductions.

Senate Bill 375 (SB 375), passed in 2008, links transportation and land use planning with global warming. It requires the California Air Resources Board (ARB) to set regional targets for the purpose of reducing greenhouse gas emissions from passenger vehicles. Under this law, if regions develop integrated land use, housing and transportation plans that meet SB 375 targets, new projects in these regions can be relieved of certain review requirements under CEQA. SANDAG has prepared the region's Sustainable Communities Strategy (SCS) which is a new element of the 2050 Regional Transportation Plan (RTP). The strategy identifies how regional greenhouse gas reduction targets, as established by the ARB, will be achieved through development patterns, transportation infrastructure investments, and/or transportation measures or policies that are determined to be feasible.

In addressing the potential for a project to generate GHG emissions that would have a potentially significant cumulative effect on the environment, a 900 metric ton threshold was selected to identify those projects that would be required to calculate emissions and implement mitigation measures to reduce a potentially significant impact. The 900 metric ton screening threshold is based on a threshold included in the CAPCOA white paper² that covers methods for addressing greenhouse gas emissions under CEQA. The CAPCOA white paper references the 900 metric ton guideline as a conservative threshold for requiring further analysis and mitigation. The 900 metric ton threshold was based on a review of data from four diverse cities (Los Angeles in southern California and Pleasanton, Dublin, and Livermore in northern California) to identify the threshold

² See CAPCOA White Paper : "CEQA & Climate Change: *Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act*" January 2008 (<http://www.capcoa.org/rokdownloads/CEQA/CAPCOA%20White%20Paper.pdf>).

that would capture at least 90% of the residential units or office space on the pending applications list. This threshold will require a substantial portion of future development to minimize GHG emissions to ensure implementation of AB 32 targets is not impeded. By ensuring that projects that generate more than 900 metric tons of GHG implement mitigation measures to reduce emissions, it is expected that a majority of future development will contribute to emission reduction goals that will assist the region in meeting its GHG reduction targets.

It should be noted that an individual project's GHG emissions will generally not result in direct impacts under CEQA, as the climate change issue is global in nature, however an individual project could be found to contribute to a potentially significant cumulative impact. CEQA Guidelines Section 15130(f) states that an EIR shall analyze greenhouse gas emissions resulting from a proposed project when the incremental contribution of those emissions may be cumulatively considerable.

The project would generate GHG emissions from a variety of sources. First, GHG emissions would be generated during construction of the proposed project. Once fully operational, the project's operations would generate GHG emissions from an increase in both area and mobile sources. Indirect source emissions include electrical consumption, water and wastewater usage (transportation) and waste disposal. Mobile sources of air pollutants associated with the proposed project would consist of motor vehicles trips generated by project residents.

GHG emissions for the project were estimated using the California Emissions Estimator Model (CalEEMod). CalEEMod incorporates the 2007 versions of the EMFAC and Off-Road models developed by ARB. Construction assumptions used are consistent with the Air Quality Study. Modeling was based on project-specific data (i.e., size and type of proposed uses) and vehicle trip information from the traffic analysis prepared for the project. Detailed emissions calculations and methodologies are available upon request.

The project's total emissions (operational and amortized construction emissions) would exceed the 900 metric ton screening threshold described above. In order to meet the required reductions under AB 32, the project includes mitigation measures to reduce emissions by 33% from business-as-usual. The project applicant shall implement the following measures:

- Design and construct the residential units to exceed Title 24 energy efficiency requirements by a minimum of 25%.
- Reduce indoor and outdoor water consumption by 20% through measures such as low flow fixtures, water-efficient appliances, drought tolerant landscaping, water-efficient irrigation systems such as drip irrigation, and rainwater collection systems.
- Institute recycling and composting services to reduce landfill-bound waste by 20%.
- Design buildings to use natural systems to reduce energy use. Locate and orient buildings to take advantage of shade, prevailing winds, landscaping and sun screens to reduce energy use.
- Design buildings to require no wood or gas-fired hearths and fireplaces.

- Require orientation of buildings to maximize passive solar heating during cool seasons, avoid solar heat gain during hot periods, enhance natural ventilation, and promote effective use of daylight. Building orientation, wiring, and plumbing should optimize and facilitate opportunities for on-site solar generation and heating.

Subsequent site plans shall include the listed design measures to meet the performance standards for each sector as specified. It should be noted that measures for reducing GHG emissions may not be limited to those listed above. Prior to the issuance of building permits, project applicants shall provide evidence to the County that these design features or equivalent measures have been incorporated into the project and the project meets the performance standards for each applicable sector. Approval of future site plans and/or construction permits shall not occur until it can be assured that the mitigation measures (or other measures meeting the performance criteria specified above) have been incorporated in the project design. The performance standards allow project applicants flexibility in choosing which specific measures they will pursue to achieve the percent reductions while still making the commitment to comply with the GHG reductions under AB 32. For example, the performance standard for energy use, i.e. exceed Title 24 2008 by 25% could be met in a number of ways (for example, installing higher quality building insulation; installing a more efficient water heating system; use of energy efficient lighting, heating and cooling systems, appliances, equipment, and control systems, including the installation of Energy Star-certified products). Similarly water consumption could be reduced through the use of reclaimed water, gray water, or locally sourced water; installing low-flow water fixtures; designing water efficient landscapes and irrigation systems; and planting drought-tolerant trees and vegetation. The waste management strategy may include source reduction, recycling, composting, or combusting.

As discussed previously, in order to meet the AB 32 mandate of 1990 GHG emissions levels by 2020, San Diego county would need to reduce GHG emissions by approximately 33% from business as usual. The ARB Scoping Plan identifies expected GHG emissions reductions from regulations, such as those that would reduce emissions from vehicles (e.g., AB 1493, Executive Order S-1-07 [i.e., the Low Carbon Fuel Standard]) and electric utilities (e.g., the Renewables Portfolio Standard [RPS]). The following reductions in GHG emissions from adopted regulations have been quantified and accounted for toward reductions from the project:

- This analysis assumes full implementation of federal and/or state mandates for 2020 that would result in GHG emissions reductions associated with vehicle trips. According to the AB 32 Scoping Plan, implementation of the GHG emission reduction standards for new passenger cars, pickup trucks and sport utility vehicles under AB 1493 (or an equivalent federal program) would lead to a 21% reduction from the 2020 statewide GHG inventory. Additionally, implementation of the LCFS would reduce mobile-source GHG emissions by 10% (ARB, 2008).
- The RPS rules will require the renewable energy portion of the retail electricity portfolio to be 33% in 2020. For SDG&E, the electricity provider in the project area, approximately 11.9% of their current portfolio qualifies under the RPS rules and thus the gain by 2020 would be approximately 21%.

With implementation of mitigation measures and state regulations, the project would reduce GHG emissions from BAU conditions by more than 33%. The project would be consistent with the goals of AB 32 and the impact is less than significant with mitigation incorporated.

b) Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases?

- | | |
|--|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input checked="" type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant With Mitigation Incorporated:

In 2006, the State passed the Global Warming Solutions Act of 2006, commonly referred to as AB 32, which set the greenhouse gas emissions reduction goal for the State of California into law. The law requires that by 2020, State emissions must be reduced to 1990 levels by reducing greenhouse gas emissions from significant sources via regulation, market mechanisms, and other actions.

Senate Bill 375 (SB 375), passed in 2008, links transportation and land use planning with global warming. It requires the California Air Resources Board (ARB) to set regional targets for the purpose of reducing greenhouse gas emissions from passenger vehicles. Under this law, if regions develop integrated land use, housing and transportation plans that meet SB 375 targets, new projects in these regions can be relieved of certain review requirements under CEQA. SANDAG has prepared the region's Sustainable Communities Strategy (SCS) which is a new element of the 2050 Regional Transportation Plan (RTP). The strategy identifies how regional greenhouse gas reduction targets, as established by the ARB, will be achieved through development patterns, transportation infrastructure investments, and/or transportation measures or policies that are determined to be feasible.

To implement State mandates to address climate change in local land use planning, local land use jurisdictions are generally preparing GHG emission inventories and reduction plans and incorporating climate change policies into local General Plans to ensure development is guided by a land use plan that reduces GHG emissions. The County of San Diego has updated its General Plan and is in the process of incorporating associated climate change policies. These policies will provide direction for individual development projects to reduce GHG emissions and help the County meet its GHG emission reduction targets.

Until local plans are developed to address greenhouse gas emissions, such as a Climate Action Plan, the project is evaluated to determine whether it would impede the implementation of AB 32 GHG reduction targets. For the reasons discussed in the response to question VII.a), with incorporation of mitigation measures, the project would

reduce GHG emissions by more than 33% from a business-as-usual scenario and would not impede the implementation of AB 32 reduction targets. Therefore, the project would not conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases.

VIII. HAZARDS AND HAZARDOUS MATERIALS -- Would the project:

- a) Create a significant hazard to the public or the environment through the routine transport, storage, use, or disposal of hazardous materials or wastes or through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project will not create a significant hazard to the public or the environment because it does not propose the storage, use, transport, emission, or disposal of Hazardous Substances, nor are Hazardous Substances proposed or currently in use in the immediate vicinity. In addition, the project does not propose to demolish any existing structures onsite and therefore would not create a hazard related to the release of asbestos, lead based paint or other hazardous materials from demolition activities.

- b) Emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project is not located within one-quarter mile of an existing or proposed school. Therefore, the project will not have any effect on an existing or proposed school.

- c) Be located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Code Section 65962.5, or is otherwise known to have been subject to a release of hazardous substances and, as a result, would it create a significant hazard to the public or the environment?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
|---|---|

- Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

No Impact: Based on a site visit and regulatory database search, the project site has not been subject to a release of hazardous substances. The project site is not included in any of the following lists or databases: the State of California Hazardous Waste and Substances sites list compiled pursuant to Government Code Section 65962.5, the San Diego County Hazardous Materials Establishment database, the San Diego County DEH Site Assessment and Mitigation (SAM) Case Listing, the Department of Toxic Substances Control (DTSC) Site Mitigation and Brownfields Reuse Program Database ("CalSites" Envirostor Database), the Resource Conservation and Recovery Information System (RCRIS) listing, the EPA's Superfund CERCLIS database or the EPA's National Priorities List (NPL). Additionally, the project does not propose structures for human occupancy or significant linear excavation within 1,000 feet of an open, abandoned, or closed landfill, is not located on or within 250 feet of the boundary of a parcel identified as containing burn ash (from the historic burning of trash), is not on or within 1,000 feet of a Formerly Used Defense Site (FUDS), does not contain a leaking Underground Storage Tank, and is not located on a site with the potential for contamination from historic uses such as intensive agriculture, industrial uses, a gas station or vehicle repair shop. Therefore, the project would not create a significant hazard to the public or environment.

- d) For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project result in a safety hazard for people residing or working in the project area?

- Potentially Significant Impact Less than Significant Impact
 Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

No Impact: The proposed project is not located within an Airport Land Use Compatibility Plan (ALUCP), an Airport Influence Area, or a Federal Aviation Administration Height Notification Surface. Also, the project does not propose construction of any structure equal to or greater than 150 feet in height, constituting a safety hazard to aircraft and/or operations from an airport or heliport. Therefore, the project will not constitute a safety hazard for people residing or working in the project area.

- e) For a project within the vicinity of a private airstrip, would the project result in a safety hazard for people residing or working in the project area?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The proposed project is not within one mile of a private airstrip. As a result, the project will not constitute a safety hazard for people residing or working in the project area.

- f) Impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

The following sections summarize the project's consistency with applicable emergency response plans or emergency evacuation plans.

- i. OPERATIONAL AREA EMERGENCY PLAN AND MULTI-JURISDICTIONAL HAZARD MITIGATION PLAN:

Less Than Significant Impact: The Operational Area Emergency Plan is a comprehensive emergency plan that defines responsibilities, establishes an emergency organization, defines lines of communications, and is designed to be part of the statewide Standardized Emergency Management System. The Operational Area Emergency Plan provides guidance for emergency planning and requires subsequent plans to be established by each jurisdiction that has responsibilities in a disaster situation. The Multi-Jurisdictional Hazard Mitigation Plan includes an overview of the risk assessment process, identifies hazards present in the jurisdiction, hazard profiles, and vulnerability assessments. The plan also identifies goals, objectives and actions for each jurisdiction in the County of San Diego, including all cities and the County unincorporated areas. The project will not interfere with this plan because it will not prohibit subsequent plans from being established or prevent the goals and objectives of existing plans from being carried out.

- ii. SAN DIEGO COUNTY NUCLEAR POWER STATION EMERGENCY RESPONSE PLAN

No Impact: The San Diego County Nuclear Power Station Emergency Response Plan will not be interfered with by the project due to the location of the project, plant and the specific requirements of the plan. The emergency plan for the San Onofre Nuclear Generating Station includes an emergency planning zone within a 10-mile radius. All land area within

10 miles of the plant is not within the jurisdiction of the unincorporated County and as such a project in the unincorporated area is not expected to interfere with any response or evacuation.

iii. OIL SPILL CONTINGENCY ELEMENT

No Impact: The Oil Spill Contingency Element will not be interfered with because the project is not located along the coastal zone or coastline.

iv. EMERGENCY WATER CONTINGENCIES ANNEX AND ENERGY SHORTAGE RESPONSE PLAN

No Impact: The Emergency Water Contingencies Annex and Energy Shortage Response Plan will not be interfered with because the project does not propose altering major water or energy supply infrastructure, such as the California Aqueduct.

v. DAM EVACUATION PLAN

No Impact: The Dam Evacuation Plan will not be interfered with because the project is not located within a dam inundation zone.

g) Expose people or structures to a significant risk of loss, injury or death involving wildland fires, including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The proposed project is adjacent to wildlands that have the potential to support wildland fires. However, the project will not expose people or structures to a significant risk of loss, injury or death involving wildland fires because the project will comply with the regulations relating to emergency access, water supply, and defensible space specified in the County Consolidated Fire Code for the 17 Fire Protection Districts in San Diego County. Furthermore, an approved Fire Protection Plan has been prepared for the project dated August 28, 2008. Implementation of these fire safety standards will occur during the Tentative Map or building permit process. Also, a Fire Service Availability Letter and conditions, dated February 23, 2005, have been received from the Lakeside Fire Protection District. The Fire Service Availability Letter indicates the expected emergency travel time to the project site to be five (5) minutes. The Maximum Travel Time allowed pursuant to the County Public Facilities Element is 5 minutes. Therefore, based on the review of the project by County staff, through compliance with the County Consolidated Fire Code and through compliance with the Lakeside Fire Protection District's conditions, the project is not anticipated to

expose people or structures to a significant risk of loss, injury or death involving hazardous wildland fires. Moreover, the project will not contribute to a cumulatively considerable impact, because all past, present and future projects in the surrounding area are required to comply with the County Consolidated Fire Code.

h) Propose a use, or place residents adjacent to an existing or reasonably foreseeable use that would substantially increase current or future resident's exposure to vectors, including mosquitoes, rats or flies, which are capable of transmitting significant public health diseases or nuisances?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project does not involve or support uses that allow water to stand for a period of 72 hours (3 days) or more (e.g. artificial lakes, agricultural irrigation ponds). Also, the project does not involve or support uses that will produce or collect animal waste, such as equestrian facilities, agricultural operations (chicken coops, dairies etc.), solid waste facility or other similar uses. Moreover, based on a site visit there are none of these uses on adjacent properties. Therefore, the project will not substantially increase current or future resident's exposure to vectors, including mosquitoes, rats or flies.

IX. HYDROLOGY AND WATER QUALITY - Would the project:

a) Violate any waste discharge requirements?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project proposes a tentative map to merge and redraw parcel configuration to construct 266-units of residential units which requires a General Permit for Discharges of Storm Water Associated with Construction Activities. The project applicant has provided a Storm Water Management Plan, approved July 2009, and a copy of their "Notice of Intent" submitted to the RWQCB, which demonstrates that the project will comply with all requirements of the "General Permit for Discharges of Storm Water Associated with Construction Activities." The project site proposes and will be required to implement the following site design measures and/or source control BMP's and/or treatment control BMP's to reduce potential pollutants to the maximum extent practicable from entering storm water runoff. The project design implemented Low Impact Development (LID) measures. Other BMPs incorporated include: Storm drain stenciling and signage, inlet filters, efficient

irrigation systems, extended/dry detention basins with grass/vegetated lining, and vegetated slopes and swales. These measures will enable the project to meet waste discharge requirements as required by the Land-Use Planning for New Development and Redevelopment Component of the San Diego Municipal Permit (SDRWQCB Order No. 2001-01), as implemented by the San Diego County Jurisdictional Urban Runoff Management Program (JURMP) and Standard Urban Storm Water Mitigation Plan (SUSMP).

Finally, the project's conformance to the waste discharge requirements listed above ensures the project will not create cumulatively considerable water quality impacts related to waste discharge because, through the permit, the project will conform to Countywide watershed standards in the JURMP and SUSMP, derived from State regulation to address human health and water quality concerns. Therefore, the project will not contribute to a cumulatively considerable impact to water quality from waste discharges.

- b) Is the project tributary to an already impaired water body, as listed on the Clean Water Act Section 303(d) list? If so, could the project result in an increase in any pollutant for which the water body is already impaired?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project lies in the Coches 907.14 hydrologic subarea, within the San Diego hydrologic unit. According to the Clean Water Act Section 303(d) list, July 2003, a portion of this watershed at the Pacific Ocean and mouth of the San Diego River is impaired for coliform bacteria. Constituents of concern in the San Dieguito watershed include coliform bacteria, total dissolved solids, nutrients, petroleum chemicals, toxics, and trash.

The project proposes the following activities that are associated with these pollutants: attached residential, detached residential and commercial. However, the project design implemented Low Impact Development (LID) measures. Other BMPs incorporated include: Storm drain stenciling and signage, inlet filters, efficient irrigation systems, extended/dry detention basins with grass/vegetated lining, and vegetated slopes and swales.

The proposed BMP's are consistent with regional surface water and storm water planning and permitting process that has been established to improve the overall water quality in County watersheds. As a result the project will not contribute to a cumulative impact to an already impaired water body, as listed on the Clean Water Act Section 303(d). Regional surface water and storm water permitting regulation for County of San Diego, Incorporated Cities of San Diego County, and San Diego Unified Port District

includes the following: Order 2001-01 (NPDES No. CAS 0108758), adopted by the San Diego Region RWQCB on February 21, 2001; County Watershed Protection, Storm Water Management, and Discharge Control Ordinance (WPO) (Ord. No. 9424); County Storm water Standards Manual adopted on February 20, 2002; and amended January 10, 2003 (Ordinance No. 9426). The stated purposes of these ordinances are to protect the health, safety and general welfare of the County of San Diego residents; to protect water resources and to improve water quality; to cause the use of management practices by the County and its citizens that will reduce the adverse effects of polluted runoff discharges on waters of the state; to secure benefits from the use of storm water as a resource; and to ensure the County is compliant with applicable state and federal laws. Ordinance No. 9424 (WPO) has discharge prohibitions, and requirements that vary depending on type of land use activity and location in the County. Ordinance No. 9426 is Appendix A of Ordinance No. 9424 (WPO) and sets out in more detail, by project category, what Dischargers must do to comply with the Ordinance and to receive permits for projects and activities that are subject to the Ordinance. Collectively, these regulations establish standards for projects to follow which intend to improve water quality from headwaters to the deltas of each watershed in the County. Each project subject to WPO is required to prepare a Storm water Management Plan that details a project's pollutant discharge contribution to a given watershed and propose BMPs or design measures to mitigate any impacts that may occur in the watershed.

c) Could the proposed project cause or contribute to an exceedance of applicable surface or groundwater receiving water quality objectives or degradation of beneficial uses?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The Regional Water Quality Control Board has designated water quality objectives for waters of the San Diego Region as outlined in Chapter 3 of the Water Quality Control Plan (Plan). The water quality objectives are necessary to protect the existing and potential beneficial uses of each hydrologic unit as described in Chapter 2 of the Plan.

The project lies in the Coches 907.14 hydrologic subarea, within the San Diego hydrologic unit that has the following existing and potential beneficial uses for inland surface waters, coastal waters, reservoirs and lakes, and ground water: municipal and domestic supply; agricultural supply; industrial process supply; industrial service supply; hydropower generation; contact water recreation; non-contact water recreation; warm freshwater habitat; cold freshwater habitat; wildlife habitat; commercial and sport fishing; estuarine habitat; marine habitat; migration of aquatic organisms; shellfish harvesting; and, rare, threatened, or endangered species habitat.

The project proposes the following potential sources of polluted runoff: Construction, grading, landscaping, and outdoor vehicle parking. However, the project design implemented Low Impact Development (LID) measures. Other BMPs incorporated include: Storm drain stenciling and signage, inlet filters, efficient irrigation systems, extended/dry detention basins with grass/vegetated lining, and vegetated slopes and swales. The above BMP's will be employed to reduce potential pollutants in runoff to the maximum extent practicable, such that the proposed project will not cause or contribute to an exceedance of applicable surface or groundwater receiving water quality objectives or degradation of beneficial uses.

In addition, the proposed BMP's are consistent with regional surface water, storm water and groundwater planning and permitting process that has been established to improve the overall water quality in County watersheds. As a result, the project will not contribute to a cumulatively considerable exceedance of applicable surface or groundwater receiving water quality objectives or degradation of beneficial uses. Refer to Section VIII., Hydrology and Water Quality, Question b, for more information on regional surface water and storm water planning and permitting process.

- d) Substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted)?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project will obtain its water supply from the Helix Water District that obtains water from surface reservoirs or other imported water source. The project will not use any groundwater for any purpose, including irrigation, domestic or commercial demands. In addition, the project does not involve operations that would interfere substantially with groundwater recharge including, but not limited to the following: the project does not involve regional diversion of water to another groundwater basin; or diversion or channelization of a stream course or waterway with impervious layers, such as concrete lining or culverts, for substantial distances (e.g. 1/4 mile). These activities and operations can substantially affect rates of groundwater recharge. Therefore, no impact to groundwater resources is anticipated.

- e) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, in a manner which would result in substantial erosion or siltation on- or off-site?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
|---|--|

- Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

Less Than Significant Impact: The project proposes to subdivide 21.89 acres into four future residential development lots. The lots range in size from 3.96 to 7.20 acres and will ultimately include a total of 266 dwelling units. As outlined in the Storm water Management Plan (SWMP) prepared by REC Consultants, dated June 2009, the project will implement the following site design measures, source control, and/or treatment control BMP's to reduce potential pollutants, including sediment from erosion or siltation, to the maximum extent practicable from entering storm water runoff: silt fence, desilting basin, street sweeping and vacuuming, sandbag barrier, storm drain inlet protection, material delivery and storage, spill prevention and control, solid waste management, concrete waste management, stabilized construction entrance and exit, water conservation practices, dewatering operations, paving and grinding operations, vehicle and equipment maintenance, and slope protection. These measures will control erosion and sedimentation and satisfy waste discharge requirements as required by the Land-Use Planning for New Development and Redevelopment Component of the San Diego Municipal Permit (SDRWQCB Order No. 2001-01), as implemented by the San Diego County Jurisdictional Urban Runoff Management Program (JURMP) and Standard Urban Storm Water Mitigation Plan (SUSMP). The SWMP specifies and describes the implementation process of all BMP's that will address equipment operation and materials management, prevent the erosion process from occurring, and prevent sedimentation in any onsite and downstream drainage swales. The Department of Public Works will ensure that the Plan is implemented as proposed. Due to these factors, it has been found that the project will not result in significantly increased erosion or sedimentation potential and will not alter any drainage patterns of the site or area on- or off-site. In addition, because erosion and sedimentation will be controlled within the boundaries of the project, the project will not contribute to a cumulatively considerable impact. For further information on soil erosion refer to VI., Geology and Soils, Question b.

- f) **Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or off-site?**

- Potentially Significant Impact Less than Significant Impact
 Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

Less Than Significant Impact: The proposed project will not significantly alter established drainage patterns or significantly increase the amount of runoff based on a Drainage Study prepared by REC Consultants on June 12, 2009:

1. Drainage will be conveyed to either natural drainage channels or ~~approved~~ drainage facilities.
2. The project will not increase water surface elevation in a watercourse with a watershed equal to or greater one square mile by 2/10 of a foot or more in height.
3. The project will not increase surface runoff exiting the project site equal to or greater than one cubic foot/second.

Therefore, the project will not substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner which would result in flooding on-site or off-site. Moreover, the project will not contribute to a cumulatively considerable alteration or a drainage pattern or increase in the rate or amount of runoff, because the project will not substantially increase water surface elevation or runoff exiting the site, as detailed above.

- g) Create or contribute runoff water which would exceed the capacity of existing or planned storm water drainage systems?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project does not propose to create or contribute runoff water that would exceed the capacity of existing or planned storm water drainage systems. The project proposes to create four residential lots to be developed in the future. Measures to mitigate added flows will be implemented at full project development. The proposed temporary desilting/detention basins shall be replaced at full project development with permanent detention facilities, i.e. permanent dry/wet detention basins, underground detention system, infiltration trenches, etc. Existing downstream storm drain pipes at the intersection of Los Coches Road and Highway 8 Business will be required to be upsized.

- h) Provide substantial additional sources of polluted runoff?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project proposes the following potential sources of polluted runoff: Construction, grading, landscaping, and outdoor vehicle parking. However, the project design implemented Low Impact Development (LID) measures. Other BMPs incorporated include: Storm drain stenciling and signage, inlet filters, efficient irrigation systems, extended/dry detention basins with grass/vegetated lining, and vegetated slopes and swales. Therefore, potential pollutants will be reduced in runoff to the maximum extent practicable. Refer to VIII Hydrology and Water Quality Questions a, b, c, for further information.

- i) Place housing within a 100-year flood hazard area as mapped on a federal Flood Hazard Boundary or Flood Insurance Rate Map or other flood hazard delineation map, including County Floodplain Maps?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: No FEMA mapped floodplains, County-mapped floodplains or drainages with a watershed greater than 25 acres were identified on the project site or off-site improvement locations; therefore, no impact will occur.

- j) Place within a 100-year flood hazard area structures which would impede or redirect flood flows?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: No 100-year flood hazard areas were identified on the project site or off-site improvement locations; therefore, no impact will occur.

- k) Expose people or structures to a significant risk of loss, injury or death involving flooding?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project site lies outside any identified special flood hazard area. Therefore, the project will not expose people to a significant risk of loss, injury or death involving flooding.

l) Expose people or structures to a significant risk of loss, injury or death involving flooding as a result of the failure of a levee or dam?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project site lies outside a mapped dam inundation area for a major dam/reservoir within San Diego County. In addition, the project is not located immediately downstream of a minor dam that could potentially flood the property. Therefore, the project will not expose people to a significant risk of loss, injury or death involving flooding.

m) Inundation by seiche, tsunami, or mudflow?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

i. SEICHE

No Impact: The project site is not located along the shoreline of a lake or reservoir; therefore, could not be inundated by a seiche.

ii. TSUNAMI

No Impact: The project site is located more than a mile from the coast; therefore, in the event of a tsunami, would not be inundated.

iii. MUDFLOW

No Impact: Mudflow is type of landslide. The site is not located within a landslide susceptibility zone. Also, staff geologist has determined that the geologic environment of the project area has a low probability to be located within an area of potential or pre-existing conditions that could become unstable in the event of seismic activity. In addition, though the project does propose land disturbance that will expose unprotected soils, the project is not located downstream from unprotected, exposed soils within a

landslide susceptibility zone. Therefore, it is not anticipated that the project will expose people or property to inundation due to a mudflow.

X. LAND USE AND PLANNING -- Would the project:

a) Physically divide an established community?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project does not propose the introduction of new infrastructure such major roadways or water supply systems, or utilities to the area. Therefore, the proposed project will not significantly disrupt or divide the established community.

b) Conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

The proposed project is subject to the Village Regional Category with a Land Use Designation of VR-4.3 (4.3 du's/acre) on 2.25 acres and VR-15 (15 du's/acre) on 19.64 acres. These designations permit a maximum of 305 dwelling units on the 21.89-acre project site. However, the CEQA analysis assumed 266 units because this was a more realistic unit count given the sites topography and other site specific constraints. This yield is consistent with the General Plan land use designations. Additionally, a portion of the project site has been identified in the Housing Element Residential Sites Inventory adopted on August 3, 2011, which identifies a total yield of at least 130 units that should be achieved. The subsequent Site Plan requirement will ensure that a minimum of at least 143 units will be attained for Lots 2, 3, and 4. Therefore, the proposed project is consistent with the minimum planned yield that has been identified in the County's Housing Element.

The project is also consistent with the policies identified in the Lakeside Community Plan. Policy 3 in the Land Use section of the Lakeside Community Plan reads: Confine higher density residential development to the areas that (a) have all necessary public facilities; (b) are within the existing sewer district; and (c) are adjacent to major roads and commercial areas. The proposed project meets these criteria because it would allow up to 266 units, but no less than 143 units, on 21.89-acres along Olde Highway

80. The project site has all necessary public facilities, it is within an existing sewer district, and it is adjacent to a major road and commercial areas. Therefore, the project is consistent with the Lakeside Community Plan policies.

XI. MINERAL RESOURCES -- Would the project:

a) Result in the loss of availability of a known mineral resource that would be of value to the region and the residents of the state?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: Although the project site has been classified by the California Department of Conservation – Division of Mines and Geology (Update of Mineral Land Classification: Aggregate Materials in the Western San Diego Production-Consumption Region, 1997) as an area of undetermined mineral resources MRZ-3, a staff geologist has reviewed the site's geologic environment and has determined that the site is not located within an alluvial river valley or underlain by coastal marine/non-marine granular deposits. Therefore, no potentially significant loss of availability of a known mineral resource of value to the region and the residents of the state will occur as a result of this project. Moreover, if the resources are not considered significant mineral deposits, loss of these resources cannot contribute to a potentially significant cumulative impact.

b) Result in the loss of availability of a locally-important mineral resource recovery site delineated on a local general plan, specific plan or other land use plan?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project site is zoned RS-4, which is not considered to be an Extractive Use Zone (S-82) nor does it have an Impact Sensitive Land Use Designation (24) with an Extractive Land Use Overlay (25) (County Land Use Element, 2000).

Therefore, no potentially significant loss of availability of a known mineral resource of locally important mineral resource recovery site delineated on a local general plan, specific plan or other land use plan will occur as a result of this project.

XII. NOISE -- Would the project result in:

- a) Exposure of persons to or generation of noise levels in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies?

- | | |
|--|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input checked="" type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant With Mitigation Incorporated: The project is a four (4) lot subdivision and will be occupied by residential use. Based the Noise Analysis prepared by Urban Crossroads and dated December 18, 2007, the surrounding area is zoned residential and commercial. Incorporation of a Noise Protection Easement will ensure that the project will not expose people to potentially significant noise levels that exceed the allowable limits of the County of San Diego General Plan, County of San Diego Noise Ordinance, and other applicable standards.

General Plan – Noise Element

The County of San Diego General Plan, Noise Element addresses noise sensitive areas and requires an acoustical study to be prepared for any use that may expose noise sensitive area to noise in excess of a Community Noise Equivalent Level (CNEL) of 60 decibels (dBA) for single family residences and 65 dBA CNEL for multi-family. Moreover, if the project is excess of CNEL 60 dB(A), modifications must be made to project to reduce noise levels. Noise sensitive areas include residences, hospitals, schools, libraries or similar facilities where quiet is an important attribute. Based on a Noise Analysis prepared by Urban Crossroads and dated December 18, 2007, exterior noise level will exceed the County of San Diego 60 dBA CNEL standard in portions of Lots 3 and 4 located 25 feet within the edges of the property line. The noise study provides a highly conservative noise assessment addressing the possibility of having future exterior noise sensitive receptors located within the 60 dBA CNEL contour line, to be mitigated by a 4 foot high wall running along the southeastern property lines of Lots 3 and 4. It has been determined that these areas exposed to future noise levels of 60 dBA CNEL are small portions of Lots 3 and 4 and are less than significant because no residences are proposed within these areas as part of the proposed project. Although a noise wall may not be necessary, the project will be conditioned to dedicate a noise protection easement on small portion of Lots 3 and 4 on the Final Map and have the proposed four (4') foot high sound barriers noted on the preliminary grading plans. This Final Map condition and sound barrier notes on the grading plan will ensure any future noise sensitive land uses will comply with County Noise Element.

Noise Ordinance – Section 36-404

Based on a Noise Analysis prepared by Urban Crossroads and dated December 18, 2007, non-transportation noise generated by the project is not expected to exceed the standards of the County of San Diego Noise Ordinance (Section 36-404) at or beyond

the project's property line. The site is zoned RS4 that has a one-hour nighttime average sound limit of 45dBA. The project's noise levels at the adjoining properties will not exceed County Noise Standards.

Noise Ordinance – Section 36-410

Based on a Noise Analysis prepared by Urban Crossroads and dated December 18, 2007, the project will not generate construction noise that may exceed the standards of the County of San Diego Noise Ordinance (Section 36-410). Construction operations will occur only during permitted hours of operation pursuant to Section 36-410. Also, it is not anticipated that the project will operate construction equipment in excess of an average sound level of 75dB between the hours of 7 AM and 7 PM. Additionally, grading activities would be comprised of four excavators, six scrapers, and two water trucks. The grading operations are considered short term and moving noise source that would be spread out through the project site. The centroid of the property would be representative of the grading activities which is approximately 300 feet from the property line where an existing residence is located. Based on this distance separation, grading activities would result in a sound level of 73.3 dBA at the property line which is below the 75 dBA requirement.

Finally, the project's conformance to the County of San Diego General Plan (Noise Element) and County of San Diego Noise Ordinance (Section 36-404 and 36.410) ensures the project will not create cumulatively considerable noise impacts, because the project will not exceed the local noise standards for noise sensitive areas; and the project will not exceed the applicable noise level limits at the property line or construction noise limits, derived from State regulation to address human health and quality of life concerns. Therefore, the project will not contribute to a cumulatively considerable exposure of persons or generation of noise levels in excess of standards established in the local general plan, noise ordinance, and applicable standards of other agencies.

b) Exposure of persons to or generation of excessive groundborne vibration or groundborne noise levels?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project proposes residences where low ambient vibration is essential for interior operation and/or sleeping conditions. However, the facilities are typically setback more than 50 feet from any County Mobility Element (ME) roadway using rubber-tired vehicles with projected groundborne noise or vibration contours of 38 VdB or less; any property line for parcels zoned industrial or extractive use; or any permitted extractive uses. A setback of 50 feet from the roadway centerline for heavy-duty truck activities would insure that these proposed uses or operations do

not have any chance of being impacted significantly by groundborne vibration or groundborne noise levels (Harris, Miller Miller and Hanson Inc., *Transit Noise and Vibration Impact Assessment* 1995, Rudy Hendriks, *Transportation Related Earthborne Vibrations* 2002). This setback insures that this project site will not be affected by any future projects that may support sources of groundborne vibration or groundborne noise related to the adjacent roadways.

Also, the project does not propose any major, new or expanded infrastructure such as mass transit, highways or major roadways or intensive extractive industry that could generate excessive groundborne vibration or groundborne noise levels and impact vibration sensitive uses in the surrounding area.

Therefore, the project will not expose persons to or generate excessive groundborne vibration or groundborne noise levels on a project or cumulative level.

c) A substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project involves the following permanent noise sources that may increase the ambient noise level: Vehicle traffic from nearby roadways and typical residential activities. As indicated in the response listed under Section XI Noise, Question a., the project would not expose existing or planned noise sensitive areas in the vicinity to a substantial permanent increase in noise levels that exceed the allowable limits of the County of San Diego General Plan, County of San Diego Noise Ordinance, and other applicable local, State, and Federal noise control. Also, the project is not expected to expose existing or planned noise sensitive areas to direct noise impacts over existing ambient noise levels based on review of the project by County staff and Noise Analysis prepared by Urban Crossroads dated December 18, 2007. Project related additions to traffic on nearby roadways are less than significant. Studies completed by the Organization of Industry Standards (ISO 362; ISO 1996 1-3; ISO 3095; and ISO 3740-3747) state an increase of 10 dB is perceived as twice as loud and is perceived as a significant increase in the ambient noise level.

The project will not result in cumulatively noise impacts because a list of past, present and future projects within in the vicinity were evaluated. It was determined that the project in combination with a list of past, present and future project would not expose existing or planned noise sensitive areas to cumulative noise over existing ambient noise levels. Refer to XVII. Mandatory Findings of Significance for a comprehensive list of the projects considered.

d) A substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project does not involve any uses that may create substantial temporary or periodic increases in ambient noise levels in the project vicinity including but not limited to extractive industry; outdoor commercial or industrial uses that involve crushing, cutting, drilling, grinding, or blasting of raw materials; truck depots, transfer stations or delivery areas; or outdoor sound systems.

General construction noise is not expected to exceed the construction noise limits of the County of San Diego Noise Ordinance (Section 36-410), which are derived from State regulations to address human health and quality of life concerns. Construction operations will occur only during permitted hours of operation pursuant to Section 36-410. Additionally, grading activities would be comprised of four excavators, six scrapers and two water trucks. The grading operations are considered short term and moving noise source that would be spread out through the project site. The centroid of the property would be representative of the grading activities which is approximately 300 feet from the property line where an existing residence is located. Based on this distance separation, grading activities would result in a sound level of 73.3 dBA at the property line which is below the 75 dBA requirement.

Furthermore, it is not anticipated that the project will operate construction equipment in excess of 75 dB for more than an 8 hours during a 24-hour period. Therefore, the project would not result in a substantial temporary or periodic increase in existing ambient noise levels in the project vicinity.

e) For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project expose people residing or working in the project area to excessive noise levels?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The proposed project is not located within an Airport Land Use Compatibility Plan (ALUCP) for airports or within 2 miles of a public airport or public use

airport. Therefore, the project will not expose people residing or working in the project area to excessive airport-related noise levels.

f) For a project within the vicinity of a private airstrip, would the project expose people residing or working in the project area to excessive noise levels?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The proposed project is not located within a one-mile vicinity of a private airstrip; therefore, the project will not expose people residing or working in the project area to excessive airport-related noise levels.

XIII. POPULATION AND HOUSING -- Would the project:

a) Induce substantial population growth in an area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure)?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The proposed project will not induce substantial population growth in an area because the project does not propose any physical changes that would remove a restriction to or encourage population growth in an area such as: new or extended infrastructure or public facilities; new commercial or industrial facilities; accelerated conversion of homes to commercial or multi-family use; or regulatory changes including General Plan amendments or rezones, specific plan amendments, sewer or water annexations; or LAFCO annexation actions. Because community level population analysis and traffic analysis is based on build out of the General Plan Land Use designations, the project would have a less than significant impact on population and housing because it is consistent with the County's long range planning documents.

b) Displace substantial numbers of existing housing, necessitating the construction of replacement housing elsewhere?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The property had one single-family residence which was demolished in 2007. Removal of this residence development did not result in displacement of existing housing since the proposed project will generate up to 266 multi-family dwellings units. Therefore, the proposed project will not displace a substantial number of people

XIV. PUBLIC SERVICES

a) Would the project result in substantial adverse physical impacts associated with the provision of new or physically altered governmental facilities, need for new or physically altered governmental facilities, the construction of which could cause significant environmental impacts, in order to maintain acceptable service ratios, response times or other performance service ratios, response times or other performance objectives for any of the public services:

- i. Fire protection?
- ii. Police protection?
- iii. Schools?
- iv. Parks?
- v. Other public facilities?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: Based on the service availability forms received for the project, the proposed project will not result in the need for significantly altered services or facilities. Service availability forms have been provided which indicate existing services are available to the project from the following agencies/districts: Lakeside Fire Protection, Lakeside Union School District, Cajon Valley Union School District, and Grossmont Union High School District. The project does not involve the construction of new or physically altered governmental facilities including but not limited to fire protection facilities, sheriff facilities, schools, or parks in order to maintain acceptable service ratios, response times or other performance service ratios or objectives for any public services. Therefore, the project will not have an adverse physical effect on the environment because the project does not require new or significantly altered services or facilities to be constructed.

XV. RECREATION

a) Would the project increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facility would occur or be accelerated?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
|---|--|

- Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

Less Than Significant Impact: The project involves a residential subdivision that will create 266 dwelling units that will increase the use of existing neighborhood and regional parks or other recreational facilities. To avoid substantial physical deterioration of local recreation facilities the project will be required to pay fees or dedicate land for local parks to the County pursuant to the Park Land Dedication Ordinance (PLDO). The Park Land Dedication Ordinance (PLDO) is the mechanism that enables the funding or dedication of local parkland in the County. The PLDO establishes several methods by which developers may satisfy their park requirements. Options include the payment of park fees, the dedication of a public park, the provision of private recreational facilities, or a combination of these methods. PLDO funds must be used for the acquisition, planning, and development of local parkland and recreation facilities. Local parks are intended to serve the recreational needs of the communities in which they are located. The proposed project opted to pay park fees. Therefore, the project meets the requirements set forth by the PLDO for adequate parkland dedication and thereby reducing impacts, including cumulative impacts to local recreational facilities. The project will not result in significant cumulative impacts, because all past, present and future residential projects are required to comply with the requirements of PLDO. Refer to XVII. Mandatory Findings of Significance for a comprehensive list of the projects considered.

There is an existing surplus of County Regional Parks. Currently, there is over 21,765 acres of regional parkland owned by the County, which far exceeds the General Plan standard of 15 acres per 1,000 population. In addition, there are over one million acres of publicly owned land in San Diego County dedicated to parks or open space including Federal lands, State Parks, special districts, and regional river parks. Due to the extensive surplus of existing publicly owned lands that can be used for recreation the project will not result in substantial physical deterioration of regional recreational facilities or accelerate the deterioration of regional parkland. Moreover, the project will not result any cumulatively considerable deterioration or accelerated deterioration of regional recreation facilities because even with all past, present and future residential projects a significant surplus of regional recreational facilities will remain.

- b) Does the project include recreational facilities or require the construction or expansion of recreational facilities, which might have an adverse physical effect on the environment?

- Potentially Significant Impact Less than Significant Impact
 Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

No Impact: The project does not include recreational facilities or require the construction or expansion of recreational facilities. Therefore, the construction or expansion of recreational facilities cannot have an adverse physical effect on the environment.

XVI. TRANSPORTATION/TRAFFIC -- Would the project:

a) Cause an increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system (i.e., result in a substantial increase in either the number of vehicle trips, the volume to capacity ratio on roads, or congestion at intersections)?

- | | |
|--|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input checked="" type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant With Mitigation Incorporated: The project will have potentially significant direct traffic impacts that require mitigation. A Traffic Impact Analysis (TIA), prepared by Linscott, Law, and Greenspan, dated May 6, 2009, has been completed. The TIA identified direct impacts to the following road segments and/or intersections:

- Highway 8 Business from Los Coches Road to the Project Driveway (Street "A")

The project would add an additional 1,130 average daily trips onto this segment which would result in a level of service (LOS) E. According to a travel time survey, the following improvements were found to reduce the travel time along Highway Business 8 (between Pepper Drive & Los Coches) and would reduce potentially significant impacts to a level of less than significant:

- Provide a dedicated eastbound left-turn lane and a dedicated westbound right turn lane on Highway 8 Business at the project driveway (Street "A").
- Widen the north side of Highway 8 Business along the project frontage to County of San Diego Standards for a Public Major Road (plus bike lane).
- Provide a northbound right-turn overlap phase at the Los Coches Road and Highway 8 Business intersection.

These mitigation measures have been made conditions of project approval. Also refer to the answer for XV. b. below.

b) Exceed, either individually or cumulatively, a level of service standard established by the County congestion management agency and/or as identified by the County of San Diego Transportation Impact Fee Program for designated roads or highways?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
|---|---|

- Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

Less Than Significant With Mitigation Incorporated: The County of San Diego has developed an overall programmatic solution that addresses existing and projected future road deficiencies in the unincorporated portion of San Diego County. This program includes the adoption of a Transportation Impact Fee (TIF) program to fund improvements to roadways necessary to mitigate potential cumulative impacts caused by traffic from future development. Based on SANDAG regional growth and land use forecasts, the SANDAG Regional Transportation Model was utilized to analyze projected build-out (year 2030) development conditions on the existing circulation element roadway network throughout the unincorporated area of the County. Based on the results of the traffic modeling, funding necessary to construct transportation facilities that will mitigate cumulative impacts from new development was identified. Existing roadway deficiencies will be corrected through improvement projects funded by other public funding sources, such as TransNet, gas tax, and grants. Potential cumulative impacts to the region's freeways have been addressed in SANDAG's Regional Transportation Plan (RTP). This plan, which considers freeway buildout over the next 30 years, will use funds from TransNet, State, and Federal funding to improve freeways to projected level of service objectives in the RTP.

The proposed project generates 2128 ADT. These trips will be distributed on circulation element roadways in the County that were analyzed by the TIF program, some of which currently or are projected to operate at inadequate levels of service. These project trips therefore contribute to a potential significant cumulative impact and mitigation is required. The potential growth represented by this project was included in the growth projections upon which the TIF program is based. Therefore, payment of the TIF, which will be required at issuance of building permits, in combination with other components of the program described above, will mitigate potential cumulative traffic impacts to less than significant.

The project will have potentially significant cumulative traffic impacts that require mitigation. A Traffic Impact Analysis (TIA), prepared by Linscott, Law, and Greenspan, dated May 6, 2009, has been completed. The TIA identified cumulative impacts to the following road segments and/or intersections:

- Los Coches Road from Woodside Avenue to Wellington Hill Drive.
- Los Coches Road from Wellington Hills Drive to Highway 8 Business.
- Highway 8 Business from the project driveway (Street "A") to Pepper Drive.
- Los Coches Road and Highway 8 Business Intersection.

The TIA proposes the following mitigation measures that will reduce the potentially significant impacts to a level less than significant:

- Payment into the County's TIF Program.

These mitigation measures have been made conditions of project approval.

- c) Result in a change in air traffic patterns, including either an increase in traffic levels or a change in location that results in substantial safety risks?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The proposed project is located outside of an Airport Influence Area and is not located within two miles of a public or public use airport; therefore, the project will not result in a change in air traffic patterns.

- d) Substantially increase hazards due to a design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The proposed project will not significantly alter traffic safety on Highway 8 Business. A safe and adequate sight distance shall be required at all driveways and intersections to the satisfaction of the Director of the Department of Public Works. All road improvements will be constructed according to the County of San Diego Public and Private Road Standards. Roads used to access the proposed project site are up to County standards. The proposed project will not place incompatible uses (e.g. farm equipment) on existing roadways. Therefore, the proposed project will not significantly increase hazards due to design features or incompatible uses.

- e) Result in inadequate emergency access?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The proposed project will not result in inadequate emergency access. The Lakeside Fire Department has reviewed the proposed project

and has determined that there is adequate emergency fire access. Additionally, roads used to access the proposed project site are up to County standards.

f) Result in inadequate parking capacity?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The Zoning Ordinance Section 6766 Parking Schedule requires provision for on-site parking spaces and the Lakeside Community Plan currently requires 2.1 parking spaces per unit for all multi-family residential development. As a project condition, any future development would need to prepare a site plan and demonstrate conformance with parking requirements identified in both the County Zoning Ordinance and the Lakeside Design Guidelines; therefore, the project will not result in insufficient parking capacity.

g) Conflict with adopted policies, plans, or programs supporting alternative transportation (e.g., bus turnouts, bicycle racks)?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project does not propose any hazards or barriers for pedestrians or bicyclists. Any required improvements will be constructed to maintain existing conditions as it relates to pedestrians and bicyclists.

XVII. UTILITIES AND SERVICE SYSTEMS -- Would the project:

a) Exceed wastewater treatment requirements of the applicable Regional Water Quality Control Board?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project proposes to discharge domestic waste to a community sewer system that is permitted to operate by the Regional Water Quality Control Board (RWQCB). A project facility availability form has been received from Lakeside Sanitation District that indicates the district will serve the project. Therefore,

because the project will be discharging wastewater to a RWQCB permitted community sewer system, the project is consistent with the wastewater treatment requirements of the RWQCB, including the Regional Basin Plan.

- b) Require or result in the construction of new water or wastewater treatment facilities or expansion of existing facilities, the construction of which could cause significant environmental effects?

- | | |
|---|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input checked="" type="checkbox"/> No Impact |

Discussion/Explanation:

No Impact: The project does not include new or expanded water or wastewater treatment facilities. In addition, the project does not require the construction or a substantial expansion of water or wastewater treatment facilities. Service availability forms have been provided which indicate adequate water and wastewater treatment facilities are available to the project from the following agencies/districts: Helix Water District and the Lakeside Sanitation District. Therefore, the project will not require any construction of new or expanded facilities, which could cause significant environmental effects.

- c) Require or result in the construction of new storm water drainage facilities or expansion of existing facilities, the construction of which could cause significant environmental effects?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant Impact: The project involves new storm water drainage facilities. The new facilities include yard drain systems to catch runoff from landscaped areas and a storm drain system to convey runoff to the existing facilities downstream from the site. Refer to the Storm water Management Plan, dated June 2009, for more information. However, as outlined in this Environmental Analysis Form Section I-XVII, the new facilities will not result in adverse physical effect on the environment. Specifically, refer to Sections VIII and XVI for more information.

- d) Have sufficient water supplies available to serve the project from existing entitlements and resources, or are new or expanded entitlements needed?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
|---|--|

- Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

Less Than Significant Impact: The project requires water service from the Helix Water District. A Service Availability Letter from the Helix Water District has been provided, indicating adequate water resources and entitlements are available to serve the requested water resources. Therefore, the project will have sufficient water supplies available to serve the project.

- e) Result in a determination by the wastewater treatment provider, which serves or may serve the project that it has adequate capacity to serve the project's projected demand in addition to the provider's existing commitments?

- Potentially Significant Impact Less than Significant Impact
 Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

Less Than Significant Impact: The project requires wastewater service from the Lakeside Sanitation District. A Service Availability Letter from the Lakeside Sanitation District has been provided, indicating adequate wastewater service capacity is available to serve the requested demand. Therefore, the project will not interfere with any wastewater treatment provider's service capacity.

- f) Be served by a landfill with sufficient permitted capacity to accommodate the project's solid waste disposal needs?

- Potentially Significant Impact Less than Significant Impact
 Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

Less Than Significant Impact: Implementation of the project will generate solid waste. All solid waste facilities, including landfills require solid waste facility permits to operate. In San Diego County, the County Department of Environmental Health, Local Enforcement Agency issues solid waste facility permits with concurrence from the California Integrated Waste Management Board (CIWMB) under the authority of the Public Resources Code (Sections 44001-44018) and California Code of Regulations Title 27, Division 2, Subdivision 1, Chapter 4 (Section 21440et seq.). There are five, permitted active landfills in San Diego County with remaining capacity. Therefore, there

is sufficient existing permitted solid waste capacity to accommodate the project's solid waste disposal needs.

g) Comply with federal, state, and local statutes and regulations related to solid waste?

- | | |
|---|--|
| <input type="checkbox"/> Potentially Significant Impact | <input checked="" type="checkbox"/> Less than Significant Impact |
| <input type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less than Significant Impact: Implementation of the project will generate solid waste. All solid waste facilities, including landfills require solid waste facility permits to operate. In San Diego County, the County Department of Environmental Health, Local Enforcement Agency issues solid waste facility permits with concurrence from the California Integrated Waste Management Board (CIWMB) under the authority of the Public Resources Code (Sections 44001-44018) and California Code of Regulations Title 27, Division 2, Subdivision 1, Chapter 4 (Section 21440et seq.). The project will deposit all solid waste at a permitted solid waste facility and therefore, will comply with Federal, State, and local statutes and regulations related to solid waste.

XVIII. MANDATORY FINDINGS OF SIGNIFICANCE:

a) Does the project have the potential to degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, substantially reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory?

- | | |
|--|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input checked="" type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less Than Significant With Mitigation Incorporated: Per the instructions for evaluating environmental impacts in this Initial Study, the potential to degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory were considered in the response to each question in sections IV and V of this form. In addition to project specific impacts, this evaluation considered the projects potential for significant cumulative effects. Resources that have been evaluated as significant would be potentially impacted by the project. However,

mitigation has been included that clearly reduces these effects to a level below significance. As a result of this evaluation, there is no substantial evidence that, after mitigation, significant effects associated with this project would result. Therefore, this project has been determined not to meet this Mandatory Finding of Significance.

b) Does the project have impacts that are individually limited, but cumulatively considerable? ("Cumulatively considerable" means that the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects)?

- Potentially Significant Impact Less than Significant Impact
 Less Than Significant With Mitigation Incorporated No Impact

Discussion/Explanation:

Less than Significant With Mitigation Incorporated: The following list of past, present and future projects were considered and evaluated as a part of this Initial Study:

PROJECT NAME	PERMIT/MAP NUMBER
#10101 B Mountain View – AT&T	MUP 03-135
East County Square Site Plan	SP 99-025
Williams	TPM 20002
Lasen	TPM 20361
Priest	TPM 20305
JBR Inc.	TPM 20569
Blossom Valley Mini Storage	SP 04-009
Sundial Investments	SP 00-066
Los Coches Development	TM 5306
Peacock Hill Apartments	REZ 03-013
Highway Los Coches	REZ 06-009
Denny's Lakeside	SP MOD / DEV 98-001-02
Antonio	TPM 21030
Cox	TPM 20337
Big "O" Tires	SP 04-039
Cox	GPA 05-002
Peacock Hill Apartments	REZ 05-002
Wintergardens	MUP 05-006
Schreiber TPM	TPM 21169
Diaz Day Care	MUP 07-015
Pennings	TPM 21139
Sky Rim Tank	MUP 06-080
Mellco	REZ 08-003
Walmart	MUP (minor) 94-005-11
Los Coches	TPM 21033

Per the instructions for evaluating environmental impacts in this Initial Study, the potential for adverse cumulative effects were considered in the response to each question in sections I through XVI of this form. In addition to project specific impacts, this evaluation considered the projects potential for incremental effects that are cumulatively considerable. As a result of this evaluation, there were determined to be potentially significant cumulative effects related to Transportation/Traffic. However, mitigation has been included that clearly reduces these cumulative effects to a level below significance. This mitigation includes payment into the TIF Program. As a result of this evaluation, there is no substantial evidence that, after mitigation, there are cumulative effects associated with this project. Therefore, this project has been determined not to meet this Mandatory Finding of Significance.

c) Does the project have environmental effects, which will cause substantial adverse effects on human beings, either directly or indirectly?

- | | |
|--|---|
| <input type="checkbox"/> Potentially Significant Impact | <input type="checkbox"/> Less than Significant Impact |
| <input checked="" type="checkbox"/> Less Than Significant With Mitigation Incorporated | <input type="checkbox"/> No Impact |

Discussion/Explanation:

Less than Significant With Mitigation Incorporated: In the evaluation of environmental impacts in this Initial Study, the potential for adverse direct or indirect impacts to human beings were considered in the response to certain questions in sections I. Aesthetics, III. Air Quality, VI. Geology and Soils, VII. Hazards and Hazardous Materials, VIII Hydrology and Water Quality XI. Noise, XII. Population and Housing, and XV. Transportation and Traffic. As a result of this evaluation, there were determined to be potentially significant effects to human beings related to the following Transportation/Traffic. The TIA identified direct impacts to the following road segments and/or intersections:

- Highway 8 Business from Los Coches Road to the Project Driveway (Street "A")

The TIA proposes the following mitigation measures that will reduce the potentially significant impacts to a level less than significant:

- Provide a dedicated eastbound left-turn lane and a dedicated westbound right turn lane on Highway 8 Business at the project driveway (Street "A").
- Widen the north side of Highway 8 Business along the project frontage to County of San Diego Standards for a Public Major Road (plus bike lane).
- Provide a northbound right-turn overlap phase at the Los Coches Road and Highway 8 Business intersection.

These mitigation measures have been made conditions of project approval. As a result of this evaluation, there is no substantial evidence that, after mitigation, there are

adverse effects to human beings associated with this project. Therefore, this project has been determined not to meet this Mandatory Finding of Significance.

XIX. REFERENCES USED IN THE COMPLETION OF THE INITIAL STUDY CHECKLIST

All references to Federal, State and local regulation are available on the Internet. For Federal regulation refer to <http://www4.law.cornell.edu/uscode/>. For State regulation refer to www.leginfo.ca.gov. For County regulation refer to www.amlegal.com. All other references are available upon request.

Visual Analysis Letter Report for Settler's Point, REC Consultants, dated August 2009

Air Quality Study, Urban Crossroads, dated August 28, 2008

Biological Resources Report and Updated Project Description, REC Consultants, dated July 2008

Cultural Resource Evaluation of the Settlers Point Property County of San Diego, California, prepared by G. Timothy Gross, Principal Archaeologist, and Matt Sivba with Affinis, dated March 2006

Fire Protection Plan, dated August 28, 2008

Storm Water Management Plan (SWMP), REC Consultants, dated July 2009

~~Drainage Study, REC Consultants, June 12, 2009~~

Noise Analysis, Urban Crossroads, dated December 18, 2007

Traffic Impact Analysis (TIA), Linscott, Law, and Greenspan, dated May 6, 2009

Conceptual Sewer Capacity Study and Feasibility, REC Consultants, Dated August 2008

AESTHETICS

California Street and Highways Code [California Street and Highways Code, Section 260-283. (<http://www.leginfo.ca.gov/>)

California Scenic Highway Program, California Streets and Highways Code, Section 260-283. (<http://www.dot.ca.gov/hq/LandArch/scenic/scpr.htm>)

County of San Diego, Department of Planning and Land Use. The Zoning Ordinance of San Diego County. Sections 5200-5299; 5700-5799; 5900-5910, 6322-6326. (www.co.san-diego.ca.us)

County of San Diego, Board Policy I-73: Hillside Development Policy. (www.co.san-diego.ca.us)

County of San Diego, Board Policy I-104: Policy and Procedures for Preparation of Community Design Guidelines, Section 396.10 of the County Administrative Code and Section 5750 et seq. of the County Zoning Ordinance. (www.co.san-diego.ca.us)

County of San Diego, General Plan, Scenic Highway Element VI and Scenic Highway Program. (ceres.ca.gov)

County of San Diego Light Pollution Code, Title 5, Division 9 (Sections 59.101-59.115 of the County Code of Regulatory Ordinances) as added by Ordinance No 6900,

effective January 18, 1985, and amended July 17, 1986 by Ordinance No. 7155. (www.amlegal.com)

County of San Diego Wireless Communications Ordinance [San Diego County Code of Regulatory Ordinances. (www.amlegal.com)

Design Review Guidelines for the Communities of San Diego County. (Alpine, Bonsall, Fallbrook, Julian, Lakeside, Ramona, Spring Valley, Sweetwater, Valley Center).

Federal Communications Commission, Telecommunications Act of 1996 [Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996). (<http://www.fcc.gov/Reports/tcom1996.txt>)

Institution of Lighting Engineers, Guidance Notes for the Reduction of Light Pollution, Warwickshire, UK, 2000 (<http://www.dark-skies.org/ile-qd-e.htm>)

International Light Inc., Light Measurement Handbook, 1997. (www.intl-light.com)

Rensselaer Polytechnic Institute, Lighting Research Center, National Lighting Product Information Program (NLPIP), Lighting Answers, Volume 7, Issue 2, March 2003. (www.lrc.rpi.edu)

US Census Bureau, Census 2000, Urbanized Area Outline Map, San Diego, CA. (<http://www.census.gov/qeo/www/maps/ua2kmaps.htm>)

US Department of the Interior, Bureau of Land Management (BLM) modified Visual Management System. (www.blm.gov)

US Department of Transportation, Federal Highway Administration (FHWA) Visual Impact Assessment for Highway Projects.

US Department of Transportation, National Highway System Act of 1995 [Title III, Section 304. Design Criteria for the National Highway System. (<http://www.fhwa.dot.gov/legisreqs/nhsdatoc.html>)

AGRICULTURE RESOURCES

California Department of Conservation, Farmland Mapping and Monitoring Program, "A Guide to the Farmland Mapping and Monitoring Program," November 1994. (www.consrv.ca.gov)

California Department of Conservation, Office of Land Conversion, "California Agricultural Land Evaluation and Site Assessment Model Instruction Manual," 1997. (www.consrv.ca.gov)

California Farmland Conservancy Program, 1996. (www.consrv.ca.gov)

EXHIBIT D

February 10, 2012

RESOLUTION OF SAN DIEGO COUNTY)
CONDITIONALLY APPROVING)
TENTATIVE MAP NO. 3100 5423 (TM))

WHEREAS, Tentative Map No. 5423 RPL³ proposing the division of property located along Old Highway 8 Business Road, approximately 550 feet south of the Los Cochis / Old Highway 8 intersection and generally described as:

Parcel A of Boundary Change Plat 07-0031 recorded in the County of San Diego May 24, 2007.

was filed with the County of San Diego pursuant to the Subdivision Map Act and San Diego County Subdivision Ordinance on October 2, 2009; and

WHEREAS, on February 10, 2012 the Planning Commission of the County of San Diego pursuant to Section 81.304 of the San Diego County Subdivision Ordinance held a duly advertised public hearing on said Tentative Map and received for its consideration, documentation, written and oral testimony, recommendations from all affected public agencies, and heard from all interested parties present at said hearing; and

WHEREAS, the Planning Commission of the County of San Diego has determined that the conditions hereinafter enumerated are necessary to ensure that the subdivision and the improvement thereof will comply with the Subdivision Map Act and conform to all ordinances, plans, rules, standards, and improvement and design requirements of San Diego County.

IT IS RESOLVED, DETERMINED, AND ORDERED, that based on the findings, said Tentative Map is hereby approved subject to the following conditions:

MAP EXPIRATION: The approval of this Tentative Map Expires Thirty-Six (36) Months after the date of the approval of this Resolution at 4:00 P.M. Unless, prior to that date, an application for a Time Extension has been filed as provided by Section 81.308 of the County Subdivision Ordinance. The approval of this Tentative Map shall become effective 30 days after the adoption of this Resolution.

STANDARD CONDITIONS: The "Standard Conditions (1-29) for Tentative Subdivision Maps" approved by the Board of Supervisors on June 16, 2000, and filed with the Clerk, as Resolution No. 00-199, shall be made conditions of this Tentative Map approval. Only the following exceptions to the Standard Conditions set forth in this Resolution or shown on the Tentative Map will be authorized. **The following Standard Subdivision Conditions are here by waived:**

Standard Condition 10: Said condition pertains to Low Pressure Sodium Street Lights.

Standard Condition 14: Said condition pertains to lined channels.

Standard Condition 27.1: Said condition states that the Final Map may be filed as units or groups of units. The Final Map for this project is required to include the entire area shown on the Tentative Map and shall not be filed as units or groups of units.

Standard Condition 11: Said condition pertains to condominium units.

Standard Condition 22: Said condition pertains to private subsurface sewage disposal systems.

Standard Condition 23.3: Said condition pertains to California Department of Forestry and Fire Protection.

Standard Condition 24: Said condition pertains to projects outside the boundaries of a fire protection agency.

PRELIMINARY GRADING PLAN: The approval of this Tentative Map hereby adopts the Preliminary Grading and Improvement Plan dated October 2, 2009 consisting of 2 sheets (Attached Herein as Exhibit B) pursuant to Section 81.303 of the County Subdivision Ordinance. In accordance with the Section 87.207 of the County Grading Ordinance, Environmental Mitigation Measures or other conditions of approval required and identified on this plan, shall be completed or implemented on the final engineering plan before any improvement or grading plan can be approved and any permit issued in reliance of the approved plan. Any Substantial deviation therefrom the Preliminary Grading and Improvement Plan may cause the need for further environmental review. Additionally, approval of the preliminary plan does not constitute approval of a final engineering plan. A final engineering plan shall be approved pursuant to County of San Diego Grading Ordinance (Sec 87.701 et. al.)

APPROVAL OF MAP: THE FOLLOWING SPECIFIC CONDITIONS SHALL BE COMPLIED WITH BEFORE A MAP IS APPROVED BY THE DEPARTMENT OF PUBLIC WORKS AND FILED WITH THE COUNTY OF SAN DIEGO RECORDER: (and where specifically indicated, conditions shall also be complied with prior to the approval and issuance of grading or other permits as specified):

- 1-29. The "Standard Conditions (1-29) for Tentative Subdivision Maps" approved by the Board of Supervisors on June 16, 2000, with the exceptions noted above.

(TRANSPORTATION)

30. Intersection configuration proposed at the project driveway Street "A" and Highway 8 Business Loop which will include the following: Southbound – one exclusive left-turn lane and one exclusive right-turn lane; Eastbound – one left turn lane and one through lane; Westbound – one right turn lane and one

through lane. County sight-distance standards will be met at the intersection with Highway 8 business loop.

31. The project will include a 10 foot wide pathway along the west side of Street "A" composed of decomposed granite.

(BIOLOGY)

32. Provide evidence to the satisfaction of the Director of Public Works (DPW) that the following "Specific Environmental Notes" have been placed on the grading, and or improvement plans:
 - a. "Restrict all brushing, clearing and/or grading such that none will be allowed within 300 feet of coastal sage scrub habitat during the breeding season of the California gnatcatcher. This is defined as occurring between March 1 and August 15."
33. Provide evidence to the satisfaction of the Director of Planning and Land Use that 3.24 acres of Tier I or II habitat has been preserved in perpetuity through one of the methods described below:
 - a. **Option 1:** If purchasing Mitigation Credit the mitigation bank shall be either the Crestridge Mitigation Bank or another mitigation bank approved by the California Department of Fish & Game, located within the Multiple Species Conservation Program. The following evidence of purchase shall include the following information to be provided by the mitigation bank:
 1. A copy of the purchase contract referencing the project name and numbers for which the habitat credits were purchased.
 2. If not stated explicitly in the purchase contract, a separate letter must be provided identifying the entity responsible for the long-term management and monitoring of the preserved land.
 3. To ensure the land will be protected in perpetuity, evidence must be provided that a dedicated conservation easement or similar land constraint has been placed over the mitigation land.
 4. An accounting of the status of the mitigation bank. This shall include the total amount of credits available at the bank, the amount required by this project and the amount remaining after utilization by this project.
 - b. **Option 2:** If habitat credit cannot be purchased in a mitigation bank, then the applicant shall provide for the conservation of habitat of the same amount and type of land located within the Multiple Species Conservation Program in a Biological Resource Core Area as indicated below:

1. The type of habitat and the location of the proposed mitigation, should be pre-approved by [DPLU, PCC] before purchase or entering into any agreement for purchase.
 2. A Resource Management Plan (RMP) shall be prepared and approved pursuant to the County of San Diego Biological Report Format and Content Requirements to the satisfaction of the Director of DPLU. If the offsite mitigation is proposed to be owned and/or managed by DPR, the RMP shall also be approved by the Director of DPR.
 3. An open space easement over the land shall be dedicated to the County of San Diego or like agency to the satisfaction of the Director of DPLU. The land shall be protected in perpetuity.
 4. The final RMP cannot be approved until the following has been completed to the satisfaction of the Director of DPLU: The land shall be purchased, the easements shall be dedicated, a Resource Manager shall be selected, and the RMP funding mechanism shall be in place.
 5. In lieu of providing a private habitat manager, the applicant may contract with a federal, state or local government agency with the primary mission of resource management to take fee title and manage the mitigation land. Evidence of satisfaction must include a copy of the contract with the agency, and a written statement from the agency that (1) the land contains the specified acreage and the specified habitat, or like functioning habitat, and (2) the land will be managed by the agency for conservation of natural resources in perpetuity.
34. Provide evidence to the satisfaction of the Director of Planning and Land Use that 10.02 acres of Tier III habitat has been preserved in perpetuity through one of the methods described below:
- a. **Option 1:** If purchasing Mitigation Credit the mitigation bank shall be either the Crestridge Mitigation Bank or another mitigation bank approved by the California Department of Fish & Game, located within the Multiple Species Conservation Program. The following evidence of purchase shall include the following information to be provided by the mitigation bank:
 1. A copy of the purchase contract referencing the project name and numbers for which the habitat credits were purchased.
 2. If not stated explicitly in the purchase contract, a separate letter must be provided identifying the entity responsible for the long-term management and monitoring of the preserved land.

3. To ensure the land will be protected in perpetuity, evidence must be provided that a dedicated conservation easement or similar land constraint has been placed over the mitigation land.
 4. An accounting of the status of the mitigation bank. This shall include the total amount of credits available at the bank, the amount required by this project and the amount remaining after utilization by this project.
- b. **Option 2:** If habitat credit cannot be purchased in a mitigation bank, then the applicant shall provide for the conservation of habitat of the same amount and type of land located within the Multiple Species Conservation Program in a Biological Resource Core Area as indicated below:
1. The type of habitat and the location of the proposed mitigation, should be pre-approved by [DPLU, PCC] before purchase or entering into any agreement for purchase.
 2. A Resource Management Plan (RMP) shall be prepared and approved pursuant to the County of San Diego Biological Report Format and Content Requirements to the satisfaction of the Director of DPLU. If the offsite mitigation is proposed to be owned and/or managed by DPR, the RMP shall also be approved by the Director of DPR.
 3. An open space easement over the land shall be dedicated to the County of San Diego or like agency to the satisfaction of the Director of DPLU. The land shall be protected in perpetuity.
 4. The final RMP cannot be approved until the following has been completed to the satisfaction of the Director of DPLU: The land shall be purchased, the easements shall be dedicated, a Resource Manager shall be selected, and the RMP funding mechanism shall be in place.
 5. In lieu of providing a private habitat manager, the applicant may contract with a federal, state or local government agency with the primary mission of resource management to take fee title and manage the mitigation land. Evidence of satisfaction must include a copy of the contract with the agency, and a written statement from the agency that (1) the land contains the specified acreage and the specified habitat, or like functioning habitat, and (2) the land will be managed by the agency for conservation of natural resources in perpetuity.

(CULTURAL RESOURCES)

35. Provide evidence to the satisfaction of the Director of Public Works (DPW) that the following "Specific Environmental Notes" have been placed on the grading, and or improvement plans:
- a. "The County approved Project Archaeologist, the Native American Monitor, and the DPLU Permit Compliance Coordinator (PCC), shall attend the pre-construction meeting with the contractors to explain and coordinate the requirements of the monitoring program."
 - b. "The Project Archaeologist (and Native American Monitor, if contracted) shall monitor original cutting of previously undisturbed deposits in all areas identified for development including off-site improvements."
 - c. "During the original cutting of previously undisturbed deposits, the Project Archaeologist and Native American monitor shall be onsite as determined necessary by the Project Archaeologist. Inspections will vary based on the rate of excavation, the materials excavated, and the presence and abundance of artifacts and features. The frequency and location of inspections will be determined by the Project Archaeologist in consultation with the Native American monitor. Monitoring of cutting of previously disturbed deposits will be determined by the Project Archaeologist."
 - d. "In the event that previously unidentified potentially significant cultural resources are discovered, the Project Archaeologist shall have the authority to divert or temporarily halt ground disturbance operations in the area of discovery to allow evaluation of potentially significant cultural resources. At the time of discovery, the Project Archaeologist shall contact the DPLU Staff Archaeologist. The Project Archaeologist, in consultation with the Staff Archaeologist, shall determine the significance of the discovered resources. Construction activities will be allowed to resume in the affected area only after the Staff Archaeologist has concurred with the evaluation. For significant cultural resources, a Research Design and Data Recovery Program to mitigate impacts shall be prepared by the Project Archaeologist and approved by the Staff Archaeologist, then carried out using professional archaeological methods."
 - e. "If any human bones are discovered, the Project Archaeologist shall contact the County Coroner. If the remains are determined to be of Native American origin, the Most Likely Descendant, as identified by the Native American Heritage Commission, shall be contacted by the Project Archaeologist in order to determine proper treatment and disposition of the remains."
 - f. "The Project Archaeologist shall submit monthly status reports to the Director of Planning and Land Use starting from the date of the notice to

proceed to termination of implementation of the grading monitoring program. The reports shall briefly summarize all activities during the period and the status of progress on overall plan implementation. Upon completion of the implementation phase, a final report shall be submitted describing the plan compliance procedures and site conditions before and after construction."

- g. "Prior to rough grading inspection sign-off for each phase, the Project Archaeologist shall provide evidence that the field grading monitoring activities have been completed. Evidence shall be in the form of a letter to the Director of the Department of Planning and Land Use."
 - h. "Prior to Final Grading Release for each phase, submit to the satisfaction of the Director of Planning and Land Use, a final report that documents the results, analysis, and conclusions of all phases of the Archaeological Monitoring Program. The report shall include the following:"
 - (1) "Department of Parks and Recreation Primary and Archaeological Site forms."
 - (2) "Evidence that all cultural resources collected during the grading monitoring program have been submitted to a San Diego curation facility that meets federal standards per 36 CFR Part 79, and, therefore, would be professionally curated and made available to other archaeologists/researchers for further study. The collections and associated records, including title, shall be transferred to the San Diego curation facility and shall be accompanied by payment of the fees necessary for permanent curation. Evidence shall be in the form of a letter from the curation facility stating that archaeological materials have been received and that all fees have been paid."
 - (3) "If no cultural resources are discovered, a brief letter to that effect and stating that the grading monitoring activities have been completed, shall be sent to the Director of Planning and Land Use by the Project Archaeologist.."
36. Prior to recordation of the final map(s) TM 5423 ***and*** prior to approval of any grading or improvement plans or issuance of any grading or construction permits, the subdivider shall implement the following conditions relating to the grading monitoring program to mitigate potential impacts to undiscovered buried archaeological resources on the Project site. The following conditions shall be implemented to the satisfaction of the Director of the Department of Planning and Land Use:

- a. Provide evidence that a County approved archaeologist ("Project Archaeologist") has been contracted to implement a grading monitoring and potential data recovery program that complies with the County of San Diego Guidelines for Determining Significance and Report Format and Content Requirements, to the satisfaction of the Director of Planning and Land Use. Also, provide evidence that a Native American Monitor has been contracted to monitor grading, or evidence that no Native American Monitor was available, in which case the Project Archaeologist shall perform that function.
- b. The Contract shall include a cost estimate of the required monitoring; this estimate shall be submitted to the Director of Public Works and included in the Bond Cost Estimate for the required Grading.

(NOISE)

37. On the Final Parcel Map, grant to the County of San Diego a perpetual Noise Protection Easement, as shown on Tentative Map TM5423. The easement shall be placed over the first 285 feet from the centerline of Interstate 8 Business Route on portions of Lots 3 and 4, to the satisfaction of the Director of Public Works. The easement is for the mitigation of present and anticipated future excess noise levels on residential uses of the affected Parcel. "Said Noise Protection easement requires that before the issuance of any building or grading permit for any residential use within the noise protection easement located on portions of Lots 3 and 4", the applicant shall:
 - a. Complete to the satisfaction of the Director of the Department of Planning and Land Use, an acoustical analysis performed by a County approved acoustical engineer, demonstrating that the present and anticipated future noise levels for the interior and exterior of the residential dwelling will not exceed the allowable sound level limit of the Noise Element of the San Diego County General Plan [exterior (60 dB CNEL), interior (45 dB CNEL)]. Future traffic noise level estimates for Interstate 8 Business Route shall use a traffic flow equivalent to a Level of Service "C" traffic flow for a Major road that is the designated General Plan Circulation Element buildout roadway classification.
 - b. Incorporate to the satisfaction of the Director of the Department of Planning and Land Use all of the recommendations or mitigation measures of the acoustical analysis into the project design and building plans.

(ROADS)

38. Improve or agree to improve and provide security for Highway 8 Business (SA 895) (Old Highway 80) fronting Boundary/Certification B/C 07-0031, Parcels B, C, and D, to Public Boulevard (4.2B) (plus bike lane) Standards, to a minimum one-half graded width of fifty-three feet (53') with a minimum of forty-three feet (43') of asphaltic concrete pavement over approved base with portland cement concrete curb, gutter, and sidewalks with curb at a minimum of forty-three feet (43') from centerline. This includes transitions, tapers, traffic striping, street lights and A.C. dike to the existing pavement. Provide additional grading and improvements for a dedicated eastbound left turn lane and a dedicated westbound right turn lane on Highway 8 Business (SA 895) at Street "A" intersection. Provide additional grading and improvements to accommodate dedicated east bound left turn lane and dedicated west bound right turn at project access, Street "A". All of the foregoing shall be to the satisfaction of the Director of Public Works.
39. Improve or agree to improve and provide security for Street "A" from the improved intersection with Highway 8 Business (SA 895) to the northwesterly project boundary in accordance with Public Residential Collector Road Standards, to a graded width of sixty feet (60') with forty feet (40') of asphalt concrete pavement over approved base with Portland cement concrete curb, gutter, and sidewalk on one side and a 10 foot wide disintegrated granite (DG) pathway on the other side with face of curb at twenty feet (20') from centerline to the satisfaction of the Director of Public Works.
40. Improve or agree to improve and provide security for the off-site Street "A" to Public Residential Collector Road Standards from northwesterly property line to the proposed knuckle intersection with Wellington Hill Drive, to a graded width of sixty feet (60') with forty feet (40') of asphalt concrete pavement over approved base with Portland cement concrete curb, gutter, and sidewalk on one side and a 10 foot wide disintegrated granite (DG) pathway on the other side with face of curb at twenty feet (20') from centerline. The improvements shall correspond to the recommendations of approved TIA for this segment of Street "A" and its intersection with Wellington Hill Drive. All to the satisfaction of the Director of Public Works.
41. Improve or agree to improve and provide security for the off-site Street "A" and Wellington Hill Drive intersection, in accordance with Public Road Standards by means of a knuckle (DS-15) and/or as approved by TIA for this segment of Wellington Hill Drive and Street "A" intersection and to the satisfaction of the Director of Public Works.
42. Improve or agree to improve and provide security for off-site Wellington Hill Drive intersection with Street "A" knuckle northeasterly to the existing improved terminus of Wellington Hill Drive, in accordance with Public Residential Collector Road Standards, to a graded width of sixty feet (60') with forty feet (40') of asphalt concrete pavement over approved base with Portland cement concrete

curb, gutter, and sidewalk on one side and a 10 foot wide disintegrated granite (DG) pathway on the other side with face of curb at twenty feet (20') from centerline. The improvements shall correspond to the recommendations of approved TIA for this segment of Wellington Hill Drive and Street "A" intersection. All to the satisfaction of the Director of Public Works.

43. Asphalt concrete surfacing material shall be hand-raked and compacted to form smooth tapered connections along all edges including those edges adjacent to soil. The edges of asphalt concrete shall be hand-raked at 45 degrees or flatter, so as to provide a smooth transition next to existing soil, including those areas scheduled for shoulder backing. The above shall be done to the satisfaction of the Director of Public Works.
44. A Registered Civil Engineer, Registered Traffic Engineer, or Licensed Land Surveyor shall provide a certified signed statement that, "Physically, there is a minimum unobstructed sight distance in both directions along Highway 8 Business (SA 895) from Street "A", for the prevailing operating traffic speed on Highway 8 Business (SA 895) per the Design Standards of Section 6.1.F of the County of San Diego Public Road Standards (approved March 3, 2010)", to the satisfaction of the Director of Public Works. If the lines of sight fall within the existing public road right-of-way, the engineer or surveyor shall further certify that, "said lines of sight fall within the existing right-of-way and a clear space easement is not required."
45. Where height of downsloping bank for a 2:1 slope is greater than twelve feet (12'); or where height of downsloping bank for a 1.5:1 slope is greater than ten feet (10'), guardrail shall be installed per CALTRANS standards to the satisfaction of the Director of Public Works.
46. The subdivider shall construct to the satisfaction of the Director of Public Works, a public street lighting system that complies with the following conditions: [DPW - Development Review Section]
 - a. All fixtures shall use a high pressure sodium vapor light source.
 - b. Deposit with the County of San Diego, through the Department of Public Works, a cash deposit sufficient to:
 - Energize, maintain and operate the street lighting system until tax revenues begin accruing from the subdivision for those purposes.
 - Pay the cost to process lighting district administration of this project. After recording of the Final Map, the subdivision shall be transferred without notice or hearing, to Zone A of the lighting district to operate and maintain the system.

47. Specific Conditions:

- a. The private storm drain system shall be privately maintained by a private maintenance mechanism such as a homeowners association or other private entity acceptable to the satisfaction of the Director of Public Works.
- b. The detention basin system shall be maintained by category 2 storm water maintenance (to ensure perpetual maintenance) according to category 2 post-construction BMPs (see 17 below) to the satisfaction of the Director of Public Works.

48. Impact of discharge to the drainage structures Master Facilities 27, 28, 29, 30 and 35 within Zone 2 shall be reviewed and re-analyzed at final engineering for impacts to said facilities to the satisfaction of the Director of Public Works.

49. The 100-year flood line of the natural channels crossing all lots with drainage watersheds in excess of twenty-five (25) acres shall be clearly delineated on the non-title information sheet of the Final Map to the satisfaction of the Director of Public Works.

50. The project includes Category 2 post-construction BMPs. The applicant will be required to establish a maintenance agreement / mechanism (to include easements) to assure maintenance of these BMPs and to provide security to back up maintenance pursuant to the County Maintenance Plan Guidelines to the satisfaction of the Director of Public Works.

51. WELL DESTRUCTION AND SEPTIC REMOVAL [DEH]

- a. Prior to the approval of any plans, issuance of any permit, and approval of any final map(s), provide evidence to the satisfaction of the Director of Public Works (DPW) that:
 1. Prior to the completion of grading, any water well on the property must be properly destroyed. Water well destruction is required to be performed by a licensed and bonded C-57 well contractor through permit approval with the Department of Environmental Health.
 2. Prior to approval of the grading plan, the septic tank that served the existing residence must be pumped and backfilled by a permitted septic pumper and verified by DEH staff.

52. Specific Conditions.

- a. The County Facility Plan Study (CFPS) for Alpine and Lakeside Sanitation District (District) as confirmed by the Settlers Point projects (CSFS) has

identified downstream reaches of Woodside Interceptor 1 (8-inch sewer pipe) within Los Coches Road that exceeds the District's 50% design criteria for Peak Dry Weather Flow (PDWF). To meet the operational requirements for ultimate flow conditions, Capital Improvement Projects (CIP) are scheduled within the next five to six years to replace the following segments of the sewer line downstream of the proposed project:

1. Woodside Interceptor 1 – Installing approximately 3,682 LF of 12-inch PVC and approximately 375 LF of 15-inch PVC sewer pipe.

A reimbursement agreement between the District and the developer will be required if the project precedes construction of the downstream improvements by the District and/or item 1 above is implemented by the developer.

- b. Plans and Specifications for the installation of the sewer system serving each lot must be approved by the Lakeside Sanitation District and shall be contingent upon:
 1. Construction of required off-site sewer improvements to mitigate impacts by the project on the existing downstream sewer facilities.
 2. Dedication by the developer of all necessary easements and right-of-way.
- c. A commitment to serve each parcel must be obtained from the Lakeside Sanitation District. In addition, to the capacity commitment fees, the developer shall pay all the appropriate fees at time of issuance of the Wastewater Discharge Permit.
- d. The applicant shall install the sewer system and shall dedicate the sewer system that is to be public as shown on the approved plans and specifications.
- e. The developer may be required to grade an access road to maintain any public sewers constructed within easements and may be required to dedicate additional access easements to maintain the public sewers.

DEVELOPMENT IMPACT FEES

SPECIFIC CONDITIONS:

53. Deposit with the County Department of Public Works sufficient funds to cover the cost of inspection of the development improvements.

FINAL MAP RECORDATION

(Streets and Dedication)

SPECIFIC CONDITIONS:

54. Cause to be granted offsite Highway 8 Business (SA 895) (Old Highway 80) fronting Boundary/Certification B/C 07-0031, Parcels B, C, and D, to Public Boulevard (4.2B) (plus bike lane) Standards, to a one-half width of fifty-three feet (53'). Provide additional right-of-way as necessary for a dedicated eastbound left turn lane and a dedicated westbound right turn lane on Highway 8 Business (SA 895) at Street "A" intersection together with right to construct and maintain slopes and drainage facilities. All of the foregoing shall be to the satisfaction of the Director of Public Works.
55. Dedicate on the Final Map, Street "A," from the improved intersection with Highway 8 Business (SA 895) northwesterly to the project boundary, in accordance with Public Residential Collector Road Standards, to a width of sixty feet (60'), together with right to construct and maintain slopes and drainage facilities. All of the foregoing shall be to the satisfaction of the Director of Public Works.
56. Caused to be granted off-site Street "A" to Public Residential Collector Road Standards from northwesterly property line to the proposed knuckle at intersection with Wellington Hill Drive, to a width of sixty feet (60') for this segment of Street "A", together with right to construct and maintain slopes and drainage facilities. All of the foregoing shall be to the satisfaction of the Director of Public Works.
57. Relinquish access rights onto Street "A" from improved intersection with Highway 8 Business (SA 895) northwesterly to project southeastern boundary, to the satisfaction of the Director of Public Works.
58. Caused to be granted off-site Street "A" and Wellington Hill Drive intersection, in accordance with Public Road Standards by means of a knuckle (DS-15), together with right to construct and maintain slopes and drainage facilities. All of the foregoing shall be to the satisfaction of the Director of Public Works.
59. Caused to be granted off-site Wellington Hill Drive intersection with Street "A" knuckle northeasterly to the existing improved terminus of Wellington Hill Drive, to a width of sixty feet (60'), together with right to construct and maintain slopes and drainage facilities. All of the foregoing shall be to the satisfaction of the Director of Public Works.
60. Prior to approval of improvement and/or grading plans, issuance of excavation permits, and issuance of any further grant of approval, the owners of this project will be required to sign a statement that they are aware of the County of San

Diego, Department of Public Works, Pavement Cut Policy and that they have contacted all adjacent property owners and solicited their participation in the extension of utilities, to the satisfaction of the Director of Public Works.

61. The Basis of Bearings for the Subdivision Map shall be in terms of the California Coordinate System Zone 6 NORTH AMERICAN DATUM OF 1983 by use of existing Horizontal Control, to the satisfaction of the Director of Public Works. **To be in compliance with the Public Resources Code, all Subdivision Map surveys performed after January 1, 2000 must use a Basis of Bearings established from existing Horizontal Control Stations with first order accuracy.**
62. If conducted prior to January 1, 2000, a survey for any Subdivision Map that is to be based on state plane coordinates shall show two measured ties from the boundary of the subject property to existing Horizontal Control station(s) having California coordinate values of Third order accuracy or better, as published in the County of San Diego's Horizontal Control book. These tie lines to the existing control shall be shown in relation to the California Coordinate System (i.e. Grid bearings and Grid distances). All other distances shown on the map are to be shown as ground distances. A combined factor for conversion of Ground-to-Grid distances shall be shown on the map, all to the satisfaction of the Director of Public Works (Ref. San Diego County Subdivision Ordinance Section 81.506(j)).

If conducted after December 31, 1999, a survey for any Subdivision Map that is to be based on state plane coordinates shall show two measured ties from the boundary of the subject property to existing Horizontal Control station(s) having California Coordinate values of first order accuracy or better, as published in the County of San Diego's Horizontal Control book. These tie lines to the existing control shall be shown in relation to the California Coordinate System (i.e. Grid bearings and Grid distances). All other distances shown on the map are to be shown as Ground distances. A combined factor for conversion of Grid-to-Ground distances shall be shown on the map.

For purposes of this section, the date of survey for the field observed connections shall be the date of survey as indicated in the surveyor's/engineer's certificate as shown on the final map.

63. **HYDROMODIFICATION NOTE: [DPW, LDR] [MA]**
Intent: In order to acknowledge future processing requirements for projects which were deemed complete, pursuant to Subdivision Map Act Section 66474.2, prior to January 8, 2011, a note shall be placed on the map. This project has provided acknowledge from the owner and professional that hydromodification needs have been reviewed, based on the project's technical studies, and can be accommodated on the project. Furthermore the acknowledgement states that hydromodification requirements will be complied with prior to development of the lots and that any changes that result from

implementing hydromodification requirements may require changes to the project design or processing a revision. **Description of requirement:** The following note shall be shown as the first note in the Non-Title sheet of the map and labeled "Hydromodification Note".

"Approval of a final map does not guarantee that subsequent governmental permits and approvals needed to develop the property can be issued based on laws, regulations or standards in place at the time the subdivision was approved. Changes in the law, regulations or standards that occur or become effective prior to the time development permits are sought can adversely impact the ability to develop a subdivision. In some instances, it may be necessary to redesign or remap a subdivision to address these changes, which can be a costly and time consuming process.

Without limiting the generality of the foregoing, it is specifically noted that starting on January 8, 2011 updated storm water requirements required by the California Regional Water Quality Control Board, San Diego Region, became applicable to priority development projects in the County pursuant to Regional Board Order No. R9-2007-0001, NPDES No. CAS0108758. Subdivisions in process prior to this date may not have been designed to address these new requirements. In order to issue grading, building and other development permits, it may be necessary to address these new requirements even if such considerations were not required to approve the final map. "

Documentation: The applicant shall add the Hydromodification Note on the Non-Title sheet of the map as indicated above. **Timing:** Prior to the approval of the map, the note shall be shown on the map. **Monitoring:** The [DPW, LDR] shall verify that the note has been added to the map pursuant to this condition.

64. SITE PLAN REVIEW: [DPLU, ZONING COUNTER]

Intent: To allow for the careful examination of a project's quality of site planning, architecture, landscape design and important details such as signage and lighting, the Lakeside Community has adopted design guidelines. The purpose of these guidelines is to insure that every new development will consider the community context in which it takes place and make a conscientious effort to develop a compatible relationship to the natural setting, neighboring properties and community design goals. The Lakeside Design Guidelines require all multi-family and duplex residential development at a density over 7.3 dwelling units per acre to be subject to Design Review. A Site Plan Permit is the mechanism that enables the County to review development proposals for compliance with the Lakeside Design Guidelines. The Site Plan will also ensure that the proposed development will not exceed 266 total units and maintain a minimum of 130 units per the County's Housing Element Residential Sites Inventory. The Site Plan will require the following: Lot 1 maximum 85 units no minimum number of units are required; Lot 2 maximum of 56 units and a minimum of 44 units; Lot 3 maximum of 68 units and a minimum of 54 units; Lot 4 maximum 57 units and

a minimum of 45 units. Placing "B" Special Area designator (denoting Community Design Review Area) in the project site's zone box requires a Site Plan to be reviewed and approved prior to issuing a building permit. **Description of requirement:** The applicant shall attain Site Plan approval OR have a "B" Special Area Designator (denoting Community Design Review Area) placed in the zone box for the project site prior recording the final map. **Documentation:** Demonstrate that a Site Plan has been approved OR demonstrate that the project site has been rezoned with a "B" Special Area designator. **Timing:** Prior to the approval of the final map. **Monitoring:** The [DPLU, Zoning Counter] shall make sure that this condition has been satisfied.

IT IS FURTHER RESOLVED, THEREFORE, that the Planning Commission of the County of San Diego hereby makes the following findings as supported by the minutes, maps, exhibits, and documentation of said Tentative Map all of which are herein incorporated by reference:

1. The Tentative Map is consistent with all elements of the San Diego County General Plan and with the (VR-4.3) Village Residential (4.3 du/acre) and (VR-15) Village Residential (15 du/acre) Land Use Designation of the Lakeside Community Plan because it proposes a residential use type at a density of 4.3 du/acre and 15 du/acre and complies with the provisions of the State Subdivision Map Act and the Subdivision Ordinance of the San Diego County Code;
2. The Tentative Map is consistent with The Zoning Ordinance because it proposes a residential use type that is consistent with the RS, (Single Family Residential) Use Regulation, and the RV (Variable Family Residential) Use Regulation;
3. The design and improvements of the proposed subdivision are consistent with all elements of the San Diego County General Plan and with the Lakeside Community Plan, and comply with the provisions of the State Subdivision Act and the Subdivision Ordinance of the San Diego County Code;
4. The site is physically suitable for the residential type of development because future development will be sited on flat pads which will not require variances to setbacks, nor will it impact sensitive resources. Additionally, retaining walls, access roads and stormwater and drainage improvements will be constructed;
5. The site is physically suitable for the proposed density of development because all required services and utilities are available to serve the proposed use;
6. The design of the subdivision and the type of improvements will not cause public health problems because adequate water supply and sewage disposal services have been found to be available or can be provided concurrent with need;
7. The design of the subdivision or the proposed improvements are not likely to cause substantial environmental damage or substantially and avoidably injure

fish or wildlife or their habitat based upon the findings of a Mitigated Negative Declaration dated February 10, 2012;

8. The design of the subdivision or the type of improvements do not conflict with easements, acquired by the public at large, for access through, or use of property within the proposed subdivision, as defined under Section 66474 of the Government Code, State of California; and

The division and development of the property in the manner set forth on the approved Tentative Map will not unreasonably interfere with the free and complete exercise of the public entity or public utility right-of-way or easement;

9. The discharge of sewage waste from the subdivision into the Lakeside Sanitation District sewer system will not result in violation of existing requirements prescribed by the California Regional Water Quality Control Board pursuant to Division 7 (commencing with Section 13000) of the Water Code, as specified by Government Code Section 66474.6;
10. Because adequate facilities and services have been assured and adequate environmental review and documentation have been prepared, the regional housing opportunities afforded by the subdivision outweigh the impacts upon the public service needs of County residents and fiscal and environmental resources; and
11. It is hereby found that the use or development permitted by the application is consistent with the provisions of the Resource Protection Ordinance.
12. It is hereby found that the project proposed by the application has prepared plans and documentation demonstrating compliance with the provisions of the County of San Diego Watershed Protection, Stormwater Management, and Discharge Control Ordinance.
13. The "Multiple Species Conservation Planning Conformance Findings" dated June 25, 2010 on file with DPLU as Environmental Review Number 05-14-009 are hereby adopted.

MITIGATION MONITORING OR REPORTING PROGRAM (MMRP): Public Resources Code Section 21081.6 requires the County to adopt a Mitigation Monitoring or Reporting Program for any project approved with the adoption of a Mitigated Negative Declaration or with the certification of an Environmental Impact Report, for which changes in the project are required in order to avoid significant impacts.

Section 21081.6(a)(1) states, in part:

The public agency shall adopt a reporting or monitoring program for the changes made to the project or conditions of project approval, adopted in order to mitigate

or avoid significant effects on the environment. The reporting or monitoring program shall be designed to ensure compliance during project implementation.

Section 21081(b) further states:

A public agency shall provide [that] the measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures.

As indicated above, a Mitigation Monitoring or Reporting Program is required to assure that a project is implemented in compliance with all required mitigation measures. The Mitigation Monitoring or Reporting Program (MMRP) for this project is incorporated into the mitigation measures adopted as project conditions of approval. Each mitigation measure adopted as a condition of approval (COA) includes the following five components.

Intent: An explanation of why the mitigation measure (MM) was imposed on the project.

Description: A detailed description of the specific action(s) that must be taken to mitigate or avoid impacts.

Documentation: A description of the informational items that must be submitted by the applicant to the Lead Agency to demonstrate compliance with the COA.

Timing: The specific project milestone (point in progress) when the specific required actions are required to implemented.

Monitoring: This section describes the actions to be taken by the lead agency to assure implementation of the mitigation measure.

The conditions of approval required to mitigate or avoid significant impacts on the environment are listed below and constitute the MMRP for this project:

Transportation conditions 30 – 31; Biology conditions 32 – 34; Cultural conditions 35 – 36; & Noise conditions 37.

MAP PROCESSING REQUIREMENTS: The parcel map shall comply with the following processing requirements pursuant to the Sections 81.801 through 81.811 of the Subdivision Ordinance and the Subdivision Final Map Processing Manual.

- The Final map shall show an accurate and detailed vicinity map.
- The Basis of Bearings for the Final Map shall comply with Section 81.506 of the Subdivision Ordinance.

- Prior to the approval of the Final Map by the Department of Public Works, the subdivider shall provide the Department of Public Works with a copy of the deed by which the subject property was acquired and a Final Map report from a qualified title insurance company.
- The following notes shall appear on the Final Map:
 - All parcels within this subdivision have a minimum of 100 square feet of solar access for each future dwelling unit allowed by this subdivision as required by Section 81.401(m) of the Subdivision Ordinance.
 - At the time of recordation of the Final Map, the name of the person authorizing the map and whose name appears on the SURVEYOR'S CERTIFICATE as the person who requested the map, shall be the name of the owner of the subject property.
 - The public and private easement roads serving this project shall be named. The responsible party shall contact the Street Address Section of the Department of Planning and Land Use (858-694-3797) to discuss the road naming requirements for the development. Naming of the roads is necessary for the health and safety of present and future residents.
 - Certification by the Department of Environmental Health with respect to water supply and sewage disposal shall be shown on the Final Map.
 - This is a map of a condominium project as defined in Section 1350 of the State of California Civil Code, the maximum number of dwelling units is 266. The amount of units shall be indicated on the final map.
- The Zoning regulations require that each parcel shall contain a minimum net area as specified on the Tentative Map 5423. If, as a result of survey calculations, required easements, or for any other reason, the area of any parcel shown on this Tentative Map is determined by the Department of Public Works to be below the zoning minimum, it becomes the responsibility of the subdivider to meet zoning requirements by lot redesign, or other applicable technique. The subdivider shall comply with the zoning area requirements in full before the Department of Public Works may file a Parcel Map with the County Recorder.
- Cause the centerline to be surveyed and monumented. Monumentation shall consist of street survey monuments, per Drawing M-10 Regional Standard Drawings when the road, as improved, is at ultimate line and grade and 2" x 24" pipe when the road is not at ultimate line and grade.
- The Director of Public Works will assign a road survey number to the off-site public roads being created. If the off-site road is not shown on the Final Map, the developer shall file with the County Recorder a Record of Survey after approval

of the Director of Public Works showing the centerline Monumentation set with ties to adjacent property.

ORDINANCE COMPLIANCE AND NOTICES: The project is subject to, but not limited to the following County of San Diego, State of California, and US Federal Government, Ordinances, Permits, and Requirements:

LIGHTING ORDINANCE COMPLIANCE: In order to comply with the County Lighting Ordinance 59.101 et seq. and Zoning Ordinance Sections 6322, 6324, and 6326, the onsite lighting shall comply with the approved plot plan(s), specific permit conditions and approved building plans associated with this permit. All light fixtures shall be designed and adjusted to reflect light downward, away from any road or street, and away from adjoining premises, and shall otherwise conform to the County Lighting Ordinance 59.101 et seq. and Zoning Ordinance Sections 6322, and 6324. The property owner and permittee shall conform to the approved plot plan(s), specific permit conditions, and approved building plans associated with this permit as they pertain to lighting. No additional lighting is permitted. If the permittee or property owner chooses to change the site design in any way, they must obtain approval from the County for a Minor Deviation or a Modification pursuant to the County of San Diego Zoning Ordinance.

NOISE ORDINANCE COMPLIANCE: In order to comply with the County Noise Ordinance 36.401 et seq. and the Noise Standards pursuant to the General Plan Noise Element (Policy 4.b), the property and all of its uses shall comply with the approved plot plan(s), specific permit conditions and approved building plans associated with this permit. No loudspeaker or sound amplification system shall be used to produce sounds in violation of the County Noise Ordinance. The property owner and permittee shall conform to the approved plot plan(s), specific permit conditions, and approved building plans associated with this permit as they pertain to noise generating devices or activities. If the permittee or property owner chooses to change the site design in any way, they must obtain approval from the County for a Minor Deviation or a Modification pursuant to the County of San Diego Zoning Ordinance.

STORMWATER ORDINANCE COMPLIANCE: In order to Comply with all applicable stormwater regulations the activities proposed under this application are subject to enforcement under permits from the San Diego Regional Water Quality Control Board (RWQCB) and the County of San Diego Watershed Protection, Stormwater Management, and Discharge Control Ordinance No. 9926 and all other applicable ordinances and standards for the life of this permit. The project site shall be in compliance with all applicable stormwater regulations referenced above and all other applicable ordinances and standards. This includes compliance with the approved Stormwater Management Plan, all requirements for Low Impact Development (LID), materials and wastes control, erosion control, and sediment control on the project site. Projects that involve areas 1 acre or greater require that the property owner keep additional and updated information onsite concerning stormwater runoff. The property

owner and permittee shall comply with the requirements of the stormwater regulations referenced above.

LOW IMPACT DEVELOPMENT NOTICE: On January 24, 2007, the San Diego Regional Water Quality Control Board (SDRWQCB) issued a new Municipal Stormwater Permit under the National Pollutant Discharge Elimination System (NPDES). The requirements of the Municipal Permit were implemented beginning January 25, 2008. *Project design shall be in compliance with the new Municipal Permit regulations.* The Low Impact Development (LID) Best Management Practices (BMP) Requirements of the Municipal Permit can be found at the following link on Page 19, Section D.1.d (4), subsections (a) and (b):

http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/sd_permit/r9_2007_0001/2007_0001final.pdf

<http://www.sdcounty.ca.gov/dplu/docs/LID-Handbook.pdf>

The County has provided a LID Handbook as a source for LID information and is to be utilized by County staff and outside consultants for implementing LID in our region. See link above.

GRADING PERMIT REQUIRED: A grading permit is required prior to commencement of grading when quantities exceed 200 cubic yards of excavation or eight feet (8') of cut/fill per criteria of Section 87.202 (a) of the County Code.

CONSTRUCTION PERMIT REQUIRED: A Construction Permit and/or Encroachment Permit for any and all work within the County road right-of-way. Contact DPW Construction/Road right-of-way Permits Services Section, (858) 694-3275, to coordinate departmental requirements. In addition, before trimming, removing or planting trees or shrubs in the County Road right-of-way, the applicant must first obtain a permit to remove plant or trim shrubs or trees from the Permit Services Section.

ENCROACHMENT PERMIT REQUIRED: An Encroachment Permit from the Department of Public Works for any and all proposed/existing facilities within the County right-of-way. Road on the Circulation Element of the County General Plan. At the time of construction of future road improvements, the proposed facilities shall be relocated at no cost to the County, to the satisfaction of the Director of Public Works.

EXCAVATION PERMIT REQUIRED: Obtain an excavation permit from the County Department of Public Works for undergrounding and/or relocation of utilities within the County right-of-way.

TRANSPORTATION IMPACT FEE: The project is subject to County of San Diego Transportation Impact Fee (TIF) pursuant to County TIF Ordinance number 77.201 – 77.219. The Transportation Impact Fee (TIF) shall be paid. The fee is required for the entire project, or it can be paid at building permit issuance for each phase of the project.

The fee is calculated pursuant to the ordinance at the time of building permit issuance. The applicant shall pay the TIF at the [DPW, Land Development Counter] and provide a copy of the receipt to the [DPLU, Building Division Technician] at time of permit issuance.

II. FEDERAL AND STATE LAW COMPLIANCE:

NOTICE: This project has been found to conform to the San Diego County Multiple Species Conservation Program Subarea Plan, Biological Mitigation Ordinance and Implementing Agreement. Upon fulfillment of the requirements for permanent mitigation and management of preserved areas as outlined in Section 17.1 (A) of the County's Implementing Agreement for the Multiple Species Conservation Program (MSCP) Plan, Third Party Beneficiary Status can be attained for the project. Third party beneficiary status allows the property owner to perform "incidental take" under the State and Federal Endangered Species Acts, of species covered by the MSCP Plan while undertaking land development activities in conformance with an approval granted by the County in compliance with the County's Implementing Agreement.

NOTICE: Time Extension requests cannot be processed without updated project information including new Department of Environmental Health certification of septic systems. Since Department of Environmental Health review may take several months, applicants anticipating the need for Time Extensions for their projects are advised to submit applications for septic certification to the Department of Environmental Health several months prior to the expiration of their Tentative Maps.

EXPLANATION OF COUNTY DEPARTMENT AND DIVISION ACRONYMS			
Department of Planning and Land Use	<u>DPLU</u>	Department of Public Works	<u>DPW</u>
Project Planning Division	PPD	Land Development Project Review Teams	LDR
Permit Compliance Coordinator	PCC	Project Manager	PM
Building Plan Process Review	BPPR	Plan Checker	PC
Building Division	BD	Map Checker	MC
Building Inspector	BI	Private Development Construction Inspection	PDCI
Landscape Architect	LA	Environmental Services Unit Division	ESU
Zoning Counter	ZO		
Department of Environmental Health	<u>DEH</u>	Department of Parks and Recreation	<u>DPR</u>
Land and Water Quality Division	LWQ	Trails Coordinator Group Program Manager Parks Planner	TC GPM PP
Vector Control	VCT	Department of General Service	<u>DGS</u>
Local Enforcement Agency	LEA	Real Property Division	RP

EXHIBIT E



California Regional Water Quality Control Board, San Diego Region

August 27, 2015

**NOTICE OF VIOLATION
NO. R9-2015-0130**

Mr. Todd Snyder, Manager
Watershed Protection Program
County of San Diego
5510 Overland Avenue, Ste. 410
San Diego, CA 92123-3597

**Violations of Order R9-2007-0001 and
R9-2013-0001**

**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:

The County of San Diego is in violation of California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) Order No. R9-2007-0001, National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS0108758, *Waste Discharge Requirements For Discharges Of Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority*, and San Diego Water Board Order No. R9-2013-0001 (NPDES No. CAS0109266), *Waste Discharge Requirements for Discharges from the MS4s Draining the Watersheds within the San Diego Region*.

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.

HENRY ABARBANEL, CHAIR | DAVID GIBSON, EXECUTIVE OFFICER

2375 Northside Drive, Suite 100, San Diego, CA 92108-2700 | (619) 516-1990 | www.waterboards.ca.gov/sandiego



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 Cocheros Road (Latitude: 32.832479°N, Longitude: -116.914554°W, Center Reading).

Directly adjacent to and southeast of the Brightwater Ranch project site is the 40.6 acre KB Home Settler's Point residential housing project (Project). The Project was purchased by KB Home in September of 2014. Active grading on the Project began in December 2014 and construction activities are ongoing.

In February 2006, a Biological Technical Report was prepared for the Project by RC Biological Consulting. The report was prepared for the previous owner (Centex Homes). The project description did not include any offsite grading on the adjacent Brightwater property. The report did include general biological surveys, sensitive plant surveys, and a presence/absence survey for the Quino checkerspot butterfly. There was no indication of survey or delineation for jurisdictional waters of the U.S./State conducted. However, the survey included vegetation mapping 100 feet beyond the Project boundaries.

In August of 2008, the County of San Diego requested that the Odom Trust (subsequent owner to Centex) add additional offsite grading to the Project. These improvements consisted of a "temporary street knuckle" per County Design Standard DS-15. This street knuckle was requested to provide secondary access to Wellington Hill Drive and to comply with the County of San Diego's Fire Protection Plan requirements. From 2008 to the present, the street knuckle on the offsite Brightwater Ranch property has been a consistent part of the project design.

In January 2009, and again in March 2013, REC Consulting prepared updated Biological Assessments of the Project that included the offsite street knuckle. In both updates, REC Consulting determined that no additional biological field work was necessary to analyze the both onsite and off-site impacts of the Project. As a result, no jurisdictional waters of the U.S./State were observed in the offsite street knuckle.

On February 10, 2012, the County of San Diego, acting as Lead Agency under the California Environmental Quality Act (CEQA), issued a Final Mitigated Negative Declaration (MND), for the Project. The Initial Study that accompanied the MND failed to acknowledge the presence of jurisdictional water of the U.S./State associated with the offsite road improvements, and thus did not require any mitigation measures for those proposed impacts.

As required by Order No. R9-2007-0001, the County of San Diego must ensure that Priority Development Projects (PDPs), such as the Settler's Point Project, are designed with appropriate stormwater treatment Control Best Management Practices (BMPs) to treat pollutants generated by the site during precipitation events. The County of San Diego approved the June 2009 *Stormwater Management Plan for "Settlers Point"* (also prepared by REC Consultants). The plan included the off-site street knuckle as part of the Project, but failed to propose treatment control BMPs to treat pollutants generated from the street knuckle's impervious surface. Additionally, Order No. R9-2013-0001 prohibits the discharge of non-stormwater pollutants into the MS4, and drainages impacted by the off-site street knuckle are considered to be part of the County's MS4 system. The County's approval of the Project as proposed, led to the unauthorized discharge of fill to waters of the U.S./State by KB Home, and a discharge of pollutants to the MS4.

On February 26, 2014, the County of San Diego issued a grading permit for the Project. On September 2, 2014 KB Home purchased the Settler's Point property. Grading on the Project began on December 4, 2014 and was completed by January 13, 2015. On March 10, 2015, Pulte Home Corporation submitted a Clean Water Act Section 401 Water Quality Certification (Certification) application for the adjacent 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 Certification application 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 0.17 acre (4,395 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 Cocheros 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 United States Army Corps of Engineers (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 preliminary jurisdictional delineation. On July 7, 2015, KB Home's environmental consultant reported that their unauthorized discharge of fill into jurisdictional waters of the U.S./State, associated with the offsite knuckle portion of the Project was approximately 0.018 acres (278 linear feet) (see attached Exhibit 1).

B. Summary of Violations

1. Failure to Prevent the Discharge of Pollutants into the Municipal Separate Storm Sewer System (MS4)

- a. **Pursuant to Discharge Prohibition A.1 (b) of Order No. R9-2013-0001:** Non-storm water discharges into MS4s are to be effectively prohibited, through the implementation of Provision E.2, unless such discharges are authorized by a separate NPDES permit.

Additionally, Finding No. 11 of Order No. R9-2013-0001 states in part that "Historic and current development makes use of natural drainage patterns and features as conveyances for runoff. Rivers, streams and creeks in developed areas used in this manner are part of the Copermittees' MS4s regardless of whether they are natural, anthropogenic, or partially modified features. In these cases, the rivers, streams and creeks in the developed areas of the Copermittees' jurisdictions are both an MS4 and receiving water."

Observation: As shown in the attached Exhibit 2, Drainage 1 is part of the County of San Diego's MS4 system, receiving runoff from the Terrace View Mobile Home Estates located at 13162 Highway 8 Business in El Cajon, CA, and connecting downstream to the MS4 at the Wellington Hill Drive road knuckle.

The impacted 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 drainages has negatively impacted, if not eliminated, the Beneficial Uses in that location and resulted in a condition of pollution, contamination, and/or nuisance.

The County of San Diego requested and approved the construction of the street knuckle through its actions as lead agency in the CEQA process, approval of development requirements, and its issuance of grading permits to KB Home. The County's review and approval process of the Project allowed the discharge of sediment and construction materials into Drainage 1, part of the County of San Diego's MS4, which is in violation of Discharge Prohibition A.1(b) of Order No. R9-2013-0001.

2. Failure to Prevent the Discharge of Pollutants not Reduced to the Maximum Extent Practicable

- a. **Pursuant to Discharge Prohibition A.2 of Order No. R9-2007-0001:** Discharges from MS4s containing pollutants which have not been reduced to the Maximum Extent Practicable (MEP) are prohibited.

Observations: While a majority of the Project contains storm water treatment control BMPs, the County of San Diego failed to ensure that the pollutants generated from storm water runoff at the street knuckle are also treated. No treatment control BMPs were installed to capture and treat flows from the street knuckle.

Precipitation data from the El Cajon rain gauge¹ for 2015 shows that after installation of the road knuckle, there were at least 5 rain events (03/01/2015, 03/02/2015, 05/15/2015, 07/18/2015 and 07/09/2015) that generated over 0.1 inch of precipitation and likely created runoff from the impervious street knuckle that received no treatment by treatment control BMPs.

3. Failure to Implement Standard Urban Storm Water Mitigation Plan (SUSMP) Requirements

- a. Pursuant to Provision D.1.d of Order No. R9-2007-0001: Each Copermittee shall implement an updated local SUSMP which meets the requirements of section D.1.d of this Order and (1) reduces Priority Development Project discharges of pollutants from the MS4 to the MEP, (2) prevents Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, and (3) manages increases in runoff discharge rates and durations from Priority Development Projects that are likely to cause increased erosion of stream bed and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

Observations: The County of San Diego failed to conduct adequate oversight of the Project's original June 2009 Stormwater Management Plan, and approved a project that did not propose treatment control BMPs to treat the off-site street knuckle in violation of Section D.1.d.6 of Order R9-2007-0001.

Additionally, On August 11, 2015, KB Home submitted *Amendment 1 to the Major Stormwater Management Plan (Major SWMP) for Jackson Ridge* (prepared by Hunsaker and Associates) which provides an after the fact solution to the lack of treatment control BMPs associated with the street knuckle. The plan proposes the implementation of drainage inlet filters to treat the new pavement of the road knuckle. Drainage Inlet filters are considered to have a low pollutant removal efficiency. Order R9-2007-0001, Section D.1.d.6(d)(i) requires that :

¹ http://www.wrh.noaa.gov/sgx/obs/rtp/rtp_ELC_15

“Treatment control BMPs with a low removal efficiency ranking shall only be approved by a Copermitttee when a feasibility analysis has been conducted which exhibits that implementation of treatment control BMPs with high or medium removal efficiency rankings are infeasible for a Priority Development Project or portion of a Priority Development Project.”

In reviewing the August 11, 2015 submittal, there seems to be no feasibility analysis included with the amendment, and the County has provided no communications to indicate that any such analysis has been required of KB Home.

By failing to require appropriate treatment control BMPs as part of the off-site road knuckle portion of the KB Project, and allowing discharges of pollutants not treated to the MEP, the County has failed to implement its SUSMP program as required by Provision D.1.d of Order R9-2007-001.

B. 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 \$10,000 per day of violation (Water Code section 13385) and/or any of the following enforcement actions:

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

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



Chiara Clemente
Senior Environmental Scientist,
San Diego Water Board

CMC:EB:cjm

Attachments:

Exhibit 1: Impacts to Waters of the US/Water of the State

Exhibit 2: Overview of Waters of the US/Waters of the State

Tech Staff Info & Use	
Reg Measure ID	387335
Party ID	39617
Violation ID	995028
Place ID	255223

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By failing to require appropriate treatment control BMPs as part of the off-site road knuckle portion of the KB Project, and allowing discharges of pollutants not treated to the MEP, the County has failed to implement its SUSMP program as required by Provision D.1.d of Order R9-2007-001.

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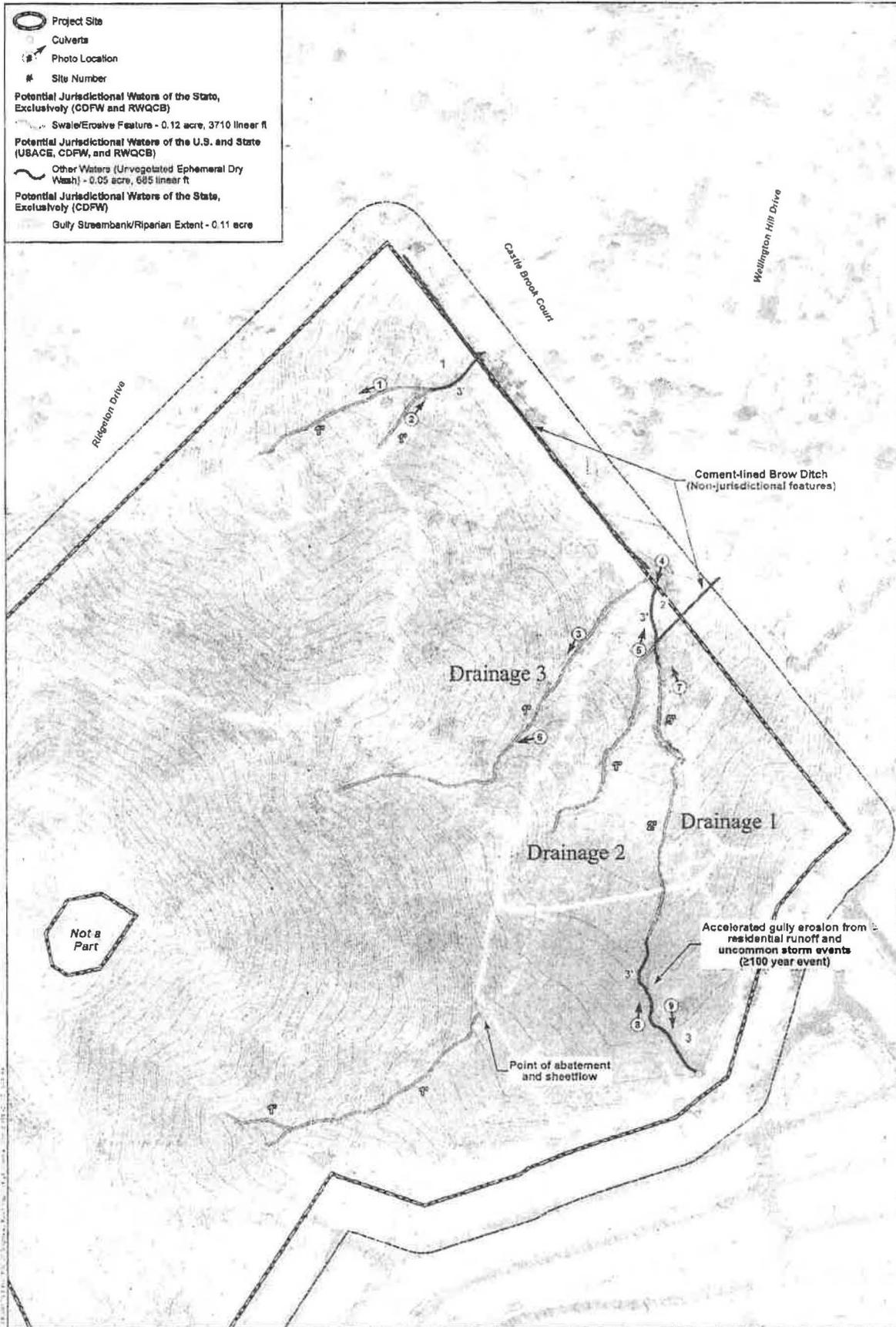
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Chiara Clemente
Senior Environmental Scientist,
San Diego Water Board

CMC:EB:cjm

Exhibit 2



Waters of the US/Waters of the State

BRIGHTWATER RANCH

EXHIBIT F



Civil Engineering · Environmental

2442 Second Avenue
San Diego, CA 92101
Phone: 619.232.9200
Fax: 619.232.9210

March 19, 2013

Ashley Gungle & Larry Hofreiter
County of San Diego
Planning and Development Services
5510 Overland Avenue, 3rd Floor
San Diego, CA 92123

Subject: Settlers Point Project No. PDS2013-STP-13-002
Updated Project Description

Dear Ms. Gungle and Mr. Hofreiter:

This letter is being submitted to inform you of an updated project description for the Settlers Point project (proposed project). The proposed project is located near the community of Lakeside in the County of San Diego, California. The project is located within the metro-Lakeside Jamul Segment of the County's Subarea Plan of the Multiple Species Conservation Program (MSCP) and part of the MSCP Pre-approved Mitigation Area (PAMA) or Biological Resource Core Area (BRCA). Attached to this letter is the Biological Technical Report prepared by RC Biological Consulting (October 2005, revised February 2006) and the subsequent Biological Letter Update prepared by REC Consultants, Inc. (January 5, 2009). A summary of the results of each report is provided below.

2006 BIOLOGY REPORT SUMMARY

As documented by the 2006 RC Biological Consulting report, the biological resources onsite include three habitat types: coastal sage scrub, non-native grassland, and developed. The coastal sage scrub habitat occurs in the northwest portion of the property on northwest facing slopes. Plant species in this habitat area include flat-top buckwheat (*Eriogonum fasciculatum*), coast sagebrush (*Artemisia californica*), white sage (*Salvia apiana*), deerweed (*Lotus scoparius*) and broom baccharis (*Baccharis sarothroides*). The non-native grassland onsite is dominated by non-native grasses including red-stem filaree (*Erodium cicutarium*), cheeseweed (*Malva parviflora*), and black mustard (*Brassica nigra*). Other species located in this habitat area include tocalote (*Centaurea melitensis*), narrow-leafed filago (*Filago gallica*), rancher's fiddleneck (*Amsinckia menziesii*), wild radish (*Raphanus sativus*), miniature lupine (*Lupinus bicolor*) and scarlet pimpernel (*Anagalis arvensis*). The developed habitat area contains several non-native species including African fountain grass (*Pennisetum setaceum*), California fan palm (*Washingtonia filifera*), Canary Island date palm (*Phoenix canariensis*), castor bean (*Ricinus communis*), and tree tobacco (*Nicotiana glauca*).

A total of 87 plant species were observed onsite. Additionally, a total of 34 wildlife species were observed onsite.

No state or federally listed plant or animal species were observed onsite. However, one sensitive wildlife species, the Cooper's hawk (*Accipiter cooperii*) was observed onsite. The Cooper's hawk is a federal and/or California Species of Special Concern. Although a protocol survey for California gnatcatcher was not conducted onsite, the project site is considered occupied by California gnatcatcher because a California gnatcatcher was observed offsite on an adjacent property. A focused survey for the Quino checkerspot butterfly was conducted in 2005 with negative results. Per the 2005 survey report results, the potential for the Quino checkerspot butterfly to occur onsite was low due to the lack of the butterfly's main host plant, dwarf plantain (*Plantago erecta*). Two individuals of purple owl's clover (*Castilleja exserta*), a secondary host plant for Quino Checkerspot butterfly, were found onsite. However, this would not be sufficient to support the Quino checkerspot butterfly onsite.

In addition, three sensitive species were observed on an adjacent site. One sensitive plant, San Diego sunflower (*Viguiera laciniata*), a Group D species was found. Two bird species were also observed adjacent to the project site: the federally threatened and California Species of Special Concern California gnatcatcher (*Polioptila californica*) and California Species of Special Concern American kestrel (*Falco sparverius*).

Per the 2006 RC Biological Consulting report and based on the project description under consideration at that time, implementation of the project would result in 100% impact to the approximately 1.74 acres of coastal sage scrub, 18.7 acres of non-native grassland and 1.99 acres of developed land onsite. Additionally, offsite impacts to 0.11 acre of coastal sage scrub, 0.63 acre of non-native grassland and 0.15 acre of developed land would occur as a result of project implementation.

The 2006 RC Biological Consulting report indicated that mitigation land be purchased through the Crestridge Mitigation Bank. Mitigation for a 1.85 acre impact to coastal sage scrub would be achieved at a 1.5:1 ratio through the purchase of 2.78 acres of coastal sage scrub habitat within a County approved mitigation bank. In addition, 19.33 acres of non-native grassland would be mitigated at a 0.5:1 ratio, for a total of 9.67 acres purchased within a County approved mitigation bank. Potential impacts to sensitive animal species would be mitigated by the habitat based mitigation in accordance with the Biological Mitigation Ordinance (BMO). The loss of the developed habitat would not be considered biologically significant. Implementation of these mitigation measures would reduce impacts to below a level of significance.

2009 BIOLOGY LETTER UPDATE TO PROJECT DESCRIPTION

In 2009, REC Consultants Inc., prepared a Biology Letter Update for the revised project. The 2009 Biology Letter Update determined that for the updated Tentative Map, the 2006

findings, impacts and mitigation recommendations remained largely the same. Therefore, a new biological technical report was not warranted and no additional field work was required. Due to a Boundary Adjustment and slight refinements in the engineering of the site, habitat acreage calculations and impact amounts changed minimally between 2006 and 2009, and are described below.

It should be noted that the 2006 RC Biological Consulting report described the project site total acreage as 22.4 acres, while the 2009 proposed Tentative Map project site totaled 21.89 acres. This discrepancy occurred due to a Boundary Adjustment to the southern-most project boundary between the Settlers Point project and the Los Coches Self Storage and commercial site to the south (Document #2007-0758216). This Boundary Adjustment document is attached to the 2009 letter for your reference. The Boundary Adjustment accounts for the decrease in total site acreage of 0.51 acre between 2006 and 2009.

The 2006 RC Biological Consulting report described the proposed subdivision of the 22.4 acre Settlers Point site into three residential lots. The property was proposed to be subdivided into one single-family residential lot, one HOA lot and one lot for a multi-family condominium development. The proposed multi-family residential lot was proposed to be developed with 233 condominium units, an active recreation area and passive recreation areas.

The 2009 REC Consultants Biology Letter Update evaluated a proposed Tentative Map that consisted of Assessor Parcel Numbers 397-210-17, 397-212-01, 397-291-02, 397-291-15 through 18. The 2009 letter described the 21.89 acre Settlers Point Tentative Map, which consisted of four lots proposed for future residential development. Of the four residential lots proposed for Settlers Point, the largest was 7.19 acres and the smallest was 3.92 acres. Grading of each of the pads was proposed to provide future residential development potential. A total of 266 residential units were determined to be possible given the zoning and density assigned to each of the lots. One additional 2.09 acre lot was reserved for the 60 foot wide public street ("Street A") to access the project from Hwy. 8 Business and to provide secondary access for the Brightwater Ranch (TM 5306) residential project to the northwest of Settlers Point. Street improvements were proposed for Hwy. 8 Business, including stormdrains and five feet of public street dedication. A 10 foot decomposed granite trail ran the length of the project's access road. The 2009 project also included offsite impacts due to fire clearing, frontage improvements along Hwy. 8 Business, utility lines, and drainage structures.

Similar to the 2006 design, 100 percent of the project site was determined to be impacted by the 2009 project development with the construction of flat pads, slopes, retaining walls, access road, and stormwater and drainage improvements (earthen swales, temporary siltation basins, etc.).

2009 habitat acreages and impact acreages are detailed in Table 1 below.

Table 1. 2009 Project Habitats and Impacts

Habitat Type (Habitat Code)	Total Acreage Onsite	Acres Impacted Onsite	Acres Impacted Offsite	Mitigation Ratio	Offsite Mitigation Purchase
Coastal Sage Scrub (32500)	1.69	1.69	0.47	1.5:1	3.24
Non-native Grassland (42200)	18.21	18.21	1.83	0.5:1	10.02
Developed (12000)	1.99	1.99	0.71	0	NA
TOTAL	21.89	21.89	3.01		13.26

The 2006 RC Biological Consulting report proposed mitigation to occur at the Crestridge Mitigation Bank. However, the Crestridge Mitigation Bank no longer has any coastal sage scrub or non-native grassland mitigation acreage available for purchase. Therefore, the applicant would be required to purchase up-tiered habitat there. For the 2009 project, approximately 3.24 acres of Tier I habitat will be purchased in lieu of the coastal sage scrub while 10.02 acres of Tier III habitat will be purchased in lieu of non-native grassland habitat.

The January 5, 2009 Biological Letter Update was approved as part of the Settlers Point Tentative Map (TM 5423 RPL3) by the County of San Diego Planning Commission on February 10, 2012.

2013 UPDATED PROJECT DESCRIPTION

In 2013, the project underwent further revisions. The 2013 project consists of Assessor Parcel Numbers 397-210-17, 397-212-01, 397-291-01, 397-291-02, 397-291-03, and 397-291-15 through 17. The 2013 proposed project would include two additional properties along the frontage of Hwy. 8 Business, making the total project acreage 26.37 acres. The proposed project would impact 100% of this acreage. No onsite preservation of habitat is proposed.

The proposed project is located within Lakeside, California in the eastern portion of the County of San Diego (Figures 1 and 2). The project site is located on the El Cajon USGS 7.5' Quadrangle in Sections 29 and 30 in Township 15 South, Range 1 East (Figures 1 and 2). Topography includes a hilltop and the majority of the site is on a southeast-facing slope. Elevation onsite ranges from approximately 600 feet above mean sea level in the southern portion of the site to approximately 740 feet above mean sea level.

The site is surrounded by residential development with a large undeveloped area to the west. The properties are generally undeveloped; however, there is evidence of past disturbance and development onsite including a curved, tree-lined driveway. The site is dominated by a hill where a house was located, until its demolition in 2007, and its associated slopes to the east and west. The properties located adjacent to Hwy. 8 Business have been disturbed over time with limited grading and the placement of gravel

substrate. They are currently undeveloped. A newer residential housing subdivision is located on the opposite side of the Hwy. 8 Business, south of the project site.

The proposed Site Development Plan for the 2013 project consists of 52 courtyard units on Lot 1. Lots 2 and 3 would be combined into one mass graded pad so that the lot line is realigned between Lots 2 and 3. Approximately 100 duplex units are proposed for this pad. Lot 4 would consist of 32 duplex units. Courtyard and duplex units would provide fenced, private rear yards. See Table 2, Figures 3 and 4.

No biological field work was deemed necessary for the analysis of 2013 project impacts, which included the two additional properties fronting Hwy. 8 Business. The following analysis is based on 2006 and 2009 habitat mapping associated with the Settlers TM and was confirmed via aerial photography of the site (Google 2010). Onsite conditions have not changed since 2009. It should be noted that offsite impact acreages have decreased from 2009 amounts due to the addition of the two properties fronting Hwy. 8 Business.

Table 2. 2013 Project Habitats and Impacts

Habitat Type (Habitat Code)	Total Acreage Onsite	Acres Impacted Onsite	Acres Impacted Offsite	Mitigation Ratio	Offsite Mitigation Purchase
Coastal Sage Scrub (32500)	1.69	1.69	0.31	1.5:1	3.0
Non-native Grassland (42200)	20.22	20.22	0.04	0.5:1	10.1
Disturbed (12000)	2.13	2.13	0.38	-	NA
Developed (12000)	2.33	2.33	0.10	-	NA
TOTAL	26.37	26.37	0.83		13.1

Mitigation for 2013 project impacts shall be the purchase of up-tiered habitat at the Crestridge Ecological Reserve. Approximately 3.0 acres of Tier I habitat will be purchased in lieu of the coastal sage scrub and 10.1 acres of Tier III habitat will be purchased in lieu of non-native grassland habitat.

Please contact REC Consultants, Inc. with any questions or concerns regarding the updated project description and the conclusions stated above.

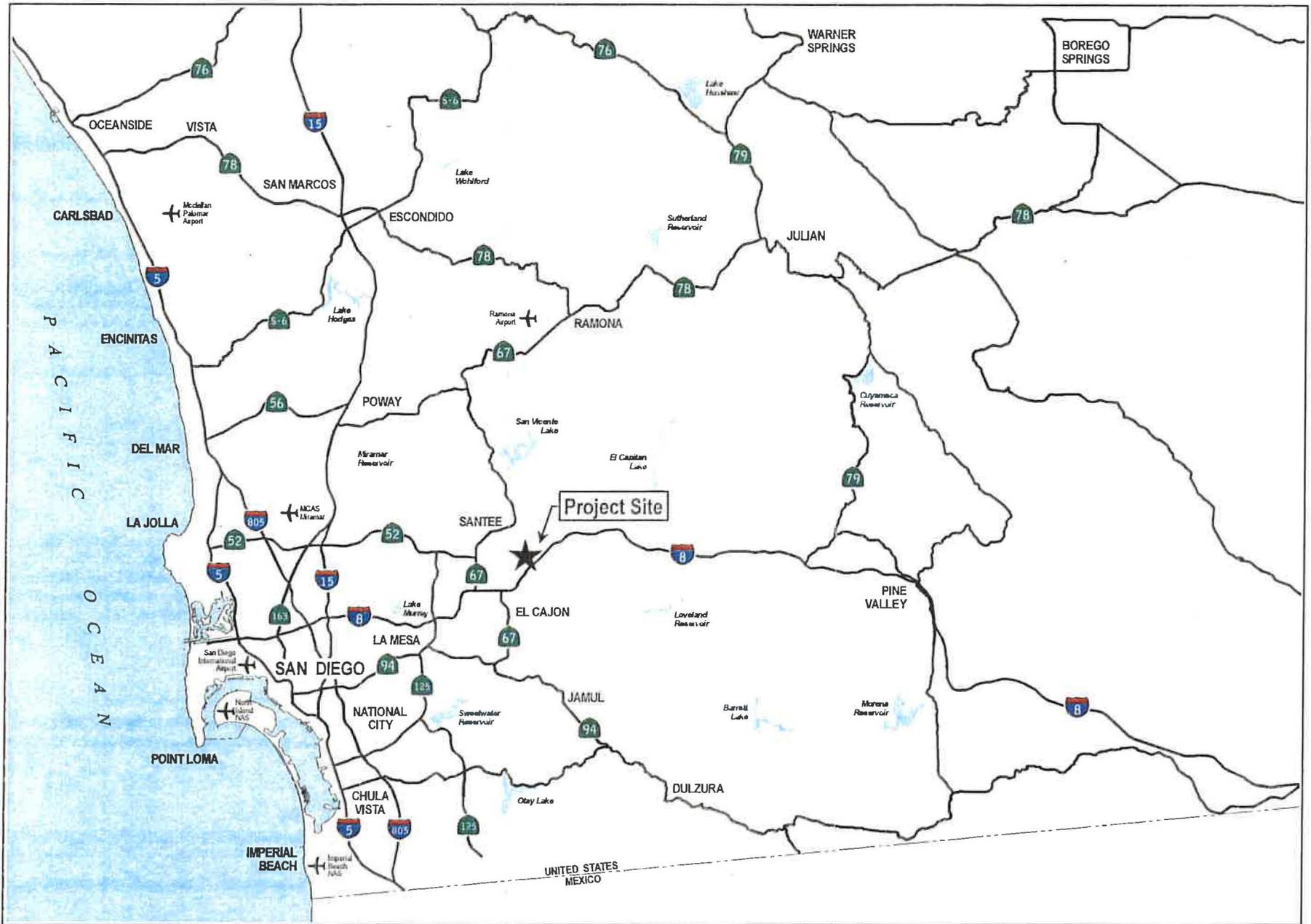
Sincerely,


Elyssa K. Robertson
Principal

Enclosures

cc: Stefan LaCasse, Quinn Communities
Dan Floit, Floit Properties

FIGURES



REC Regional Location Map

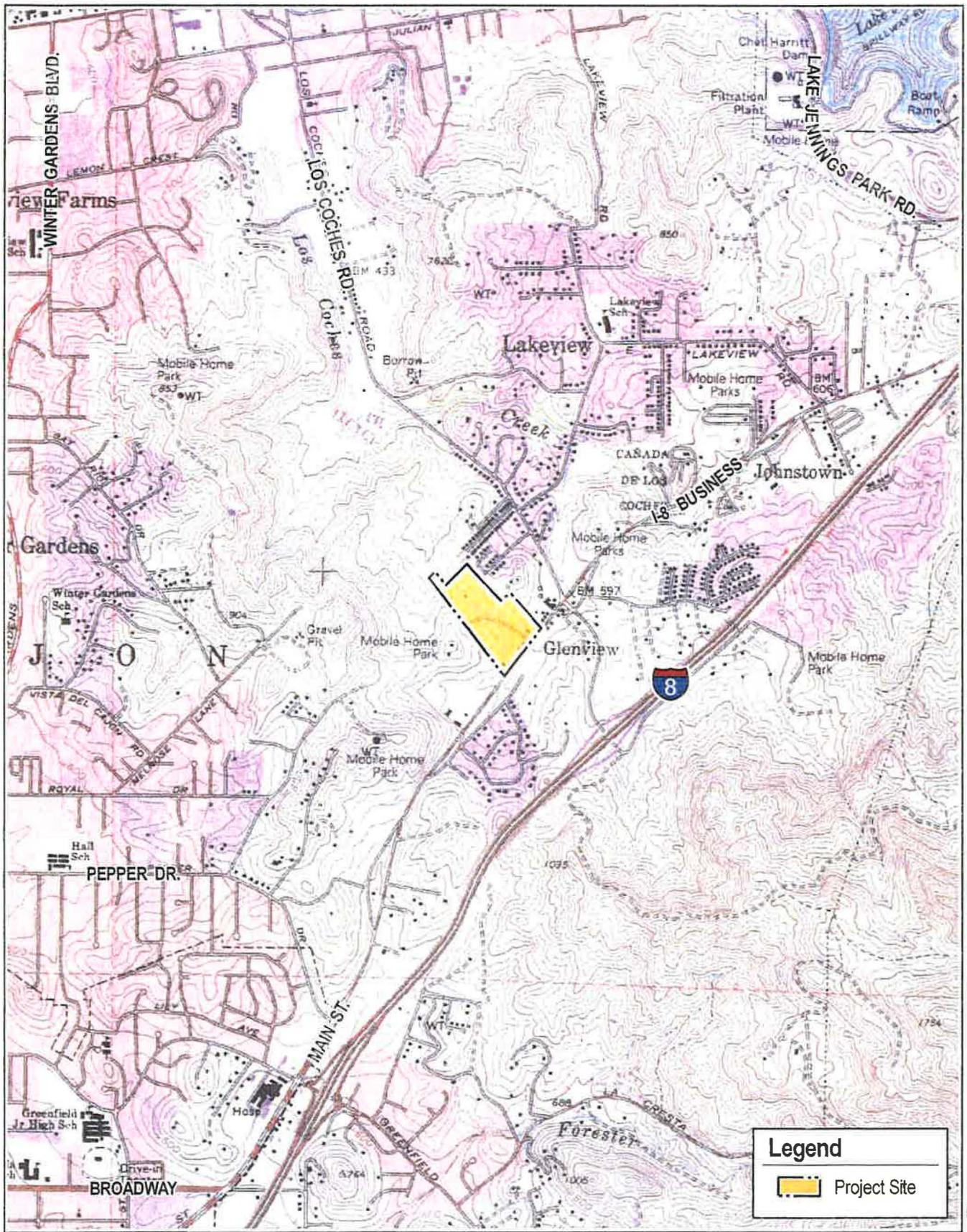
Consultants, Inc. | SETTLERS POINT - TM 5423



FIGURE 1

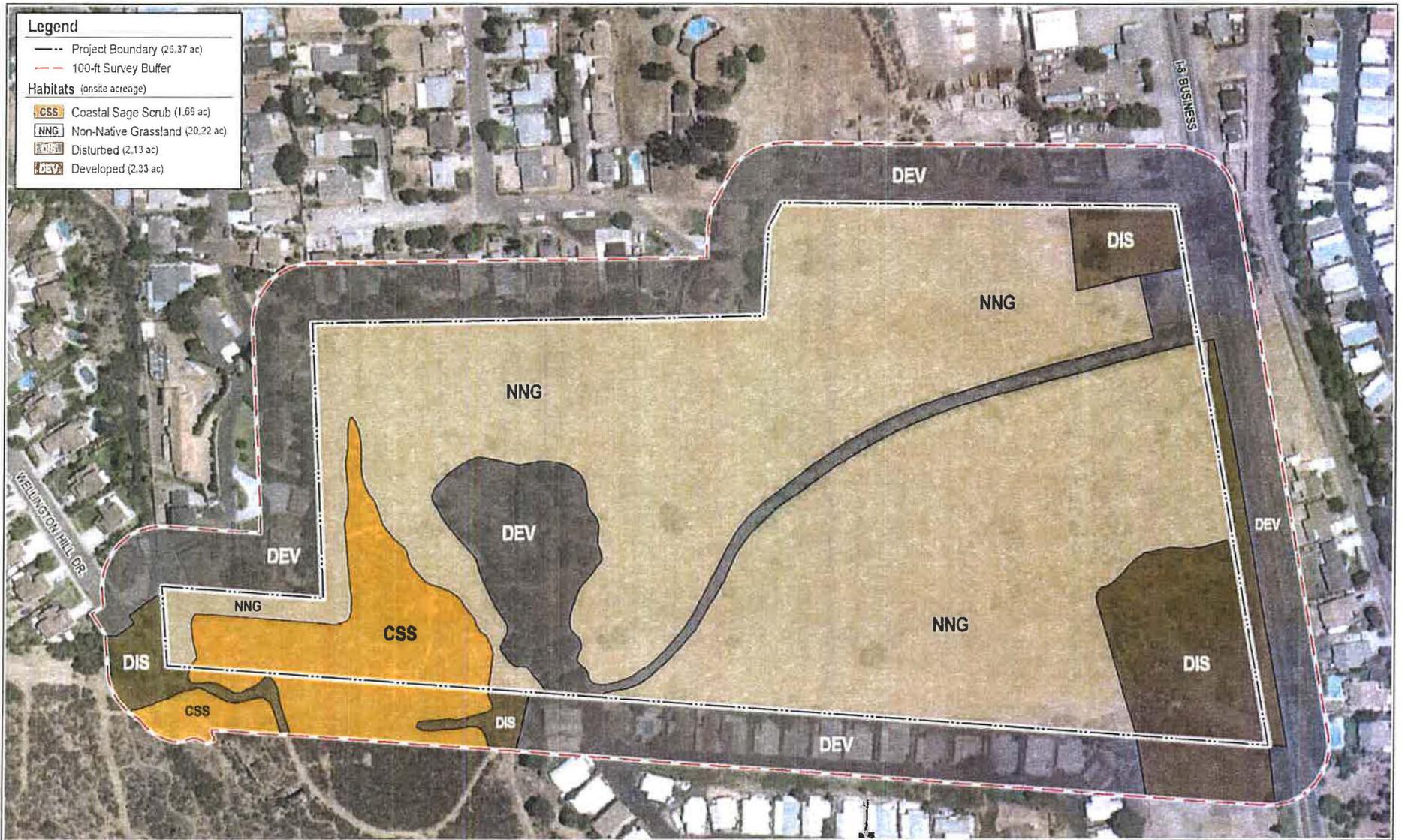
Source: SANGIS Land Use GIS Database, 2011.

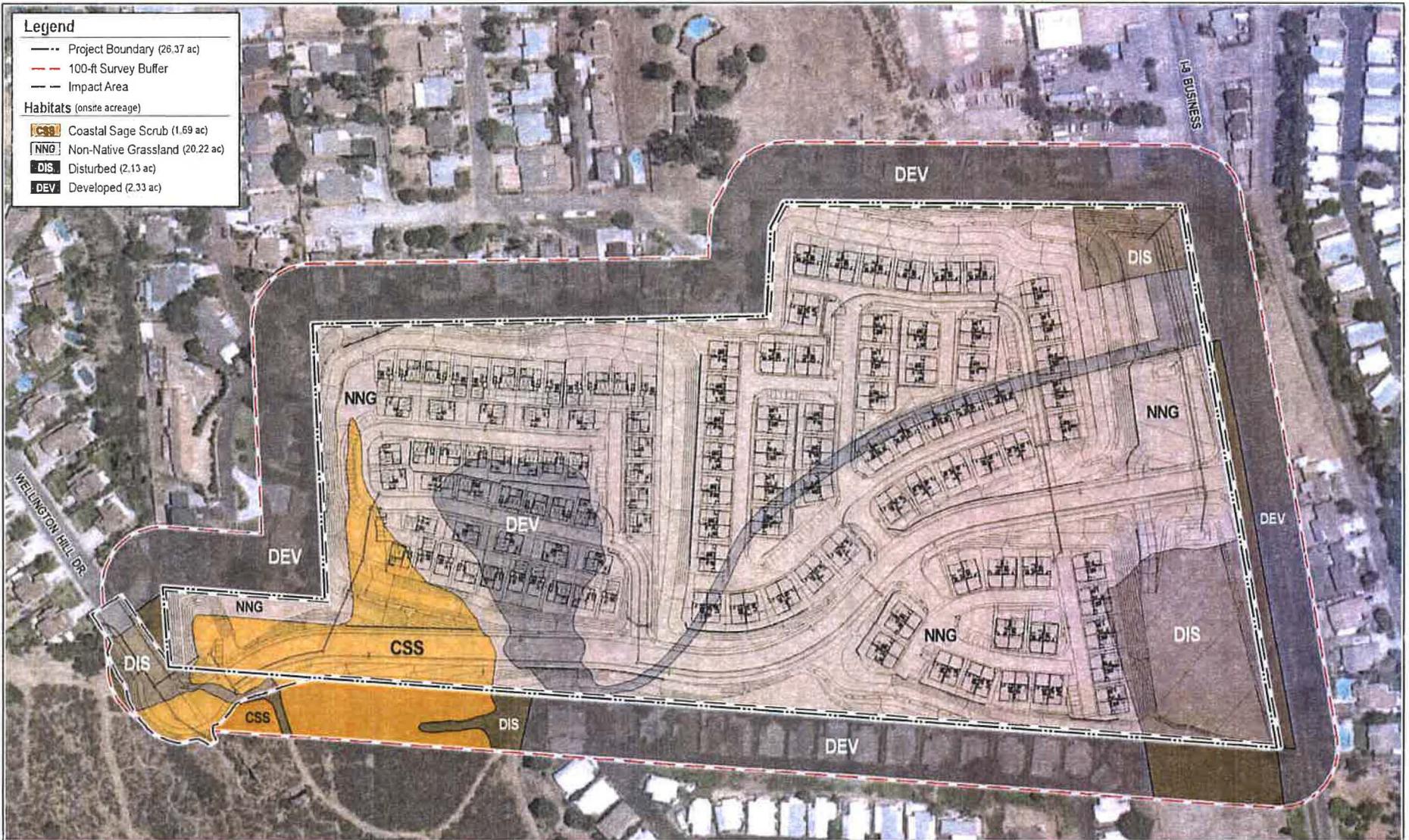
March 2013



Legend

 Project Site





ATTACHMENTS



Civil Engineering - Environmental

2442 Second Avenue
San Diego, CA 92101
Phone: 619.232.9200
Fax: 619.232.9210

January 5, 2009

Larry Hofreiter and Beth Ehsan
County of San Diego
Department of Planning and Land Use
5201 Ruffin Road, Suite B
San Diego, CA 92123

Subject: Settlers Point TM 5423, R05-004, S05-064, ER 05-14-009
Updated Project Description

Dear Mr. Hofreiter and Ms. Ehsan:

This letter is being submitted to inform you of an updated project description for the 21.89 acre Settlers Point project site located in Lakeside, San Diego County, California. The proposed project is located near the community of Lakeside in the County of San Diego. The project is located within the metro-Lakeside Jamul Segment of the County's Subarea Plan of the MSCP and part of the MSCP Pre-approved Mitigation Area (PAMA) or Biological Resource Core Area (BRCA). Please see the attached previously drafted Biological Technical Report prepared by RC Biological Consulting (October 2005, revised February 2006).

This 2006 report outlined biological resources onsite, the significance of impacts to those resources, and mitigation requirements. 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. The findings of the report are summarized in this letter along with the new project description.

Please note that the 2006 RC Biological Consulting report described the project acreage as 22.4 acres, and the current proposed Tentative Map is 21.89 acres. This discrepancy exists because since 2006, there has been a Boundary Adjustment to the southern-most project boundary between the Settlers Point project and the Los Coches Self Storage and commercial site to the south (Document #2007-0758216). This document is attached for your reference. This Boundary Adjustment accounts for the change in project acreage of 0.51 acre.

Due to the Boundary Adjustment and slight refinements in the engineering of the site, habitat acreage calculations and impact amounts have changed minimally. Please see the table on page four of this letter for further clarification of habitat and impact acreages.

2006 BIOLOGY REPORT SUMMARY

As documented by the 2006 RC Biological Consulting report, the biological resources onsite include three habitat types: coastal sage scrub, non-native grassland, and developed. The coastal sage scrub habitat occurs in the northwest portion of the property on northwest facing slopes. Plant species in this habitat area include flat-top buckwheat (*Eriogonum fasciculatum*), coast sagebrush (*Artemisia californica*), white sage (*Salvia apiana*), deerweed (*Lotus scoparius*) and broom baccharis (*Baccharis sarothroides*). The non-native grassland onsite is dominated by non-native grasses including red-stem filaree (*Erodium cicutarium*), cheeseweed (*Malva parviflora*), and black mustard (*Brassica nigra*). Other species located in this area include tocalote (*Centaurea melitensis*), narrow-leaved filago (*Filago gallica*), rancher's fiddleneck (*Amsinckia menziesii*), wild radish (*Raphanus sativus*), miniature lupine (*Lupinus bicolor*) and scarlet pimpernel (*Anagalis arvensis*). The developed habitat area contains several non-native species including African fountain grass (*Pennisetum setaceum*), California fan palm (*Washingtonia filifera*), Canary Island date palm (*Phoenix canariensis*), castor bean (*Ricinus communis*), and tree tobacco (*Nicotiana glauca*).

A total of 87 plant species were observed onsite. Additionally, 34 wildlife species were observed.

No state or federally listed plant or animal species were observed onsite. However, one sensitive wildlife species, the Cooper's hawk (*Accipiter cooperii*) was observed onsite. The Cooper's hawk is a federal and/or state species of concern. In addition, three sensitive species were observed on an adjacent site. One sensitive plant, San Diego sunflower (*Viguiera laciniata*), a Group D species was found. Two bird species were observed: the federally threatened and California Species of Special Concern California Gnatcatcher (*Polioptila californica*) and California Species of Special Concern American kestrel (*Falco sparverius*). The California Gnatcatcher was observed offsite on an adjacent property. Although a protocol survey for California gnatcatcher was not conducted, the project site is considered occupied. A focused survey for the Quino checkerspot butterfly was conducted in 2005 with negative results. Per the 2005 survey report, the potential for the Quino checkerspot butterfly to occur onsite was low due to the lack of the butterfly's main host plant, dwarf plantain (*Plantago erecta*). Two individuals of the secondary host plant were found onsite, purple owl's clover (*Castilleja exserta*); however, this would not be sufficient to support the Quino checkerspot butterfly onsite.

Per the 2006 RC Biological Consulting report and based on the project description under consideration at that time, implementation of the project would result in 100% impact to the approximately 1.74 acres of coastal sage scrub, 18.7 acres of non-native grassland and 1.99 acres of developed land onsite. Additionally, offsite impacts to 0.11 acre of coastal sage scrub, 0.63 acre of non-native grassland and 0.15 acre of developed land would occur as a result of project implementation. The RC Biological Consulting report indicated that mitigation land be purchased through the Crestridge Mitigation Bank.

Mitigation for a 1.85 acre impact to coastal sage scrub would be achieved at a 1.5:1 ratio through the purchase of 2.78 acres of coastal sage scrub habitat within a County approved mitigation bank. In addition, 19.33 acres of non-native grassland would be mitigated at a 0.5:1 ratio for a total of 9.67 acres purchased within a County approved mitigation bank. Potential impacts to sensitive animal species would be mitigated by the habitat based mitigation in accordance with the Biological Mitigation Ordinance (BMO). The loss of the developed habitat would not be considered biologically significant. Implementation of these mitigation measures would reduce impacts to below a level of significance.

UPDATED PROJECT DESCRIPTION

The project is located northwest of the intersection of Hwy. 8 Business and Los Coches Road. The development of the site affects Assessor Parcel Numbers 397-210-17, 397-212-01, 397-291-02, 397-291-15 through 17. The proposed project is located within Lakeside, California in the eastern portion of the County of San Diego (Figures 1 and 2). The project site is located on the El Cajon USGS 7.5' Quadrangle in Sections 29 and 30 in Township 15 South, Range 1 East (Figure 2). Topography includes a hilltop and the majority of the site is on a southeast-facing slope. Elevation onsite ranges from approximately 600 feet above mean sea level at the southern portion of the site to approximately 700 feet above mean sea level.

The site is surrounded by residential development with a large undeveloped area to the west. Current land uses onsite included a single family home which was demolished in 2007, a driveway and undeveloped land. The site is dominated by a hill where the house was located and its associated slopes to the east and west. A proposed self storage project is located directly to the southwest of the Settlers Point project (Los Coches Self Storage S04-009), adjacent to Hwy. 8 Business. The site plan for the self storage project was approved in late 2008. An undeveloped commercial site is located directly to the southeast of the Settlers Point project. No development applications are pending on this property at this time. All of these properties are under the same family ownership.

The 2006 RC Biological Consulting report describes the proposed subdivision of the 22.4 acre Settlers Point site into three residential lots. The property was proposed to be subdivided into one single-family residential lot, one HOA lot and one lot for a multi-family condominium development. The proposed multi-family residential lot was proposed to be developed with 233 condominium units, an active recreation area and passive recreation areas.

The proposed 21.89 acre Settlers Point project is now pursuing a Tentative Map with four lots proposed for future residential development. Of the four residential lots proposed for Settlers Point, the largest is 7.19 acres and the smallest is 3.92 acres. Grading of each of the pads is proposed to provide future residential development potential. A total of 266 residential units may be possible given the current zoning and density assigned to each of the lots.

One additional 2.09 acre lot is reserved for the 60 foot wide public street ("Street A") to access the project from Hwy. 8 Business and to provide secondary access for the Brightwater Ranch (TM 5306) residential project to the northwest of Settlers Point. Street improvements are proposed for Hwy. 8 Business including stormdrains and five feet of public street dedication. A 10' decomposed granite (D.G.) trail runs the length of the project's access road.

The project also includes offsite impacts due to fire clearing, frontage improvements along Hwy. 8 Business, utility lines, and drainage structures. At this time it is unknown if Brightwater Ranch (TM 5306) will obtain its Tentative Map prior to Settlers Point. Therefore, impacts resulting from a road knuckle on the property of Brightwater Ranch are also included as offsite impacts.

As with the earlier project proposal, 100 percent of the site is proposed to be impacted by the development by the construction of flat pads, slopes, retaining walls, access road, and stormwater and drainage improvements (earthen swales, temporary siltation basins, etc.).

Due to the change in project acreage resulting from the Boundary Adjustment and further engineering refinements of the plan habitat acreages and impact acreages are detailed in the table below.

Habitat Type (Habitat Code)	Total Acreage Onsite	Acres Impacted Onsite	Acres Impacted Offsite	Mitigation Ratio	Offsite Mitigation Purchase
Coastal Sage Scrub (32500)	1.69	1.69	0.47	1.5:1	3.24
Non-native Grassland (42200)	18.21	18.21	1.83	0.5:1	10.02
Developed (12000)	1.99	1.99	0.71	0	NA
TOTAL	21.89	21.89	3.01		

The 2006 RC Biological Consulting report proposed mitigation to occur at the Crestridge Mitigation Bank. Because Crestridge Mitigation Bank no longer has any coastal sage scrub or non-native grassland mitigation acreage available for purchase, the applicant will purchase up-tiered habitat there. Approximately 3.24 acres of Tier I habitat will be purchased in lieu of the coastal sage scrub and 10.02 acres of Tier III habitat will be purchased in lieu of non-native grassland habitat.

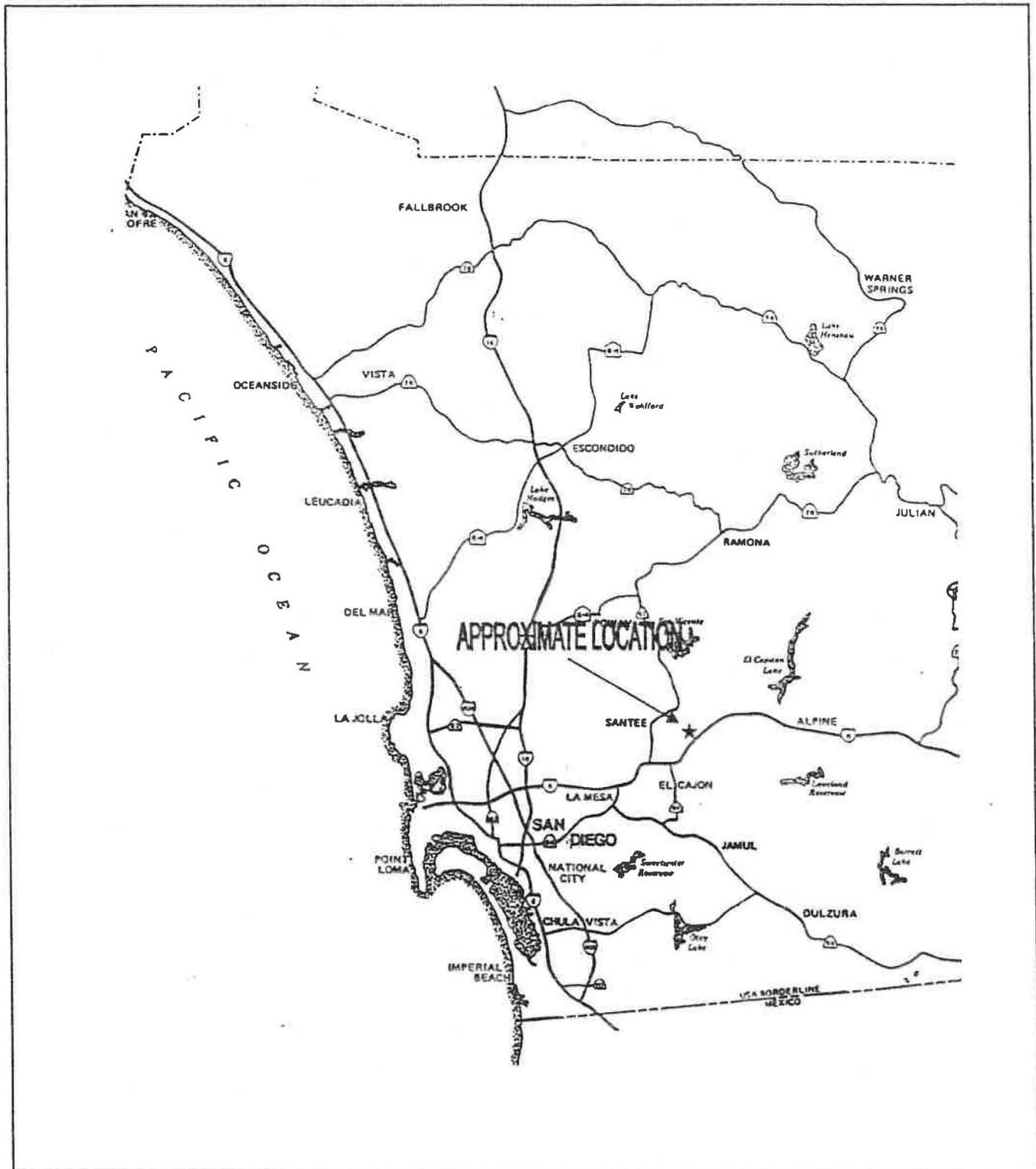
Larry Hofreiter, Beth Ehsan
Settlers Point TM 5423
Page 5

Please contact REC Consultants, Inc. with any questions or concerns regarding the new project description.

Sincerely,

A handwritten signature in cursive script that reads "Elyssa K. Robertson". The signature is written in dark ink and is positioned below the word "Sincerely,".

Elyssa K. Robertson
Principal

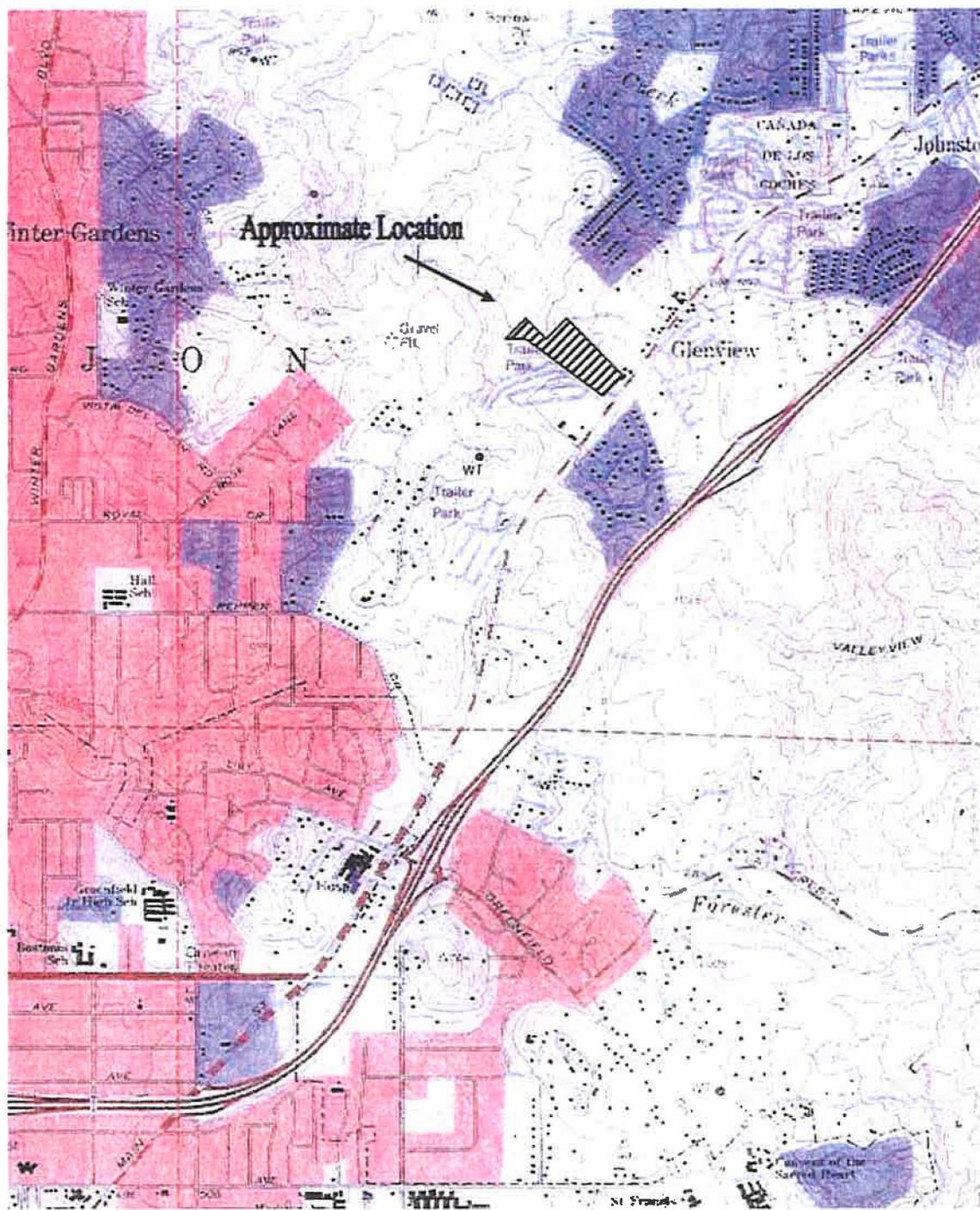


REC
Consultants, Inc.

REGIONAL LOCATION
Settler's Point
NO SCALE

Figure
1





REC
Consultants, Inc.

VICINITY MAP
Settler's Point

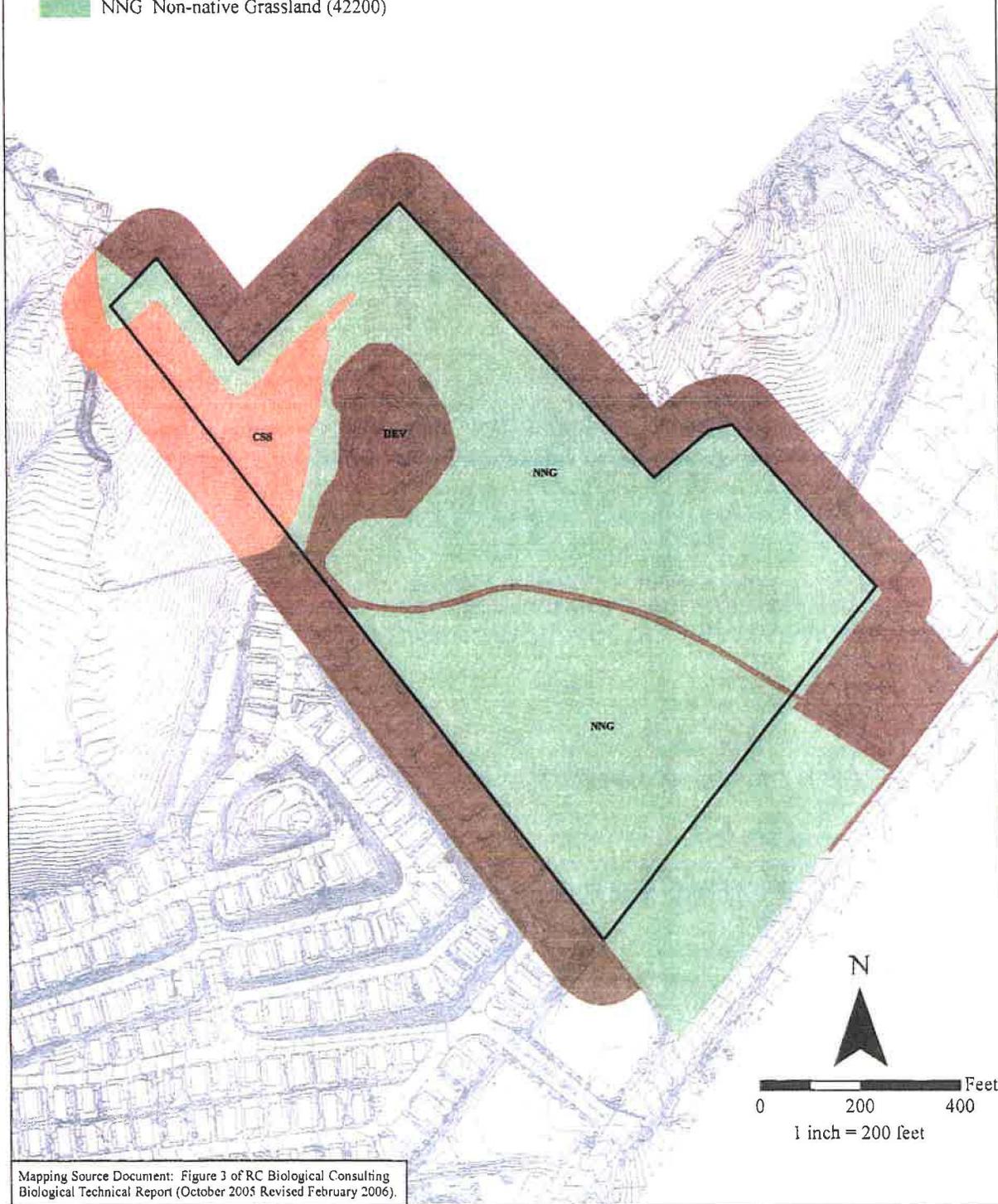
El Cajon USGS 7.5 Minute Quad



Figure
2

Legend

- Boundary
- CSS Coastal Sage Scrub (32520)
- DEV Developed (12000)
- NNG Non-native Grassland (42200)



Mapping Source Document: Figure 3 of RC Biological Consulting
Biological Technical Report (October 2005 Revised February 2006).



Consultants, Inc.

Biological Resources Settlers Point

Figure
3

Legend

- Boundary
- CSS Coastal Sage Scrub (32520)
- DEV Developed (12000)
- NNG Non-native Grassland (42200)
- Proposed Grading Plan
- ▨ Impact Area



Mapping Source Document: Figure 3 of RC Biological Consulting Biological Technical Report (October 2005 Revised February 2006).



**Impacts
Settlers Point**

**Figure
4**

EXHIBIT G



County of San Diego

DEPARTMENT OF PUBLIC WORKS

JOHN L. SNYDER
DIRECTOR

5555 OVERLAND AVE, SUITE 2188
SAN DIEGO, CALIFORNIA 92123-1295
(858) 694-2212 FAX: (858) 288-0461
Web Site: sdcdpw.org

DATE: 2/26/14

RE: GRADING PERMIT L- PDS2013-LDGRM5-00006

Dear Grading Permit Owner;

Pursuant to the requirements of Section 87.217 – "Pre-Construction Conferences" of the County's Grading Ordinance, a pre-construction conference with the County Official is required prior to commencement of any grading, clearing, or other associated work under this permit.

Please call Private Development Construction Inspection at (858) 694-3165 to contact your assigned inspector and schedule the pre-construction conference at an agreeable time. All requests for meeting need to be at least 48 hours in advance.

For requests to waive the pre-construction conference, please contact the Senior Civil Engineer, Glen Gundert, at (858) 694-3172 or John R. Thomas, at (858) 694-2841.

Sincerely,

Derek R. Gade

Derek R. Gade, P.E.
Public Works Manager
Private Development Construction Inspection



County of San Diego

DEPARTMENT OF PUBLIC WORKS

JOHN L. SNYDER
DIRECTOR

6555 OVERLAND AVE, SUITE 2188
SAN DIEGO, CALIFORNIA 92123-1295
(858) 694-2212 FAX: (858) 268-0461
Web Site: sdcdpw.org

To all Permit Holders and Supervising Engineers of approved "L" grading permits with 5,000 cubic yards or more of proposed grading:

Please note the Department of Public Work's policy regarding submission of supervised engineer's report of grading activities. Weekly reports are required during grading operations when moving more than 200 cubic yards of material per week. When moving less than 200 cubic yards of material per week, monthly reports are required until all punchlist work is completed and "record plans" are submitted. Please utilize the following guidelines for submission of these reports:

Weekly: Reports are to cover the entire workweek, starting on Sunday and ending on Saturday. Reports are due no later than the Wednesday following the week for which you are reporting. Private Development Inspection Office Hours are Monday – Friday 7am – 4 pm.

Monthly: Reports are to cover the entire month, starting on the first day of the month and ending on the last day of the month. Monthly reports are due no later than the 15th day following the month for which you are reporting.

Transition: When you are transitioning from weekly to monthly reporting you must notify and receive concurrence from the DPW inspector. Your first monthly report begins the Sunday following your last weekly report and ends on the last day of the month. Monthly reports are due no later than the 15th day following the month for which you are reporting.

Your timely submission of these reports is greatly appreciated. Failure to submit reports by the date due may result in administrative action and possible fines. Reports can be faxed to (858) 694-2354 or emailed to GRADING@SDCOUNTY.CA.GOV Please include your permit number and the dates covered on your report in the subject line or body of email. If you have any questions or need additional information, please contact Ingrid Stichter, Engineer Technician I at (858) 694-3165.

Sincerely,

Derek R. Gade

Derek R. Gade, P.E.
Public Works Manager
Private Development Construction Inspection

COUNTY OF
SAN DIEGO

DEPARTMENT OF PUBLIC WORKS
COUNTY OPERATIONS CENTER
5555 OVERLAND AVENUE
SAN DIEGO, CA 92123-1295
INSPECTION: 694-3165 • PERMITS: 694-2055

GRADING PERMIT

NO. *PD52013-LD&RMJ-00006*

ASSESSOR'S
PARCEL NO. *397-210-17-317-212-01-397-211-2*

DATE OF
ISSUE *2/26/14*

POST ON SITE
15-7-18



COUNTY OF SAN DIEGO
 DEPARTMENT OF PUBLIC WORKS
 PRIVATE DEVELOPMENT CONST.
 INSPECTION
 5510 OVERLAND AVE, SUITE 210
 SAN DIEGO, CALIFORNIA 92123-1239
 (858) 694-3165 FAX: (858) 694-2354



GRADING PERMIT

Grading Permit Major

DATE ISSUED: 02/26/2014
 EXPIRATION DATE: 02/26/2017

TRUST ACCOUNT NO.:
 2008224-D-01632

PERMIT NO.: PDS2013-LDGRMJ-00006

APPLICANT:
 FLOIT DAN
 3565 7TH AVE*SAN DIEGO CA
 SAN DIEGO, CA 92103
 619 294-3350
 dan@floil.com

ENGINEER OF WORK:
 Hunsaker and Associates
 Raymond Martin
 9707 Waples St
 858 558-4500
 rmarlin@hunsakersd.com

FINANCIALLY RESPONSIBLE:
 FLOIT DAN
 3565 7TH AVE*SAN DIEGO CA
 SAN DIEGO, CA 92103
 619 294-3350
 dan@floil.com

JOB LOCATION:

APN (PRIMARY): 397-210-17-00

GPS COORD.:

Quantities: CY CUT: 294933 CY IMPORT
 CY FILL: 294933 CY EXPORT: 0

NOI (WDID): 9370369002

DETAILED DESCRIPTION:
 Area: Lakeside - Proposed Use of Graded Site: Subdivison - Emergency Contact: Stefan La Casse 760 942-9991 - Issuance of Grading Permit approved by Ed Sinsay, DPW Project Manager on 2/26/14

SPECIFIC CONDITIONS:

GRADING SHALL CONFORM TO APPROVED GRADING PLANS. THE ISSUANCE OF THIS GRADING PERMIT DOES NOT AUTHORIZE THE APPLICANT FOR SAID PERMIT TO VIOLATE ANY FEDERAL, STATE, OR COUNTY LAWS, REGULATIONS OR POLICIES, INCLUDING, BUT NOT LIMITED TO THE FEDERAL ENDANGERED SPECIES ACT, THE STORMWATER QUALITY ORDINANCE OR AMENDMENTS THERTO.

Notify Construction Inspection at (858) 694-3165 24 hours in advance of beginning any portion of the work, completion of work, backfill or concrete pour, and otherwise as required by the Director of Public Works.

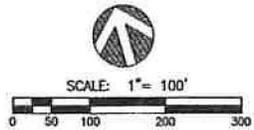
I hereby acknowledge that I have read the application and state that the information I have provided is correct. I agree to comply with all County Ordinances and State regulations regarding excavating and grading, and with the provisions and conditions of any permit issued pursuant to this application.

Signature of Owner/Agent Arnell Ingram Date: 2-26-14

This permit is governed by Division 7, Title 8 of the San Diego County Code of Regulatory Ordinances.

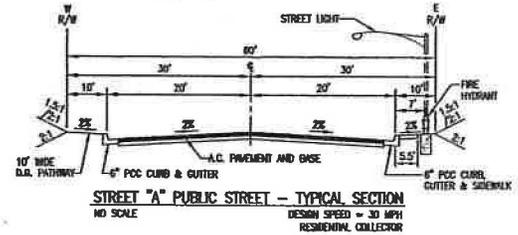
County of San Diego, Director of Public Works by: [Signature] Date: 2/26/14

COUNTY OF SAN DIEGO
TRACT NO. TM 5423 RPL3



EXISTING	
GENERAL PLAN	VR-4.3 (4.3 DU/AC)
ZONING REGS.	RS

EXISTING	
GENERAL PLAN	VR-15 (15 DU/AC)
ZONING REGS.	RV

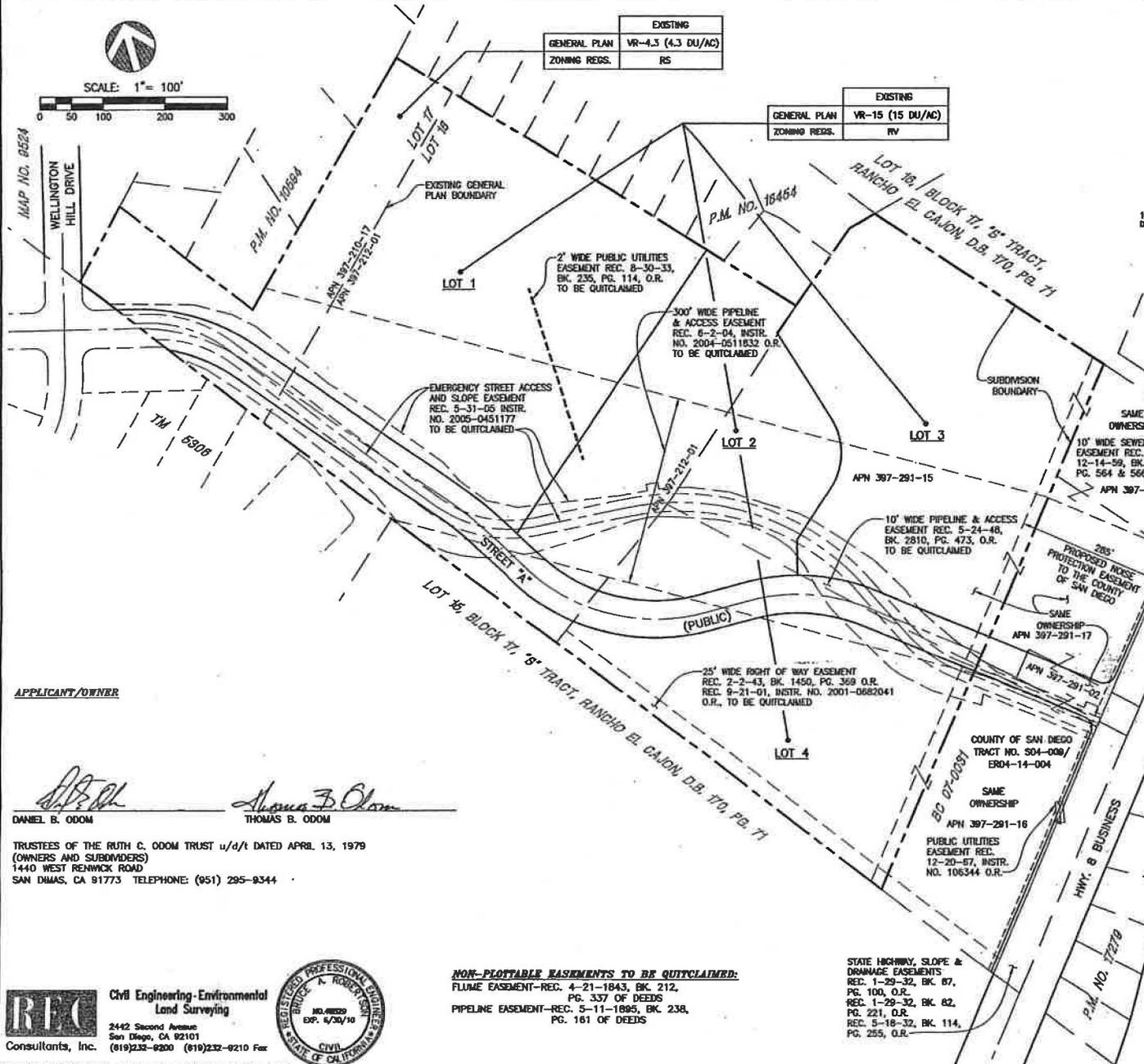


ZONING (ALL EXCEPT APN 397-210-17):

USE REGULATIONS	EXISTING
ANIMAL REGULATIONS	Q
DENSITY	-
LOT SIZE	6,000 sq.ft.
BUILDING TYPE	K
MAX. FLOOR AREA	-
FLOOR AREA RATIO	-
HEIGHT	C
LOT COVERAGE	-
SETBACK	H
OPEN SPACE	-
SPECIAL AREA REGS.	-

ZONING (APN 397-210-17 ONLY):

USE REGULATIONS	EXISTING
ANIMAL REGULATIONS	RS
DENSITY	Q
LOT SIZE	10,000 sq.ft.
BUILDING TYPE	C
MAX. FLOOR AREA	-
FLOOR AREA RATIO	-
HEIGHT	C
LOT COVERAGE	-
SETBACK	H
OPEN SPACE	-
SPECIAL AREA REGS.	-



APPLICANT/OWNER

[Signature]
DANIEL B. ODOM

[Signature]
THOMAS B. ODOM

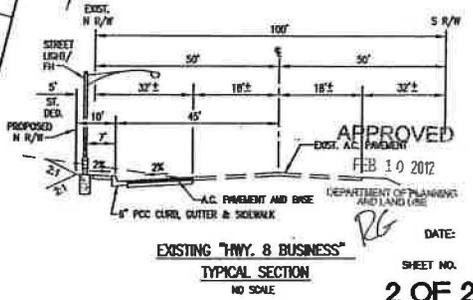
TRUSTEES OF THE RUTH C. ODOM TRUST u/d/t DATED APRIL 13, 1979
(OWNERS AND SUBDIVIDERS)
1440 WEST RENWICK ROAD
SAN DIMAS, CA 91773 TELEPHONE: (951) 295-9344

RIC Civil Engineering-Environmental
Land Surveying
2442 Second Avenue
San Diego, CA 92101
Consultants, Inc. (619)232-9200 (619)232-6210 Fax



NON-PLOTTABLE EASEMENTS TO BE QUITCLAIMED:
FLUME EASEMENT-REC. 4-21-1843, BK. 212,
PG. 337 OF DEEDS
PIPELINE EASEMENT-REC. 5-11-1895, BK. 238,
PG. 161 OF DEEDS

STATE HIGHWAY, SLOPE &
DRAINAGE EASEMENTS
REC. 1-29-32, BK. 87,
PG. 100, O.R.
REC. 1-29-32, BK. 82,
PG. 221, O.R.
REC. 5-18-32, BK. 114,
PG. 255, O.R.

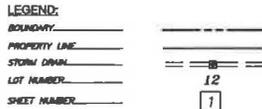
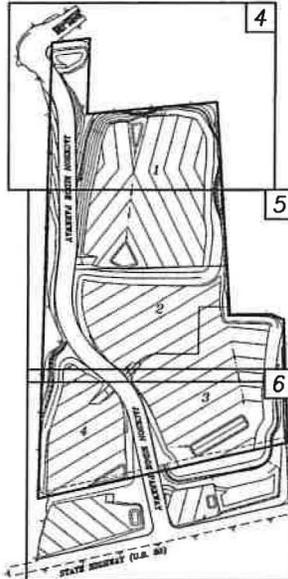


MASS GRADING PLANS FOR: SETTLERS POINT COUNTY OF SAN DIEGO TRACT NO. 5423 RPL



SHEET INDEX

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KEY MAP
SCALE: 1"=200'

WORK TO BE DONE

GRADING AND DRAINAGE WORK CONSIST OF THE FOLLOWING WORK TO BE DONE ACCORDING TO THESE PLANS, THE CURRENT SAN DIEGO AREA REGIONAL STANDARD DRAWINGS, THE STANDARD SPECIFICATIONS FOR PUBLIC WORKS CONSTRUCTION, AND FOR THE SAN DIEGO COUNTY GRADING ORDINANCE.

STANDARD SPECIFICATIONS

- STANDARD SPECIFICATIONS FOR PUBLIC WORKS CONSTRUCTION (2003) INCLUDING THE REGIONAL AND SAN DIEGO SUPPLEMENT AMENDMENTS.
- 1899 STANDARD SPECIAL PROVISIONS FOR SIGNALS, LIGHTING AND THE CITY OF ELECTRICAL SYSTEMS OF SAN DIEGO, DOCUMENT NO. 798843, FILED OCTOBER 22, 1999.
- CALIFORNIA DEPARTMENT OF TRANSPORTATION "MANUAL OF TRAFFIC CONTROLS FOR CONSTRUCTION AND MAINTENANCE WORK ZONES" (1998 ED.), DOCUMENT NO. 798843 FILED JANUARY 24, 2000.

STANDARD DRAWINGS

- COUNTY OF SAN DIEGO STANDARD DRAWINGS, APRIL 2008 EDITION
- CALIFORNIA DEPARTMENT OF TRANSPORTATION STANDARD PLANS, JULY 1997, D-84

SOURCE OF TOPOGRAPHY:

ROBERT J. LUMP & ASSOCIATES PLAN ON DECEMBER 10, 2013

HYDROLOGY/HYDRAULIC REPORT:

SETTLERS POINT DRAINAGE STUDY PREPARED FOR FLOIT PROPERTIES DATED JANUARY 25, 2013

TRAFFIC CONTROL NOTE

TRAFFIC CONTROL PLAN MUST BE APPROVED BY DEPARTMENT OF PUBLIC WORKS, TRAFFIC ENGINEERING SECTION PRIOR TO START OF CONSTRUCTION.

GENERAL NOTES

- APPROVAL OF THIS GRADING PLAN DOES NOT CONSTITUTE APPROVAL OF VERTICAL OR HORIZONTAL ALIGNMENT OF ANY PRIVATE ROAD SHOWN HEREIN FOR COUNTY ROAD PURPOSES.
- FINAL APPROVAL OF THESE GRADING PLANS SUBJECT TO FINAL CURB ELEVATIONS MAY BE ASSOCIATED IMPROVEMENT PLANS WHERE APPLICABLE. FINAL CURB ELEVATIONS MAY REQUIRE CHANGES IN THESE PLANS.
- IMPORT MATERIAL SHALL BE OBTAINED FROM A LEGAL SITE.
- A CONSTRUCTION, EXCAVATION OR ENCHANCEMENT PERMIT FROM THE DEPARTMENT OF PUBLIC WORKS WILL BE REQUIRED FOR ANY WORK IN THE COUNTY RIGHT-OF-WAY.
- ALL SLOPES OVER THREE FEET IN HEIGHT WILL BE PLANTED IN ACCORDANCE WITH SAN DIEGO COUNTY SPECIFICATIONS.
- THE CONTRACTOR SHALL VERIFY THE EXISTENCE AND LOCATION OF ALL UTILITIES BEFORE COMMENCING WORK. NOTICE OF PROPOSED WORK SHALL BE GIVEN TO THE FOLLOWING AGENCIES:

SAN DIEGO GAS & ELECTRIC	TELEPHONE NO.	1-800-422-4133
PACIFIC TELEPHONE	TELEPHONE NO.	1-800-212-2133
GENEX	TELEPHONE NO.	1-760-241-2147
OWENS	TELEPHONE NO.	1-760-751-5489
- A SOILS REPORT MAY BE REQUIRED PRIOR TO THE ISSUANCE OF A BUILDING PERMIT.
- APPROVAL OF THESE PLANS BY THE DIRECTOR OF PUBLIC WORKS DOES NOT AUTHORIZE ANY WORK OR GRADING TO BE PERFORMED UNTIL THE PROPERTY OWNER'S PERMISSION HAS BEEN OBTAINED AND VALID GRADING PERMIT HAS BEEN ISSUED.
- THE DIRECTOR OF PUBLIC WORKS' APPROVAL OF THESE PLANS DOES NOT CONSTITUTE COUNTY BUILDING OFFICIAL APPROVAL OF ANY FOUNDATION FOR STRUCTURES TO BE PLACED ON THE ITEMS COVERED BY THESE PLANS. NO OWNER OF THE GRADING OR DRAINAGE REQUIREMENTS CONCERNING MINIMUM COVER EXPANSIVE SOIL IS MADE ON IMPLIED (SECTIONS 87.403 & 87.410). ANY SUCH OWNER MUST BE DETERMINED FROM THE DIRECTOR OF PLANNING AND LAND USE.
- ALL OPERATIONS CONDUCTED ON THE PREMISES, INCLUDING THE WAREHOUSING, REPAIR, ARRIVAL, DEPARTURE OR RUMMAGING OF TRUCKS, FERTILIZING EQUIPMENT AND ANY OTHER ASSOCIATED GRADING EQUIPMENT SHALL BE LIMITED TO THE PERIOD BETWEEN 7:00 AM AND 6:00 PM EACH DAY, MONDAY THRU SATURDAY, AND NO EARLYWORK OR GRADING OPERATIONS SHALL BE CONDUCTED ON THE PREMISES ON SUNDAYS OR HOLIDAYS.
- ALL MAJOR SLOPES SHALL BE ROUNDED INTO EXISTING TERRAIN TO PRODUCE A CONTINUED TRANSITION FROM CUT OR FILL FACES TO NATURAL GROUND AND ADJUTING CUT OR FILL SURFACES.
- NOTWITHSTANDING THE MINIMUM STANDARDS SET FORTH IN THE GRADING ORDINANCE AND NOTWITHSTANDING THE APPROVAL OF THESE GRADING PLANS, THE PERMITTEE IS RESPONSIBLE FOR THE PREVENTION OF DAMAGE TO ADJACENT PROPERTY. NO PERSON SHALL EXCAVATE OR LAND SO CLOSE TO THE PROPERTY LINE AS TO ENDANGER ANY ADJACENT PUBLIC STREET, GENERAL ALLEY, FUNCTION OF ANY SEWER DISPOSAL SYSTEM, OR ANY OTHER PUBLIC OR PRIVATE PROPERTY WITHOUT SUPPORTING AND PROTECTING SUCH PROPERTY FROM SETTLING, LANGUORING, ACCUMULATED WATER OR OTHER DAMAGE WHICH MIGHT RESULT FROM THE GRADING DESCRIBED ON THIS PLAN.
- SLOPE RATIOS:
CUT-1.5:1 FOR MINOR SLOPES UNDER 15' HIGH OR IN ROCK 2:1 FOR MAJOR SLOPES
FILL-2:1
EXCAVATION: 27/855 C.Y.
FILL: 27/855 C.Y.
EXPORT: 0 C.Y.
(NOTE: A SEPARATE WASTE PERMIT MUST EXIST FOR EITHER WASTE OR IMPORT AREAS)
FILL QUANTITIES ADJUSTED FOR THE AFFECT OF SHRINKAGE/BULKING
- SPECIAL CONDITION: IF ANY ARCHEOLOGICAL RESOURCES ARE DISCOVERED ON THE SITE OF THIS GRADING DURING GRADING OPERATIONS, SUCH OPERATIONS WILL CEASE IMMEDIATELY, AND THE PERMITTEE WILL NOTIFY THE DIRECTOR OF PUBLIC WORKS OF THE DISCOVERY. GRADING OPERATIONS WILL NOT RECOMMENCE UNTIL THE PERMITTEE HAS RECEIVED WRITTEN AUTHORITY FROM THE DIRECTOR OF PUBLIC WORKS.
- ALL GRADING DETAILS WILL BE IN ACCORDANCE WITH SAN DIEGO COUNTY STANDARD DRAWINGS DS-8, DS-10, DS-11, AND D-73.
- CONSTRUCTION OF ONE POC STANDARD RESIDENTIAL DRIVEWAY PER LOT, LOCATION TO BE DETERMINED IN THE FIELD BY ENGINEER OF WORK. POC SURFACING OF DRIVEWAY TO EXTEND FROM CURBS TO PROPERTY LINE. USE STANDARD DRAWINGS G-14A, G-14B, G-14C, G-15 AND G-16.
- FINISHED GRADING SHALL BE CERTIFIED BY A REGISTERED CIVIL ENGINEER AND INSPECTED BY THE COUNTY ENGINEER FOR DRAINAGE CLEARANCE. (APPROVAL OF ROUGH GRADING DOES NOT CERTIFY FINISH BECAUSE OF POTENTIAL SURFACE DRAINAGE PROBLEMS THAT MAY BE CREATED BY LANGUORING ACCUMULATED WATER ROUGH GRADING CERTIFICATION).
- GRADING AND CLEARING ACTIVITIES ADJACENT TO DESIGNATED WETLANDS SHALL BE LIMITED TO THE DRY SEASON (MARCH 1 TO MAY 1). STANDARD EROSION CONTROL PROCEDURES SHALL BE USED, AND GRADED SLOPES SHALL BE REVEGETATED AS SOON AS POSSIBLE AFTER GRADING.
- FUELING OF CONSTRUCTION VEHICLES OR EQUIPMENT IS PROHIBITED WITHIN 50 FEET OF ALL WETLANDS AND DRAINAGES.

NEAREST INTERSECTION IS 585' S. ABBY AT LOS COCHES ROAD AND HIGHWAY 8 THOMAS GUIDE PG. 1232, SECTION C-7

SOILS ENGINEER CERTIFICATION

THIS GRADING PLAN HAS BEEN REVIEWED BY THE UNDERSIGNED AND FOUND TO BE IN CONFORMANCE WITH THE RECOMMENDATIONS AS OUTLINED IN OUR SOILS REPORT FOR THIS PROJECT. THE SOILS REPORT SHALL BE CONSIDERED AS A PART OF THIS PLAN, AND ALL GRADING WORK SHALL BE DONE IN ACCORDANCE WITH THE SPECIFICATIONS AND RECOMMENDATIONS OF GEOTECHNICAL INVESTIGATION, LOS COCHES & SETTLERS POINT, DATED OCTOBER 26, 2005.

BY: TREVOR E. MYERS R.C.E. 63773 EXP. 08/30/14

GECON INCORPORATED
8800 FLANDERS DRIVE
SAN DIEGO, CA 92121-2974
(619) 558-6158

DEFENSE OF LAWSUITS AND INDEMNITY

THE APPLICANT SHALL:

- DEFEND, INDEMNIFY AND HOLD HARMLESS THE COUNTY, ITS AGENTS, OFFICERS AND EMPLOYEES FROM ANY CLAIM, ACTION OR PROCEEDING AGAINST THE COUNTY, ITS AGENTS, OFFICERS AND EMPLOYEES TO ATTACK, SET ASIDE, VOID OR ANNEAL THIS APPROVAL OR ANY OF THE PROCEEDINGS ACTS OR DETERMINATIONS TAKEN, DONE OR MADE PRIOR TO THIS APPROVAL; AND
- REIMBURSE THE COUNTY, ITS AGENTS, OFFICERS OR EMPLOYEES FOR ANY COURT COSTS AND ATTORNEY'S FEES WHICH THE COUNTY, ITS AGENTS OFFICERS OR EMPLOYEES MAY BE REQUIRED BY A COURT TO PAY AS A RESULT OF SUCH APPROVAL. AT ITS SOLE DISCRETION, THE COUNTY MAY PARTICIPATE AT ITS OWN EXPENSE IN THE DEFENSE OF ANY SUCH ACTION, BUT SUCH PARTICIPATION SHALL NOT RELIEVE THE APPLICANT OF ANY OBLIGATION IMPOSED BY THIS SECTION. THE COUNTY SHALL NOTIFY THE APPLICANT PROMPTLY OF ANY CLAIM OR ACTION AND COOPERATE FULLY IN THE DEFENSE.

SOLAR ACCESS CERTIFICATE

I DECLARE THAT THIS GRADING PLAN HAS PROVIDED A MINIMUM OF ONE HUNDRED SQ. FT. OF SOLAR ACCESS FOR EACH LOT CREATED BY THIS SUBDIVISION PURSUANT TO SECTION 81.601 (a) OF THE SUBDIVISION ORDINANCE.

RAYMOND L. MARTIN R.C.E. 48670
EXP. 6/30/14

IMPORTANT NOTICE

SECTION 4218 14817 OF THE GOVERNMENT CODE REQUIRES A DIGEST/IDENTIFICATION NUMBER BE ISSUED BEFORE A PERMIT TO EXCAVATE WILL BE VALID. FOR YOUR DIGEST/ I.D. NUMBER CALL UNDERGROUND SERVICE ALERT.

TOLL FREE: 1-800-422-4133
TWO WORKING DAYS BEFORE YOU DIG.



OWNER'S/PERMITTEE'S

NAME: FLOIT PROPERTIES
ADDRESS: 3365 7TH AVENUE
SAN DIEGO, CA 92103

TELEPHONE NO.: (619) 294-3350

SHORT LEGAL DESCRIPTION: PORTIONS OF LOTS 18 AND 19, BLOCK 17 OF THE "337 TRACT, APPROVED PL. GRADING, IN THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF FILED IN BOOK 170, PAGE 77 IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY, DECEMBER 8, 2007.

API NO.: 387-210-17, 387-212-1, 387-291-2, 15, 16, 17 & 18

SITE ADDRESS: VICINITY LAND
13240 HIGHWAY 8 BUSINESS LANSING, CA 92021-1871

NOTE: CONTRACTOR TO VERIFY THE LOCATION OF ALL EXISTING FACILITIES PRIOR TO CONSTRUCTION AND PROTECT ALL FACILITIES DURING CONSTRUCTION.



ENVIRONMENTAL SERVICE UNIT

APPROVED FOR COMPLIANCE WITH THE ENVIRONMENTAL REVIEW PER LETTER

FROM: ESU DATE:

RECORD PLAN

BY: _____ DATE: _____
R.C.E. _____
COMPIRE: _____

DECLARATION OF RESPONSIBLE CHARGE

I HEREBY DECLARE THAT I AM THE ENGINEER OF WORK FOR THIS PROJECT. THAT I HAVE EXERCISED RESPONSIBLE CHARGE OVER THE DESIGN OF THE PROJECT AS DEFINED IN SECTION 8703 OF THE BUSINESS AND PROFESSIONS CODE, AND THAT THE DESIGN IS CONSISTENT WITH CURRENT STANDARDS.

I UNDERSTAND THAT THE CHECK OF PROJECT DRAWINGS AND SPECIFICATIONS BY THE COUNTY OF SAN DIEGO IS COMPAED TO REVIEW ONLY AND DOES NOT RELIEVE ME AS ENGINEER OF WORK OF MY RESPONSIBILITIES FOR PROJECT DESIGN.

BY: RAYMOND L. MARTIN DATE: _____
R.C.E. NO.: 48670 EXP. DATE: 6-30-14

COUNTY APPROVED CHANGES

NO.	DESCRIPTION	APPROVED BY	DATE

PERMITS

H.O.L. NO. _____
REGIONAL PERMIT NO. _____
SPECIAL USE PERMIT NO. _____
TERMINATE MAP NO. TM 5423 RP.3 (7/10/13)

BENCH MARK

DESCRIPTION: 1/2" DIA. C.I. BENCHMARK BRASS LENS
SET IN CONCRETE BELOW SURFACE
ELEVATION: 468.238
DATE: JAN 28

PRIVATE CONTRACT

SHEET _____ COUNTY OF SAN DIEGO DEPARTMENT OF PUBLIC WORKS 15 2013

MASS GRADING PLAN FOR
COUNTY OF SAN DIEGO TRACT
TM 5423 RPL3

CALIFORNIA COORDINATE ZONE 343-1767 (CSZ 3)

CONTRACT NO. _____

DATE: _____

PROJECT NO. LXXXXX

ENGINEER: HUNSAKER & ASSOC., S.D., INC. PHONE: (858) 558-4500

GRADING AND IMPROVEMENT NOTES

- GRADING AND/OR IMPROVEMENT PLANS SHALL INCLUDE THE REQUIREMENT THAT TEMPORARY FENCES SHALL BE PLACED TO PROTECT ALL OPEN SPACE EASEMENTS SHOWN ON THE TENTATIVE MAP WHICH PRECLUDE GRADING, OR BURNING OR CLEARING. THE SURVEYOR SHALL SUBMIT TO THE DEPARTMENT OF PLANNING AND LAND USE A STATEMENT FROM A CALIFORNIA REGISTERED ENGINEER OR LICENSED SURVEYOR THAT TEMPORARY FENCES HAVE BEEN PLACED IN ALL LOCATIONS OF THE PROJECT SINCE PROPOSED GRADING OR CLEARING IS WITHIN 100 FEET OF AN OPEN SPACE EASEMENT BOUNDARY. THE TEMPORARY FENCE LOCATION SHALL BE IDENTIFIED IN THE FIELD BY A CALIFORNIA REGISTERED ENGINEER OR LICENSED SURVEYOR AND POSTED BETWEEN THE OPEN SPACE EASEMENT BOUNDARY AND ANY AREA OF PROPOSED DISTURBANCE. THE TEMPORARY FENCING SHALL BE REMOVED ONLY AFTER THE COMPLETION OF SUCH ACTIVITY.
- PERMANENT FENCES SHALL BE PLACED ALONG THE OPEN SPACE BOUNDARIES. THE PROPERTY OWNER SHALL SUBMIT TO THE DIRECTOR, DEPARTMENT OF PLANNING AND LAND USE ENGINEER, OR LICENSED SURVEYOR THAT PERMANENT FENCES OR WALLS HAVE BEEN PLACED TO PROTECT FROM IMPROVEMENT DISTURBANCE ALL OPEN SPACE EASEMENTS THAT DO NOT ALLOW GRADING, BURNING OR CLEARING. PERMANENT FENCING OR WALLS ARE REQUIRED IN ALL LOCATIONS OF THE PROJECT AS SHOWN ON THE FUTURE JOOL OF THE ENVIRONMENTAL IMPACT REPORT DATED JUNE 01 ON FILE AS BOOK WITH THE DEPARTMENT OF PLANNING AND LAND USE AT THE COMPLETION OF THE GRADING ACTIVITY AND PRIOR TO RECORD PLAN APPROVAL. THE PERMANENT FENCE LOCATIONS SHALL BE IDENTIFIED IN THE FIELD BY A CALIFORNIA REGISTERED ENGINEER OR LICENSED SURVEYOR AND POSTED JUST OUTSIDE OF THE OPEN SPACE EASEMENT. PHOTOGRAPHS AND A BRIEF DESCRIPTION OF DESIGN AND MATERIALS USED SHALL BE SUBMITTED WITH THE STATEMENT FROM THE CALIFORNIA REGISTERED ENGINEER. CONSTRUCTION MATERIALS AND FENCE AND/OR WALL DESIGN ARE SUBJECT TO APPROVAL BY THE DEPARTMENT OF PLANNING AND LAND USE. MINIMUM FENCE OR WALL HEIGHT SHALL BE 4 FEET.
- DRILLING OPERATIONS FOR BLASTING WITHIN 200 FEET OF THE PROPERTY LINE OF A RESIDENTIAL PROPERTY SHALL BE SHOWN THROUGH PHYSICAL INTERFERENCE IN THE DIRECT LINE OF SIGHT FROM THE SOURCE TO THE RECEIVER.
- A QUALIFIED ACOUSTICIAN SHALL MONITOR NOISE LEVELS AT THE RESIDENTIAL PROPERTY LINE MOST AFFECTED BY CONSTRUCTION OPERATIONS (I.E. ALONG THE NORTHERN PROJECT SITE BOUNDARY WITH WEST AND EAST OF CHURCH DEL ARROYO DRIVE), WHEN A DAILY NOISE "DOSE" HAS BEEN ACCUMULATED SUFFICIENT TO EQUAL 75 dBA (L₉₀), DRILLING OR CONSTRUCTION OPERATIONS SHALL BE TERMINATED FOR THAT DAY.
- A COUNTY CERTIFIED ARCHAEOLOGIST SHALL FIELD CHECK THE PROTOPS WITHIN THE LIMITS OF GRADING FOLLOWING BURNING AND CLEARING AND PRIOR TO GRADING ACTIVITIES. SHOULD ARCHAEOLOGICAL RESOURCES BE DISCOVERED DURING MONITORING, A GRADING MONITORING AND DATA RECOVERY PROGRAM SHALL BE IMPLEMENTED. THIS PROGRAM SHALL INCLUDE, BUT SHALL NOT BE LIMITED TO, THE FOLLOWING ACTIONS:
 - THE COUNTY CERTIFIED ARCHAEOLOGIST/HISTORIAN SHALL ATTEND THE PRE-GRADING MEETING WITH THE CONTRACTORS TO EXPLAIN AND COORDINATE THE REQUIREMENTS OF THE MONITORING PROGRAM.
 - DURING THE GRADING, CUTTING OF PREVIOUSLY UNDISTURBED DEPOSITS, THE ARCHAEOLOGICAL MONITORS SHALL BE ON-SITE FULL-TIME TO PERFORM PERIODIC INSPECTIONS OF THE EXCAVATIONS. THE FREQUENCY OF INSPECTIONS WILL DEPEND ON THE RATE OF EXCAVATION, THE MATERIALS EXCAVATED, AND THE PRESENCE AND ABUNDANCE OF ARTIFACTS AND FEATURES.
 - IN THE EVENT THAT PREVIOUSLY UNDISCOVERED CULTURAL RESOURCES ARE DISCOVERED, THE ARCHAEOLOGIST SHALL HAVE THE AUTHORITY TO SWEET, DIRECT OR TEMPORARILY HALT GRADING ACTIVITIES IN THE AREA OF DISCOVERY TO ALLOW EVALUATION OF POTENTIAL SIGNIFICANT CULTURAL RESOURCES. THE ARCHAEOLOGIST SHALL CONTACT THE COUNTY ARCHAEOLOGIST. IN CONSULTATION WITH THE COUNTY ARCHAEOLOGIST, SHALL DETERMINE THE SIGNIFICANCE OF THE DISCOVERED RESOURCES. THE COUNTY ARCHAEOLOGIST MUST CONSIDER WITH THE EVALUATION BEFORE CONSTRUCTION ACTIVITIES WILL BE ALLOWED TO RESUME IN THE AFFECTED AREA. ISOLATES AND CLEARLY NON-SIGNIFICANT DEPOSITS WILL BE USUALLY DOCUMENTED IN THE FIELD AND THE MONITORED GRADING CAN PROCEED. FOR SIGNIFICANT CULTURAL RESOURCES, A RESEARCH DESIGN AND DATA RECOVERY PROGRAM TO MITIGATE IMPACTS SHALL BE PREPARED BY THE CONSULTING ARCHAEOLOGIST AND APPROVED BY THE COUNTY ARCHAEOLOGIST. THEN CARRIED OUT USING PROFESSIONAL ARCHAEOLOGICAL METHODS. IF ANY HUMAN BONES ARE DISCOVERED, THE COUNTY CORONER SHALL BE CONTACTED. IN THE EVENT THAT THE REMAINS ARE OF INDIAN AMERICAN ORIGIN, THE MOST LIKELY DESCENDANT, AS IDENTIFIED BY THE NATIVE AMERICAN HERITAGE COMMISSION, SHALL BE ACCOMPANIED IN ORDER TO DETERMINE PROPER TREATMENT AND DISPOSITION OF THE REMAINS.

- BEFORE CONSTRUCTION ACTIVITIES ARE ALLOWED TO RESUME IN THE AFFECTED AREA, THE ARTIFACTS SHALL BE RECORDED AND FEATURES RECORDED USING PROFESSIONAL ARCHAEOLOGICAL METHODS, ACCORDING TO THE RESEARCH DESIGN AND DATA RECOVERY PROGRAM.
- ALL CULTURAL MATERIAL COLLECTED DURING THE GRADING MONITORING PROGRAM SHALL BE PROCESSED AND CURATED ACCORDING TO CURRENT PROFESSIONAL REPOSITORY STANDARDS. THE COLLECTIONS AND ASSOCIATED RECORDS SHALL BE TRANSFERRED, INCLUDING TITLE, TO AN APPROPRIATE CURATION FACILITY WITHIN SAN DIEGO COUNTY, TO BE ACCOMPANIED BY PROMPT OF THE FEES NECESSARY FOR PERMANENT CURATION.
- A REPORT DOCUMENTING THE FIELD AND ANALYSIS RESULTS AND INTERPRETING THE ARTIFACT AND RESEARCH DATA WITHIN THE RESEARCH CONTEXT SHALL BE COMPLETED AND SUBMITTED TO THE SATISFACTION OF THE DIRECTOR OF PLANNING AND LAND USE PRIOR TO THE ISSUANCE OF ANY BUILDING PERMITS. THE REPORT WILL INCLUDE DEPARTMENT OF PLANNING AND RECOGNITION PRIMARY AND ARCHAEOLOGICAL SITE TONGS.

- A COUNTY CERTIFIED, QUALIFIED ORNITHOLOGIST, SHALL PERFORM A SURVEY TO BE COMPLETED NOT MORE THAN ONE WEEK PRIOR TO INITIATION OF BLASTING, CLEARING AND GRADING ACTIVITIES, AND BASED ON THE SURVEY, CERTIFY IN WRITING TO THE COUNTY DEPARTMENT OF PLANNING AND LAND USE THAT THERE ARE NO NESTING RAFFORTS ON THE PROJECT SITE. IF THE ORNITHOLOGIST'S SURVEY LOCATES NESTING RAFFORTS, THE ORNITHOLOGIST SHALL CERTIFY THAT AN AREA NOT LESS THAN 800 FEET RADIUS FROM THE NEST(S) HAS BEEN FLAGGED TO IDENTIFY A CONSTRUCTION-FREE ZONE TO AVOID DISTURBANCE TO NESTING RAFFORTS.
- PRIOR TO THE START OF GRADING, DRILLING AND BLASTING ACTIVITIES, A COUNTY CERTIFIED BIOLOGIST SHALL CONDUCT A PROPOSED SURVEY WITHIN THE NATIVE CONSERVATION SAFE ZONES TO DETERMINE IF ANY NESTING CALIFORNIA Gnatcatcher PAIRS ARE PRESENT. IF NESTING PAIRS ARE LOCATED WITHIN 500 FEET OF THE PROPOSED LIMITS OF GRADING (INCLUDES LIMITS OF DRILLING AND BLASTING), ONE OF THE TWO FOLLOWING MITIGATION MEASURES SHALL BE IMPLEMENTED:
 - CONSTRUCTION ACTIVITIES (DRILLING, BLASTING OR GRADING) SHALL BE POSTPONED UNTIL AFTER THE BREEDING SEASON ENDS (BREEDING SEASON IS FEBRUARY 15 THROUGH AUGUST 15), OR
 - TEMPORARY NOISE BARRIERS (EARTHEN BERMS OR SOLID FENCING) SHALL BE ERRECTED BETWEEN THE NOISE SOURCE AND RECEIVER TO REDUCE THE NOISE TO A LEVEL THAT WILL NOT DISTURB NESTING Gnatcatcher (40 dB L₉₀). THE LOCATION AND HEIGHT OF THE TEMPORARY BARRIER SHALL DEPEND UPON WHERE BREEDING PAIRS OF Gnatcatchers ARE FOUND AND UPON THE DISTANCE BETWEEN THE CONSTRUCTION NOISE SOURCE AND THE RECEIVER (BREEDING PAIRS). THE PEAK HOURLY NOISE LEVEL AND REQUIRED BERM HEIGHT TO ACHIEVE THE NECESSARY MITIGATION ARE PROVIDED IN THE ENVIRONMENTAL IMPACT REPORT, APPENDIX F, PAGE 6. NOISE BARRIER MATERIALS SHALL CONSIST OF EITHER AN EARTHEN BERM OR PLYWOOD FENCING, AND SHALL BE LOCATED AT THE EDGE OF THE LIMITS OF GRADING FOR DISTANCES NO GREATER THAN 200-300 LINEAR FEET.

- CONSTRUCTION ACTIVITIES (DRILLING, BLASTING OR GRADING) SHALL BE POSTPONED UNTIL AFTER THE BREEDING SEASON ENDS (BREEDING SEASON IS FEBRUARY 15 THROUGH AUGUST 15), OR
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LEGEND OF ABBREVIATIONS

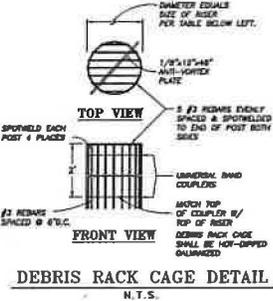
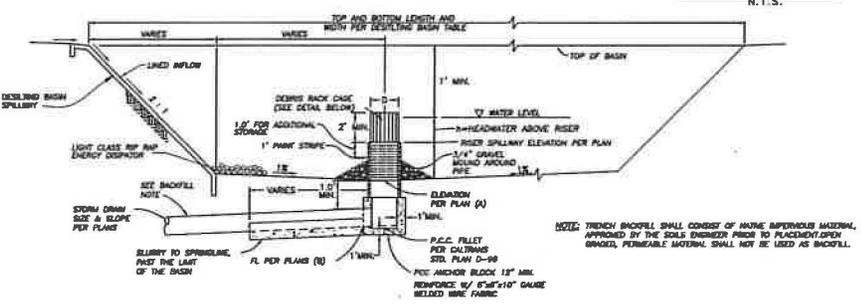
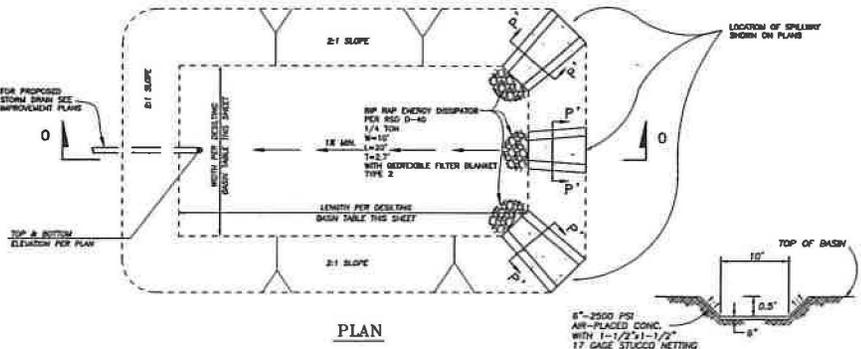
BC	TOP OF CURB	EC	END CURVE
EQ	EDGE OF CUTTER	FM	FILE NUMBER
EP	END OF PROPOSED	LT	LEFT
FC	FOOT OF CURB RETURN	RT	RIGHT
PC	POINT OF CURB RETURN	PR	PRIVATE
MP	POINT OF BEGINNING CURVE	PRV	PRIVATE
MR	RENDER MARK	RO	ROOF
LE	RIGHT ELEVATION	TOP	TOP OF GRADE
CL	DATE VALUE	W/	WITH
BVC	BEGIN VERTICAL CURVE	W/	WITH
ECV	END VERTICAL CURVE	W/	WITH
BC	BOUNDARY CURVE	W/	WITH
SC	BOUNDARY CURVE	W/	WITH
SP	SPRING	W/	WITH
HP	HIGH POINT	W/	WITH
LP	LOW POINT	W/	WITH
FL	FLOW LINE	W/	WITH
ST	STAKE	W/	WITH
PRV	PRIVATE	W/	WITH
FE	PROPOSED GRADE	W/	WITH



HUNSAKER & ASSOCIATES
SAN DIEGO, CALIFORNIA

PLANNING
ENGINEERING
SURVEYING

3575 Miraloma Street
San Diego, CA 92108
PH: 619-594-0001 FAX: 619-594-1148



MAINTENANCE

SEDIMENT SHALL BE REMOVED WHENEVER STORAGE CAPACITY AT THE BASIN STRIKE HAS BEEN ACHIEVED. SEDIMENT SHALL BE DEPOSITED IN SUCH A MANNER THAT WILL PREVENT ITS RETURN TO THE BASIN THROUGH DOWNSTREAM AREAS DURING SUBSEQUENT RAINFALL. THE DESIGNING ENGINEER HAS PRIVATE FACILITIES AND THE CITY WILL NOT BE RESPONSIBLE FOR THEIR MAINTENANCE.

CAN. RISER NOT-DIPPED FULLY COVERED GALVANIZED 12 GAUGE 2-1/2\"/>

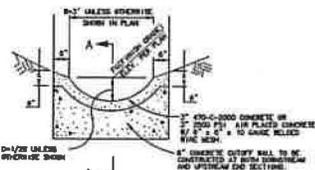
**TEMPORARY EROSION CONTROL
DESILTING BASIN DETAIL**

COUNTY APPROVED CHANGES			
NO.	DESCRIPTION	APPROVED BY	DATE

PERMITS	
N.O.I. NO.	
RECORD PERMIT NO.	
TEMPORARY MAP NO.	TM 5423 RP1.3 (2/10/13)
BENCH MARK	
DESCRIPTION	1/2\"/>
LOCATION	SOUTH SIDE GARDENS DRIVE/CHURCH AT INTERSECTION WITH CALDEN ROAD ROAD STA 57142.00
RECORD FROM	COUNTY OF SAN DIEGO
ELEVATION	848.23M
DATE	NOV 24

PRIVATE CONTRACT	
SHEET NO.	15
COUNTY OF SAN DIEGO	DEPARTMENT OF PUBLIC WORKS
MASS GRADING PLAN FOR	
COUNTY OF SAN DIEGO TRACT	
TM 5423 RP1.3	
CA COLOR INDEX	243-1787 (CCS 27)
DATE OF BIDDING	
APPROVED BY	
DATE OF PUBLIC WORKS	
APPROVED BY	
DATE OF PUBLIC WORKS	

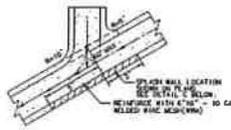
ENGINEER: HUNSAKER & ASSOC., S.D., INC.
PHONE: (858) 558 - 4500



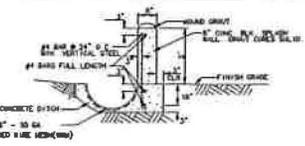
MODIFIED TYPE D TERRACE DITCH PER SDRSD D-75
NOT TO SCALE



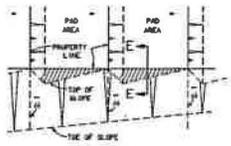
SECTION A-A
NOT TO SCALE



LINED DITCH CONFLUENCE
NOT TO SCALE



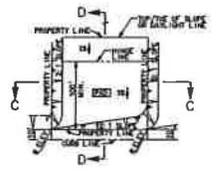
SPLASH WALL
NOT TO SCALE



TYPICAL LOT GRADING REAR OF LOTS
NOT TO SCALE

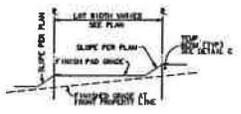


SECTION E-E
NOT TO SCALE

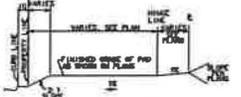


TYPICAL LOT ROUGH GRADING
NOT TO SCALE

NOTE: BOTH TOP AND FULL OR REMOTE INTERSECTIONS OF THIS DITCH SHALL BE CONSTRUCTED TO FORM A 15' x 15' x 15' EMERGENCY SPILLWAY AT AN ELEVATION OF 307.9 FT. PER SDRSD D-75.

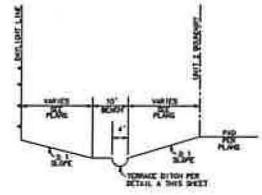


SECTION C-C
NOT TO SCALE

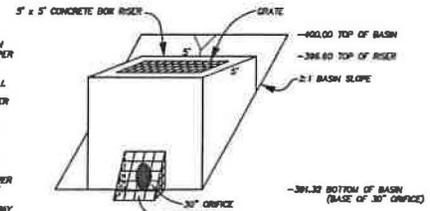


SECTION D-D
NOT TO SCALE

NOTE: FINISH LOT ELEVATION SHALL BE PER OS-16

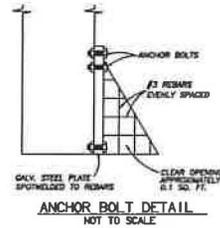


SECTION G-G
NOT TO SCALE

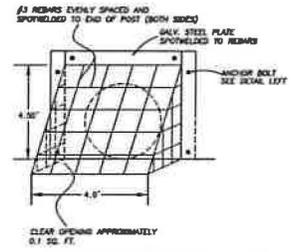


TYPE A-4 CLEANOUT
NOT TO SCALE

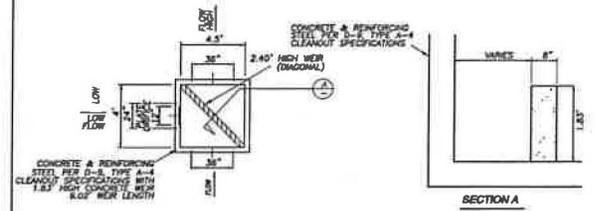
- NOTES:**
- 1) MODIFIED STORM DRAIN CLEANOUT PER SDRSD D-4, TYPE A-4
 - 2) CONCRETE WALL THICKNESS AND REINFORCEMENT PER SDRSD D-11
 - 3) WELDED STEEL GRATE FRAME PER SDRSD D-13
 - 4) DRAINAGE STRUCTURE GRATE PER SDRSD D-15
 - 5) DEBRIS RACK PER DETAIL THIS SHEET
 - 6) PROVIDE 15' EMERGENCY SPILLWAY AT AN ELEVATION OF 307.9 FT.



ANCHOR BOLT DETAIL
NOT TO SCALE



DEBRIS RACK DETAIL
NOT TO SCALE



MODIFIED TYPE A-4 CLEANOUT, Y=4.5' WITH DIVERSION WEIR
NOT TO SCALE



HUNSAKER & ASSOCIATES
FAM DESIGN INC

PLANNING: 3000 Wagon Street
ENGINEERING: San Diego, Ca 92101
SURVEYING: PH: 619-594-1144

RECORD PLAN

BY: _____ DATE: _____
R.C.E.: _____
EXPIRES: _____

COUNTY APPROVED CHANGES

NO.	DESCRIPTION	APPROVED BY	DATE

PERMITS

REG. NO. _____
SPECIAL USE PERMIT NO. _____
TEXTATIVE MAP NO. TH 5423 RPL3 (2/10/13)

BENCH MARK

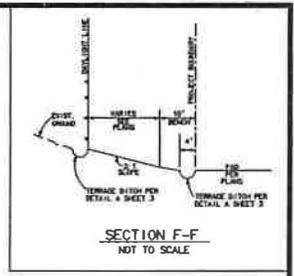
DESCRIPTION: I.C. 0245, C.A. HIGHWAY 1685 DISC
SET IN CONCRETE BELOW SURFACE
LOCATION: SW/4th GARDENS BOULEVARD AT INTERSECTION WITH GOLDEN RIDGE ROAD STA 57+82.08
RECORD FROM: COUNTY OF SAN DIEGO
ELEVATION: 848.730 DATE: 10/02/09

PRIVATE CONTRACT

SHEET 21 COUNTY OF SAN DIEGO DEPARTMENT OF PUBLIC WORKS 10
MASS GRADING PLAN FOR COUNTY OF SAN DIEGO TRACT TM 5423 RPL3
CALCOOR INDEX: 243-1197 (02/1/13)

DATE: _____
DRAWN BY: _____
CHECKED BY: _____

ENGINEER: HUNSAKER & ASSOC., S.D., INC.
PHONE: (858) 558-4500



- EASEMENT LEGEND**
- △ INDICATES STREET "A" AND A PORTION OF WELLINGTON HILL DRIVE TOGETHER WITH THE RIGHT TO EXTEND AND MAINTAIN DRAINAGE FACILITIES, EXCAVATION AND EMBANKMENT SLOPES BEYOND THE LIMITS OF THE RIGHT-OF-WAY, PER FINAL MAP.
 - △ INDICATES EXISTING EASEMENT GRANTED TO SAN DIEGO GAS & ELECTRIC COMPANY RECORDED AUGUST 30, 1933 IN BOOK 285 PAGE 114, OF OFFICIAL RECORDS.
 - △ INDICATES EXISTING EASEMENT FOR ACCESS AND UTILITIES GRANTED TO LOS COCHOS DEVELOPMENT RECORDED JUNE 2, 2004 AS DOC. NO. 2004-051442 AND AMENDED MAY 31, 2005 AS DOC. NO. 2005-045177, OF OFFICIAL RECORDS.
 - △ INDICATES EXISTING EASEMENT FOR SLOPE PURPOSES GRANTED TO LOS COCHOS DEVELOPMENT RECORDED JUNE 2, 2004 AS DOC. NO. 2004-051442 AND AMENDED MAY 31, 2005 AS DOC. NO. 2005-045177, OF OFFICIAL RECORDS.

SEE SHEET NO. 5



HUNSAKER & ASSOCIATES
LAW OFFICES, INC.

PLANNING 8707 Wiggins Street
ENGINEERING San Diego, CA 92121
SURVEYING PH: 619-591-0400 FAX: 619-591-1514

RECORD PLAN

BY: _____ DATE: _____
P.L.C.E. _____
EXPRES: _____

COUNTY APPROVED CHANGES			
NO.	DESCRIPTION	APPROVED BY	DATE

PERMITS	PRIVATE CONTRACT
H.O.L. NO. _____ MEZONNE PERMIT NO. _____ SPECIAL USE PERMIT NO. _____ TENTATIVE MAP NO. TM 5423 RPL3 (2/10/13)	SHEET 4 COUNTY OF SAN DIEGO DEPARTMENT OF PUBLIC WORKS 10 SECTIONS TRACT CHANGING PLAN FOR: COUNTY OF SAN DIEGO TRACT TM 5423 RPL3 CALIFORNIA INDEX 343-1787 (CCS 27)
BENCHMARK DESCRIPTION: 6" DIA. C.I. BENCHMARK #14452 2006 SET IN CONCRETE BELOW SURFACE LOCATION: WALTER CARRON BOULEVARD AT INTERSECTION WITH GOLDEN ROAD ROAD STA 57+82.08 RECORD FROM: COUNTY OF SAN DIEGO ELEVATION: 648.238 DATE: JULY 28	PREPARED BY: MICHAEL FARMINGTON CHECKED BY: _____ DATE: _____

ENGINEER: HUNSAKER & ASSOC., S.D., INC.
PHONE: (858) 558 - 4500

SEE SHEET NO. 4



EASEMENT LEGEND

- ▲ INDICATES STREET "A" AND A PORTION OF BOLLINGTON HILL DRIVE TOGETHER WITH THE RIGHT TO ERECT AND MAINTAIN DRAINAGE FACILITIES, EXCAVATION AND EMBANKMENT SLOPES BEYOND THE LIMITS OF THE RIGHT-OF-WAY, PER FINAL MAP.
- ▲ INDICATES EXISTING EASEMENT GRANTED TO SAN DIEGO GAS & ELECTRIC COMPANY RECORDED AUGUST 20, 1933 IN BOOK 233 PAGE 114, OF OFFICIAL RECORDS.
- ▲ INDICATES EXISTING EASEMENT FOR ACCESS AND UTILITIES GRANTED TO LOS COCHOS DEVELOPMENT RECORDED JUNE 2, 2004 AS DOC. NO. 2004-0811832 AND AMENDED MAY 31, 2005 AS DOC. NO. 2005-0811777, OF OFFICIAL RECORDS.
- ▲ INDICATES EXISTING EASEMENT FOR SLOPE REPAIRS GRANTED TO LOS COCHOS DEVELOPMENT RECORDED JUNE 2, 2004 AS DOC. NO. 2004-0811832 AND AMENDED MAY 31, 2005 AS DOC. NO. 2005-0811777, OF OFFICIAL RECORDS.

SEE SHEET NO. 6



H & A
HUNSAKER & ASSOCIATES
 SAN DIEGO, INC.

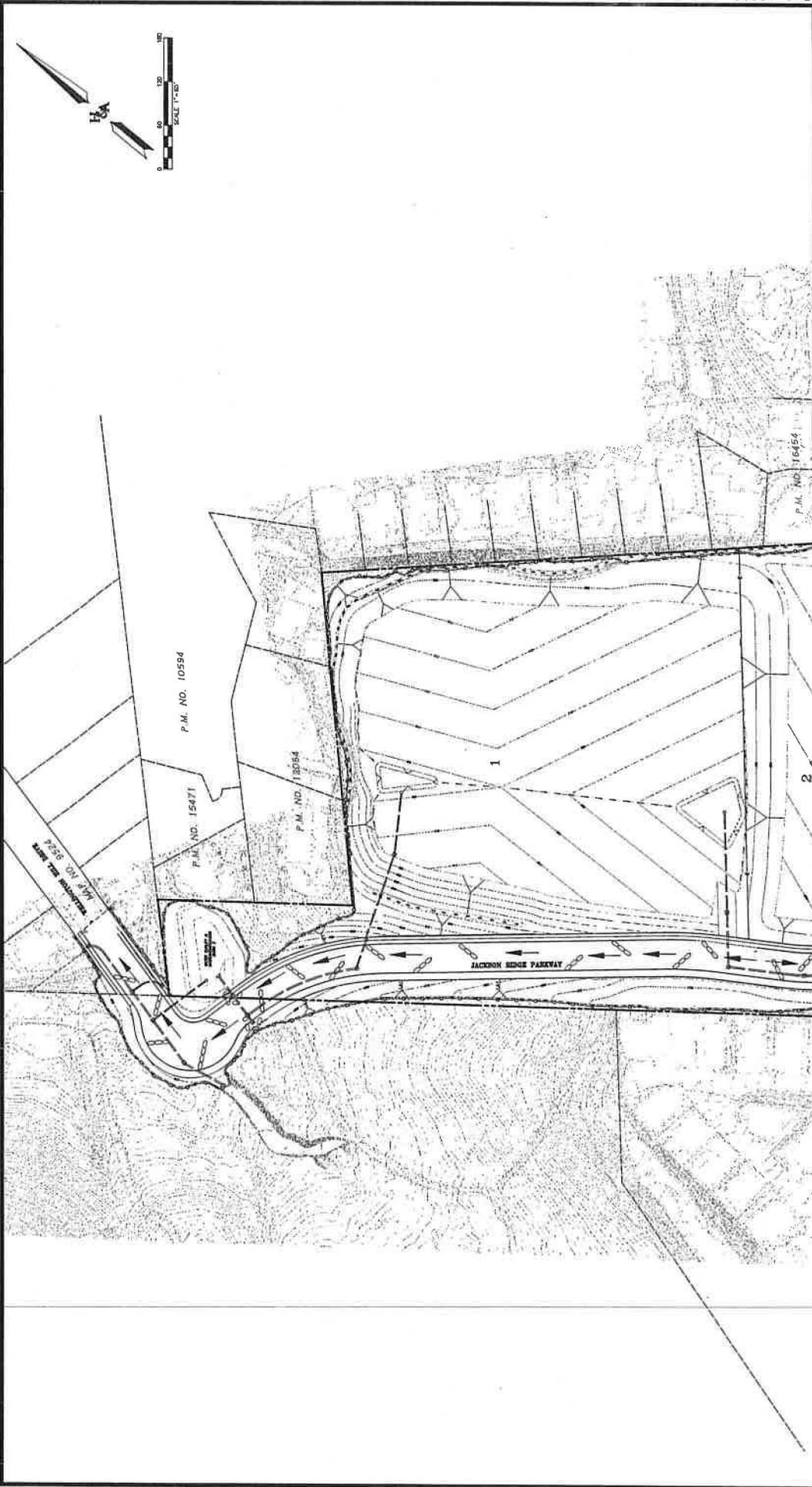
PLANNING: W.P. Vaughn, Sr.
 ENGINEERING: San Diego, CA 92101
 SURVEYING: PLS00018-0010-17040183-101

RECORD PLAN

BY: _____ DATE: _____
 R.C.E. _____
 CHECKED: _____

COUNTY APPROVED CHANGES				PERMITS		PRIVATE CONTRACT	
NO.	DESCRIPTION	APPROVED BY	DATE	R.O.L. NO.	COUNTY OF SAN DIEGO	SHEET	15
				REGULATORY PERMIT NO.	DEPARTMENT OF PUBLIC WORKS		
				SPECIAL USE PERMIT NO.		MASS GRADING PLAN FOR:	
				RELATIVE MAP NO.	TM 5423 RPL3 (2/10/12)	COUNTY OF SAN DIEGO TRACT	
						TM 5423 RPL3	
						EX-COOR INDEX: 845-1787 (205 27)	
						PROJECT OF WORK	
						EXTENDING E. BARRON "C" STREET	
						DATE	
						DATE	
						DATE	

ENGINEER: HUNSAKER & ASSOC., S.D., INC.
 PHONE: (858) 558 - 4500



PRIVATE CONTRACT

ENGINEER: HUNSAKER & ASSOC., S.D., INC.
 PHONE: (658) 558 - 4500

ENGINEER: HUNSAKER & ASSOC., S.D., INC.
 PHONE: (658) 558 - 4500

PERMITS

ROLL NO. _____
 SPECIAL USE PERMIT NO. _____
 TENTATIVE MAP NO. _____

NO. 5413 REC. 12/19/13

BENCH MARK

CONSTRUCTION SET 2014, C.E. HUNSAKER & ASSOCIATES, S.D., INC.
 SET AT CORNER OF JACKSON RIDGE PARKWAY
 LOCATION: 11154 LINDEN BLVD. AT JACKSON RIDGE PARKWAY
 RECORD TRAC: 133347, 137 JAN 2013
 ELEVATION: 668.738 DATE: 1/30/13

NO.	DESCRIPTION	APPROVED DATE

SEE SHEET NO. 9

RECORD PLAN

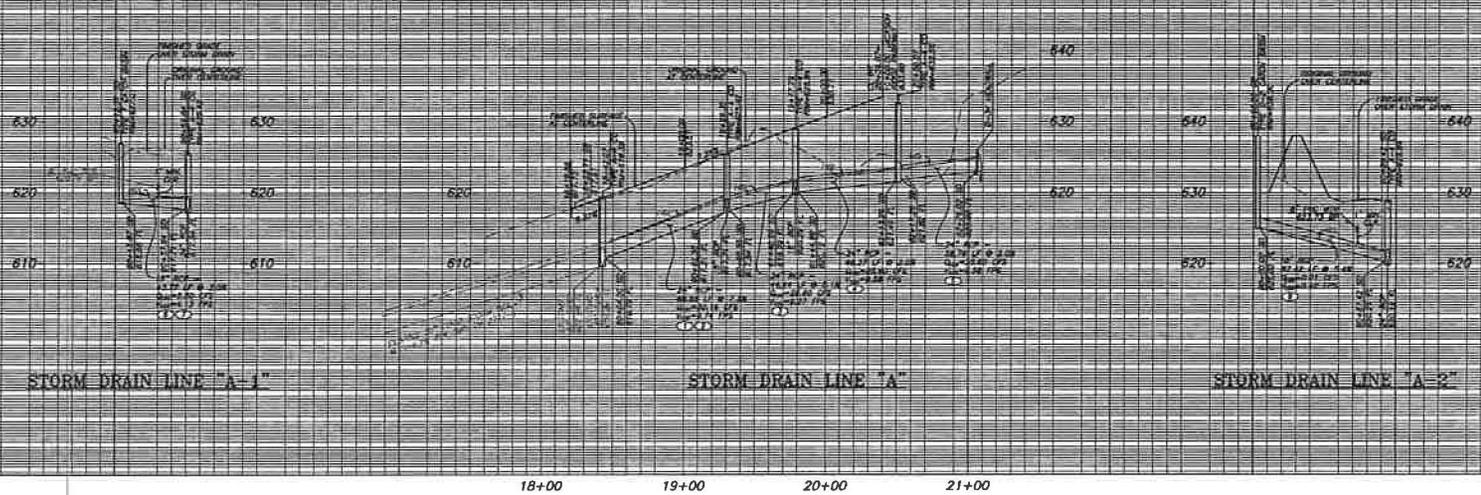
BY: _____ DATE: _____
 R.C.E. _____
 DRAWN: _____

HUNSAKER & ASSOCIATES
 SAN DIEGO, CA

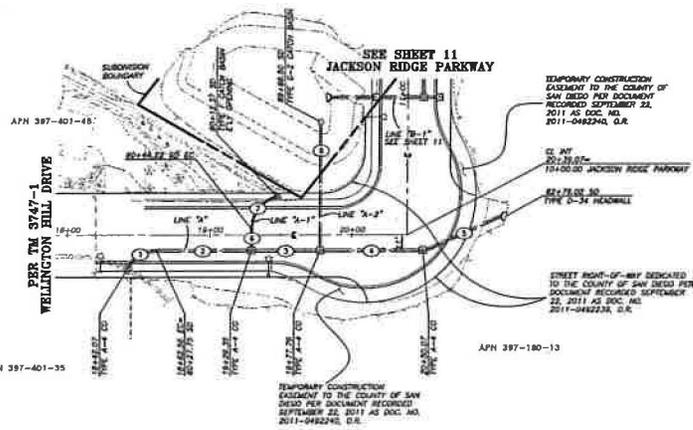
PLANNING
 ENGINEERING
 ARCHITECTURE
 SURVEYING

11154 Linden Blvd. San Diego, CA 92121
 PH: (619) 558-4500 FAX: (619) 558-4501



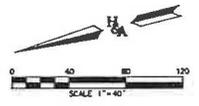


PROFILE SCALES
 HORIZ. : 1"=40'
 VERT. : 1"=8'



STORM DRAIN DATA

NO.	BEARING/Delta	RADIUS	LENGTH	REMARKS
1	R 22°21'	22.26'	23.75'	24" RCP 1350-D
2	N 14°30'11" E	64.80'	24" RCP 1350-D	
3	N 14°30'11" E	44.42'	24" RCP 1350-D	
4	R 14°30'11" E	64.27'	24" RCP 1350-D	
5	N 14°40'11" W	28.74'	24" RCP 1350-D	
6	N 72°30'11" W	13.67'	18" RCP 1350-D	
7	T 22°21'	24.00'	30.31'	18" RCP 1350-D
8	N 14°30'11" E	7.87'	18" RCP 1350-D	
9	N 14°30'11" W	67.62'	18" RCP 1350-D	



STORM DRAIN LINE "A"
WELLINGTON HILL DRIVE
 (SEE SHEET NO. 4 FOR GRADING)



RECORD PLAN

BY: _____ DATE: _____
 R.C.E. _____
 D.P.W.S. _____

COUNTY APPROVED CHANGES

NO.	DESCRIPTION	APPROVED BY	DATE

PERMITS

NO.A. NO. _____
 REGIONAL PERMIT NO. _____
 SPECIAL USE PERMIT NO. _____
 TENTATIVE MAP NO. _____ TM 5423 RPL3 (2/10/12)

BENCH MARK

DESCRIPTION: EC 0155 CAL MONUMENT BRASS DISC
 SET IN CONCRETE BELOW SURFACE
 LOCATION: WINTER GARDENS BOULEVARD AT INTERSECTION WITH GOLDEN RIDGE ROAD STA 57+82.08
 RECORD FROM: COUNTY OF SAN DIEGO
 ELEVATION: 648.738 DATE: MEVD 29

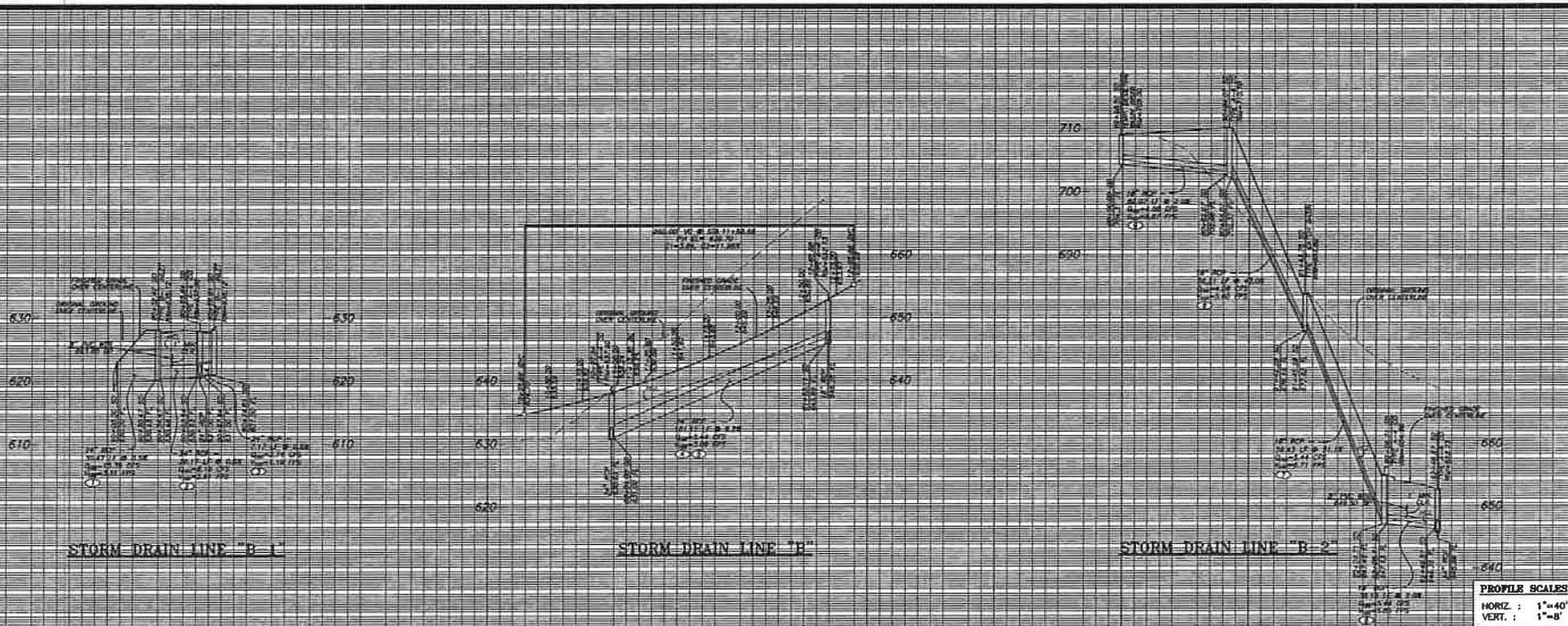
PRIVATE CONTRACT

SHEET 10 OF 19
 COUNTY OF SAN DIEGO DEPARTMENT OF PUBLIC WORKS
 STORM DRAIN PLAN FOR:
COUNTY OF SAN DIEGO TRACT TM 5423 RPL3
 CALIFORNIA COORDINATE INDEX: 243-1797 (CCS 27)

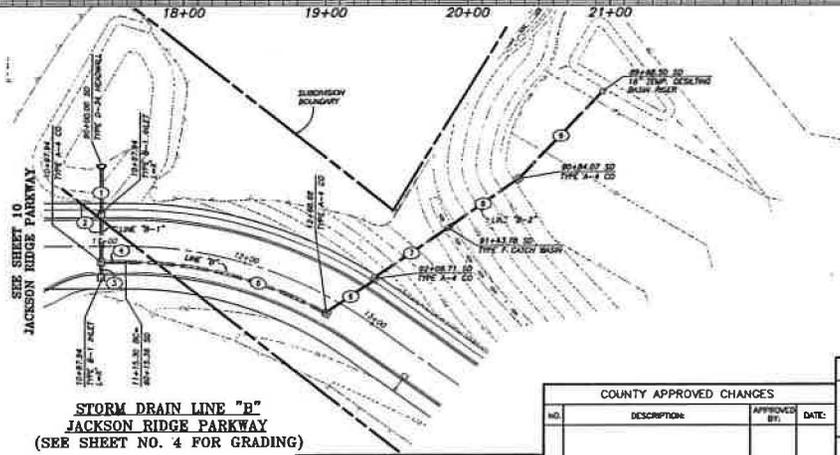
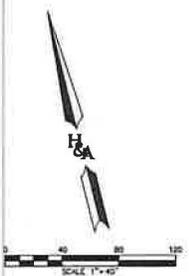
DESIGNED BY: HUNSAKER & ASSOCIATES
 DRAWN BY: _____
 CHECKED BY: _____



ENGINEER: HUNSAKER & ASSOC., S.D., INC.
 PHONE: (858) 558-4500



PROFILE SCALES
 HORIZ. : 1"=40'
 VERT. : 1"=8'



STORM DRAIN LINE "B"
JACKSON RIDGE PARKWAY
 (SEE SHEET NO. 4 FOR GRADING)

STORM DRAIN DATA

BEARING/Delta	RADIUS	LENGTH	REMARKS
1. N 14°01'11" E	30.00'	24'	24" RCP 1500-0*
2. N 14°01'11" E	28.17'	24'	24" RCP 1500-0*
3. N 14°01'11" E	7.17'	24'	24" RCP 1500-0*
4. N 70°09'41" E	18.36'	24'	24" RCP 1500-0*
5. 20°47'46"	288.00'	148.75'	24" RCP 1500-0*
6. N 20°31'17" E	26.14'	18'	RCP 1500-0
7. N 70°09'41" E	18.36'	18'	RCP 1500-0
8. N 69°20'18" E	18.37'	18'	RCP 1500-0
9. N 57°24'35" E	82.00'	18'	RCP 1500-0

* USE UNDER SIGHT JOINTS

RECORD PLAN

BY: _____ DATE: _____
 R.C.C. _____
 EXPIRES: _____

COUNTY APPROVED CHANGES

NO.	DESCRIPTION	APPROVED BY	DATE

PERMITS

NO.I. NO. _____
 REGIONAL PERMIT NO. _____
 SPECIAL USE PERMIT NO. _____
 TENTATIVE MAP NO. **TM 5423 RPL3 (2/10/12)**

BENCH MARK

DESCRIPTION: 60 DIA. C.I. MONUMENT BRASS DISC
 SET IN CONCRETE BELOW SURFACE
 LOCATION: WINTER GARDENS BOULEVARD AT INTERSECTION
 WITH GOLDEN RIDGE ROAD STA. 57+82.06
 RECORD FROM: COUNTY OF SAN DIEGO
 ELEVATION: 848.738 DATE: 06/02/09

PRIVATE CONTRACT

NO. **11** COUNTY OF SAN DIEGO DEPARTMENT OF PUBLIC WORKS 15 DOWNS

STORM DRAIN PLAN FOR
COUNTY OF SAN DIEGO TRACT
TM 5423 RPL3
 CALIFORNIA COORDINATE SYSTEM 243-1797 (CODE 27)

DATE: _____



ENGINEER: HUNSAKER & ASSOC., S.D., INC.
 PHONE: (858) 558 - 4500

EXHIBIT H

1 John J. Lormon (Bar No. 74720)
Walter E. Rusinek (Bar No. 148438)
2 PROCOPIO, CORY, HARGREAVES
& SAVITCH LLP
3 525 B Street, Suite 2200
San Diego, California 92101
4 Telephone: 619-238-1900
Facsimile: 619-235-0398

5 Attorneys for KB HOME
6
7

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

10
11 IN THE MATTER OF:
12 COMPLAINT FOR ADMINISTRATIVE CIVIL
LIABILITY NO. R9-2016-0092 AGAINST
13 KB HOME, SETTLER'S POINT PROJECT,
LAKESIDE, CALIFORNIA
14
15

**DECLARATION OF KURT
BAUSBACK**

16 I, Kurt Bausback, declare:

17 1. I currently am Director of Forward Planning for KB Home, Inc. ("KB"). As part of
18 my job, I oversaw the development of the Settler's Point residential project ("Project") on property
19 in Lakeside, California ("Property").

20 2. This declaration is submitted in support of KB's opposition to the San Diego
21 Regional Water Quality Control Board's Complaint for Administrative Civil Liability ("ACL").
22 All the facts testified to below are within my personal knowledge except those matters stated upon
23 information in belief, and with respect to those matters I believe them to be true. If called as a
24 witness, I could and would competently testify to these matters.

25 3. I have over 27 years of experience in the construction industry in California. I have
26 been employed by KB for a total of 11 years. During my career, I have worked on over 100
27 residential developments throughout southern California.
28

1 4. As a homebuilder, KB generally seeks to delay closing on a property until a project
2 has been fully entitled so that construction of residences can begin as soon as possible. That limits
3 development risks and carrying costs, and makes it important to ensure that all entitlements have
4 been obtained prior to the purchase.

5 5. Prior to purchasing the Property, I met with the County of San Diego staff to
6 confirm that the residential Project had all of the required entitlements that would allow KB to
7 begin grading the Property. These entitlements included an approved Tentative Map, all the
8 required environmental reviews and approvals under CEQA and other laws, all environmental
9 agency permits, an approved grading plan and grading permit (which included storm drain
10 improvements) and that the required environmental mitigation credits had been provided. The
11 County confirmed that all required approvals had been obtained for the Project and that KB could
12 be substituted as the permittee on the approved grading permit after it acquired the Property.

13 6. Because environmental permitting is a complicated process, KB's standard
14 operating procedure is to hire a qualified, third-party environmental consultant to confirm that all
15 required permits and approvals have been obtained for a project. Because I am not an expert on
16 environmental regulatory issues, that third-party expert provides me with a due-diligence
17 assessment of a potential project.

18 7. For this Project, KB retained Mr. Barry Jones and Helix Environmental Planning to
19 conduct a due-diligence assessment of the property and the Project. KB has used Mr. Jones to
20 conduct such reviews of environmental issues for potential KB projects for many years, and KB
21 has relied on his experience and judgment in determining whether to pursue various projects due to
22 potential environmental issues he has identified.

23 8. KB pursued the purchase of the Project and the Property based on the seller's
24 representations that all entitlements had been obtained, and on KB's discussions with the County.
25 To confirm KB's that the Project had all approvals needed, Mr. Jones and Helix conducted further
26 due diligence to ensure that no additional environmental approvals were required. The due-
27 diligence letter from Mr. Jones to me dated May 9, 2014, confirmed that no additional approvals
28 were required and that there were no jurisdictional waters that would be affected by the Project.

EXHIBIT I

1 John J. Lormon (Bar No. 74720)
Walter E. Rusinek (Bar No. 148438)
2 PROCOPIO, CORY, HARGREAVES
& SAVITCH LLP
3 525 B Street, Suite 2200
San Diego, California 92101
4 Telephone: 619-238-1900
Facsimile: 619-235-0398

5 Attorneys for KB HOME
6
7

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

10
11 IN THE MATTER OF:

DECLARATION OF BARRY JONES

12 COMPLAINT FOR ADMINISTRATIVE CIVIL
LIABILITY NO. R9-2016-0092 AGAINST
13 KB HOME, SETTLER'S POINT PROJECT,
LAKESIDE, CALIFORNIA
14
15

16 I, Barry Jones, declare:

17 1. I currently am the principal environmental consultant for Sweetwater Environmental
18 Biologists, Inc. ("Sweetwater") located in San Diego County, California. Sweetwater provided
19 environmental consulting services to HELIX Environmental Planning, Inc. (HELIX) related to KB
20 Home, Inc.'s ("KB") Settler's Point residential development project ("Project").

21 2. This declaration is submitted in support of KB's opposition to the San Diego
22 Regional Water Quality Control Board's Complaint for Administrative Civil Liability ("ACL").
23 All the facts testified to below are within my personal knowledge except those matters stated upon
24 information in belief, and with respect to those matters I believe them to be true. If called as a
25 witness, I could and would competently testify to these matters.

26 3. I have more than 30 years of environmental consulting experience in southern
27 California. For the last 20 years I have been a senior biologist and project manager overseeing a
28 variety of projects, including field investigations, preparation of biological technical reports for a

1 wide range of projects under the California Environmental Quality Act (“CEQA”) and National
2 Environmental Policy Act (“NEPA”), and the processing of permits through various agencies.
3 This work has involved both public and private projects and a range of various sizes of projects
4 from small projects to master plans in excess of 25,000 acres.

5 4. My work has included interaction with local, state, and federal officials in relation
6 to permitting under Sections 401 and 404 of the Clean Water Act, Section 1600 of the California
7 Fish and Game Code, and the Federal Endangered Species Act and its California counterpart. I
8 have processed more than 50 projects through the Section 404 permit and Section 401 water
9 quality certification processes, and I have developed and implemented numerous wetland
10 mitigation plans. I also have successfully created mitigation and conservation banks throughout
11 southern California.

12 5. I became involved with the Project in April of 2014 when HELIX was asked by KB
13 to assess whether the previous owners of the Settler’s Point property (“Property”) had obtained the
14 needed environmental approvals to construct the Project and whether the mitigation for the impacts
15 of the Project identified in the CEQA documents prepared by the County of San Diego (“County”)
16 had been satisfied. That assessment was to be taken as part of KB’s due diligence prior to
17 purchasing the Property.

18 6. As part of the due-diligence assessment, I reviewed documents prepared during the
19 CEQA and County permit approval processes as well as previous reports assessing the biological
20 resources on the Property and potential Project impacts to those resources. Neither the previous
21 biological assessments prepared by the seller’s biologist, nor the Mitigated Negative Declaration
22 prepared by the County identified jurisdictional waters of the United States (“WUS”) or waters of
23 the State (“WOS”) on the Property that would be impacted by the construction of the Project. As
24 part of this process, the site was inspected by Jasmine Bakker of HELIX, who is a biologist
25 qualified to make these determinations. Her post-inspection report confirmed that there were no
26 jurisdictional waters of the United States (“WUS”) or waters of the State (“WOS”) on the Property
27 that would be impacted by the construction of the Project.

28

1 7. Based on this review, I wrote to Mr. Kurt Bausback of KB a letter dated May 9, 2014
2 with these findings.

3 8. I was not involved in the neighboring Brightwater Ranch project and was unaware of
4 any studies that were performed on that project.

5 9. On July 1, 2015, I attended a meeting at the Property with representatives of the
6 Regional Board, the Army Corps of Engineers ("Army Corps"), the County, Helix and KB to
7 discuss the construction of the road knuckle.

8 10. During that meeting, the history of the Project was discussed, including KB's due
9 diligence review of the property prior to the purchase of the Project, the relationship to the
10 Brightwater Project (including the HELIX delineation), as well as next steps going forward.

11 11. On August 13, 2015, the Regional Board issued a notice of violation ("NOV") to
12 KB.

13 12. In an effort to cooperate with Regional Board staff, I responded to a request from staff
14 asking the depth of the material placed to construct the road knuckle. I told them that the material
15 was approximately 12 feet deep. Based on that estimate of the depth of the material used in the
16 overall construction of the road knuckle, the Prosecution Team has alleged in the ACL and in the
17 Technical Analysis accompanying the ACL ("TA") that KB placed 350 cubic yards (or 9,450 cubic
18 feet) of fill into the ephemeral drainage.

19 13. The Prosecution Team converted the 350 cubic yards of solid material into 70,691
20 gallons by multiplying 350 cubic yards times the conversion factor of 202 liquid gallons per cubic
21 yard. That conversion was improper because it converts a dry material using a conversion factor
22 applicable only to liquids.

23 14. The Prosecution Team's attempt to convert solid material into liquid gallons is
24 improper. The amount of construction materials such as those used to build the road knuckle is
25 never referred to in terms of "gallons." People in the construction or other industries that use
26 such materials do not refer to such solid materials in terms of "gallons" and neither do regulatory
27 agency personnel. The term "gallons" is only used to refer to liquid volumes.

28

1 15. Based on my experience with and understanding of the rules implementing the Clean
2 Water Act, the Army Corps only regulates activities in a WUS under Section 404 of the Clean
3 Water Act if those activities impact the area below the ordinary high water mark ("OHWM"). The
4 area below the OHWM is the only area which is subject to jurisdiction under the Clean Water Act.

5 16. Based on my review of photographs of the ephemeral drainage taken by HELIX in
6 November of 2014 as part of its delineation work on the Bridgewater Project, before the road
7 knuckle was constructed, as well as my visits to the site after the fill had already occurred, I
8 calculated that the OHWM of the ephemeral drainage was approximately 1 to 3 feet deep. I
9 consider that range to be a conservative estimate that likely overestimates the actual depth of the
10 high water flow during an "ordinary" storm event.

11 17. I provided my calculation of the OHWM of the ephemeral drainage to the Prosecution
12 Team and Regional Board staff.

13 18. Using an OHWM of between 1-3 feet as the depth depending on the location within the
14 channel, and multiplying that depth times the area of 0.018 acres impacted by construction of the
15 road knuckle, the total amount of the area below the OHWM was approximately 1,297 cubic feet.
16 Using the Regional Board's own faulty method of converting that amount of cubic feet into liquid
17 gallons, the amount equals only 9,702 gallons.

18 19. In my experience, a PJD is often used by a project proponent as a way to obtain a quick
19 agreement with the Army Corps on the scope of WUS on a site. Such an agreement with the Army
20 Corps can expedite the permitting process for a project.

21 20. In my experience, if there is a disagreement over the amount of WUS that may be
22 impacted, the Army Corps can prepare a formal approved jurisdictional determination to inform the
23 project proponent if a Section 404 permit is required. Unlike a PJD, an approved jurisdictional
24 determination can be appealed administratively and in court.

25 21. In my experience, a PJD often is used if it is possible that a proposed project will be
26 eligible for a nationwide permit ("NWP"). The NWP program is a general permit program
27 developed by the Army Corps to expedite the permitting process for proposed projects that the
28 Army Corps has determined pose little harm to the environment on both an individual and a

1 cumulative basis. A NWP is a faster and less-costly permit to obtain than an individual Section
2 404 permit.

3 22. Based on the 0.018 acre and 278 linear feet of the ephemeral drainage in which the
4 road knuckle was installed, the construction would have been eligible for NWP 29. NWP 29
5 authorizes the fill of up to 0.5 acre for residential developments and ancillary facilities such as
6 roads. The allowed 0.5 acres is nearly 30 times more area than the 0.018 acres at issue in this
7 matter. The 278 linear feet of the ephemeral drainage also is less than the 300 linear feet allowed
8 under NWP 29.

9 23. Because the ephemeral drainage is not a traditional navigable water (TNW), a
10 relatively permanent water (RPW), or a wetland, the ephemeral drainage would be considered a
11 WUS only if the Army Corps presents evidence showing that the ephemeral drainage has a
12 "significant nexus" to a TNW.

13 24. Based on my experience, the process of proving that an ephemeral drainage has a
14 significant nexus to a TNW requires field work and other analyses of various biological, chemical
15 and physical factors of the ephemeral drainage. I am not aware that any such work has been
16 completed by the Army Corps or any other agency concerning the ephemeral drainage.

17 25. Based on my experience with the Regional Board concerning similar construction
18 activities, the amount of mitigation that would have been required to obtain a Section 401 water
19 quality certification would have been approximately 0.036-0.054 acres.

20 26. I also have reviewed the beneficial uses that have been applied to the ephemeral
21 drainage in the Basin Plan through application of the tributary rule. Based on my knowledge of the
22 ephemeral drainage and my experience with similar water courses, it is my opinion that the
23 drainage cannot physically support the beneficial uses identified as IND, REC 1, REC 2, or
24 WARM because there is not sufficient water flow in the ephemeral drainage to support any of these
25 uses. It is also my opinion that there is not sufficient water in the ephemeral drainage to support
26 the WILD designation.

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I declare under penalty of perjury under the laws of California that the foregoing is true and correct. Executed this 5th day of July, 2016, in San Diego, California.

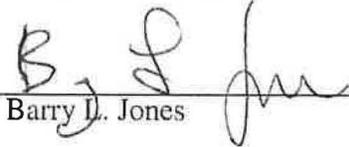

Barry L. Jones

EXHIBIT J

HELIX Environmental Planning, Inc.
7578 El Cajon Boulevard
Suite 200
La Mesa, CA 91942
619.462.1515 tel
619.462.0552 fax
www.helixepi.com



May 9, 2014

KAB-199

Mr. Kurt Bausback
KB Home
36310 Inland Valley Drive
Wildomar, CA 92595

RE: Due Diligence Assessment for the Settler's Point Project, Community of Lakeside,
County of San Diego, California.

Dear Mr. Bausback:

HELIX Environmental Planning, Inc. (HELIX) conducted a Due Diligence Assessment of the Settler's Point project site located in the community of Lakeside in the unincorporated portion of the County of San Diego, California.

This assessment is based on a site reconnaissance on May 5, 2014 by HELIX Biologist Jasmine Bakker, and a review of project files provided by KB Home and regional planning documents. 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.

Files reviewed include:

- CEQA Initial Study for Settler's Point; TM 3100 5423; ER 3910 05-14-009 (County 2012a)
- Mitigated Negative Declaration (MND) for Settler's Point; TM 3100 5423; ER 3910 05-14-009 (County 2012b)
- Settler's Point TM 5423, R05-004, S05-064, ER 05-14-009 Updated Project Description (REC Consultants, Inc. 2009)
- Habitat Map – Settler's Point – TM5423 (REC Consultants, Inc. 2013)

PROJECT LOCATION

The project site is located in the unincorporated community of Lakeside in San Diego County, in Sections 29 and 30, Township 15 South, Range 1 East of the El Cajon USGS 7.5-minute topographic quadrangle. Specifically, the project site is located northwest of Interstate (I-) 8 and I-8 Business Loop, southwest of Los Coches Road, and east of the Terrace View trailer park and adjacent undeveloped property.

EXISTING CONDITIONS

Ms. Bakker reviewed the vegetation mapping provided (REC 2009, 2013) based on work done in 2008 to determine if any significant changes in vegetation have occurred since that vegetation mapping effort. However, a complete revision to the vegetation mapping of the site was outside the scope of this due diligence assessment. The site primarily consists of an unpaved road leading from the southeastern perimeter to a previously developed hilltop (single-family residence was demolished in 2007) that gently slopes towards the southeast and northwest. Vegetation communities present comprise disturbed Diegan coastal sage scrub, non-native grassland, disturbed habitat, and developed land.

Non-native grassland characterizes most of the site, occurring mostly southeast of the developed hilltop. Non-native grassland is a sensitive habitat requiring mitigation and is categorized as a County MSCP Tier III habitat.

While the Diegan coastal sage scrub (DCSS) mapped previously on site in the northwestern portion of the property on the other side of the hill has already been cleared, a small finger of the site previously mapped as non-native grassland and/or disturbed habitat is recovering to what we would map as DCSS. This area is very disturbed and comprises mostly California buckwheat (*Eriogonum fasciculatum*) and broom baccharis (*Baccharis sarothroides*), with an occasional California sagebrush (*Artemisia californica*). This area totals approximately 1.3 acre. DCSS is a sensitive habitat requiring mitigation and is categorized as a County MSCP Tier II habitat. The project was previously approved with these areas not being mapped as DCSS, and the updated mapping completed in 2013 by the project biologist, REC, did not modify this area to DCSS. We are assuming that the County is still considering these areas as non-native grassland and disturbed areas.

Disturbed habitat mapped previously is located at either corner along the southern perimeter that border I-8 Business Loop. The soils in this area have been heavily disturbed, contain a lot of gravel or are devoid of vegetation, and/or are sparsely vegetated with non-native plant species. The total area of disturbed habitat in these locations has decreased due to the emergence of native shrubs and non-native grasses in recent years; however, a portion of non-native grassland along the eastern perimeter appears to have been impacted (degraded to disturbed habitat) by an adjacent residence.

Developed land comprises the previously demolished residence currently composed of ornamental vegetation, debris (including dead plants), and a stone retaining wall. It also includes the unpaved road leading from the southeastern perimeter to the demolished residence, and has been expanded from what was mapped previously to include an adjacent cleared area along the western perimeter and the row of dead trees bordering the road that have been cut down and left in place.

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.

No populations of sensitive plant species were identified on site during this assessment, nor during earlier surveys (REC 2009). The potential for sensitive plant species is low given the site's disturbed nature and past negative survey results.

No sensitive animal species were observed during this assessment, although a Cooper's hawk was observed on site in 2006 (REC 2009). There is very little potential for any sensitive animal species that would constrain development to occur in the project site because of the lack of suitable native habitat and amount of disturbance.

PROJECT CONDITIONS AND MITIGATION REQUIREMENTS

Potential biological constraints for development of the site include the presence of sensitive upland habitat (i.e., coastal sage scrub and non-native grassland) and grading restrictions associated with the Migratory Bird Treaty Act (MBTA). Both are briefly described below.

The project's MND listed mitigation measures for impacts to biological resources that affect the timing of construction activity and identify mitigation of habitat. Condition B-1 states:

“Restrict all brushing clearing and/or grading such that none will be allowed within 300 feet of coastal sage scrub habitat during the breeding season of the California gnatcatcher. This is defined as occurring between March 1 and August 15.”

The sage scrub in the northwestern corner of the site and immediately offsite has been cleared but there is sage scrub immediately adjacent to the cleared habitat. The County will likely restrict grading on site because of the sage scrub habitat that occurs immediately offsite. The sage scrub that is developing in the southwestern portion of the site was not previously mapped as part of project approvals and because of its small size and disturbed nature should be able to be cleared without further review.

Letter Report to Mr. Kurt Bausback
May 9, 2014

Page 4 of 4

Mitigation for impacts to Diegan coastal sage scrub is addressed in Condition B-2 which requires purchase of 3.24 acres of Tier I or Tier II habitat either at a CDFW approved mitigation bank or providing conservation in a Biological Resource Core Area. Condition B-3 requires purchase of 10.02 acres of Tier III habitat either at a CDFW approved mitigation bank or providing conservation in a Biological Resource Core Area.

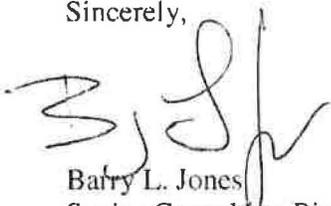
A total of 3.24 acres of Tier I habitat and 10.02 acres of Tier III habitat were purchased on February 6, 2014 from the Crestridge Mitigation Bank. This fulfills Conditions B-2 and B-3.

In addition to Condition B1, potential direct impacts to nesting bird species are not allowed under the Migratory Bird Treaty Act. Brushing and tree removal conducted outside of the breeding season of most bird species (general breeding season, including for raptors, is January 15 to August 31) would avoid these impacts.

The only potential constraint to development would be the requirement to avoid grading within 300 feet of Diegan coastal sage scrub between March 1 and August 15. Although the condition is not clear, I am assuming this includes habitat that occurs offsite to the northwest. The area mapped as non-native grassland and disturbed habitat that is developing into DCSS would only be a constraint if the County were to determine that site conditions had changed from what was reviewed and approved in 2012.

Please let me know if you have any questions.

Sincerely,



Barry L. Jones
Senior Consulting Biologist

EXHIBIT K

Ocampo, Hazel

Subject: FW: KB Home Documents (NOV No. R9-2015-0120)
Attachments: Receipt Notification: DOCS-#2332983-v1-KB_Home_Documents.PDF RE: KB Home Documents (NOV No. R9-2015-0120)

From: Means, Christopher@Waterboards [<mailto:Christopher.Means@waterboards.ca.gov>]
Sent: Friday, September 11, 2015 10:40 AM
To: Ocampo, Hazel; Clemente, Chiara@Waterboards
Cc: Lormon, John J.
Subject: RE: KB Home Documents (NOV No. R9-2015-0120)

Thank you Hazel.

Regards,

Chris

From: Hazel.Ocampo@procopio.com [Hazel.Ocampo@procopio.com]
Sent: Friday, September 11, 2015 10:39 AM
To: Means, Christopher@Waterboards; Clemente, Chiara@Waterboards
Cc: john.lormon@procopio.com
Subject: KB Home Documents (NOV No. R9-2015-0120)

You have received 1 secure file from Hazel.Ocampo@procopio.com.
Use the secure link below to download.

Dear Chris and Chiara,

The information to assist with your investigation of KB Home is available to download at the link below:

- (1) The field notes and inspection report from the Helix Environmental Planning employee (Ms. Jasmine Baker) related to the site inspection in the spring of 2014;
- (2) Documentation that was provided to Ms. Bakker prior to the inspection of the site regarding the scope of the project; and
- (3) Contracts and correspondence (including emails) between Pulte Homes and KB Home related to the easement and grading/construction of the "knuckle".

Please don't hesitate to contact John Lormon or me should you have any questions or comments.

All the best,

Hazel

Secure File Downloads:

Available until: **09 March 2016**

Click link to download:

[DOCS-#2332983-v1-KB Home Documents.PDF](#)
79.10 MB, Fingerprint: 60560a327013e020011c5942ef164514 ([What is this?](#))

Ocampo, Hazel

From: naomi.kaplowitz@waterboards.ca.gov
Sent: Thursday, September 10, 2015 10:10 AM
To: Ocampo, Hazel
Subject: Receipt Notification: DOCS-#2332983-v1-KB_Home_Documents.PDF RE: KB Home Documents (NOV No. R9-2015-0120)

Your files have been received by naomi.kaplowitz@waterboards.ca.gov
10 September 2015 10:02:03

Return Receipt:
File: DOCS-#2332983-v1-KB_Home_Documents.PDF
File size: 79.10 MB
Downloaded at: 10 September 2015 10:02:03
Recipient: naomi.kaplowitz@waterboards.ca.gov

Secured by [Accellion](#)

mailgw01.procopio.com made the following annotations

Thu Sep 10 2015 10:10:08

This is an email from Procopio, Cory, Hargreaves & Savitch LLP, Attorneys at Law. This email and any attachments hereto may contain information that is confidential and/or protected by the attorney-client privilege and attorney work product doctrine. This email is not intended for transmission to, or receipt by, any unauthorized persons. Inadvertent disclosure of the contents of this email or its attachments to unintended recipients is not intended to and does not constitute a waiver of attorney-client privilege or attorney work product protections. If you have received this email in error, immediately notify the sender of the erroneous receipt and destroy this email, any attachments, and all copies of same, either electronic or printed. Any disclosure, copying, distribution, or use of the contents or information received in error is strictly prohibited.

mobile: (619) 347-4525

Please consider the environment before printing this e-mail. P

On Aug 26, 2015, at 11:05 AM, Kaplowitz, Naomi@Waterboards
<Naomi.Kaplowitz@waterboards.ca.gov<mailto:Naomi.Kaplowitz@waterboards.ca.gov>> wrote:

Mr. Lorman,

At our August 19, 2015 meeting regarding the Settler's Point KB Home matter, we discussed that the Regional Board would likely request certain information to assist with completing our investigation. We are writing in that regard to formally request the following documents:

- (1) The field notes and inspection report from the Helix Environmental Planning employee (Ms. Jasmine Baker) related to the site inspection in the spring of 2014;
- (2) Any documentation that was provided to Ms. Baker prior to the inspection of the site regarding the scope of the project; and
- (3) All contracts and correspondence (including emails) between Pulte Homes and KB Home related to the easement and grading/construction of the "knuckle".

Please provide us with the items listed above by September 15, 2015. We appreciate your attention to this matter and look forward to our future discussions.

Sincerely,
Naomi Kaplowitz, Staff Attorney
Office of Enforcement
State Water Resources Control Board
1001 I Street, P.O. Box 100
Sacramento, CA 95812
(916) 341-5677

mailgw01.procopio.com made the following annotations

Thu Aug 27 2015 09:52:10

This is an email from Procopio, Cory, Hargreaves & Savitch LLP, Attorneys at Law. This email and any attachments hereto may contain information that is confidential and/or protected by the attorney-client privilege and attorney work product doctrine. This email is not intended for transmission to, or receipt by, any unauthorized persons. Inadvertent disclosure of the contents of this email or its attachments to unintended recipients is not intended to and does not constitute a waiver of attorney-client privilege or attorney work product protections. If you have received this email in error, immediately notify the sender of the erroneous receipt and destroy this email, any attachments, and all copies of same,

From: "Barry Jones" <BarryJ@helixepi.com>
To: "Bausback, Kurt" <kbausback@kbhome.com>, "Lormon, John J." <john.lormon@procopio.com>
Subject: **RE: Request for Information Regarding KB Homes**

Hi Kurt and John - here is the information they requested. It includes the aerial photograph that Jasmine used for her fieldwork, her fieldnotes, and the report.

-----Original Message-----

From: Bausback, Kurt [<mailto:kbausback@kbhome.com>]
Sent: Thursday, August 27, 2015 10:05 AM
To: Barry Jones
Subject: FW: Request for Information Regarding KB Homes

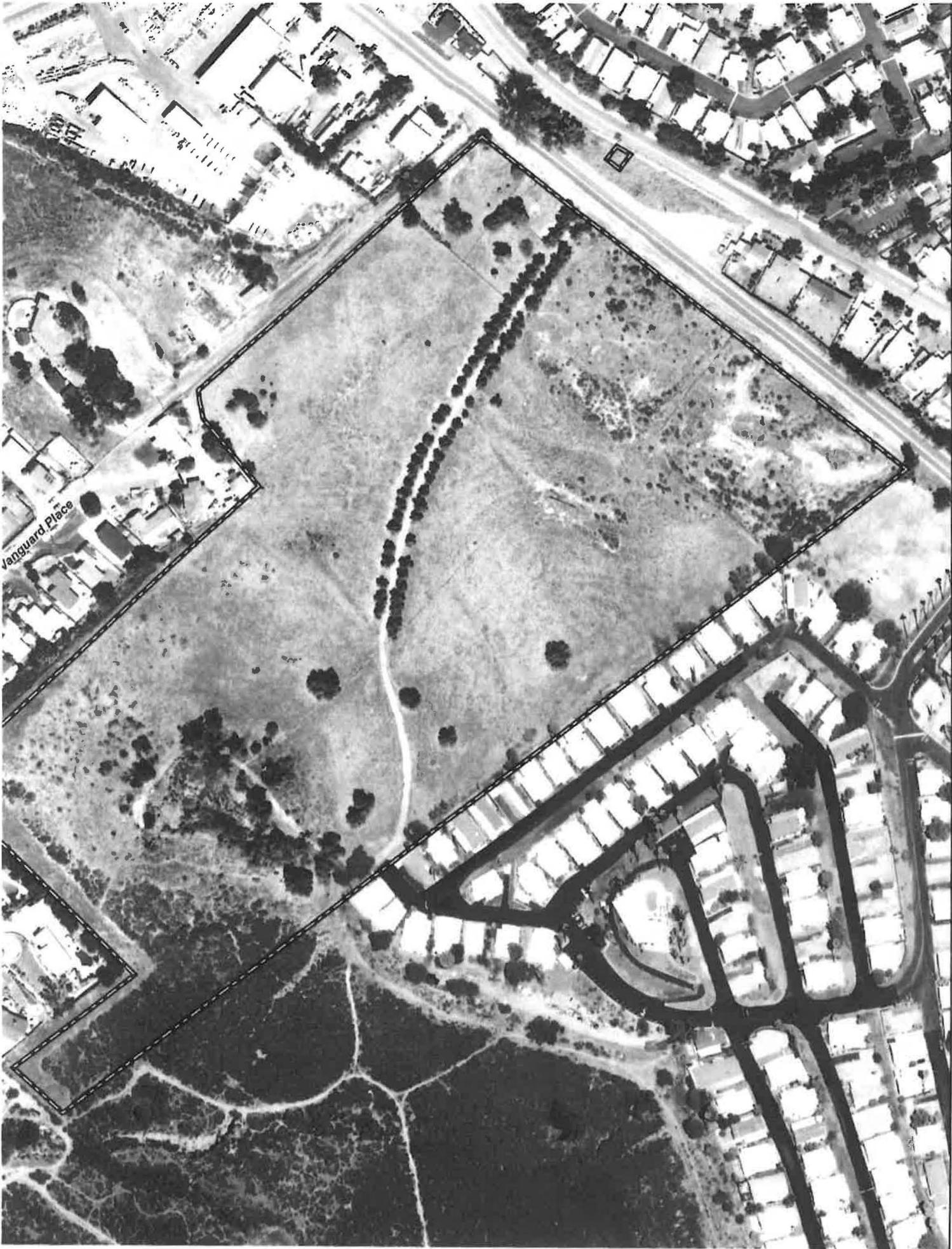
Barry,

See email below from the water board. They want us to provide them with additional information.

Please give me a call to discuss

Kurt Bausback
Director, Forward Planning
KB HOME Coastal Inc.
9915 Mira Mesa Blvd, Suite 100
San Diego, Ca 92131
Office: 858.877.4262
cell: 760.473.0609

888-KB-HOMES kbhome.com
Consider the environment before printing this email.



KAB-199
Sexton's Point

5 May 2014
JB

DUE DILIGENCE

Southwestern portion mapped	WINDUFE
an DH / NNG has developed	LEGF CLSW
into low quality OCS-D.	ANHU CALT
w/ Eri for*, Bac sal*, Artral.	KILL CARA
soils very disturbed	HEFI WSJA
	MODD C.K.I.

portion of "DEV" = landscaped disturbed
and other = Brodia, Bac sal,
Hir inc (east half)

NNG / DH

Hir inc* Arana

Bac sal Nicola

Conmel *

Eri for Filgal

Bromad Schmol

Brodia * Opundia

Bac sal Atlantes

Mar val Olo

Amigla

Rum cru

DEO cic

Hetzgrw

Eri for - small patches

Area west of "DEV"

= graded / DH; prev.

mapped NNG

NNG encompasses

some areas of DH

too small to map

separately

DEV along rd should include

dead tree row

NO JURISDICTIONAL
FEATURES OBSERVED

EXHIBIT L

HELIX Environmental Planning, Inc.
7578 El Cajon Boulevard
Suite 200
La Mesa, CA 91942
619.462.1515 tel
619.462.0552 fax
www.helixepi.com



December 30, 2014

PHC-20

Mr. Sohail Bokhari
Director of Planning & Engineering
Pulte Home Corporation
27101 Puerta Real, Suite 300
Mission Viejo, CA 92691

Re: Brightwater Ranch Jurisdictional Delineation Letter Report and Preliminary Jurisdictional Determination

Dear Mr. Bokhari:

This jurisdictional delineation letter report (JDLR) presents the results of a formal jurisdictional delineation performed by HELIX Environmental Planning, Inc. (HELIX) for the Brightwater Ranch Project (proposed project). This letter summarizes the latest federal and state guidance and methodologies employed in conducting a formal delineation for potential jurisdictional waters of the U.S and state; the results of the fieldwork; and the amount, type, and location of the delineated potential regulated aquatic resources occurring within the approximate 76.0-acre Brightwater Ranch project site (Assessor's Parcel Number 397-180-13). The project site is also synonymous with the delineation survey area (Figures 1 through 3 [all figures are included in Attachment A]).

SUMMARY

HELIX's formal field delineation determined the following regarding jurisdictional waters of the U.S and state on the site (Figure 4):

- 0.05¹ acre (685-linear feet) of potential jurisdictional waters of the U.S. and state, in the form of unvegetated ephemeral dry wash, as regulated by the U.S. Army Corps of Engineers (USACE), Regional Water Quality Control Board (RWQCB [Region 9]), and California Department of Fish and Wildlife (CDFW)

¹ All acreages are rounded to the nearest hundredth of an acre.

- 0.12 acre (3710-linear feet) of potential jurisdictional aquatic habitat of the state, exclusively, in the form of swale, as regulated by CDFW and RWQCB
- 0.11 acre of potential jurisdictional aquatic habitat of the state, exclusively, in the form of gullying streambank/riparian extent, as regulated by CDFW

INTRODUCTION

Project Location

The survey area is located within the unincorporated community of Lakeside in San Diego County, California. Specifically, the site is located northwest of Business Route 8/East Main Street, southwest of Los Coches Road, at the eastern terminus of Jackson Hill Drive within unsectioned lands in Township 15 South, Range 1 East on the U.S. Geological Survey (USGS) 7.5-minute El Cajon quadrangle map (USGS 1975) (Figures 1 through 3).

Project Description

The project proposes a 66-unit single-family residential subdivision (Figure 3). The remainder of the site will remain undeveloped and placed within biological open space, with the exception of a proposed water utility line, 16-foot-wide access road, and 24-foot-wide easement over the access road and underlying utility line in the southern portions of the site. An existing water tank, access road, and 30-foot-wide easement occur internal to the project site and are not a part of the proposed project.

REGULATORY FRAMEWORK

Aquatic environments and habitats occurring within California are regulated by the USACE, RWQCB, and CDFW under the following federal laws, as applicable to the survey area.

Federal Regulations

Clean Water Act, Section 404

Pursuant to Section 404 of the Clean Water Act (CWA), USACE is authorized to regulate any activity that would result in the discharge of dredged or fill material into waters of the U.S., which include those waters listed in 33 Code of Federal Regulations (CFR) Part 328 (Definitions). The fundamental rationale of Section 404 of the CWA is that no discharge of dredged or fill material should be permitted if there is a practicable alternative that would be less damaging to aquatic resources or if significant degradation would occur to waters of the U.S. (including wetlands).

USACE, with oversight by the U.S. Environmental Protection Agency (USEPA), has the principal authority to issue CWA Section 404 Permits (40 CFR Part 230). Under two 1989

Memorandums of Agreement between USEPA and the Department of Defense, USACE is given sole responsibility for making final permit decisions pursuant to Section 404, and “conducts jurisdictional delineations associated with the day-to-day administration of the Section 404 program.” However, USEPA retains the authority to enforce compliance with Section 404, and maintains the power to overrule USACE decisions on the issuance or denial of permits. If there is a dispute about whether an area can be regulated, USEPA has the ultimate authority to determine the actual geographic scope of waters of the U.S. subject to jurisdiction under all sections of the CWA, including the Section 404 regulatory program (USEPA 1989a, 1989b).

Clean Water Act, Section 401

If it is determined that an activity proposed within jurisdictional waters requires a permit pursuant to Section 404 of the CWA, then, pursuant to Section 401 of the CWA the RWQCB (Region 9) must certify that the discharge will comply with state water quality standards, or waive the certification requirement. The RWQCB, as delegated by USEPA, has the principal authority to issue a CWA Section 401 water quality certification or conditional waiver.

State Regulations

Lake and Streambed Alteration Program

Pursuant to Section 1600 *et seq.* of the CFGC, the CDFW regulates activities of an applicant’s project that would *substantially* alter the flow, bed, channel, or bank of streams or lakes unless certain conditions outlined by CDFW are met by the applicant. The limits of CDFW jurisdiction are defined in CFGC Section 1600 *et seq.* as the “bed, channel, or bank of any river, stream, or lake designated by [CDFW] in which there is at any time an existing fish or wildlife resource or from which these resources derive benefit.” However, in practice, the CDFW usually extends its jurisdictional limit and assertion to the top of a bank of a stream, the bank of a lake, or outer edge of the riparian vegetation, whichever is wider.

In summary, CDFW links stream protection, conservation, and management with the presence (and/or indirect consideration) of fish, wildlife, and their habitats. CDFW does not consider a stream or watercourse defined by particular flow events, such as bankfull flow or ordinary high water, but rather by the local topography or elevations of the land that confine a stream to a definite course when its waters rise to their highest level. Thus, the watercourse is a stream and its boundaries define the maximal extent or expression of a stream on the landscape. All streams (manmade and natural) are subject to CDFW jurisdiction (Brady et. al. 2014).

California Water Code

Pursuant to Section 13000 *et seq.* of the California Water Code (CWC) (the 1969 Porter-Cologne Water Quality Act [Porter-Cologne]), the RWQCB is authorized to regulate any activity that would result in discharges of waste or fill material into waters of the state, including “isolated” waters and/or wetlands (e.g., vernal pools and seeps). Waters of the state include any surface or

groundwater within the boundaries of the state (CWC Section 13050[e]). Porter-Cologne authorizes the State Water Resources Control Board (SWRCB) to adopt, review, and revise policies for all waters of the state and directs the RWQCB to develop and implement regional Basin Plans that recognize and are designed to maintain the unique characteristics of each region with regard to natural water quality, actual and potential beneficial uses, maintaining water quality, and addressing the water quality problems of that region (CWC Section 13050[j]).

California Water Code Section 13170 also authorizes the SWRCB to adopt water quality control plans on its own initiative. The *Water Quality Control Plan for the San Diego Basin* (RWQCB 1994, as amended) is designed to preserve and enhance the quality of water resources. The purpose of the Water Quality Control Plan is to designate beneficial uses of surface waters and groundwater, designate water quality objectives for the reasonable protection of those uses, and establish an implementation plan to achieve the objectives within RWQCB Region 9. Designated beneficial uses of state waters that may be protected against degradation includes preservation and enhancement of fish, wildlife, designated biological habitats of special significance, and other aquatic resources or preserves.

JURISDICTIONAL DELINEATION METHODOLOGY

Pre-survey Investigations

Prior to conducting the field delineation for potential jurisdictional waters of the U.S. (including wetlands), HELIX ecologist Joshua Zinn reviewed all available biological reports, historical land use of the property, local and regional climactic data, and areas with topographical configurations and vegetative signatures occurring within the survey area that may suggest the potential or presence of jurisdictional waters of the U.S. at the time of the field survey. This information was evaluated by consulting the following available sources:

- 7.5-minute USGS El Cajon Quadrangle (USGS 1975)
- National Hydrography Dataset (USGS 2014)
- 2012 aerial maps of the survey area (USDA National Agriculture Imagery Program) (USDA 2012)
- National Wetlands Inventory (NWI) Interactive Wetlands Mapper (USFWS 2014)
- California Environmental Resources Evaluation System, California Wetlands Information System Wetland Databases and Inventories (CERES 2014)
- NRCS Web Soil Survey (NRCS 2014a)
- NRCS Soils Website (NRCS 2014b)
- NRCS Official Soil Series Descriptions (NRCS 2014c)
- NRCS National List of Hydric Soils (NRCS 2014d)

- California Soil Resource Lab (U.C. Davis 2014a)
- Information Center for the Environment (U.C. Davis 2014b)
- California Watershed Portal (CalEPA 2014)
- California Watershed Network (CWN 2014)
- Office of Water Programs, Water Quality Planning Tool (CSUS 2014)
- Digital Watershed (USEPA 2014)
- Western Regional Climate Center (WRCC 2014)
- National Weather Service Climate Office (NOAA 2014)

Field Survey and Delineation for Waters of the U.S.

On November 7, 2014, HELIX ecologist and regulatory specialist conducted a field survey and formal jurisdictional delineation of potentially regulated waters (including wetlands) within the survey area.

All acquired field data were obtained by recording the presence (including extents, types, and boundaries) of potential jurisdictional waters using a Trimble XH subfoot-accuracy handheld Global Positioning System (GPS) unit. All acquired field data were submitted to HELIX's geographic information system (GIS) specialists for post-field processing. Post-field processing was conducted in tandem by a HELIX GIS specialist and the biologist who performed the fieldwork. Post-field analysis used Trimble Pathfinder (Version 2.1) GIS software to code, define, designate, and edit all acquired GPS field data representing potential jurisdictional waters occurring within the survey area.

The formal jurisdictional delineation and assessment of potentially regulated waters (including wetlands) were conducted within the survey area and delineated pursuant to the guidance and criteria outlined in and in accordance with the following:

- 33 CFR 328 (Definition of Waters of the United States)
- Regulatory Guidance Letter (RGL) 88-06 and RGL 05-05
- *The Corps of Engineers Wetlands Delineation Manual* (Environmental Laboratory 1987)
- *The Corps of Engineers Wetlands Delineation Manual On-Line Edition* (Environmental Laboratory 2005)

- *The Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0)* (Environmental Laboratory 2008)²
- *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual* (Lichvar and McColley 2008)³
- *Review of Ordinary High Water Mark Indicators for Delineating Arid Streams in the Southwestern United States* (Lichvar and Wakeley 2004)
- *Distribution of Ordinary High Water Mark (OHWM) Indicators and their Reliability in Identifying the Limits of "Waters of the United States" in Arid Southwestern Channels* (Lichvar et al. 2006)
- *Review and Synopsis of Natural and Human Controls on Fluvial Channel Processes in the Arid West* (Field and Lichvar 2007)
- *Vegetation and Channel Morphology Responses to Ordinary High Water Discharge Events in Arid West Stream Channels* (Lichvar et al. 2009)
- *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* (Lefebvre et al. 2013)
- *Channel Classification across Arid West Landscapes in Support of OHW Delineation* (Lefebvre et al. 2013)

It was determined through a pre-field survey, field reconnaissance, formal delineation efforts, and post-field assessment that the survey area does not currently support hydrophytic vegetation, hydric soils, or wetland hydrology.

Therefore, based upon federal guidance, normal circumstances⁴, and ambient conditions of the survey area presents the potential for the presence of, at a minimum, one type of potentially federally regulated water: "other" waters of the U.S., warranting the formal field delineation/assessment effort using all relevant guidance and procedural documents (see above) for field indicators of all potential nonwetland waters of the U.S. (e.g., unvegetated ephemeral

² *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual and Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0)* are guidance documents for delineating waters in the form of federally defined wetlands only (e.g., 33 CFR 328.3[b]).

³ Datasheets from this field delineation manual were used as guidance documents and are not included in this JDLR.

⁴ As outlined in the Preface, Introduction, and Part IV Sections F and G of the On-line Edition of the 1987 *Corps Wetlands Delineation Manual* (Environmental Laboratory 2005), RGLs 82-02, 86-09 and 90-7 (following RGL 05-06 [Expired RGLs]. Unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date, as discussed in the Federal Register notice on RGLs of March 22, 1999, FR Vol. 64, No. 54, page 13783.

dry wash) and to define and identify the jurisdictional lateral extent of the ordinary high water mark (OHWM).⁵

Delineation for Potential Waters of the U.S. in the Form of Other Waters

OHWM indicators were used to delineate the lateral jurisdictional extent of potential nonwetland waters of the U.S. Lateral jurisdictional limits were established for all drainage features/channels occurring within the survey area in conjunction with field verification for a determination of the OHWM, which provides an acceptable estimate for the lateral jurisdictional limits. Therefore, boundaries for ephemeral wash waters of the state were determined (and recorded) by the presence of shelving and/or scour resulting in an established bank, bed, or channel of an ephemeral wash feature. The field indicators for the ephemeral washes occurring within the survey area were identified and delineated on the basis of observing the following (as applicable in light of the channelization of the riverine feature delineated within the survey area):

- water marks within their respective channel banks established by the fluctuations of water and indicated by physical characteristics such as clear, natural lines impressed on the banks;
- scour and shelving, local deposition, distinct and indistinct terraces, and changes in the character of soil;
- the presence of developed longitudinal bars within channel margins;
- type, abundance, and relative age of vegetation and/or destruction of terrestrial vegetation, exposed roots, and the presence and absence of litter and debris within the ephemeral channels;
- ephemeral channel configuration, estimated streamflow behavior, and other subtle geomorphic evidence indicative of regular flow levels;
- consideration of precipitation patterns and lack of consistent flow;
- geomorphic OHWM indicators (e.g., surface relief, cobblebars, benches, crested ripples, particle size distribution, mudcracks and gravel sheets); and
- pattern and location of relictual and abandoned channels and discontinuous drainage features.

Federal Guidance for OHWM

The criteria for frequency and duration of the OHWM have not been defined under the CWA or under any guidance from USACE for field delineators; therefore, identifiable field indicators and characteristics of OHWM, best professional judgment, interpretation of 33 CFR 328.3(e) and 328.4, and appropriate RGLs were applied to determine the potential jurisdictional extent of the

⁵ 33 CFR 328.3(e); RGL 88-06; RGL 05-05; and USACE OHWM field manuals (USACE 2006, 2007, 2008).

OHWL within the survey area. Fluvial channels occurring within the arid western region of the U.S. have recently been described as “ordinary” when they typically correspond to a 5- to 8-year event, and typically have an active floodplain with sparse vegetation cover, shifts in soil texture, and occasional alignment with distinctive bed and bank features (Field and Lichvar 2007). However, modeling has shown that slightly larger events (5- to 10-year recurrence) may be necessary to engage the active floodplain in arid systems (Lichvar et al. 2006).

OHWL and the limits of jurisdiction are discussed in the preamble to the USACE November 13, 1986, Final Rule, Regulatory Programs of the Corps of Engineers, Federal Register Volume 51, No. 219, page 41217, which discusses the proper interpretation of 33 CFR Part 328.4(c)(1) as follows:

Section 328.4: Limits of Jurisdiction. Section 328.4(c)(1) defines the lateral limit of jurisdiction in nontidal waters as the OHWL provided that the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that, in the absence of wetlands, the upstream limit of [USACE] jurisdiction also stops when the OHWL is no longer perceptible.

In addition, RGL 88-06, issued June 27, 1988, discusses the OHWL as follows:

The OHWL is the physical evidence (shelving, debris lines, etc.) established by normal fluctuations of water level. For rivers and streams, the OHWL is meant to mark the within-channel high flows, not the average annual flood elevation that generally extends beyond the channel.⁶

RGL 05-05, issued December 7, 2005, discusses the field practice and practicability of identifying, determining, and applying the OHWL for nontidal waters under Section 404 of the CWA (and under Sections 9 and 10 of the Rivers and Harbors Act of 1899), and states the following:

Where the physical characteristics are inconclusive, misleading, unreliable, or otherwise not evident, districts may determine OHWL by using other appropriate means that consider the characteristics of the surrounding areas, provided those other means are reliable.⁷ Such other reliable methods that may be indicative of the OHWL include, but are not limited to, lake and stream gage data, elevation data, spillway height, flood predictions, historic records of water flow, and statistical evidence.

⁶ Following RGL 05-06 (Expired RGLs). Unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date as discussed in the Federal Register (FR) notice on RGLs of March 22, 1999, FR Vol. 64, No. 54, page 13783.

⁷ In some cases, the physical characteristics may be misleading and would not be reliable for determining the OHWL. For example, water levels or flows may be manipulated by human intervention for power generation or water supply. For such cases, districts should consider using other appropriate means to determine the OHWL (RGL 05-05).

Many stream channels in arid regions are dry for much of the year and, at times, may lack hydrology indicators entirely or exhibit relic OHWM features from exceptional hydrological events. RGL 05-05 further states the following:

When making OHWM determinations, districts should be careful to look at characteristics associated with ordinary high water events, which occur on a regular or frequent basis. Evidence resulting from extraordinary events, including major flooding and storm surges, is not indicative of OHWM. For instance, a litter or wrack line resulting from a 200-year flood event would, in most cases, not be considered evidence of an OHWM.

Federal Guidance for Swales and Ditches

The survey area presents multiple swales.⁸ These features are primarily typified by linear depressions in the landscape that are undergoing accelerated erosion and exhibiting discontinuity (abatement into the upland landscape) along their gradient (through Diegan coastal sage scrub and, to a lesser extent, disturbed area) prior to conveyance with stormwater infrastructure located along the northeast portion of the survey area (Figure 4).

The survey area also presents cement lined ditches (brow ditches placed within upland [which have not replaced any natural drainages]) to capture any stormwater runoff prior to reaching a residential neighborhood. These cement lined ditches eventually convey into two stormwater infrastructure located at the northeast portion of the survey area (Figure 4).

Within the survey area the swales and cement lined ditches are not considered as potential jurisdictional water of the U.S. These features do not support and do not present an identifiable OHWM, are not tributaries to any receiving water, and do not support interstate commerce. Additionally, these swales and ditches only drain stormwater from the surrounding uplands during heavy rainfall events and do not support a relatively permanent flow of water (has less than a perennial or intermittent flow).

Based upon the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (USACE 2007) and *Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. U.S.* (USACE 2008), the USACE does not generally regulate certain geographic features such as:

- swales, erosional features (e.g. gullies) and small washes characterized by low volume, infrequent, and short duration flow, and

⁸ Swales can be described as generally poorly defined microtopographic surface features that *may* convey surface water in low volume and short duration flow (hours to days [usually in sheetflow within the swale feature]), during and following uncommon large storm events. Swales are commonly associated with riverine features (Hauer and Lamberti 2007).

- ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

RGL 07-02, issued July 4, 2007, discusses exemptions for construction or maintenance of irrigation ditches and maintenance of drainage ditches under Section 404 of Clean Water Act as follows:

Corps and EPA guidance on the extent of CWA geographic jurisdiction define certain categories of "upland ditches" and "upland swales" that generally are not subject to CWA jurisdiction. Discharges of dredged or fill material into those defined categories of upland ditches and upland swales are not subject to either CWA permitting requirements or the subsection 404(f) exemptions.

Field Survey and Delineation for Potential Waters of the State

In addition to pre-field and reconnaissance surveys, potential waters of the state, exclusively were assessed and delineated within the survey area. Two state agencies may have jurisdiction over aquatic features occurring within the survey area (CDFW and RWQCB), each with its own definition of jurisdictional waters, as summarized below.

CDFW

CDFW does currently have a published draft delineation manual for delineating episodic streams within arid regions occurring within California. Although this delineation manual is for desert regions, the principals and methodology it provides may be applicable to any episodic stream occurring throughout California. Therefore, in addition to the regulatory framework outlined above for the state's Lake and Streambed Alteration Program, potential waters of the state regulated by CDFW were assessed and delineated by HELIX within the project survey area pursuant to definitions and with reference to draft guidance provided in the following:

- *Methods to Describe and Delineate Episodic Stream Processes on Arid Landscapes For Permitting Utility Scale Solar Power Plants* (Brady et al. 2014)
- All applicable and relevant guidance outlined in *A Review of Stream Processes and Forms in Dryland Watersheds* (CDFG 2010)
- *Project Conservation Challenges in a Dryland Stream Environment* (Vyverberg 2010)
- *Classification of Wetland and Deepwater Habitats of the United States* (Cowardin et al. 1979)

For jurisdictional waters (e.g., jurisdictional aquatic habitat) CDFW links stream protection, conservation, and management with the presence (and/or indirect consideration) of fish, wildlife, and their habitats. In practice, the CDFW defines a stream as follows:

A body of water that flows perennially, intermittently, or ephemerally and that is defined by the area in which water currently flows, or has flowed over a given course during the historic hydrologic regime, and where the width of its course can reasonably be identified by physical or biological indicators (CDFG 2010).

Often swales do not have a developed bed and bank. Instead, swales have a smooth, subtle transition from the “head” of the swale to the “bed” of the swale, with no clear impressionable line or shelving resulting from surface water flow. In some cases, swales may still contribute to a surface hydrologic connection between upland and aquatic features if they are identifiable and are part of a network (and, thus, may be considered jurisdictional under the purview of CDFW [e.g., “waters of state interest”]). However, for underdeveloped, abandoned/relictual, and/or limited and abrupt swale features occurring in this region of California, such hydrological connections are dependent on large, uncommon storm events.

Based on the CFGC Section 1600 *et seq.* definition, relevant state regulations (see Regulatory Framework, above), CDFW regulatory practice, and past CDFW field guidance, swale features (individual and complexes) occurring within the survey area were also noted and delineated, and recorded as potential waters of the state.

Therefore, boundaries for waters of the state, as regulated by CDFW, in the form of unvegetated ephemeral dry wash, the riparian extent of the gullied streambank, and the swales (as a swale network) that have the ability to support fish and wildlife (including eventually [and indirectly] contributing conveyance into Los Coches Creek and the San Diego River) were determined (and recorded) by the presence of the established bed and banks and any associated riparian areas of these features (where applicable).

The cement lined ditches (brow ditches) are not considered as waters of the state under the purview of CDFW because they only capture stormwater runoff and have not replaced any natural drainage nor do they present habitat to fish and wildlife.

RWQCB

For jurisdictional water features occurring within the survey area, RWQCB jurisdiction was mapped identically for non-wetland waters as noted above for USACE jurisdiction (e.g., the lateral extent of OHWM only). RWQCB jurisdiction was delineated based on the presence of aquatic features that simultaneously meet the definition for waters of the state (CWC Section 13050[e]) and present “beneficial use” as outlined in the *Water Quality Control Plan for the San Diego Basin* (RWQCB 1994, as amended). If it was determined that any type of aquatic and/or aquatic-related features occurring within the survey area would present “beneficial use,” the aquatic feature would be delineated (this would include all ephemeral and perennial washes and federally defined wetland).

Therefore, boundaries for waters of the state, as regulated by RWQCB, include both the unvegetated ephemeral dry wash and the swales (that indirectly convey into the San Diego River) because both these features simultaneously meet the definition for waters of the state and present beneficial use(s).

RESULTS

Jurisdictional waters of the U.S. are listed for each aquatic habitat in Table 1.

As applicable, aquatic-related habitats were classified according to both the *Preliminary Descriptions of the Terrestrial Natural Communities of California* (Holland 1986) as modified by Oberbauer (Oberbauer et al. 2008), and *Classification of Wetlands and Deepwater Habitats of the United States* (Cowardin et al. 1979). Both classification systems incorporate a hierarchical structure of systems, subsystems, and classes to identify vegetation communities, wetland habitat types, and cover types. Vegetation (or lack thereof) occurring within the project survey area is typically associated with channelized riverine systems within this area of California.

Photo-point locations are included in Figure 4, and representative photographs taken during the field delineation are included as Figures 5 through 9.

<p align="center">Table 1 JURISDICTIONAL WATERS OF THE U.S. AND STATE OCCURRING WITHIN THE SURVEY AREA^{a,b}</p>					
Type of Potential Jurisdictional Waters	Type of Habitat (Holland 1986; Oberbauer et al. 2008)	Type of Habitat (Cowardin et al. 1979)	Acres	Linear Feet	Regulatory Authority
Potential Jurisdictional Waters of the U.S.					
Other Waters (Unvegetated Ephemeral Dry Wash)	Drainage Features/ Non-vegetated Channel (64200)	Riverine; Intermittent; Unconsolidated Bottom, Sand, Seasonally Flooded, Fresh	0.05	685	USACE, CDFW, and RWQCB
<i>Subtotal</i>			<i>0.05</i>	<i>685</i>	

Table 1 (cont.) JURISDICTIONAL WATERS OF THE U.S. AND STATE OCCURRING WITHIN THE SURVEY AREA^{a,b}					
Type of Potential Jurisdictional Waters	Type of Habitat (Holland 1986; Oberbauer et al. 2008)	Type of Habitat (Cowardin et al. 1979)	Acres	Linear Feet	Regulatory Authority
Potential Jurisdictional Waters of the State, Exclusively					
Swale	N/A ^c	N/A ^d	0.12	3,710	CDFW and RWQCB
Streambank/Riparian Extent	N/A ^c	N/A ^d	0.11	N/A	CDFW
<i>Subtotal</i>			<i>0.23</i>	<i>3,710</i>	
TOTAL			0.28	4,395	

^a Based on the total area of potential jurisdictional waters delineated within the survey area.

^b Acreage of all jurisdictional waters was determined by using the GIS program ArcGIS. All acreages are rounded to the nearest hundredth after summation, which may account for minor rounding error.

^c The swales occur primarily in Diegan coastal sage scrub and to a lesser extent nonnative grassland. Holland (1986) and Oberbauer et al. 2008) does not have a corresponding vegetation community code for this cover type.

^d Cowardin et al. (1979) does not classify swales or riparian extent as a deepwater habitat.

Preliminary Jurisdictional Determination Form for Potential Waters of the U.S.

Based on RGL 08-02, the permit applicant may elect to use a preliminary jurisdictional determination (JD) to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site, usually in the interest of allowing the landowner, permit applicant, or other “affected party” to move ahead expeditiously to obtain CWA Section 404 permit authorization where applicants determine that it is in their best interest to do so.

Preliminary JDs do not make an official determination of jurisdictional waters, and are nonbinding advisements that potential waters of the U.S. (including wetlands) *may* be present within a site and therefore should be assumed to be jurisdictional by USACE. A preliminary JD is not appealable under the USACE appeal process because it is not an official JD. If a preliminary JD is received by USACE, an approved JD can always be requested by the applicant at a later time, if necessary. Preliminary JDs cannot be used for determining whether a site has no aquatic features, no potential waters of the U.S. (including wetlands), geographically isolated waters and/or wetlands, or some jurisdictional and some nonjurisdictional waters.

A completed preliminary JD Form for this jurisdictional delineation of 0.05 acre (685-linear feet) of potential jurisdictional waters of the U.S. in the form of unvegetated non-wetland other waters is located in Attachment B.

Electronic Waters Upload Sheets for Potential Jurisdictional Waters

A separate electronic version of the Waters Upload Sheet (collectively containing all formally delineated potentially jurisdictional waters of the U.S. will be provided to the USACE during the authorization process so that USACE can automatically populate the data fields in its Operations Regulatory Module (ORM) database.

PERMITTING

Based upon the type and amount of potential jurisdictional aquatic resources formally delineated within the survey area, and based upon the current design of the proposed project, the following permits and authorizations may be required:

CWA Section 404 Permitting

Based on the USACE's March 15, 2012, Special Public Notice *Issuance of Nationwide Permits and Issuance of Final Regional Conditions for the Los Angeles District*, it is anticipated that the USACE may recommend authorizing this project under the CWA Section 404 Nationwide Permit (NWP) Program (33 CFR 330). Specifically, it is anticipated that the USACE will recommend authorizing this project under Section 404 by complying with NWP 29 (Residential Developments) (USACE 2012).

NWP 29 is applicable to this project if the discharge does not cause the loss of greater than 0.5 acre of non-tidal waters of the U.S. including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds for which the USACE district engineer may waive the 300-linear-foot limit by making a written determination concluding that the discharge will result in minimal adverse effects

For CWA Section 404 authorization, USACE will require compensatory mitigation for both temporary and permanent impacts to jurisdictional waters of the U.S. that cannot be avoided.

CWA Section 401 Permitting

A Clean Water Act Section 401 Water Quality Certification administered by the RWQCB must be issued prior to any 404 Permit for impacts to waters of the U.S. USACE jurisdictional areas addressed in this report would also be subject to 401 Certification by the RWQCB. Submittal of Request for Water Quality Certification is expected to be required prior to project activities to the San Diego RWQCB.

Requisite compensatory mitigation for CWA Section 401 issuance would likely be congruent with acceptable CWA Section 404 mitigation.

CFGC Section 1600 *et seq.* Permitting

It is anticipated that a Notification for a Lake or Streambed Alteration Agreement (SAA) will be required by the appropriate CDFW field office (South Coast Region). CDFW will ascertain which (or all) of the delineated aquatic features occurring within the survey area are under its regulatory purview. The SAA Notification process also allows CDFW to determine whether aquatic features will become “substantially adversely affected” under CFGC Section 1602(a), and to issue a Lake and Streambed Alteration Agreement in order to proceed with the project.

For CFGC Section 1600 *et seq.* permitting, CDFW will require compensatory mitigation for both temporary and permanent impacts to jurisdictional aquatic habitat they regulate which cannot be avoided as a result of the proposed project.

CWC Section 13000 *et seq.* (Porter-Cologne) Waste Discharge Requirement

The RWQCB regulates the “discharge of waste” to waters of the state.⁹ The definition of waters of the state is broader than that for waters of the U.S. in that all waters are considered to be a water of the state regardless of circumstances or condition. The term “discharge of waste” is also broadly defined in Porter-Cologne, such that discharges of waste include fill, any material resulting from human activity, or any other “discharge” that may directly or indirectly impact waters of the state. As conditional to this permit, best management practices (BMPs) will be required to ensure compliance with state water quality standards. BMPs can also be specified by the RWQCB based on the report of waste discharge (ROWD) (filed with the appropriate RWQCB by the applicant). The RWQCB is authorized to regulate discharges of waste and fill material to waters of the state (including “isolated” waters and wetlands) through the issuance of Waste Discharge Requirements (WDRs). WDRs are commonly issued based on the threshold of allowable pollutants into waters of the state.

Requisite compensatory mitigation for CWC Section 13000 *et seq.* issuance would likely be congruent with acceptable CFGC Section 1600 *et seq.* mitigation.

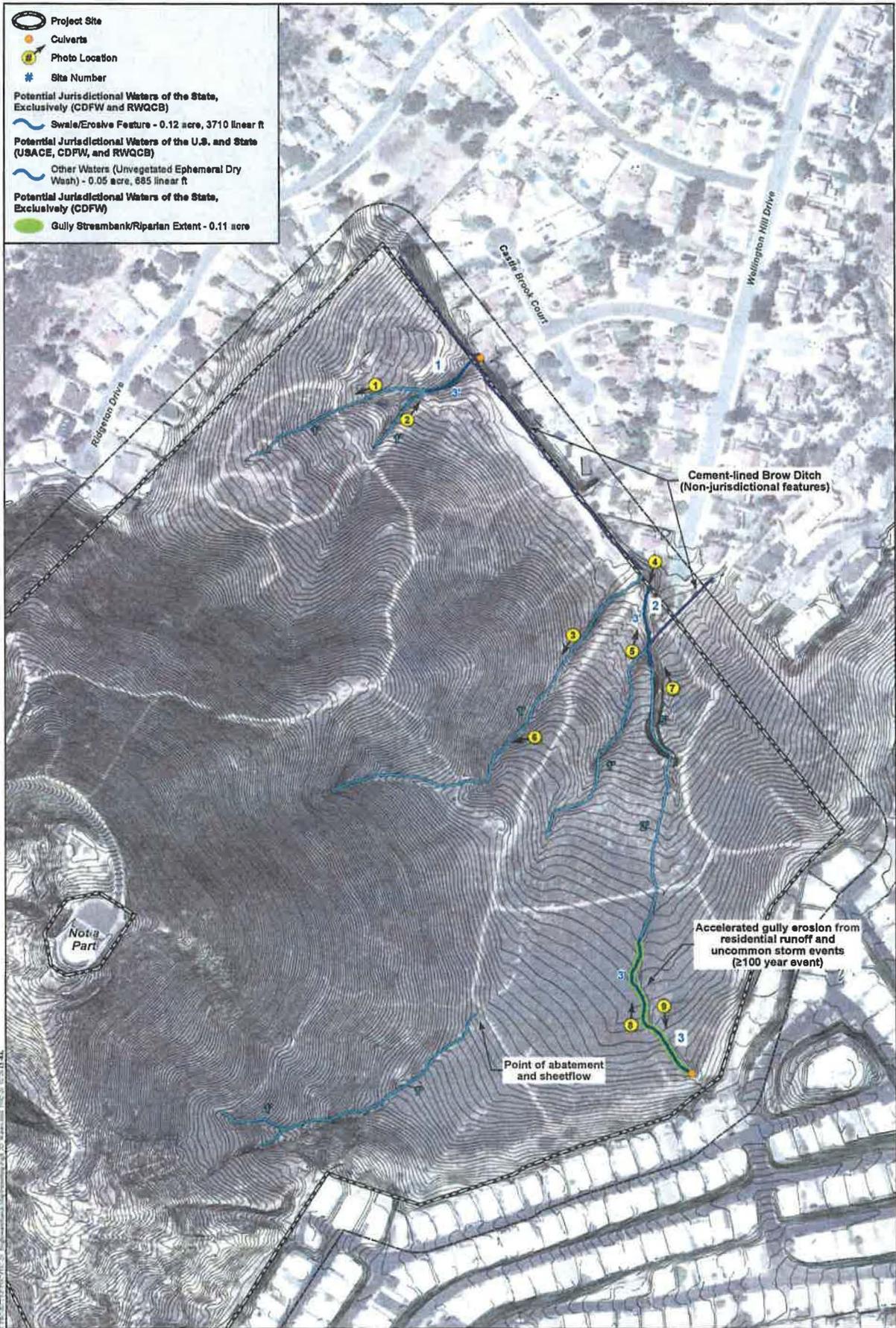
We appreciate the opportunity to provide you with this report. Please don't hesitate to contact me or Karl Osmundson at 619-462-1515.

Sincerely,



Joshua Zinn
Ecologist and Regulatory Specialist

⁹ “Waters of the state” is defined in CWC Section 13050(e).



Waters of the US/Waters of the State

BRIGHTWATER RANCH



Photograph 3: Looking southwest at close-up of discontinuous swale/erosive feature. Note gully type erosion (angular and blocky) and vegetation and duff populating this feature indicating irregular surface flow.



Photograph 4: looking southwest at underdeveloped OHWM prior to entering offsite culvert intake.



Photograph 5: looking north at underdeveloped OHWM prior to entering offsite culvert intake.



Photograph 6: Looking south at close-up of swale/erosive feature. Note gully type erosion (angular and blocky) and vegetation and duff populating this feature indicating irregular surface flow.



Photograph 7: Looking northwest at small ephemeral dry wash feature near northern boundary of survey area.



Photograph 8: Looking north at large gully populated by desertbroom (*Baccharis sarothroides*) and supporting small unvegetated ephemeral dry wash at bottom of gully. Gully was created by a large storm event and residential runoff.

EXHIBIT M

Means, Christopher@Waterboards

From: Ehsan, Beth <Beth.Ehsan@sdcounty.ca.gov>
Sent: Wednesday, July 15, 2015 11:15 AM
To: Means, Christopher@Waterboards
Cc: Clemente, Chiara@Waterboards; Becker, Eric@Waterboards; Honma, Lisa@Waterboards
Subject: RE: Settler's Point/Jackson Ridge
Attachments: PDS2005-3100-5423-PDS-PLN-Legal Agreements And Authorizations.pdf

Hi Chris,

Thanks for reaching out. In hindsight, I should have asked more questions regarding off-site impacts of the knuckle, although at the time it all seemed logical. Based on this experience I will be more vigilant for potential jurisdictional impacts in the future. Here are my responses in order of your questions:

1. The County asked for the knuckle to be added to connect Jackson Ridge Parkway to Wellington Hill Drive to provide the residents with secondary access. The County Fire Code and state law establish maximum dead-end road lengths for subdivisions based on density, and if a project exceeds that distance, they must provide another access route.
2. I looked in our files and the knuckle was shown as far back as the September 2008 submittal, which is the oldest version of the grading plan on file. I have Daniel and Thomas Odom listed as the owners at that time. I couldn't find the letter requesting the knuckle be added, but would suspect that the request may have been made in late 2007 or early 2008. Following the 2007 wildfires, the issue of emergency access and evacuation was brought into sharper focus and many projects had to find a way to provide secondary access.
3. The County does not negotiate between owners for projects to get permission to grade. I do see that we requested the permission to grade in a letter sent April 30, 2009, they submitted it to us on June 16, 2009, and we approved it on July 15, 2009.
4. Yes, I do have the permission to grade letter. See attached. (The subdivision violation referenced in the letter was subsequently resolved.)
5. Elyssa Robertson of REC Consultants was hired by the applicant, but she is on the County's approved consultant list, meaning she is authorized to submit biological impact reports for projects reviewed by the County. Biologists have to show a certain level of education, experience, and samples of their past work to get on the approved consultant list, so that we can substantially rely on their fieldwork and analysis. That system works the vast majority of the time, although not in this case.

I do apologize for not requiring a jurisdictional wetlands/waters survey of the knuckle area. REC, Helix, and the County were all involved at various time in both projects, so you'd think one of us would have put two and two together to realize that waters of the US and State had been mapped for Brightwater Ranch within the Jackson Ridge knuckle area, but I guess the timing of the two projects was offset such that no one made the connection.

The good news, at least in my mind, is that Brightwater Ranch did the delineation before the knuckle was built and they are going through the permitting process now, so the impacts are known and will be mitigated, although it will be after the fact for the knuckle area. I know that the permit should have been obtained before the impact occurred, but I remain hopeful that something can be worked out to include the knuckle impacts in Brightwater Ranch's eventual permit.

Please let me know if I can provide any additional information.

Thanks,
Beth

Beth Ehsan

Planning & Development Services
858-694-3103

From: Means, Christopher@Waterboards [mailto:Christopher.Means@waterboards.ca.gov]
Sent: Tuesday, July 14, 2015 1:33 PM
To: Ehsan, Beth
Cc: Clemente, Chiara@Waterboards; Becker, Eric@Waterboards; Honma, Lisa@Waterboards
Subject: RE: Settler's Point/Jackson Ridge

Hi Beth,

Thanks for the color copy. That helps. I received the timeline from Barry Jones outlining KB Homes involvement in the unauthorized impacts associated with the offsite knuckle on the Brightwater Property, but I am still confused about the County involvement in the process. I was hoping you could provide a timeline for the County and answer a few questions for me:

- 1) It appears that the plan changes that added the Knuckle to the KB Homes project were made at the request of the County. Is this correct? If so what the basis for this request?
- 2) When was this request first made? Who owned the Brightwater Property at the Time (2008-2009)?
- 3) Did the County take part in negotiating getting the permission for the offsite knuckle impacts? Do you have any correspondence between the County and the parties involved at the time regarding the need for the offsite impacts?
- 4) Do you have a copy of the June 5, 2009 "letter of permission" to conduct the offsite impacts, that is noted on KB Homes Site Plan (Hunsaker & Associates) which was part of the meeting materials for the Lakeside Community Planning Group's May 1, 2013 agenda (Item 6B) ?
- 5) Was REC working for the County when they prepared the January 5, 2009 Settler's Point Updated Project Description? If not, the who?

The basic overall question I am grappling with is why the offsite Knuckle creation was approved and permitted by all the parties involved, and why everyone relied on a 2006 Biological report that never looked at the adjacent Brightwater Property for the presence of Waters of the US/State? REC's decision not to conduct any additional field work when the plans changed seems to be, in hindsight, a costly error.

Any information you can provide to add to the existing timeline would be greatly appreciated.

Respectfully,

Christopher Means
Environmental Scientist
Compliance Assurance Unit
San Diego RWQCB
Phone: 619-521-3365
Email: cmeans@waterboards.ca.gov

We have moved our office. Our new address is 2375 Northside Drive, Suite 100, San Diego, CA 92108

From: Ehsan, Beth [mailto:Beth.Ehsan@sdcounty.ca.gov]
Sent: Friday, July 10, 2015 12:25 PM
To: Barry Jones; Means, Christopher@Waterboards; Honma, Lisa@Waterboards; Kurt Bausback
Cc: Clemente, Chiara@Waterboards; Becker, Eric@Waterboards
Subject: RE: Settler's Point/Jackson Ridge

It was prepared by REC, not by the County, but here is a color copy. (Sorry about the strikeout/underline.)

Processing Information Relevant to the Jackson Ridge Knuckle Violation

What is the County's typical project review process?

When an application comes in, our initial review is called "scoping" when we review the project and its surroundings using GIS, aerial photos, applications forms, etc, to determine which technical studies are needed and some detail on what specific surveys are needed within the surveys (eg. Quino checkerspot butterfly, gnatcatcher, or jurisdictional delineation if we suspect wetlands/waters). But even if we don't request a jurisdictional delineation, the biology guidelines and report format have clear requirements to survey and discuss any jurisdictional features. The applicant responds to the scoping letter with a complete submittal of the project plans and technical studies. Staff reviews the submittal and sends an iteration letter with comments on the plans and all of the draft technical studies. The applicant revises and resubmits everything, we review it all and send another iteration letter, etc., until all studies are accepted, at which point County staff prepare the draft conditions, send the California Environmental Quality Act (CEQA) documents out for public review, respond to public comments, and then bring the project to hearing for decision on the discretionary approval (Tentative Map). The process of getting the Final Map and Grading Plans approved is a ministerial process since the conditions of approval have been set and are simply being fulfilled. Staff goes through CEQA section 15162 findings to ensure nothing has changed that would lead to a new significant impact, but the issuance of the grading plan can almost always rely on the environmental documents prepared for discretionary approval.

When and why was the knuckle added to the Jackson Ridge project?

The knuckle was added in August 2008. The Preliminary Grading Plan dated 2/19/08 show the knuckle area as a four-way intersection with grading/utility improvements by other applicant(s) (TM 5306).

The 3rd iteration letter dated 5/8/08 states, "Off-site R/W for the northern connection of Street "A" to Wellington Drive must be obtained including intersection slopes & drainage rights. Update the map accordingly." That letter also includes conditions to improve the knuckle/connection as conditions 17 through 19 and to dedicate the knuckle as conditions 48 through 50.

The Preliminary Grading Plan dated 8/28/08 shows the knuckle (labeled Temporary Street Knuckle per DS-15), as part of the project, and shows the other two streets as future streets and lots per TM 5306. So it was not a change in fire safety requirements, but rather a change in the synchronicity of the two projects, that led to the knuckle being identified as an off-site impact of the Jackson Ridge project.

Is the road connection needed for fire access?

Yes. The Fire Protection Plan for the project indicates that the project had adequate two-way access and no dead-end roads because it connected to both Business Route 8 and Wellington Hill Drive (public roads). Staff relied on the two-way access to approve the project. The project is zoned for a minimum 6,000 square foot lot size, which is less than one acre, and thus the project cannot have dead-end roads over 800 feet in length. If the connection to Wellington Hill Drive were not made, the on-site dead-end length would be approximately 1,600 feet, double the standard, and the new homes being built in Jackson Ridge would not meet fire evacuation requirements needed for safety and conformance to fire code standards.

Processing Information Relevant to the Jackson Ridge Knuckle Violation

Why is the knuckle so big?

The shape of the knuckle, with the extra pavement on the outside of the turn, is required by Public Road standards in order for drivers, both passenger vehicles and fire trucks, to safely negotiate the turn. Longer vehicles have to be able to swing out when making the turn to avoid crossing over the centerline and toward oncoming traffic.

How was the jurisdictional feature within the knuckle footprint missed?

The original consulting biologist's report, prepared by Robin Church, failed to show jurisdictional waters in that area, which was originally outside of the impact footprint but within 100 feet of the project site.

There was a change in ownership and REC Consultants took over as applicant for Jackson Ridge in 2008. On their own initiative, REC prepared an updated project description memo to attach to the Robin Church report. REC made the decision not to conduct additional field work. Based on the overall low sensitivity of the site, which was mostly non-native grassland and included a home, and the surveys being fairly recent (within three years), staff did not request additional field work. Also, the off-site knuckle impacts fell within the 100 foot buffer area previously surveyed by Robin Church. And there were no jurisdictional features within the site itself.

Is a consulting biologist required to identify jurisdictional waters?

Yes, absolutely. The County's Guidelines of Significance and Report Format and Content Requirements for Biological Resources, which were approved on September 26, 2006, include significance guidelines for impacts to jurisdictional wetlands in section 4.2, Riparian Habitat or Sensitive Natural Community, and to Federal Wetlands in section 4.3. The Report Format and Content Requirements (page 8-9) state, "Wetlands surveys will be required when a wetland resource or jurisdictional water is identified on the project site. A basic wetland survey consists of mapping the boundaries of the wetland habitat based on the specific County, State and Federal wetland definitions. Field site visits and aerial photographs generally provide enough information to complete the basic wetland survey. However, a full wetland delineation survey following the US Army Corps of Engineers standards, including soil testing, may be required when the boundaries of the wetlands are not easily discernable."

Section 1.4.7, which is a required section for a full Biological Technical Report, is described as follows: "Describe any wetland resources and jurisdictional waters identified on the site. Provide an estimate of acreage classified as County, State and/or Federal wetlands and jurisdictional waters along with an explanation as to how the boundaries were delineated. Include a brief list of the dominant plant and wildlife species present. Describe the quality of the wetland habitat in terms of disturbance, canopy cover, species diversity and connectivity to off-site habitat. Discuss the wetland's local and regional importance.

"Discuss the wetland functions and values, and include a description of the habitats' location relative to hydrologic features (i.e., what is downstream from the waterway). Wetland function refers to biophysical benefits, such as groundwater recharge and discharge, flood control, flow

Processing Information Relevant to the Jackson Ridge Knuckle Violation

alteration, sediment stabilization, erosion control, toxicant retention, nutrient removal and cycling, and wildlife habitat for diversity and abundance. Wetland value refers to anthropomorphic benefits such as commercial enterprise, recreation and waste assimilation, and non-market values such as aesthetics, uniqueness and heritage.”

The Biological Resource Letter Report outline also includes a required section for Jurisdictional Wetlands and Waterways, which is described as follows (page 28 of Report Format):

- Describe all wetland and water resources found on the site.
- Estimate acres classified as County, State and/or Federal wetlands along with an explanation as to how the boundaries were delineated.
- Include a brief list of the dominant plant and wildlife species present that were either detected or likely using the site.
- Describe wetland habitat quality including disturbance, canopy cover, species diversity and connectivity to off-site habitat.
- Discuss the wetland in terms of local and regional importance.
- Wetlands must be accurately plotted on the Biological Resources Map.

The Report Format also requires all off-site impacts and the area within 100 feet of the project site to be mapped in the same way as the site itself. Therefore, **any biology report prepared according to the current Guidelines and Report Format, whether full format or letter report, must adequately discuss jurisdictional wetlands and waters.**

Are consulting biologists accountable to the County for their work?

Yes. No biology report will be accepted unless the consulting biologist is on the County’s approved consultant list, and the biologist has signed a Memorandum of Understanding (MOU) with the project applicant and the County. The MOU states generally that the consultant shall submit all environmental documents in accordance with the County CEQA Guidelines, and that the consultant is accountable to the County for the accuracy and completeness of their work. The MOU states, “...it is the responsibility of the COUNTY to provide its independent review and analysis of all documentation for the PROJECT prepared and submitted by the CONSULTANT, and subconsultant(s), and the APPLICANT. This independent review is undertaken for the benefit of the general public and is not intended to relieve the consultant of any of its responsibilities.” Also they must use their “complete and independent professional judgement.” Therefore, the consultant is completely responsible for the quality of their work.

Does the process work on other projects?

Yes. The processing of the Brightwater Ranch project, TM 5306, shows that when the guidelines are followed, jurisdictional features are disclosed. Staff required all of the technical studies to be updated to the current guidelines when the project came out of Idle status in July 2014. Although not specifically requested by staff, a jurisdictional delineation was included in the new biology report prepared by Karl Osmundson of HELIX in July 2014. The HELIX report showed Non-Wetland Waters of the US / Streambed

Processing Information Relevant to the Jackson Ridge Knuckle Violation

in the area in question and identified impacts by TM 5306. The biology report was accepted by staff on June 2, 2015, although the report is currently being revised again to reflect the ACOE and RWQCB's input on the jurisdictional delineation. The conditions of approval for the project include obtaining wetland permits.

Another current example of our review process working is Lake Jennings Park Road, TM 5578, where REC prepared a jurisdictional delineation stating that the small isolated wetland on-site did not qualify as federal wetlands, waters of the US or waters of the state. The delineation was accepted for public review; however, because the delineation had not been accepted by the agencies, the project was conditioned to either obtain permits or proof that no permits were needed. During the public review period of the CEQA document, staff arranged for a site visit by the Army Corps, which resulted in delineation of a small area of Waters of the U.S. REC is now submitting applications to the Army Corps of Engineers and the Regional Water Quality Control Board, and permits must be obtained before the Final Map can be recorded.

How will the County improve the process?

Conditioning: PDS is updating our standard wetland permitting condition to add the requirement for Waste Discharge Requirements for Waters of the State that are not Waters of the U.S. The condition language already includes Waters of the U.S. (404/401 permit) and CDFW Streambed (1602 Streambed Alteration Agreement). The condition language requires either a copy of each permit, or evidence from the applicable agency that a permit is not required. This condition is applied to projects that were determined or possible to have jurisdictional waters according to the CEQA document, but that haven't gotten far enough into the permitting process to have agreement on jurisdiction.

Training: In order to improve County staff's ability to review and comment on jurisdictional delineations, PDS plans to send two staff biologists to the Wetland Training Institute's wetland delineation class in February. We will also raise this issue in the next meeting with consultants on the County approved consultant list. The County is open to suggestions for other training opportunities or process improvements.

EXHIBIT N

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7
8 **CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**
9 **SAN DIEGO REGION**

10
11 IN THE MATTER OF:
12 COMPLAINT FOR ADMINISTRATIVE CIVIL
13 LIABILITY NO. R9-2016-0092 AGAINST
14 KB HOME, SETTLER'S POINT PROJECT,
LAKESIDE, CALIFORNIA

**DECLARATION OF MICHAEL
KLINEFELTER**

15
16 I, Michael Klinefelter, declare:

17 1. I currently am the principal environmental consultant for M.J. Klinefelter in
18 Murrieta California. This declaration is submitted in support of the opposition of KB Home, Inc.
19 ("KB") to the San Diego Regional Water Quality Control Board's Complaint for Administrative
20 Civil Liability ("ACL") concerning the Settler's Point residential development in Lakeside,
21 California ("Project").

22 2. All the facts testified to below are within my personal knowledge except those
23 matters stated upon information in belief, and with respect to those matters I believe them to be
24 true. If called as a witness, I could and would competently testify to these matters.

25 3. I have 17 years of experience in assessing biological and aquatic resources,
26 conducting jurisdictional delineations to identify jurisdictional "waters of the United States"
27 ("WOUS") under the federal Clean Water Act ("CWA"), conducting wetland assessments, and
28 obtaining permits under Section 404 of the CWA and other federal and state environmental laws. I

1 obtained a Bachelor of Sciences degree in Environmental Sciences from University of California
2 Riverside (UC Riverside) in 1995 and a Master of Science degree in soil science from UC
3 Riverside in 1998. I regularly teach classes to environmental professionals and to federal, state,
4 and local agency staff concerning wetland assessments and delineations.

5 4. I have reviewed documents concerning the Project, including the ACL and the
6 Technical Analysis (“TA”) for the ACL. I have lengthy experience with the Army Corps’ CWA
7 Section 404 program and with numerous development projects involving ephemeral drainages
8 similar to the one at issue here. I visited the Project site on May 17, 2016.

9 5. I understand that a preliminary jurisdictional determination (“PJD”) form was
10 prepared by the adjacent property owner and submitted to the Army Corps. A PJD assumes that
11 watercourses on a site are WOUS and is often used to seek an agreement with the Army Corps
12 regarding the extent of WOUS that would be impacted by a proposed project to get a quick
13 resolution of CWA Section 404 permitting requirements and to expedite a proposed project.

14 6. Obtaining a PJD is much faster than attempting to obtain a formal approved
15 jurisdictional determination (“Approved JD”) from the Army Corps. I am not aware that an
16 Approved JD has been issued by the Army Corps that identifies the ephemeral drainage as a
17 WOUS.

18 7. It also has been my experience that it is common to use a PJD when it is likely that a
19 proposed project may be eligible for a nationwide permit (“NWP”) under the CWA. The NWP
20 program allows fill activities that have been determined to have minimal individual or cumulative
21 adverse environmental impacts.

22 8. Based on my review of the information in the ACL and the TA, only 0.018 acre and
23 278 linear feet of the ephemeral drainage was impacted by the construction of the road. Given that
24 acreage, the road project would be eligible for coverage under NWP 14, which authorizes the fill of
25 up to 0.5 acre for linear transportation activities such as roads.

26 9. Based on my review of documents and on my visit to the Project site, the ephemeral
27 drainage is not a “traditional navigable water” (“TNW”) under the CWA, and is not a “relatively
28

1 permanent water” because water does not flow in the drainage year round or even seasonally as
2 required. The ephemeral drainage also does not contain any jurisdictional wetlands.

3 10. To be considered a WOUS, the Army Corps would have to show that the ephemeral
4 drainage has a “significant nexus” to a TNW.

5 11. I also have reviewed the claims in the ACL and the TA alleging that 350 cubic yards
6 (9,450 cubic feet) of fill was placed in a WOUS, the ephemeral drainage. The Prosecution Team
7 converted that 350 cubic yards of solid material into 70,691 gallons by multiplying 350 cubic yards
8 times 202 liquid gallons/cubic yard. This conversion is improper because it converts the amount of
9 solid fill, a dry material, using a liquid conversion factor. Webster’s Dictionary defines gallon as
10 “a unit of liquid capacity equal to 231 cubic inches or four quarts.”

11 12. In addition, in my experience, the volume of the type of solid material, such as
12 native rock and soil, used to construct the road knuckle is never referred to in terms of “gallons.”
13 Rather, the quantity of such solid construction material is referred to in terms of area (e.g. acres),
14 length (e.g. linear feet), or non-liquid volume (e.g. cubic yards). That also is how the Army Corps
15 refers to such materials. As part of the CWA Section 401 certification program for discharges of
16 dredged or fill materials, both the State Water Resources Control Board and the San Diego
17 RWQCB application and fee calculator assess impacts using acres, linear feet, and cubic yards. In
18 my experience, the term “gallons” is only used to refer to liquid volumes and is never used in
19 describing the amount of fill material.

20 13. Based on my experience and the rules issued by the EPA and the Army Corps that
21 implement the CWA, only those activities that occur below the ordinary high water mark
22 (“OHWM”) are regulated under the CWA. That is because only the area below the OHWM is
23 considered a WOUS under the CWA.

24 14. Based on my review of photographs taken by HELIX Environmental, Inc., before
25 the road knuckle was constructed, and on my visit to the Project site on May 17, 2016, I estimated
26 that the OHWM in the ephemeral drainage was approximately 1.5 to 2 feet deep. I consider that to
27 be a conservative estimate that likely overestimates the actual depth of the high water flow during
28 an “ordinary” storm event.

EXHIBIT O



**US Army Corps
of Engineers**

REGULATORY GUIDANCE LETTER

No. 08-02

Date: 26 June 2008

SUBJECT: Jurisdictional Determinations

1. Purpose. Approved jurisdictional determinations (JDs) and preliminary JDs are tools used by the U.S. Army Corps of Engineers (Corps) to help implement Section 404 of the Clean Water Act (CWA) and Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA). This Regulatory Guidance Letter (RGL) explains the differences between these two types of JDs and provides guidance on when an approved JD is required and when a landowner, permit applicant, or other “affected party”¹ can decline to request and obtain an approved JD and elect to use a preliminary JD instead.

a. This guidance does not address which waterbodies are subject to CWA or RHA jurisdiction. For guidance on CWA and RHA jurisdiction, see Corps regulations, “Memorandum re: Clean Water Act (CWA) Jurisdiction Following U.S. Supreme Court Discussion in *Rapanos v. United States*,” dated 19 June 2007, and the documents referenced therein.

b. This guidance takes effect immediately, and supersedes any inconsistent guidance regarding JDs contained in RGL 07-01.

2. Approved JDs. An approved JD is an official Corps determination that jurisdictional “waters of the United States,” or “navigable waters of the United States,” or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the CWA/RHA. (See 33 C.F.R. 331.2.)

a. The Corps will provide (subject to the limitation contained in paragraph 5.b. below) an approved JD to any landowner, permit applicant, or other “affected party” when:

(1) a landowner, permit applicant, or other “affected party” requests an approved JD by name or otherwise requests an official jurisdictional determination, whether or not it is referred to as an “approved JD”;

¹ As defined at 33 CFR 331.2 “affected party” means a permit applicant, landowner, a lease, easement or option holder (i.e., an individual who has an identifiable and substantial legal interest in the property) who has received an approved JD, permit denial or has declined a proffered individual permit.

(2) a landowner, permit applicant, or other “affected party” contests jurisdiction over a particular water body or wetland, and where the Corps is allowed access to the property and is otherwise able to produce an approved JD; or

(3) the Corps determines that jurisdiction does not exist over a particular water body or wetland.

b. An approved JD:

(1) constitutes the Corps’ official, written representation that the JD’s findings are correct;

(2) can be relied upon by a landowner, permit applicant, or other “affected party” (as defined at 33 C.F.R. 331.2) who receives an approved JD for five years (subject to certain limited exceptions explained in RGL 05-02);

(3) can be used and relied on by the recipient of the approved JD (absent extraordinary circumstances, such as an approved JD based on incorrect data provided by a landowner or consultant) if a CWA citizen’s lawsuit is brought in the Federal Courts against the landowner or other “affected party,” challenging the legitimacy of that JD or its determinations; and

(4) can be immediately appealed through the Corps’ administrative appeal process set out at 33 CFR Part 331.

c. The District Engineer retains the discretion to use an approved JD in any other circumstance where he or she determines that is appropriate given the facts of the particular case.

d. If wetlands or other water bodies are present on a site, an approved JD for that site will identify and delineate those water bodies and wetlands that are subject to CWA/RHA jurisdiction, and serve as an initial step in the permitting process.

e. Approved JDs shall be documented in accordance with the guidance provided in RGL 07-01. Documentation requires the use of the JD Form published on June 5, 2007, or as modified by ORM2 or subsequent revisions to the June 5, 2007 JD form approved by Corps Headquarters. Districts will continue to post approved JDs on their websites.

3. A permit applicant’s option to decline to request and obtain an approved JD. While a landowner, permit applicant, or other “affected party” can elect to request and obtain an approved JD, he or she can also decline to request an approved JD, and instead obtain a Corps individual or general permit authorization based on either a preliminary JD, or, in appropriate circumstances (such as authorizations by non-reporting nationwide general permits), no JD whatsoever. The Corps will determine what form of JD is appropriate

for any particular circumstance based on all the relevant factors, to include, but not limited to, the applicant's preference, what kind of permit authorization is being used (individual permit versus general permit), and the nature of the proposed activity needing authorization.

4. Preliminary JDs. Preliminary JDs are non-binding “. . . written indications that there may be waters of the United States, including wetlands, on a parcel or indications of the approximate location(s) of waters of the United States or wetlands on a parcel. Preliminary JDs are advisory in nature and may not be appealed.” (See 33 C.F.R. 331.2.)

a. A landowner, permit applicant, or other “affected party” may elect to use a preliminary JD to voluntarily waive or set aside questions regarding CWA/RHA jurisdiction over a particular site, usually in the interest of allowing the landowner or other “affected party” to move ahead expeditiously to obtain a Corps permit authorization where the party determines that is in his or her best interest to do so.

b. It is the Corps' goal to process both preliminary JDs and approved JDs within 60 days as detailed in paragraph 5 below, so the applicant or other affected party's choice of whether to use a preliminary JD or approved JD should not affect this goal.

c. A landowner, permit applicant, or other “affected party” may elect to use a preliminary JD even where initial indications are that the water bodies or wetlands on a site may not be jurisdictional, if the affected party makes an informed, voluntary decision that is in his or her best interest not to request and obtain an approved JD.

d. For purposes of computation of impacts, compensatory mitigation requirements, and other resource protection measures, a permit decision made on the basis of a preliminary JD will treat all waters and wetlands that would be affected in any way by the permitted activity on the site as if they are jurisdictional waters of the U.S.

e. Preliminary JDs are also commonly used in enforcement situations because access to a site may be impracticable or unauthorized, or for other reasons an approved JD cannot be completed in a timely manner. In such circumstances, a preliminary JD may serve as the basis for Corps compliance orders (e.g., cease and desist letters, initial corrective measures). The Corps should support an enforcement action with an approved JD unless it is impracticable to do so under the circumstances, such as where access to the site is prohibited.

f. When the Corps provides a preliminary JD, or authorizes an activity based on a preliminary JD, the Corps is making no legally binding determination of any type regarding whether CWA/RHA jurisdiction exists over the particular water body or wetland in question.

g. A preliminary JD is “preliminary” in the sense that a recipient of a preliminary JD can later request and obtain an approved JD if that later becomes necessary or appropriate during the permit process or during the administrative appeal process. If a

permit applicant elects to seek a Corps individual permit based on a preliminary JD, that permit applicant can later raise jurisdictional issues as part of an administrative appeal of a proffered permit or a permit denial, as explained in paragraph 6 below.

h. In all circumstances where an approved JD is not required by the guidance in paragraph 2 of this RGL, District Engineers retain authority to use preliminary JDs. The Corps may authorize an activity with one or more general permits, a letter of permission, or a standard individual permit, with no “official” JD of any type, or based on a preliminary JD, where the District Engineer determines that to be appropriate, and where the permit applicant has been made aware of his or her option to receive an approved JD and has declined to exercise that option. Generally, approved JDs should be used to support individual permit applications, but the applicant should be made aware of his or her option to elect to use a preliminary JD wherever the applicant feels doing so is in his or her best interest.

5. Processing approved and preliminary JDs. Every approved JD and preliminary JD should be completed and provided to the person, organization, or agency requesting it as promptly as is practicable in light of the district’s workload, and site and weather conditions if a site visit is determined necessary.

a. Corps districts should not give preliminary JDs priority over approved JDs. Moreover, every Corps district should ensure that a permit applicant’s request for an approved JD rather than a preliminary JD will not prejudice the timely processing of that permit application. It is the Corps’ goal that every JD requested by an affected party should be completed within 60 calendar days of receiving the request. Regulatory Project Managers will notify their supervisors and develop a schedule for completion of the JD if it is not practicable to meet this 60 day goal.

b. The Corps should not provide either an approved JD or a preliminary JD to any person if the Corps has reason to believe that person is seeking a JD for any purpose relating to a CWA program not administered by the Corps (e.g., CWA Section 402, 303, or 311). In such circumstances the Corps should decline to perform the JD and instead refer the person who requested it to the Federal or state agency responsible for administering that program.

6. JDs and appeals. In any circumstance where a permit applicant obtains a Corps proffered individual permit or a permit denial, based on a preliminary JD, and where the permit applicant elects to pursue an administrative appeal of the proffered permit or the permit denial, the appeal “may include jurisdiction issues,” as stated at 33 C.F.R. 331.5(a)(2). However, if an affected party during the appeal of a proffered permit or a permit denial challenges or questions jurisdiction, those jurisdictional issues must be addressed with an approved JD. Therefore, if, during or as a result of the administrative appeal of the permit denial or the terms and conditions of the proffered permit, it becomes necessary to make an official determination whether CWA/RHA jurisdiction exists over a site, or to provide an official delineation of jurisdictional waters on the site, the Corps should provide an approved JD as soon as is practicable, consistent with the

goal expressed in paragraph 5 above. Such an approved JD would be subject to the same procedures as other approved JDs, such as requirements for coordinating approved JDs with EPA.

7. Key distinction between approved JDs and preliminary JDs. By definition, a preliminary JD can only be used to determine that wetlands or other water bodies that exist on a particular site “may be” jurisdictional waters of the United States. A preliminary JD by definition cannot be used to determine either that there are no wetlands or other water bodies on a site at all (i.e., that there are no aquatic resources on the site and the entire site is comprised of uplands), or that there are no jurisdictional wetlands or other water bodies on a site, or that only a portion of the wetlands or waterbodies on a site are jurisdictional. A definitive, official determination that there are, or that there are not, jurisdictional “waters of the United States” on a site can only be made by an approved JD. The Corps retains the ability to use a “no-permit-required” letter to indicate that a specific proposed activity is not subject to CWA/RHA jurisdiction when that is determined appropriate, but a “no-permit-required” letter cannot make any sort of determination regarding whether there are jurisdictional wetlands or other waterbodies on a site.

8. Mandatory use of the preliminary JD form. In each and every circumstance where a preliminary JD is used, the Corps district must complete the “Preliminary Jurisdictional Determination Form” provided at Attachment 1, which sets forth in writing the minimum requirements for a preliminary JD and important information concerning the requesting party’s option to request and obtain an approved JD, and subsequent appeal rights. The signature of the affected party who requested the preliminary JD will be obtained on the preliminary JD form wherever practicable (e.g., except for enforcement situations, etc.). Where a preliminary JD form covers multiple water bodies or multiple sites, the information for each can be included in the table provided with the preliminary JD form. Information in addition to the minimum of data required on the preliminary JD form can be included on that form, but only if such information pertains to the amount and location of wetlands or other water bodies at the site. Corps regulatory personnel are expected to continue to exercise appropriate judgment and use appropriate information when making technical and scientific determinations as to what areas on the site qualify as water bodies or wetlands. Any such additional information included on the preliminary JD form should not purport, or be construed, to address any legal determination involving CWA/RHA jurisdiction on the site.

9. Data collection. Information about the quality and quantity of the aquatic resources that would be affected by the proposed activity, the types of impacts that are expected to occur, and compensatory mitigation, are obtained by the Corps during the processing of an individual permit application and are included in pre-construction notification for reporting NWPs. For example, NWP pre-construction notifications must contain a “description of the proposed project; the project’s purpose; direct and indirect adverse environmental effects the project would cause; . . . a delineation of special aquatic sites and other waters of the United States on the project site.” (Reissuance of Nationwide Permits Notice, 72 Fed. Reg. 11092, at 11194-95 (March 12, 2007).) Applicants should

provide a delineation of special aquatic sites in support of an individual permit or “letter of permission” application.

a. The information on a preliminary JD form should be limited to the amount and location of wetlands and other water bodies on the site and should be sufficiently accurate and reliable that the effective presumption of CWA/RHA jurisdiction over all of the wetlands and other water bodies at the site will support a reliable and enforceable permit decision. When a preliminary JD is used to support a request for a permit authorization, the information on the preliminary JD form is also relevant to the processing of that permit application (e.g., to calculate compensatory mitigation requirements). During the permit process, information in addition to the data on the preliminary JD form is developed and relied upon to support the Corps permit decision; that additional information should be carefully documented as part of the permit process (e.g., through an environmental assessment, 404(b)(1) analysis, combined decision document, or decision memorandum). This additional information for the permit decision should *not* be captured on a preliminary JD form.

b. The type of information collected to support the decision on the permit application will be the same for permit applications supported by approved JDs and for those supported by preliminary JDs. Therefore, decisions and judgments regarding environmental impacts, public interest determinations, and mitigation requirements should be adequately supported regardless of the type of JD used. For this reason, the data necessary to quantify and defend the Corps Regulatory Program’s performance will be available for a permit application regardless of whether it was supported by an approved JD or a preliminary JD.

c. The information used to support an approved JD should be reliable and verifiable. Traditionally, this information has been obtained or verified through a site visit, but now, with information from new, highly sensitive technology and imaging, site visits may not always be required for approved JDs.

d. When documenting preliminary JDs, any available technical, scientific, and observational information about the wetlands or other water bodies can be entered into ORM2 regardless of whether it is the type of information that could inform a formal jurisdictional determination (e.g., discussion of the ecological relationship between water bodies), so long as legal conclusions about jurisdictional status are not included. Any additional, available information that is entered into ORM2 must be accompanied by the warning that the information has not been verified, that it is not an official determination by the government, and that it cannot later be relied upon to determine whether an area is or is not jurisdictional.

10. Coordination with U.S. Environmental Protection Agency (EPA) and posting.

Districts will continue to post approved JDs on their web sites. Consistent with historical practice, preliminary JDs will not be coordinated with EPA or posted on District websites. Corps Headquarters is modifying the ORM2 data base to collect information regarding use of preliminary JDs, and regarding permit authorizations based on

preliminary JDs, or based on no official form of JD. Until ORM2 is modified to collect and access information related to preliminary JDs, every District should collect basic information, to the maximum extent practicable, on those subjects for purposes of documenting District workload.

11. This guidance remains in effect until revised or rescinded.

Attachment



for

DON T. RILEY
Major General, US Army
Deputy Commanding General for Civil and
Emergency Operations

ATTACHMENT

PRELIMINARY JURISDICTIONAL DETERMINATION FORM

BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR PRELIMINARY JURISDICTIONAL DETERMINATION (JD):

B. NAME AND ADDRESS OF PERSON REQUESTING PRELIMINARY JD:

C. DISTRICT OFFICE, FILE NAME, AND NUMBER:

**D. PROJECT LOCATION(S) AND BACKGROUND INFORMATION:
(USE THE ATTACHED TABLE TO DOCUMENT MULTIPLE WATERBODIES AT DIFFERENT SITES)**

State: County/parish/borough: City:

Center coordinates of site (lat/long in degree decimal format): Lat. °

Pick List, Long. ° Pick List.

Universal Transverse Mercator:

Name of nearest waterbody:

Identify (estimate) amount of waters in the review area:

Non-wetland waters: linear feet: width (ft) and/or acres.

Cowardin Class:

Stream Flow:

Wetlands: acres.

Cowardin Class:

Name of any water bodies on the site that have been identified as Section 10 waters:

Tidal:

Non-Tidal:

E. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

Office (Desk) Determination. Date:

Field Determination. Date(s):

1. The Corps of Engineers believes that there may be jurisdictional waters of the United States on the subject site, and the permit applicant or other affected party who requested this preliminary JD is hereby advised of his or her option to request and obtain an approved jurisdictional determination (JD) for that site. Nevertheless, the permit applicant or other person who requested this preliminary JD has declined to exercise the option to obtain an approved JD in this instance and at this time.

2. In any circumstance where a permit applicant obtains an individual permit, or a Nationwide General Permit (NWP) or other general permit verification requiring "pre-construction notification" (PCN), or requests verification for a non-reporting NWP or other general permit, and the permit applicant has not requested an approved JD for the activity, the permit applicant is hereby made aware of the following: (1) the permit applicant has elected to seek a permit authorization based on a preliminary JD, which does not make an official determination of jurisdictional waters; (2) that the applicant has the option to request an approved JD before accepting the terms and conditions of the permit authorization, and that basing a permit authorization on an approved JD could possibly result in less compensatory mitigation being required or different special conditions; (3) that the applicant has the right to request an individual permit rather than accepting the terms and conditions of the NWP or other general permit authorization; (4) that the applicant can accept a permit authorization and thereby agree to comply with all the terms and conditions of that permit, including whatever mitigation requirements the Corps has determined to be necessary; (5) that undertaking any activity in reliance upon the subject permit authorization without requesting an approved JD constitutes the applicant's acceptance of the use of the preliminary JD, but that either form of JD will be processed as soon as is practicable; (6) accepting a permit authorization (e.g., signing a proffered individual permit) or undertaking any activity in reliance on any form of Corps permit authorization based on a preliminary JD constitutes agreement that all wetlands and other water bodies on the site affected in any way by that activity are jurisdictional waters of the United States, and precludes any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court; and (7) whether the applicant elects to use either an approved JD or a preliminary JD, that JD will be processed as soon as is practicable. Further, an approved JD, a proffered individual permit (and all terms and conditions contained therein), or individual permit denial can be administratively appealed pursuant to 33 C.F.R. Part 331, and that in any administrative appeal, jurisdictional issues can be raised (see 33 C.F.R. 331.5(a)(2)). If, during that administrative appeal, it becomes necessary to make an official determination whether CWA jurisdiction exists over a site, or to provide an official delineation of jurisdictional waters on the site, the Corps will provide an approved JD to accomplish that result, as soon as is practicable. This preliminary JD finds that there "*may be*" waters of the United States on the subject project site, and identifies all aquatic features on the site that could be affected by the proposed activity, based on the following information:

SUPPORTING DATA. Data reviewed for preliminary JD (check all that apply

- checked items should be included in case file and, where checked and requested, appropriately reference sources below):

Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:

Data sheets prepared/submitted by or on behalf of the applicant/consultant.

Office concurs with data sheets/delineation report.

Office does not concur with data sheets/delineation report.

Data sheets prepared by the Corps:

Corps navigable waters' study:

U.S. Geological Survey Hydrologic Atlas:

USGS NHD data.

USGS 8 and 12 digit HUC maps.

U.S. Geological Survey map(s). Cite scale & quad name:

USDA Natural Resources Conservation Service Soil Survey. Citation:

National wetlands inventory map(s). Cite name:

State/Local wetland inventory map(s):

FEMA/FIRM maps:

100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)

Photographs: Aerial (Name & Date):

or Other (Name & Date):

Previous determination(s). File no. and date of response letter:

Other information (please specify):

IMPORTANT NOTE: The information recorded on this form has not necessarily been verified by the Corps and should not be relied upon for later jurisdictional determinations.

Signature and date of
Regulatory Project Manager
(REQUIRED)

Signature and date of
person requesting preliminary JD
(REQUIRED, unless obtaining
the signature is impracticable)

SAMPLE

Site number	Latitude	Longitude	Cowardin Class	Estimated amount of aquatic resource in review area	Class of aquatic resource
1				0.1 acre	section 10 – tidal
2				100 linear feet	section 10 – non-tidal
3				15 square feet	non-section 10 – wetland
4				0.01 acre	non-section 10 – non-wetland

EXHIBIT P

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD):

B. DISTRICT OFFICE, FILE NAME, AND NUMBER:

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: _____ County/parish/borough: _____ City: _____
Center coordinates of site (lat/long in degree decimal format): Lat. ° **Pick List**, Long. ° **Pick List**.
Universal Transverse Mercator: _____

Name of nearest waterbody: _____

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: _____

Name of watershed or Hydrologic Unit Code (HUC): _____

Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

Office (Desk) Determination. Date: _____

Field Determination. Date(s): _____

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **Pick List** "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

Waters subject to the ebb and flow of the tide.

Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Explain: _____

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There **Pick List** "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area (check all that apply):¹

- TNWs, including territorial seas
- Wetlands adjacent to TNWs
- Relatively permanent waters² (RPWs) that flow directly or indirectly into TNWs
- Non-RPWs that flow directly or indirectly into TNWs
- Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
- Impoundments of jurisdictional waters
- Isolated (interstate or intrastate) waters, including isolated wetlands

b. Identify (estimate) size of waters of the U.S. in the review area:

Non-wetland waters: _____ linear feet: _____ width (ft) and/or _____ acres.

Wetlands: _____ acres.

c. Limits (boundaries) of jurisdiction based on: **Pick List**

Elevation of established OHWM (if known): _____

2. Non-regulated waters/wetlands (check if applicable):³

Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.

Explain: _____

¹ Boxes checked below shall be supported by completing the appropriate sections in Section III below.

² For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

³ Supporting documentation is presented in Section III.F.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. TNW

Identify TNW:

Summarize rationale supporting determination:

2. Wetland adjacent to TNW

Summarize rationale supporting conclusion that wetland is "adjacent":

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody⁴ is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. Characteristics of non-TNWs that flow directly or indirectly into TNW

(i) General Area Conditions:

Watershed size: **Pick List**

Drainage area: **Pick List**

Average annual rainfall: inches

Average annual snowfall: inches

(ii) Physical Characteristics:

(a) Relationship with TNW:

Tributary flows directly into TNW.

Tributary flows through **Pick List** tributaries before entering TNW.

Project waters are **Pick List** river miles from TNW.

Project waters are **Pick List** river miles from RPW.

Project waters are **Pick List** aerial (straight) miles from TNW.

Project waters are **Pick List** aerial (straight) miles from RPW.

Project waters cross or serve as state boundaries. Explain:

Identify flow route to TNW⁵:

Tributary stream order, if known:

⁴ Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

⁵ Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

(b) General Tributary Characteristics (check all that apply):

Tributary is: Natural
 Artificial (man-made). Explain:
 Manipulated (man-altered). Explain:

Tributary properties with respect to top of bank (estimate):

Average width: feet
Average depth: feet
Average side slopes: **Pick List**.

Primary tributary substrate composition (check all that apply):

Silts Sands Concrete
 Cobbles Gravel Muck
 Bedrock Vegetation. Type/% cover:
 Other. Explain:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain:

Presence of run/riffle/pool complexes. Explain:

Tributary geometry: **Pick List**

Tributary gradient (approximate average slope): %

(c) Flow:

Tributary provides for: **Pick List**

Estimate average number of flow events in review area/year: **Pick List**

Describe flow regime:

Other information on duration and volume:

Surface flow is: **Pick List**. Characteristics:

Subsurface flow: **Pick List**. Explain findings:

Dye (or other) test performed:

Tributary has (check all that apply):

Bed and banks
 OHWM⁶ (check all indicators that apply):
 clear, natural line impressed on the bank the presence of litter and debris
 changes in the character of soil destruction of terrestrial vegetation
 shelving the presence of wrack line
 vegetation matted down, bent, or absent sediment sorting
 leaf litter disturbed or washed away scour
 sediment deposition multiple observed or predicted flow events
 water staining abrupt change in plant community
 other (list):
 Discontinuous OHWM.⁷ Explain:

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

High Tide Line indicated by: Mean High Water Mark indicated by:
 oil or scum line along shore objects survey to available datum;
 fine shell or debris deposits (foreshore) physical markings;
 physical markings/characteristics vegetation lines/changes in vegetation types.
 tidal gauges
 other (list):

(iii) **Chemical Characteristics:**

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain:

Identify specific pollutants, if known:

⁶A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

⁷Ibid.

(iv) **Biological Characteristics. Channel supports (check all that apply):**

- Riparian corridor. Characteristics (type, average width):
- Wetland fringe. Characteristics:
- Habitat for:
 - Federally Listed species. Explain findings:
 - Fish/spawn areas. Explain findings:
 - Other environmentally-sensitive species. Explain findings:
 - Aquatic/wildlife diversity. Explain findings:

2. **Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW**

(i) **Physical Characteristics:**

(a) General Wetland Characteristics:

Properties:

Wetland size: acres

Wetland type. Explain:

Wetland quality. Explain:

Project wetlands cross or serve as state boundaries. Explain:

(b) General Flow Relationship with Non-TNW:

Flow is: **Pick List**. Explain:

Surface flow is: **Pick List**

Characteristics:

Subsurface flow: **Pick List**. Explain findings:

Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:

Directly abutting

Not directly abutting

Discrete wetland hydrologic connection. Explain:

Ecological connection. Explain:

Separated by berm/barrier. Explain:

(d) Proximity (Relationship) to TNW

Project wetlands are **Pick List** river miles from TNW.

Project waters are **Pick List** aerial (straight) miles from TNW.

Flow is from: **Pick List**.

Estimate approximate location of wetland as within the **Pick List** floodplain.

(ii) **Chemical Characteristics:**

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain:

Identify specific pollutants, if known:

(iii) **Biological Characteristics. Wetland supports (check all that apply):**

- Riparian buffer. Characteristics (type, average width):
- Vegetation type/percent cover. Explain:
- Habitat for:
 - Federally Listed species. Explain findings:
 - Fish/spawn areas. Explain findings:
 - Other environmentally-sensitive species. Explain findings:
 - Aquatic/wildlife diversity. Explain findings:

3. **Characteristics of all wetlands adjacent to the tributary (if any)**

All wetland(s) being considered in the cumulative analysis: **Pick List**

Approximately () acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N)

Size (in acres)

Directly abuts? (Y/N)

Size (in acres)

Summarize overall biological, chemical and physical functions being performed:

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:
2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:
3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
 TNWs: linear feet width (ft), Or, acres.
 Wetlands adjacent to TNWs: acres.
2. **RPWs that flow directly or indirectly into TNWs.**
 Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial:
 Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally:

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: linear feet width (ft).
 Other non-wetland waters: acres.
Identify type(s) of waters: .

3. Non-RPWs⁸ that flow directly or indirectly into TNWs.

- Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

- Tributary waters: linear feet width (ft).
 Other non-wetland waters: acres.
Identify type(s) of waters: .

4. Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.

- Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
 Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .
 Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

5. Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.

- Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

6. Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.

- Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: acres.

7. Impoundments of jurisdictional waters.⁹

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

- Demonstrate that impoundment was created from "waters of the U.S.," or
 Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
 Demonstrate that water is isolated with a nexus to commerce (see E below).

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):¹⁰

- which are or could be used by interstate or foreign travelers for recreational or other purposes.
 from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
 which are or could be used for industrial purposes by industries in interstate commerce.
 Interstate isolated waters. Explain: .
 Other factors. Explain: .

Identify water body and summarize rationale supporting determination: .

⁸See Footnote # 3.

⁹To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

¹⁰ Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos.

Provide estimates for jurisdictional waters in the review area (check all that apply):

- Tributary waters: linear feet width (ft).
- Other non-wetland waters: acres.
Identify type(s) of waters: .
- Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

- If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
 - Prior to the Jan 2001 Supreme Court decision in "SWANCC," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain: .
- Other: (explain, if not covered above): .

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

- Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
- Lakes/ponds: acres.
- Other non-wetland waters: acres. List type of aquatic resource: .
- Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

- Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
- Lakes/ponds: acres.
- Other non-wetland waters: acres. List type of aquatic resource: .
- Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 - Office concurs with data sheets/delineation report.
 - Office does not concur with data sheets/delineation report.
- Data sheets prepared by the Corps: .
- Corps navigable waters' study: .
- U.S. Geological Survey Hydrologic Atlas: .
 - USGS NHD data.
 - USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite scale & quad name: .
- USDA Natural Resources Conservation Service Soil Survey. Citation: .
- National wetlands inventory map(s). Cite name: .
- State/Local wetland inventory map(s): .
- FEMA/FIRM maps: .
- 100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)
- Photographs: Aerial (Name & Date): .
or Other (Name & Date): .
- Previous determination(s). File no. and date of response letter: .
- Applicable/supporting case law: .
- Applicable/supporting scientific literature: .
- Other information (please specify): .

B. ADDITIONAL COMMENTS TO SUPPORT JD:

EXHIBIT Q

U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK

This document contains instructions to aid field staff in completing the *Approved Jurisdictional Determination Form* (“JD form”). This document is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD until this document is further revised and reissued.¹

Caribbean Sea, St. Thomas, U.S. Virgin Islands.



This document was prepared jointly by the U.S. Army Corps of Engineers and the Environmental Protection Agency.

¹The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.

In accordance with the *Rapanos* Guidance:

- Certain ephemeral waters in the arid west are distinguishable from the geographic features described below where such ephemeral waters are tributaries and may have a significant nexus to TNWs.
- Certain geographical features (e.g., ditches, canals) that transport relatively permanent (continuous at least seasonally) flow directly or indirectly into TNWs or between two (or more) waters of the U.S., including wetlands, are jurisdictional waters regulated under the CWA.
- Certain geographic features (e.g., swales, ditches, pipes) may contribute to a surface hydrologic connection where the features:
 - replace or relocate a water of the U.S., or
 - connect a water of the U.S. to another water of the U.S., or
 - provide relatively permanent flow to a water of the U.S.
- Certain geographic features generally are not jurisdictional waters:
 - swales, erosional features (e.g. gullies) and small washes characterized by low volume, infrequent, and short duration flow
 - ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water
 - uplands transporting over land flow generated from precipitation (i.e., rain events and snowmelt)

A. EXAMPLE PHOTOS OF DIFFERENT AQUATIC RESOURCES

The following photos have been taken by Corps employees, unless otherwise noted, and are presented to illustrate in an informal and general way some of the concepts addressed in this document. Each of the following photos represents one snap shot of a particular place at a particular time. No photograph is presented herein as a definitive representation of what any particular class or category of aquatic resources will or should look like. Even photographs of the same aquatic area may look different at different times of the year, or from one year to another, or where photos were taken from different angles or locations, or using different lenses. In addition, any particular type or class of water body (e.g., an adjacent wetland) will have many variations within and among the various regions and topographic circumstances found throughout the U.S. Because of all these variations, each aquatic site must be independently evaluated to determine if the aquatic resource under review is a jurisdictional water of the U.S. While we hope that each of the following photos will serve as a useful, if highly limited, teaching aid, no photo can be used or presented as any sort of definitive or universal representation of whatever concept is being illustrated. Moreover, where photos are used to represent examples of non-RPWs, wetlands adjacent to non-RPWs, and/or wetlands not directly abutting RPWs, a site-specific significant nexus evaluation would be required to determine if the aquatic resource is a jurisdictional water of the U.S.

Photo 17. Intermittent tributary, with continuous seasonal flow, South Atlantic Division. Yellow lines mark approximate location of OHWM.



Photo 18. Intermittent tributary, with continuous seasonal flow, South Atlantic Division. White lines mark approximate location of OHWM.



**RPWs are jurisdictional under the CWA.
As a matter of policy, field staff will include in the record any available information
that documents the existence of a significant nexus between a TNW and an RPW
that is not perennial.**

4. Non-RPWs that flow directly or indirectly into TNWs, where the flow through the tributary is not continuous at least seasonally. (For examples, see Photos 19 – 29)

Photo 19. An unnamed ephemeral tributary flowing into Wolf Trap Creek, Vienna, VA. Water flows through the ephemeral tributary typically during and after storm events.



Photo 21. Soft-bottom intermittent tributary with a flood control levee, Ventura County, CA.

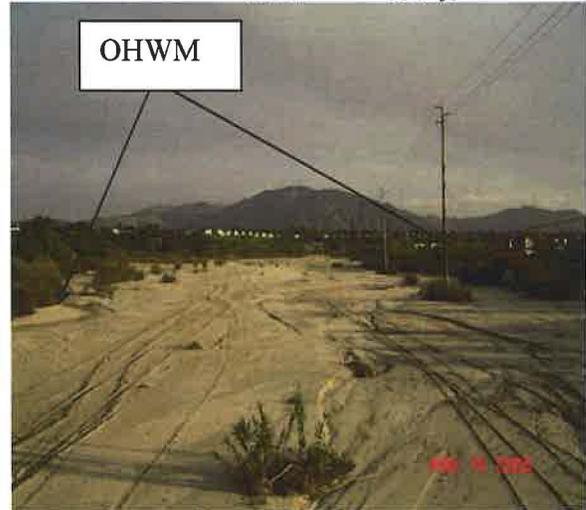
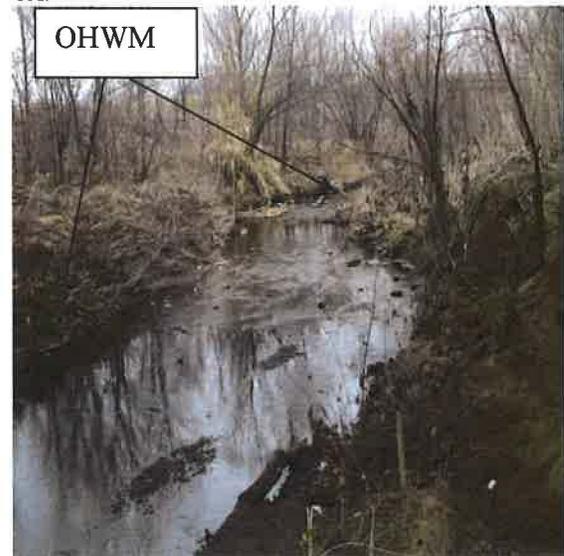


Photo 20. Unnamed ephemeral tributary, TX. Water flows typically during and after storm events. Yellow lines mark approximate location of OHWM.



Photo 22. Desert ephemeral tributary, Los Angeles County, CA.



Non-RPWs are jurisdictional under the CWA where there is a “significant nexus” with a TNW. For each specific request for non-RPWs, field staff will need to perform significant nexus evaluation to determine if tributary in combination with its adjacent wetlands (if any) is jurisdictional under the CWA.

Erosional Features. Erosional features, including **gullies**, are generally not waters of the U.S. because they are not tributaries or they do not have a significant nexus to TNWs. (For a few examples, see Photos 59-60)

Photo 59: Gullies are eroded channels where surface runoff concentrates. This photo shows a gully formed by eroding material.



Photo 60. These erosional features are small channels eroded into the soil surface by runoff.



Erosional features generally are not jurisdictional under the CWA.

C. SIGNIFICANT NEXUS DETERMINATION

- The significant nexus evaluation will combine, for analytical purposes, the tributary and all of its adjacent wetlands, whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both.
- A significant nexus analysis will assess the flow characteristics and functions of the relevant reach of the tributary, in combination with functions collectively performed by all wetlands adjacent to the tributary, to determine if they have more than an insubstantial or speculative effect on the chemical, physical, or biological integrity of TNWs.
- Consideration will be given to the distance between the tributary and the TNW. The tributary will not be so remote as to make the effect on the TNW speculative or insubstantial.
- It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of a significant nexus.
- Swales and erosional features (e.g., gullies, small washes characterized by low volume, infrequent, and short duration flow) are generally not waters of the U.S. because they are not tributaries or they do not have a significant nexus to TNWs. In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the U.S. because they are not tributaries or they do not have a significant nexus to a TNW. Even when not themselves, waters of the U.S., these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW.
- Ephemeral waters in the arid west that are tributaries may have a significant nexus to a TNW. For example, in some cases they may serve as a critical transitional area between the upland environment and the traditional navigable waters. Such ephemeral tributaries, with the associated riparian corridor, may provide refugia, foraging and breeding opportunities in areas that may have limited stands of vegetation and water due to the environmental conditions of the arid southwest. During and following precipitation events, ephemeral tributaries collect and transport water or sometimes sediment from the upper reaches of the landscape to the traditional navigable waters. These ephemeral tributaries, and associated riparian corridors, may provide habitat for wildlife and aquatic organisms. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may affect the integrity of a TNW.

1. Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNW.

Field staff will assert jurisdiction over tributaries that are not relatively permanent where the tributary has a significant nexus with a TNW. As a result, the explanation in Section III.C.1 will include a discussion documenting the characteristics and underlying rationale for the conclusions regarding the presence or absence of a significant nexus.

Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a TNW. Field staff will consider all available hydrologic information (e.g., gage data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.) and physical indicators of flow including the presence and characteristics of a reliable OHWM with a channel defined by bed and banks. Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and scour (Appendix H). Consideration will be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

Field staff will provide an explanation that demonstrates whether or not the aquatic resource has more than an insubstantial or speculative effect on the chemical, physical, or biological integrity of the TNW. The specific connections between the characteristics documented and the functions/services they play in affecting the TNW will be demonstrated. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to the TNW; capacity to transfer nutrients and organic carbon vital to support food webs; habitat services such as providing spawning areas for important aquatic species; functions related to the maintenance of water quality such as sediment trapping; and other relevant factors. In some cases, even tributaries that are relatively distant from a TNW may have a significant nexus with the TNW.

2. Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNW.

The field staff will assert jurisdiction over tributaries that are non-RPWs where the tributary, in combination with all of its adjacent wetlands, has a significant nexus with a TNW. The field staff will assert jurisdiction over wetlands that are adjacent to a non-RPW where the wetlands, in combination with the relevant tributary reach, have a demonstrated significant nexus with a TNW. As a result, the explanation in Section III.C.2 will include a discussion documenting the characteristics and underlying rationale for the conclusions regarding the presence or absence of a significant nexus with a TNW.

Field staff will explain the specific connections between the characteristics documented and the functions/services that affect a TNW. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to a TNW; capacity to transfer

nutrients and organic carbon vital to support food webs; habitat services such as providing spawning areas for important aquatic species; functions related to the maintenance of water quality such as sediment trapping; and other relevant factors.

In addition, the evaluation will also consider the functions performed cumulatively by any and all wetlands that are adjacent to the tributary, such as storage of flood water and runoff; pollutant trapping and filtration; improvement of water quality; support of habitat for aquatic species; and other functions that contribute to the maintenance of water quality, aquatic life, commerce, navigation, recreation, and public health in the TNW. This is particularly important where the presence or absence of a significant nexus is less apparent, such as for a tributary at the upper reaches of a watershed. Because such a tributary may not have a large volume, frequency, and duration of flow, it is important to consider how the functions supported by the wetlands, cumulatively, have more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of a TNW.

3. Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.

The field staff will assert jurisdiction over wetlands that do not directly abut an RPW where there is a demonstrated significant nexus with a TNW. As a result, the explanation in Section III.C.4 will include a discussion documenting the characteristics and underlying rationale for the conclusions regarding the presence or absence of a significant nexus with a TNW. The significant nexus determination can be based on the wetland under review, in combination with all other wetlands adjacent to that tributary. See Section 2 above for factors to be considered in the analysis.

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS

1. TNWs and Adjacent Wetlands. These classes of water bodies are jurisdictional under the CWA.

Documentation to support determination:

- Provide data supporting this conclusion in Section III.A.

2. RPWs that flow directly or indirectly into TNWs. This class of water bodies is jurisdictional under the CWA.

Documentation to support determination:

- If flow is typically year round; flow determinations should be supported by characteristics in Section III.B.1 of the form such as flow/gage data, rainfall data, anecdotal information, or
- If flow is continuous at least “seasonally” provide data supporting this conclusion in Section III.B.

As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a RPW that is not perennial and a TNW.

3. **Non-RPWs that flow directly or indirectly into TNWs.** This class of water bodies is jurisdictional under the CWA where there is a “significant nexus” with a TNW.

Documentation requirements to support determination:

- Section III.B.1 (and III.B.2 and III.B.3, if applicable) of the form needs to demonstrate that water flow characteristics of a non-RPW, in combination with the functions provided by those non-RPWs and any adjacent wetlands (if any), has more than an insubstantial or speculative effect on the chemical, physical, and/or biological integrity of the TNW
- Section III.C.1 or Section III.C.2 needs to identify rationale to support the significant nexus determination for the non-RPW

4. **Wetlands directly abutting RPWs that flow directly or indirectly into TNWs.** This class of water bodies is jurisdictional under the CWA.

Documentation requirements to support determination:

- Wetlands will meet the 3-parameter test contained in the agency's regulatory definition of wetlands. See also the protocol identified in the *Corps of Engineers Wetlands Delineation Manual* (1987) or appropriate Regional Supplement

If flow between the RPW and TNW is perennial, then:

- Section III.D.2. of the form needs to demonstrate that flow is typically year round
- Demonstrate wetland is directly abutting an RPW. Note that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary.

If flow between the RPW and TNW is at least seasonal, then:

- Section III.D.2 of the form needs to demonstrate that water flows from an RPW directly or indirectly into TNW
- Section III.B.2 needs to document that the wetland is directly abutting an RPW

As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a wetland directly abutting an RPW that is not perennial and a TNW.

5. **Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs.** This class of water bodies is jurisdictional under the CWA where there is a “significant nexus” with a TNW.

Documentation requirements to support determination:

- Wetlands will meet the 3-parameter test contained in the agency's regulatory definition of wetlands. See also the protocol identified in the *Corps of Engineers Wetlands Delineation Manual* (1987) or appropriate Regional Supplement
- Section III.B.1 of the form needs to demonstrate that water flows from an RPW directly or indirectly into a TNW
- Section III.B.2 and 3 need to identify rationale that wetland is adjacent (not directly abutting) to an RPW that flows directly or indirectly into a TNW
- Section III.C.3 needs to identify rationale to support significant nexus determination for a wetland, in combination with all other wetlands adjacent to that tributary

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.** This class of water bodies is jurisdictional under the CWA where there is a “significant nexus” with a TNW.

Documentation requirements to support determination:

- Wetlands will meet the 3-parameter test contained in the agency's regulatory definition of wetlands. See also the protocol identified in the *Corps of Engineers Wetlands Delineation Manual* (1987) or appropriate Regional Supplement
- Section III.B.1 of the form needs to demonstrate that water flows from a non-RPW directly or indirectly into a TNW
- Section III.B.2 and 3 need to identify rationale that the wetland is adjacent to a non-RPW that flows directly or indirectly into a TNW
- Section III.C.2 needs to identify rationale to support significant nexus determination for the wetland, in combination with all other wetlands adjacent to that tributary

7. **Impoundments of jurisdictional waters.** Generally, impoundment of a water of the U.S. does not affect the water's jurisdictional status.

Documentation requirements to support determination:

- Demonstrate that impoundment was created from “waters of the U.S.,” or
- Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
- Demonstrate that water is isolated with a nexus to commerce (see E below).
Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos. (Appendix C)

EXHIBIT R



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LOS ANGELES DISTRICT

Navigable Waters in Los Angeles District

This table lists Navigable Water only and does not include other non-navigable water of the U.S. that may be managed under Section 404 of the Clean Water Act

Body of Water	County/State	Remarks	Authority
Agua Hedionca Lagoon	San Diego County	CG--TO 2.5 ft MSL. Coe--TO 2.5 ft MSL.	D11 Memo 29 Mar 80. CoE LTR 29 Nov 72.
Alamitos Bay	Los Angeles County	TO MHW Small boat harbor	D11 Memo 25 Jan 74.
Alamo River	Imperial County	Nonnavigable	D11 Memo 14 May 76
Anaheim Bay	Orange County	CG--Entire Bay. COE--To 2.5 ft MSL.	D11 Memo 27 May 80. COE LTR 6 Feb 79
Arroyo Hondo	Santa Barbara County	CG--TO SR 101	D11 LTR 7 Sep 79
Ballona Creek	Los Angeles County	COE--TO 206 ft MSL.	COE LTR 29 Nov 72
Batiquitos Lagoon	San Diego County	COE TO Mile 2.5 ft MSL	COE LTR 29 Nov 72
Bolsa Bay	Orange County	CG--TO MHW. COE--TO 2.5 ft MSL.	D11 Memo 22 Jan 80. COE LTR 29 Nov 72
Buena Vista Lagoon	San Diego County	CG Nonavigable. COE to 2.5 ft MSL	COMDT ltr dtd 15 sep 75. COE ltr dtd 29 Nov 72.
Butano Creek	San Luis Obispo County	CG to mile 1.7. COE to mile 1.4 San Gregoria.	D12 ltr 6 feb 79. COE ltr 2 aug 71
Calleguas Creek	Ventura County	COE to 2.5 ft MSL	COE ltr 29 nov 72
Camp Pendelton Harbor	San Diego County	Military	COE ltr 17 feb 58
Carpinteria El Estero Marsh	Santa Barbara County	CoE to 2.5 ft MSL	CoE ltr 29 nov 72
Chorro Creek	San Luis Obispo County	CG to mile 1.2. COE to mile 11	D12 ltr 6 feb 79. COE Note 15 Jul 78
Colorado River: Mexican Border to Hoover Dam		Arizona V. CA., 283 US 423 (1931) & Arizona V. CA., 298 US 558 (1936)	
Colorado River: Hoover Dam to Grand Wash		Lake Mead	CoE LTR 2 Jan 75
Colorado River: Grand Wash to Glen Canyon Dam		No CG Determination CCGD11 (oan) LTR 16590 6 Feb 87	CoE LTR 8 Nov 73
Colorado River: Glen Canyon Dam to Cataract Canyon (Mile 176)		US V. Utah. 283 US 64 (1931)	
Colorado River: Cataract Canyon to Utah-Colorado Boarder			G-LMI LTR 16211 30 Nov 77
Colorado River: 4.5 Miles Below Green River to Castle Creek (just above MOAB)			
Colorado River: Utah-Colorado Boarder to Grand Junction			CoE LTR 15 Feb 72
Devareaux Ranch Lagoon	Santa Barbara County	COE to 2.5 ft MSL.	COE ltr 29 nov 72
Domingez Channel	Los Angeles County	CG to Vermont Ave	D11 dl Memo 21 Jul 81
Franklin Creek Carpinteria Valley Watershed Project	Santa Barbara County	Nonnavigable	D11 ltr 5 jan 76
Gila River	Arizona	Between Coolidge Dam & Painted Rock Dam	
Goleta Slough	Santa Barbara County	CG to MHW. CoE to 2.5 ft MSL.	COMDT ltr 12 nov 69. CoE ltr 29 nov 72.
Greenville-Banning Channel	Orange County	CG to 19th st bridge	D11 Memo 9 feb 78
Irwindale Quarry	Los Angeles County	Nonnavigable	D11 memo 17 jan 80
Lake Powell	AZ/Utah		
LA Plaeta Creek	San Diego County	CG to SD & AE Crossing. National City to San Diego & Arizona E RR BR.	D11 memo 16 jun 80

Las Chollas Creek	San Diego County	CG to mile 0.35	D11 memo 17 jul 78
Los Angeles/Long Beach Harbor	Los Angeles County	CG to MHW. CoE to to mile 8	D11 memo 23 aug 78. CoE ltr 17 feb 58.
Los Angeles River	Los Angeles County	CG to PCH Bridge/MHW. CoE to 2.5 ft MSL.	D11 memo 23 aug 78. CoE LTR 29 nov 72.
Los Penasquitos Lagoon	San Diego County	CG to I-5 Bridge. CoE to 2.5 ft MSL.	D11 memo 5 mar 86. CoE LTR 29 nov 72.
Mission Bay (Upper)	San Diego County	CoE to 2.6 ft MSL.	CoE LTR 29 nov 72
Morro Bay (Lower)	San Luis Obispo County	CG to MHW. CoE to 2.4 ft MSL.	D12 ltr 6 feb 79. CoE LTR 29 Nov 72.
Mugu Lagoon	Ventura County	CG Undetermined. CoE to 2.5 ft MSL.	COE LTR 29 Nov 72
Newport Bay (Upper)	Orange County	CoE to 2.5 ft MSL.	COE LTR 29 Nov 72
New River	Imperial County	Nonnavigable	D11 MEMO 18 Mar 77
Otay River	San Diego County	CG to MHW	D11 memo 22 mar 77
Pismo & Arroyo Grande Creeks	San Luis Obispo County	CoE to 2.5 ft MSL.	CoE ltr 29 nov 72
Playa Del Ray Harbor	Los Angeles County		
Port Hueneme	Ventura County		
Port San Luis	San Luis Obispo County	Tidal	
Redondo Beach	Los Angeles County		CoE LTR 17 feb 58
Salton Sea	Imperial County	Nonnavigable	COMDT ltr 3 jan 81
San Antonio Creek	Santa Barbara County	Nonnavigable	D11 memo 26 sep 79
San Diego River	San Diego County	CG to mean high water. CoE to 2.7 ft MSL.	D11 memo 30 sep 76. CoE ltr 29 nov 72.
San Diego Bay (lower)	San Diego County	CoE to 3 ft MSL.	COE LTR 29 nov 72
San Dieguito River	San Diego County	CG to I-5. CoE to 2.5 ft MSL.	D11 memo 8 mar 85. CoE ltr 29 nov 72.
San Elijo Lagoon	San Diego County	CoE to 2.5 ft MSL.	COE LTR 29 nov 72
San Gabriel River	Orange County	CG to 7th street bridge. CoE to 2.5 ft MSL.	D11 memo 16 sep 80. CoE LTR 6 feb 79.
San Juan Creek	Orange County	CoE to 2.6 ft MSL.	COE LTR 29 Nov 72
San Luis Rey River	San Diego County	CG to route 76. CoE to 2.5 ft MSL.	D11 memo 12 feb 79. CoE ltr 29 nov 72.
San Luis Obispo Creek	San Luis Obispo County	CG to mile 1.3. CoE to 2.5 ft MSL Pismo Beach.	D12 LTR 6 feb 79. CoE ltr 29 nov 72.
San Mateo Creek	San Diego County	CoE to 2.6 ft MSL.	COE ltr 29 nov 72.
San Pedro Creek	Santa Barbara County	Nonnavigable	D11 memo 1 may 78
San Simeon Bay	San Luis Obispo County	CoE to 2.5 ft MSL.	CoE ltr 29 nov 72.
San Simeon Creek	San Luis Obispo County	CG to mile 0.5. Camisria.	D12 ltr 6 feb 79
Santa Ana River	Orange County	CG to 19th street bridge.	D11 memo 9 feb 78.
Santa Barbara Harbor	Santa Barbara County	CoE--	
Santa Clara River	Ventura County	CG Nonnavigable	D11 memo 3 jun 87. D11 memo 29 Nov 72.
Santa Margarita River	San Diego County	CG Nonnavigable. CoE to 2.5 ft MSL.	D11 memo 16 nov 78. CoE ltr 29 nov 72.
Santa Maria River	Santa Barbara County	CoE to 2.5 ft MSL.	CoE LTR 29 nov 72
Santa Ynez River	Santa Barbara County	CoE to 2.5 ft MSL.	CoE LTR 29 nov 73
Sweetwater River	San Diego County	CG to mile 0.8	COMDT LTR 23 jan 78
Talbert Flood Control Channel	Orange County	CG to mean high water	D11 (d1) memo OF 26 july 84.
Tecolote River	San Diego County	CG to MHW. Mission Bay, San Diego	D11 memo 27 jan 78.
Tecolotilo Creek	Santa Barbara County	CG to Fowler St. Bridge.	COMDT LTR 12 nov 69
Tijuana Estuary	San Diego County	CoE to 2.5 ft. M.S.L.	CoE LTR 29 Nov 72
Ventura River	Ventura County	CoE--TO 2.6 ft M.S.L	CoE LTR 29 Nov 72



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EXHIBIT S



NIST
National Institute of
Standards and Technology
U.S. Department of Commerce

Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices

as adopted by the 100th
National Conference on
Weights and Measures 2015

NIST Handbook **44**
2016

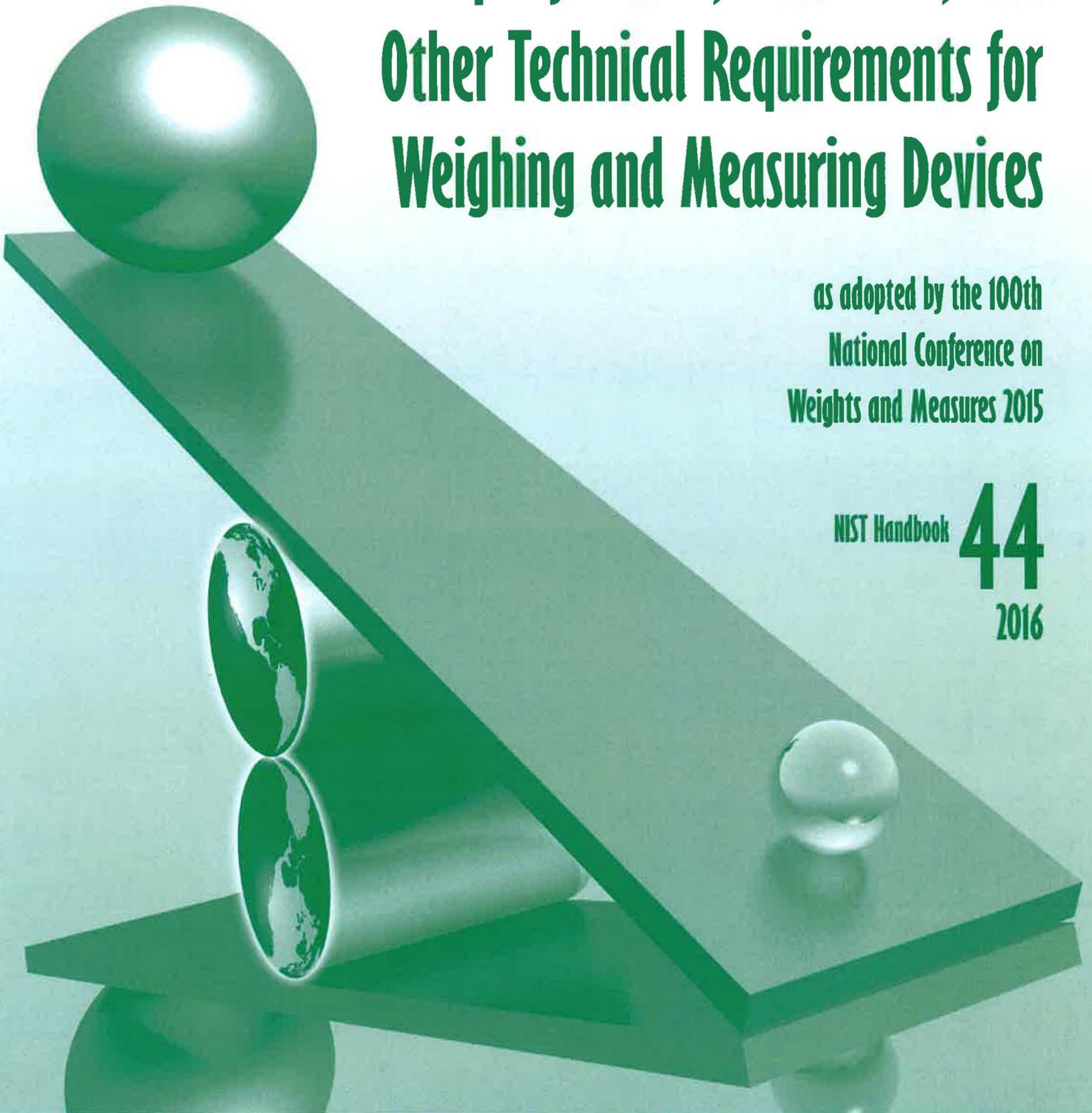


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Section 4.45. Dry Measures

A. Application

A.1. General. – This code applies to rigid measures of capacity designed for general and repeated use in the measurement of solids, including the capacities of ½ bu or more.

A.2. Exceptions.

- (a) This code does not apply to “standard containers” used for the measurement of fruits and vegetables and as shipping containers thereof.
- (b) This code does not apply to berry baskets and boxes. (Also see Section 4.46. Code for Berry Baskets and Boxes.)
(Added 1976)

A.3. Additional Code Requirements. – In addition to the requirements of this code, Dry Measures shall meet the requirements of Section 1.10. General Code.

S. Specifications

S.1. Units. – The capacity of a measure shall be 1 bu, a multiple of the bushel, or a binary submultiple of the bushel, and the measure shall not be subdivided or double-ended.

S.2. Material. – A dry measure shall be made of any suitable material that will retain its shape during normal usage.

S.3. Shape. – A measure, other than a basket, of a capacity of ½ bu or less, shall be cylindrical or conical in shape. The top diameter shall in no case be less than the appropriate minimum diameter shown in Table 1. Minimum Top Diameters for Dry Measure other than Baskets. The bottom of a measure, other than a basket, shall be perpendicular to the vertical axis of the measure and shall be flat, except that a metal bottom may be slightly corrugated. The bottom of a measure shall not be adjustable or movable.

Nominal Capacity	Minimum Top Diameter Inches
1 pint	4
1 quart	5 ³ / ₈
2 quarts	6 ⁵ / ₈
½ peck	8½
1 peck	10 ⁷ / ₈
½ bushel	13¾

S.3.1. Conical Dry Measure. – If conical, the top diameter shall exceed the bottom diameter by not more than 10 % of the bottom diameter.

S.4. Capacity Point. – The capacity of a measure shall be determined by the top edge of the measure.

S.5. Top Reinforcement. – The top edge of a measure shall be reinforced. On a wooden measure other than a basket, of a capacity of 1 qt or more, this reinforcement shall be in the form of a firmly attached metal band.

S.6. Marking Requirements. – A measure shall be conspicuously marked on its side with a statement of its capacity. If the capacity is stated in terms of the pint or quart, the word “Dry” shall be included. The capacity statement shall be in letters of the following dimensions:

- (a) At least $\frac{1}{2}$ in high and $\frac{1}{4}$ in wide on a measure of any capacity between $\frac{1}{2}$ pt and 1 pk.
- (b) At least 1 in high and $\frac{1}{2}$ in wide on a measure of a capacity of $\frac{1}{2}$ bu or more.
- (c) On a measure of a capacity of $\frac{1}{4}$ pt or less, the statement shall be as prominent as practicable, considering the size and design of such measure.

N. Notes

N.1. Testing Medium.

N.1.1. Watertight Dry Measures. – Water shall be used as the testing medium for watertight dry measures.

N.1.2. Non-Watertight Dry Measures. – A dry measure shall be tested either volumetrically using rapeseed as a testing medium or geometrically through inside measurement and calculation.

(Amended 1988)

T. Tolerances

T.1. – Maintenance tolerances in excess and in deficiency shall be as shown in Table 2. Maintenance Tolerances, in Excess and in Deficiency, for Dry Measure. Acceptance tolerances shall be one-half the maintenance tolerances.

Table 2.		
Maintenance Tolerances, in Excess and in Deficiency, for Dry Measures		
Nominal Capacity	Tolerance	
	In Excess Cubic Inches	In Deficiency Cubic Inches
$\frac{1}{32}$ pint or less	0.1	0.05
$\frac{1}{16}$ pint	0.15	0.1
$\frac{1}{8}$ pint	0.25	0.15
$\frac{1}{4}$ pint	0.5	0.3
$\frac{1}{2}$ pint	1.0	0.5
1 pint	2.0	1.0
1 quart	3.0	1.5

Table 2.		
Maintenance Tolerances, in Excess and in Deficiency, for Dry Measures		
Nominal Capacity	Tolerance	
	In Excess Cubic Inches	In Deficiency Cubic Inches
2 quarts	5.0	2.5
½ peck	10.0	5.0
1 peck	16.0	8.0
½ bushel	30.0	15.0
1 bushel	50.0	25.0

WestlawNext **California Code of Regulations**[Home Table of Contents](#)**§ 4000. Application.**

4 CA ADC § 4000

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS

Barclays Official California Code of Regulations [Currentness](#)

Title 4. Business Regulations

Division 9. Division of Measurement Standards, Department of Food and Agriculture

Chapter 1. Tolerances and Specifications for Commercial Weighing and Measuring Devices

Article 1. National Uniformity, Exceptions and Additions

4 CCR § 4000

§ 4000. Application.

Commercial weighing and measuring devices shall, except where noted below, conform to the latest requirements set forth in the National Institute of Standards and Technology Handbook 44 "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices", which is herein incorporated by reference, and to the Additional Requirements listed herein. Copies of Handbook 44 may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Note: Authority cited: Sections 12027 and 12107, Business and Professions Code. Reference: Section 12107, Business and Professions Code.

HISTORY

1. Repealer and new article 1 and section filed 11-1-94; operative 12-1-94 (Register 94, No. 44). For prior history, see Register 93, No. 19.

This database is current through 5/6/16 Register 2016, No. 19

4 CCR § 4000, 4 CA ADC § 4000

END OF DOCUMENT

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EXHIBIT T

2015-16 Fee Schedules

CALIFORNIA CODE OF REGULATIONS TITLE 23. Division 3. Chapter 9. Waste Discharge Reports and Requirements Article 1. Fees

Section 2200. Annual Fee Schedules.

Each person for whom waste discharge requirements have been prescribed pursuant to Section 13263 of the Water Code shall submit, to the State Board, an annual fee in accordance with the following schedules. The fee shall be submitted for each waste discharge requirement order issued to that person.¹

(a) The annual fees for persons issued waste discharge requirements (WDRs), except as provided in subdivisions (a)(3), (a)(4), (b), and (c), shall be based on the discharge's threat to water quality (TTWQ) and complexity (CPLX) rating according to the following fee schedule, plus applicable surcharge(s). For Fiscal Year 2015-16, Land Disposal dischargers Not Paying a Tipping Fee will receive a 19.2 percent fee reduction of the calculated fee, prior to the addition of any applicable surcharge. For Fiscal Year 2015-16, Land Disposal dischargers Paying a Tipping Fee will receive an 18.8 percent fee reduction of the calculated fee, prior to the addition of any applicable surcharge.

ANNUAL FEE SCHEDULE FOR WASTE DISCHARGE REQUIREMENTS				
Threat to Water Quality (TTWQ)	Complexity (CPLX)	Type of Discharge		
		Discharge to Land or Surface Waters ²	Land Disposal ³	
			Not Paying a Tipping Fee ⁴	Paying a Tipping Fee ⁵
1	A	\$109,095	\$70,781 ⁶	\$59,252 ⁶
1	B	\$68,901	\$57,168	\$47,856
1	C	\$37,178	\$36,751	\$30,766
2	A	\$24,833	\$30,625	\$25,638
2	B	\$14,929	\$24,502	\$20,510

¹ Federal facilities will generally not be invoiced for the portion of the annual fee that is attributable to the State Board's ambient water monitoring programs. See *Massachusetts v. United States* (1978) 435 U.S. 444.

² For this table, discharges to land or surface waters are those discharges of waste to land or surface waters not covered by NPDES permits that are regulated pursuant to Water Code Section 13263 that do not implement the requirements of Title 27 of the California Code of Regulations (CCR). Examples include, but are not limited to, wastewater treatment plants, erosion control projects, and septic tank systems. It does not include discharge of dredge or fill material, discharges from agricultural lands, including irrigated lands, or discharge from animal feeding operations. Dischargers covered by a WDR for municipal and domestic discharges with permitted flows of less than 50,000 gallons per day in categories 2-B, 2-C, 3-B and 3-C will receive a 50 percent fee discount. The design flow shall be used where no permitted flow is present. Municipal and domestic discharges receiving the discount are defined as discharges from facilities that treat domestic wastewater or a mixture of wastewater that is predominately domestic wastewater. Domestic wastewater consists of wastes from bathroom toilets, showers, and sinks from residential kitchens and residential clothes washing. It does not include discharges from food preparation and dish washing in restaurants or from commercial laundromats. Dischargers covered by a Landscape Irrigation General Permit issued by the State Water Board will be assessed a fee associated with TTWQ/CPLX rating of 3B.

³ For this table, land disposal discharges are those discharges of waste to land that are regulated pursuant to Water Code Section 13263 that implement the requirements of CCR Title 27, Division 2, except Chapter 7, Subchapter 2, §§22560-22565 (confined animal facilities). Examples include, but are not limited to, discharges associated with active and closed landfills, waste piles, surface impoundments, and mines.

⁴ For this table, Not Paying a Tipping Fee are those land disposal dischargers not subject to Public Resources Code (PRC) § 48000 et seq.

⁵ For this table, Paying a Tipping Fee are those land disposal dischargers subject to PRC § 48000 et seq.

⁶ A surcharge of \$12,000 will be added for Class I landfills. Class I landfills are those that, during the time they are, or were, in operation, are so classified by the Regional Board under 23 CCR Chapter 15, have WDRs that allow (or, for closed units, allowed) them to receive hazardous waste, and have a permit issued by the Department of Toxic Substances Control under 22 CCR Chapter 10, § 66270.1 et seq.

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2	C	\$11,195	\$18,376	\$15,383
3	A	\$8,823	\$12,250	\$10,256
3	B	\$4,699	\$9,188	\$7,690
3	C	\$2,088	\$4,082	\$3,419

Oil and gas produced water storage and disposal facilities regulated by waste discharge requirements are subject to a surcharge as follows:

Barrels/Year	Surcharge
0-19,999	\$4,500
20,000-99,999	\$9,000
100,000+	\$13,500

(1) Threat to water quality (TTWQ)⁷ and complexity (CPLX) of the discharge is assigned by the Regional Board in accordance with the following definitions:

THREAT TO WATER QUALITY

Category "1" – Those discharges of waste that could cause the long-term loss of a designated beneficial use of the receiving water. Examples of long-term loss of a beneficial use include the loss of drinking water supply, the closure of an area used for water contact recreation, or the posting of an area used for spawning or growth of aquatic resources, including shellfish and migratory fish.

Category "2" – Those discharges of waste that could impair the designated beneficial uses of the receiving water, cause short-term violations of water quality objectives, cause secondary drinking water standards to be violated, or cause a nuisance.

Category "3" – Those discharges of waste that could degrade water quality without violating water quality objectives, or could cause a minor impairment of designated beneficial uses as compared with Category 1 and Category 2.

COMPLEXITY

Category "A" – Any discharge of toxic wastes; any small volume discharge containing toxic waste; any facility having numerous discharge points and groundwater monitoring; or any Class 1 waste management unit.

Category "B" – Any discharger not included in Category A that has physical, chemical, or biological treatment systems (except for septic systems with subsurface disposal), or any Class 2 or Class 3 waste management units.

Category "C" – Any discharger for which waste discharge requirements have been prescribed pursuant to Section 13263 of the Water Code not included in Category A or Category B as described above. Included are dischargers having no waste treatment systems or that must comply with best management practices, dischargers having passive treatment and disposal systems, or dischargers having waste storage systems with land disposal.

⁷ In assigning a category for TTWQ, a regional board should consider duration, frequency, seasonality, and other factors that might limit the impact of the discharge.

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(2) For dischargers covered under Statewide General WDRs for Sanitary Sewer Systems, the TTWQ and CPLX designations are assigned based on the population served by the sanitary sewer system. The table below describes the correlation between population served and TTWQ and CPLX designations to determine the appropriate annual fee:

Population Served ⁸	Threat and Complexity Designation
Less than 50,000	3C
50,000 or more	2C

(3) The fees for discharges of dredge and fill material shall be as follows.⁹

STANDARD FEE			
Discharge Category	Application Fee ¹⁰	Annual Active Discharge Fee ¹¹	Annual Post-Discharge Monitoring Fee ¹²
(A) Fill and Excavation ¹³ Discharges	Discharge length in feet x \$13.50	\$600	\$300

⁸ Assumes 2.5 persons per equivalent dwelling unit (EDU).

⁹ i. For "excavation" the area of the discharge is the area of excavation; if the excavated material is then discharged to waters, an additional "fill" fee will be assessed.
 ii. When a single project includes multiple discharges within a single dredge and fill fee category, the fee for that category shall be assessed based on the total area, volume, or length of discharge (as applicable) of the multiple discharges. When a single project includes discharges that are assessed under multiple standard fee categories, the total application fee shall be the sum of the application fees assessed under each applicable fee category; however only a single annual active discharge fee or annual post-discharge monitoring fee, if required, shall be assessed for the project. The single annual active discharge fee and the single annual post-discharge monitoring fee for the project shall be based on the higher of the applicable fee categories. Single projects qualifying for a special/flat fee or amended order fee shall only be assessed the applicable special/flat fee or amended order fee.
 iii. Fees shall be based on the largest discharge size specified in the original or revised report of waste discharge or Clean Water Act (CWA) Section 401 water quality certification application, or as reduced by the applicant without any State Board or Regional Board intervention.
 iv. If water quality certification is issued in conjunction with dredge or fill WDRs or is issued for a discharge regulated under such preexisting WDRs, the current annual WDR fee as derived from this dredge and fill fee schedule shall be paid in advance during the application for water quality certification, and shall comprise the fee for water quality certification.
 v. Discharges requiring water quality certification and regulated under a federal permit or license other than a US Army Corps of Engineers CWA Section 404 permit or a Federal Energy Regulatory Commission License shall be assessed a fee determined from CCR 23, Section 2200(a).

¹⁰ Dischargers shall pay a one-time application fee for each project at the time that the application or report of waste discharge is submitted. Notwithstanding section 2200.2, if discharges commence in a fiscal year other than the fiscal year in which the application or report of waste discharge is submitted, the application fee is in addition to the first annual active discharge fee for the project. If discharges commence in the same fiscal year as the application or report of waste discharge is submitted, the discharger shall pay only the greater of the application fee or the first annual active discharge fee. The application fee for category (A) fill and excavation discharges will be based on the discharger's estimate of project length and area. If, upon completion, the actual length or area is larger than the estimate, the discharger may receive an additional application fee invoice that is based on the actual project length and area, minus the application fee that was previously paid.

¹¹ Dischargers shall pay an annual active discharge fee each fiscal year or portion of a fiscal year during which discharges occur until the regional board or the State Board issues a Notice of Completion of Discharges Letter to the discharger. The annual active discharge fee for category (B) dredging discharges will be invoiced after the annual dredge volume has been determined.

¹² Dischargers shall pay an annual post-discharge monitoring fee each fiscal year or portion of a fiscal year commencing with the first fiscal year following the fiscal year in which the regional board or State Board issued a Notice of Completion of Discharges Letter to the discharger, but continued water quality monitoring or compensatory mitigation monitoring is required. Dischargers shall pay the annual post-discharge monitoring fee each fiscal year until the regional board or the State Board issues a Notice of Project Complete Letter to the discharger.

¹³ "Excavation" refers to removing sediment or soil in shallow waters or under no-flow conditions where impacts to beneficial uses are best described by the area of the discharge. It typically is done for purposes other than navigation. Examples include trenching for utility lines, other earthwork preliminary to discharge, removing sediment to increase channel capacity, and other flood control and drainage maintenance activities (e.g., debris removal, vegetation management and removal, detention basin maintenance and erosion control of slopes along open channels and other drainage facilities).

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Discharges will be assessed as the higher fee of "discharge length in feet" and "discharge area in acres." The size of the discharge area shall be rounded to two decimal places (0.01 acre = 436 square feet).	-or- Discharge area in acres x \$5,670 whichever is higher, up to a maximum of \$90,000. The minimum application fee is \$600.		
Discharge Category	Application Fee¹⁰	Annual Active Discharge Fee¹¹	Annual Post-Discharge Monitoring Fee¹²
(B) Dredging¹⁴ Discharges (except Sand Mining-see (C) below) Dredge volume expressed in cubic yards.	\$600	Annual dredge volume in cubic yards x \$0.21, up to a project maximum of \$90,000. The minimum annual active discharge fee is \$600.	\$300

SPECIAL/FLAT FEE			
Discharge Category	Application Fee¹⁰	Annual Active Discharge Fee¹¹	Annual Post-Discharge Monitoring Fee¹²
(C) Sand Mining Dredging Discharges Aggregate extraction in marine waters where source material is free of pollutants and the dredging operation will not violate any basin plan provisions.	\$600	\$600	\$300
(D) Ecological Restoration and Enhancement Projects Projects undertaken for the sole purpose of restoring or enhancing the beneficial uses of water. This schedule does not apply to projects required under a regulatory mandate or to projects that are not primarily intended for ecological restoration or enhancement, e.g., land development.	\$200	\$200	\$100
(E) Low Impact Discharges Projects may be classified as low impact discharges if they meet all of the following criteria: 1. The discharge size is less than all of the following: (a) for fill, 0.1 acre, and 200 linear feet, and (b) for dredging, 25 cubic yards. 2. The discharger demonstrates that: (a) all practicable measures will be taken to avoid impacts; (b) where unavoidable temporary impacts take place, waters and vegetation will be restored to pre-project conditions as quickly as practicable; and (c) where unavoidable permanent impacts take place, there will be no net loss of wetland, riparian area, or headwater functions, including onsite habitat, habitat connectivity, floodwater retention, and pollutant removal. 3. The discharge will not do any of the following: (a) directly or indirectly destabilize a bed of a receiving water; (b) contribute to significant cumulative effects; (c) cause pollution, contamination, or nuisance; (d) adversely affect candidate, threatened, or endangered species; (e) degrade water quality or beneficial uses; (f) be toxic; or (g) include "hazardous" or "designated" material.	\$200	N/A	N/A

¹⁴ "Dredging" generally refers to removing sediment in deeper water to increase depth. The impacts to beneficial uses are best described by the volume of the discharge and typically occur to facilitate navigation. For fee purposes it also includes aggregate extraction within stream channels where the substrate is composed of coarse sediment (e.g., gravel) and is reshaped by normal winter flows (e.g., point bars), where natural flood disturbance precludes establishment of significant riparian vegetation, and where extraction timing, location and volume will not cause changes in channel structure (except as required by regulatory agencies for habitat improvement) or impair the ability of the channel to support beneficial uses.

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<p>(F) General Orders for CEQA Exempt Projects Projects which are CEQA exempt and which are required to submit notification of a proposed discharge to the State and/or Regional Board pursuant to: (1) a general order authorizing impacts for the qualifying project CEQA exemption (e.g. Small Habitat Restoration General Permit); or (2) a general water quality certification permitting discharges authorized by a U.S. Army Corps of Engineers general permit (e.g., nationwide permit). Applies ONLY if a general order or general water quality certification was previously granted.</p> <p>(G) Emergency Projects authorized by a Water Board General Order</p>	\$200	N/A	N/A
<p>(H) Amended Orders Amendments of WDR's or water quality certifications previously issued for one-time discharges not subject to annual billings.</p> <ul style="list-style-type: none"> (a) Minor project changes, not requiring technical analysis and involving only minimal processing time. (b) Changes to projects eligible for flat fees (fee categories C and D) where technical analysis is needed to assure continuing eligibility for flat fee and that beneficial uses are still protected. (c) Project changes not involving an increased discharge amount, but requiring some technical analysis to assure that beneficial uses are still protected and that original conditions are still valid, or need to be modified. (d) Project changes involving an increased discharge amount and requiring some technical analysis to assure that beneficial uses are still protected and that original conditions are still valid, or need to be modified. (e) Major project changes requiring an essentially new analysis and re-issuance of WDR's or water quality certification. 	<ul style="list-style-type: none"> (a) No fee required (b) \$300 flat fee (c) \$200 flat fee (d) Additional standard fee assessed per increased amount of discharge(s) (e) New standard fee assessed 		

DREDGE AND FILL FEE CALCULATOR ¹ v14c 09/08/2016

This fee schedule is based on California Code of Regulations, Title 23, Section 2269(a)(3). **TO CALCULATE FEE:** Enter the "Discharge Size" in Section A or, if the project qualifies, check the check box in Section B according to the applicable Flat Fee category. If the project involves multiple discharges, then both Section A and Section B fee charges may apply. The project application deposit amount will appear in the "Application Fee Deposit" row at the bottom of the Fee Calculator. The remaining fee due prior to issuance of a certification for the project will appear in the "Balance of Application Fee Due Prior to Certification" row at the bottom of the Fee Calculator. The annual active discharge fee and annual post discharge monitoring fee will appear in the "Annual Fees" row at the bottom of the Fee Calculator. Discharges to waters of the state from both temporary and permanent project impacts are subject to fees. In any case, dredge and fill operation fees shall not exceed \$90,000 for Fill and Excavation Applications and \$60,000 for Dredging Approval Active Discharge Fee.

For Flat Fees: Only the application fee deposit for the selected fee category is due at time of application. The balance of the application fee is due prior to certification (see row at bottom of calculator). Dischargers will be invoiced an Annual Active Discharge Fee beginning in November/December of the year following the Effective Date of certification. Dischargers will be invoiced for an Annual Active Discharge fee each year until the Active Discharge Period is completed. If applicable, dischargers will be invoiced for an Annual Post Discharge Monitoring Fee after the project has completed the Active Discharge Period.

Single Project Including Multiple Discharges

A. FEES BASED ON DISCHARGE SIZE

FEE CATEGORY	RATE	DISCHARGE SIZE		APPLICATION FEE ¹	ANNUAL ACTIVE DISCHARGE FEE ¹	ANNUAL POST DISCHARGE MONITORING FEE ¹
(A) Fill & Excavation³ Discharges. Discharges will be assessed as the higher fee of "discharge length in feet" and "discharge area in acres". Discharge length shall be reported in Linear Feet. Includes linear discharges to drainage features and shorelines. The size of the discharge area shall be rounded to two decimal places (0.01 acre = 436 square feet).	Discharge Length Feet x \$13.50		\$0	\$0	\$0	\$0
	Discharge Area Acres x \$5,670		\$0			
(B) Dredging Discharges (except Sand Mining-see (C) below)⁴ Annual dredge volume expressed in cubic yards.	Dredge Volume CY x \$0.21			\$0	\$0	\$0
Total Application Fee (to be submitted prior to certification):¹⁰⁰¹				\$0		
Active and Post Discharge Monitoring Fee (invoiced in following years):					\$0	\$0

B. FEES BASED ON FLAT FEE CATEGORIES

(C) Sand Mining Dredging Discharges. Aggregate extraction in marine waters where the source material is free of pollutants and the dredging operation will not violate any Basin Plan Provisions.	Flat fee	Check if Applicable	<input type="checkbox"/>	\$0	\$0	\$0
(D) Ecological Restoration and Enhancement Projects Projects undertaken for the sole purpose of restoring or enhancing the beneficial uses of water. This schedule does not apply to projects required under a regulatory mandate or to projects that are not primarily intended for ecological restoration or enhancement, e.g., land development.	Flat fee	Check if Applicable	<input type="checkbox"/>	\$0	\$0	\$0
(E) Low Impact Discharges. Projects may be classified as low impact discharges if they meet the following criteria: 1. The discharge size is less than all of the following: (a) for fill, 0.1 acre, and 200 linear feet; and (b) for dredging, 25 cubic yards. 2. The discharger demonstrates that: (a) all practicable measures will be taken to avoid impacts; (b) where unavoidable temporary impacts take place, waters and vegetation will be restored to pre-project conditions as quickly as practicable; and (c) where unavoidable permanent impacts take place, there will be no net loss of wetland, riparian area, or headwater functions, including onsite habitat, habitat connectivity, floodwater retention, and pollutant removal. 3. The discharge will not do any of the following: (a) directly or indirectly destabilize a bed of a receiving water; (b) contribute to significant cumulative effects; (c) cause pollution, contamination, or nuisance; (d) adversely affect candidate, threatened, or endangered species; (e) degrade water quality or beneficial uses; (f) be toxic; or (g) include "hazardous" or "designated" material.	Flat fee	Check if Applicable	<input type="checkbox"/>	\$0	N/A	N/A
(F) General Orders For CEQA Exempt Projects Projects which are CEQA exempt and which are required to submit notification of a proposed discharge to the State and/or Regional Board pursuant to: (1) a general order authorizing impacts for the qualifying project CEQA exemption (e.g. Small Habitat Restoration General Permit); or (2) a general water quality certification permitting discharges authorized by a U.S. Army Corps of Engineers general permit (e.g., nationwide permit). Applies ONLY if a general order or general water quality certification was previously granted.	Flat Fee	Check if Applicable	<input type="checkbox"/>	\$0	N/A	N/A
(G) Emergency Projects authorized by a Water Board General Order	Flat Fee	Check if Applicable	<input type="checkbox"/>	\$0	N/A	N/A

Application Fee (to be submitted during application)		Categories (C) to (G)	\$0		
Active and Post Discharge Monitoring Fee (invoiced in following years)		Categories (C) to (G)		\$0	\$0
C. FEES BASED ON AMENDED ORDERS					
Amended Orders. Amendments of WDR's or water quality certifications previously issued for one-time discharges not subject to annual billings. Fees charged as follows:					
(i) Minor project changes, not requiring technical analysis and involving only minimal processing time.	No fee required				
(ii) Changes to project eligible for flat fees (fee categories C, D and E above) where technical analysis is needed to assure continuing eligibility for flat fee and that beneficial uses are still protected. This does not apply if a general order or general water quality certification was issued.	Flat fee	Check if Applicable	<input type="checkbox"/>	\$0	
(iii) Project changes not involving an increased discharge amount, but requiring some technical analysis to assure that beneficial uses are still protected and that original conditions are still valid, or need to be modified	Flat fee	Check if Applicable	<input type="checkbox"/>	\$0	
(iv) Project changes involving an increased discharge amount and requiring some technical analysis to assure that beneficial uses are still protected and that original conditions are still valid, or need to be modified.	Additional fee assessed per increased amount of discharge(s) Complete Section A	Check if Applicable	<input type="checkbox"/>		
(v) Major project changes requiring an essentially new analysis and re-issuance of WDR's or water quality certification.	New fee assessed				
Fees Based on Amended Orders		Amended Orders (i) to (v)	\$0	\$0	\$0
APPLICATION FEE DEPOSIT			\$0		
BALANCE OF APPLICATION FEE DUE PRIOR TO CERTIFICATION			\$0		
ANNUAL FEES				\$0	\$0
Federal Facility (check box)			<input type="checkbox"/>		
APPLICATION FEE DEPOSIT (FEDS)			N/A		
BALANCE OF APPLICATION FEE DUE PRIOR TO CERTIFICATION (FEDS)			N/A		
ANNUAL FEES (FEDS)				N/A	N/A
<p>1(a) For "excavation" the area of the discharge is the area of excavation; if the excavated material is then discharged to waters, an additional "fill" fee will be assessed.</p> <p>1(b) When a single project includes multiple discharges within a single dredge and fill fee category, the fee for that category shall be assessed based on the total area, volume, or length of discharge (as applicable) of the multiple discharges. When a single project includes discharges that are assessed under multiple standard fee categories, the total application fee shall be the sum of the application fees assessed under each applicable fee category; however only a single annual active discharge fee or annual post-discharge monitoring fee, if required, shall be assessed for the project. The single annual active discharge fee and the single annual post-discharge monitoring fee for the project shall be based on the higher of the applicable fee categories. Single projects qualifying for a flat fee or amended order fee shall only be assessed the applicable flat fee or amended order fee.</p> <p>1(c) Fees shall be based on the largest discharge size specified in the original or revised report of waste discharge or Clean Water Act (CWA) Section 401 water quality certification application, or as reduced by the applicant without any State Board or Regional Board intervention.</p> <p>1(d) If water quality certification is issued in conjunction with dredge or fill WDRs or is issued for a discharge regulated under such preexisting WDRs, the current annual WDR fee as derived from this dredge and fill fee schedule shall be paid in advance during the application for water quality certification, and shall comprise the fee for water quality certification.</p> <p>1(e) Discharges requiring water quality certification and regulated under a federal permit or license other than a US Army Corps of Engineers CWA Section 404 permit or a Federal Energy Regulatory Commission License shall be assessed a fee determined from CCR 23, Section 2200(a).</p> <p>2 Dischargers shall pay a one-time application fee for each project at the time that the application or report of waste discharge is submitted. Notwithstanding section 2200.2, if discharges commence in a fiscal year other than the fiscal year in which the application or report of waste discharge is submitted, the application fee is in addition to the first annual active discharge fee for the project. If discharges commence in the same fiscal year as the application or report of waste discharge is submitted, the discharger shall pay only the greater of the application fee or the first annual active discharge fee. The application fee for category (A) fill and excavation discharges will be based on the discharger's estimate of project length and area. If, upon completion, the actual length or area is larger than the estimate, the discharger may receive an additional application fee invoice that is based on the actual project length and area, minus the application fee that was previously paid.</p> <p>3 Dischargers shall pay an annual active discharge fee each fiscal year or portion of a fiscal year during which discharges occur until the regional board or the State Board issues a Notice of Completion of Discharges Letter to the discharger. The annual active discharge fee for category (B) dredging discharges will be invoiced after the annual dredge volume has been determined.</p> <p>4 Dischargers shall pay an annual post-discharge monitoring fee each fiscal year or portion of a fiscal year commencing with the first fiscal year following the fiscal year in which the regional board or State Board issued a Notice of Completion of Discharges Letter to the discharger, but continued water quality monitoring or compensatory mitigation monitoring is required. Dischargers shall pay the annual post-discharge monitoring fee each fiscal year until the regional board or the State Board issues a Notice of Project Complete Letter to the discharger.</p> <p>5 "Excavation" refers to removing sediment or soil in shallow waters or under no-flow conditions where impacts to beneficial uses are best described by the area of the discharge. It typically is done for purposes other than navigation. Examples include trenching for utility lines, other earthwork preliminary to discharge, removing sediment to increase channel capacity, and other flood control and drainage maintenance activities (e.g., debris removal, vegetation management and removal, detention basin maintenance and erosion control of slopes along open channels and other drainage facilities).</p> <p>6 "Dredging" generally refers to removing sediment in deeper water to increase depth. The impacts to beneficial uses are best described by the volume of the discharge and typically occur to facilitate navigation. For fee purposes it also includes aggregate extraction within stream channels where the substrate is composed of coarse sediment (e.g., gravel) and is reshaped by normal winter flows (e.g., point bars), where natural flood disturbance precludes establishment of significant riparian vegetation, and where extraction timing, location and volume will not cause changes in channel structure (except as required by regulatory agencies for habitat improvement) or impair the ability of the channel to support beneficial uses.</p>					

EXHIBIT U



US Army Corps
of Engineers®

REGULATORY GUIDANCE LETTER

No. 05-05

Date: 7 December 2005

SUBJECT: Ordinary High Water Mark Identification

1. Purpose and Applicability

a. **Purpose.** To provide guidance for identifying the ordinary high water mark.

b. **Applicability.** This applies to jurisdictional determinations for non-tidal waters under Section 404 of the Clean Water Act and under Sections 9 and 10 of the Rivers and Harbors Act of 1899.

2. General Considerations

a. **Regulation and Policy.** Pursuant to regulations and inter-agency agreement,¹ the U.S. Army Corps of Engineers (Corps) determines, on a case-by case basis, the extent of geographic jurisdiction for the purpose of administering its regulatory program. For purposes of Section 404 of the Clean Water Act (CWA), the lateral limits of jurisdiction over non-tidal water bodies extend to the ordinary high water mark (OHWM), in the absence of adjacent wetlands. When adjacent wetlands are present, CWA jurisdiction extends beyond the OHWM to the limits of the adjacent wetlands. For purposes of Sections 9 and 10 of the Rivers and Harbors Act of 1899, the lateral extent of Federal jurisdiction, which is limited to the traditional navigable waters of the United States, extends to the OHWM, whether or not adjacent wetlands extend landward of the OHWM.

Corps regulations define the term “ordinary high water mark” for purposes of the CWA lateral jurisdiction at 33 CFR 328.3(e), which states:

“The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”

1. Memorandum of Agreement between the Department of the Army and Environmental Protection Agency Concerning the Determination of the Geographical Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act, January 19, 1989

This definition is virtually identical to the definition of the term “ordinary high water mark” found at 33 CFR Section 329.11(a)(1), describing the lateral extent of Federal jurisdiction over non-tidal traditional navigable waters of the United States subject to Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA). When the definition from 33 CFR Section 329.11(a)(1) was reproduced at 33 CFR 328.3(e), the semi-colons of the former definition were mistakenly changed to commas in the latter definition. Consequently, the definition of “ordinary high water mark” in Part 328 is not as clear in meaning as is the definition of the same term in Part 329, even though the two definitions were to serve the same basic purpose (i.e., establishing the lateral extent of jurisdiction, in the absence of adjacent wetlands).²

Both definitions of the term “ordinary high water mark” begin by discussing physical characteristics that indicate the location of the OHWM on the shore of a water body. Furthermore, both OHWM definitions conclude with the statement the OHWM can be determined using “other appropriate means that consider the characteristics of the surrounding areas”.³ Prior to this Regulatory Guidance Letter (RGL), neither the Corps nor the U.S. Environmental Protection Agency has issued any additional clarifying national guidance for use by Corps regulatory program staff in identifying the location of the OHWM for the CWA on a case-by-case basis.⁴

b. Practice. In making OHWM determinations, Corps districts generally rely on physical evidence to ascertain the lateral limits of jurisdiction, to whatever extent physical evidence can be found and such evidence is deemed reasonably reliable. Physical indicators include the features listed in the definitions at 33 CFR Sections 328.3(e) and 329.11(a)(1) and other appropriate means that consider the characteristics of the surrounding areas. In addition, districts use other methods for estimating the line on the shore established by the fluctuations of water, including, but not limited to, lake and stream gage data, flood predictions, historic records of water flow, and statistical evidence. To the maximum extent practicable, districts generally use more than one physical indicator or other means for determining the OHWM.

3. Guidance.

a. In determining the location of the OHWM for non-tidal water bodies under the CWA or the RHA, districts should give priority to evaluating the physical characteristics of the area that are determined to be reliable indicators of the OHWM. Physical evidence to be evaluated includes those items listed in the definitions at 33 CFR Sections 328.3(e) and 329.11(a)(1). Because many types of water bodies occur with varying conditions, including topography, channel morphology and flow dynamics, districts may consider other physical characteristics indicative of the OHWM.

2. CWA jurisdiction extends laterally landward of the OHWM to include all adjacent wetlands wherever such adjacent wetlands are present. This guidance addresses situations where no such adjacent wetlands exist.

3. Changes in the limits of waters of the U.S. are addressed in 33 CFR 328.5.

4. On 3 June 1983 the Corps of Engineers’ Chief Counsel distributed legal guidance to all Corps district and division counsel offices regarding certain legal questions relating to the geographic jurisdiction of Section 10 of the Rivers and Harbors Act of 1899, including questions relating to the OHWM.

b. The following physical characteristics should be considered when making an OHWM determination, to the extent that they can be identified and are deemed reasonably reliable:

Natural line impressed on the bank	Sediment sorting
Shelving	Leaf litter disturbed or washed away
Changes in the character of soil	Scour
Destruction of terrestrial vegetation	Deposition
Presence of litter and debris	Multiple observed flow events
Wracking	Bed and banks
Vegetation matted down, bent, or absent	Water staining
	Change in plant community

This list of OHWM characteristics is not exhaustive. Physical characteristics that correspond to the line on the shore established by the fluctuations of water may vary depending on the type of water body and conditions of the area. There are no “required” physical characteristics that must be present to make an OHWM determination. However, if physical evidence alone will be used for the determination, districts should generally try to identify two or more characteristics, unless there is particularly strong evidence of one.

c. Where the physical characteristics are inconclusive, misleading, unreliable, or otherwise not evident, districts may determine the OHWM by using other appropriate means that consider the characteristics of the surrounding areas, provided those other means are reliable.⁵ Such other reliable methods that may be indicative of the OHWM include, but are not limited to, lake and stream gage data, elevation data, spillway height, flood predictions, historic records of water flow, and statistical evidence.

d. When making OHWM determinations, districts should be careful to look at characteristics associated with ordinary high water events, which occur on a regular or frequent basis. Evidence resulting from extraordinary events, including major flooding and storm surges, is not indicative of the OHWM. For instance, a litter or wrack line resulting from a 200-year flood event would in most cases not be considered evidence of an OHWM.

e. Districts will document in writing the physical characteristics used to establish the OHWM for CWA and/or RHA jurisdiction. If physical characteristics are inconclusive, misleading, unreliable, or not evident, the Districts’ written documentation will include information about the physical characteristics (or lack thereof) and other appropriate means that consider the characteristics of the surrounding areas, which it used to determine the OHWM.

f. To complete an approved jurisdictional determination, districts will have complete and accurate documentation that substantiates the Corps decision. At a minimum, decisions will be documented using the standardized jurisdictional determination information sheet established by

5. In some cases, the physical characteristics may be misleading and would not be reliable for determining the OHWM. For example, water levels or flows may be manipulated by human intervention for power generation or water supply. For such cases, districts should consider using other appropriate means to determine the OHWM.

Headquarters and provided to the districts on August 13, 2004 (or as further amended by Headquarters). Documentation will allow for a reasonably accurate replication of the determination at a future date. In this regard, documentation will normally include information such as data sheets, site visit memoranda, maps, sketches, and, in some cases, surveys and photographs documenting the OHWM.

4. **Duration.** This guidance remains in effect unless revised or rescinded.



DON T. RILEY
Major General, US Army
Director of Civil Works

EXHIBIT V



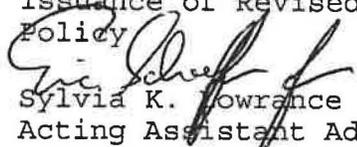
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 21 2001

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Issuance of Revised CWA Section 404 Settlement Penalty
Policy

FROM: 
Sylvia K. Lowrance
Acting Assistant Administrator

TO: Water Protection/Management Division Directors,
Regions I-X
Director, Office of Environmental Stewardship, Region I
Director, Division of Environmental Protection and
Planning, Region II
Enforcement and Compliance Assistance Directors,
Regions II, VI, and VIII
Water, Wetlands, and Pesticides Division Director,
Region VII
Regional Counsels, Regions I-X

Attached is the Agency's new Clean Water Act Section 404 Settlement Penalty Policy. This Policy is intended to be used by EPA in calculating the penalty that the Federal government will generally seek in settlement of judicial and administrative actions for Section 404 violations (i.e., violations resulting from the discharge of dredged or fill material into wetlands or other waters of the United States without Section 404 permit authorization, or in violation of a Section 404 permit.) This policy establishes a framework which EPA expects to use in exercising its enforcement discretion in determining appropriate settlement amounts for such cases.

This guidance is intended to promote a more consistent national approach to assessing settlement penalty amounts in CWA Section 404 enforcement actions, while allowing EPA staff flexibility in arriving at specific penalty settlement amounts in

a given case. This policy is effective immediately and supersedes the December 14, 1990 Guidance, "Clean Water Act Section 404 Civil Administrative Penalty Actions: Guidance on Calculating Settlement Amounts." This policy applies to all CWA Section 404 civil judicial and administrative actions filed after this date, and to all pending cases in which the government has not yet transmitted to the defendant or respondent a proposed settlement penalty amount. This policy may be applied in pending cases in which penalty negotiations have commenced, if application of this Policy would not be disruptive to the negotiations.

We would like to take this opportunity to thank all those in the Regions, the Office of General Counsel, and Department of Justice who commented on drafts of this policy. Your comments were very helpful in making this a more complete and useful document.

If you have questions or comments with respect to this Policy please contact Joe Theis in the Water Enforcement Division at (202)564-0024.

Attachment

cc: Susan Lepow, OGC
Leti Grishaw, DOJ-EDS
Mary Beth Ward, DOJ-EDS

CLEAN WATER ACT SECTION 404
SETTLEMENT PENALTY POLICY

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ATTACHMENT 1 -- Settlement Penalty Calculation Worksheet

CLEAN WATER ACT SECTION 404 SETTLEMENT PENALTY POLICY

I. INTRODUCTION

This document sets forth the policy of the U.S. Environmental Protection Agency (“EPA” or “Agency”) for establishing appropriate penalties in settlement of an administrative or civil judicial penalty proceeding against a person who has violated Sections 301 and 404 of the Clean Water Act (“CWA” or “Act”)¹ by discharging dredged or fill material into wetlands or other waters of the United States without Section 404 permit authorization, or in violation of a Section 404 permit.² This policy implements the Agency’s *Policy on Civil Penalties* and the companion document, *A Framework for Statute Specific Approaches to Penalty Assessments*, both issued on February 16, 1984, with respect to these types of violations. This settlement penalty policy should be read in conjunction with other applicable policies, such as the *Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act* (SBREFA Policy) (May 28, 1996), *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* (EPA Audit Policy) (April 11, 2000), and the *EPA Supplemental Environmental Projects Policy* (SEP Policy) (May 1, 1998).

EPA brings enforcement actions to require alleged violators to promptly correct their violations and to remedy any harm caused by those violations.³ As part of an enforcement action, EPA also seeks substantial monetary penalties, that recover the economic benefit of the violations plus an appropriate gravity amount that will deter future violations by the same violator and by other members of the regulated community. Penalties help to ensure a level playing field within the regulated community

¹ 33 U.S.C. § 1311(a), 33 U.S.C. § 1344.

² EPA may currently seek civil penalties up to \$27,500 per day per violation in the federal district courts under Section 309(d), or may seek an administrative assessment of \$11,000 per day of violation up to \$137,500 before an Agency administrative law judge under Section 309(g) for the unauthorized discharge of dredged or fill material into waters of the United States, or violation of a Section 404 permit. 33 U.S.C. § 1319(d) and (g). These figures reflect a 10% increase from the amounts set forth in the CWA as provided for under the Civil Monetary Penalties Adjustment Rule. The Agency is preparing to issue a revision to the Civil Monetary Penalties Adjustment Rule in the near future. See footnote 10 below for further discussion.

³ For a discussion of the policy and procedures regarding EPA and Army Corps of Engineers (“Corps”) implementation of Section 404 enforcement responsibilities see “Memorandum of Agreement Between the Department of the Army/Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act” (January 19, 1989). This document is available on the Internet at: <http://www.epa.gov/OWOW/wetlands/regs/enfmoa.html>.

by ensuring that violators do not obtain an unfair economic advantage over competitors who have complied with the Act. At the same time, EPA's policies provide for adjustments based on a violator's good faith efforts to comply (or lack thereof) and inability to pay a penalty.

The need to deter violations and remedy any harm caused by such violations is especially evident with respect to the discharge of dredged and/or fill material into waters of the U.S., particularly wetlands and other special aquatic sites.⁴ Wetlands are a vital yet increasingly threatened natural resource.⁵ Wetlands act as natural sponges, providing flood protection and storm damage control and facilitating groundwater recharge. They furnish habitat for myriad plants and animals, including many endangered species, and provide billions of dollars to the national economy each year from fisheries and recreational activities such as hunting and bird watching.⁶ Wetlands also perform a vital role in maintaining water quality by trapping sediments and other pollutants before they reach streams, rivers, and other open-water bodies.⁷ Other special aquatic sites, such as mud flats and vegetated shallows, as well as open bodies of waters such as rivers, lakes, and streams also provide important functions and values. Discharges of dredged or fill material into waters of the U.S. may result in destruction of, or serious degradation to such waters. Given the significant values provided by such waters, it is all the more important to assess adequate penalties to deter future Section 404 violations and thereby help to achieve the goal of the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁸

This policy sets forth how the Agency generally expects to determine an appropriate settlement penalty in CWA Section 404 cases. In some cases, the calculation methodology set forth here may not be appropriate, in whole or in part. In such cases, with the advance approval of the Office of Enforcement and Compliance Assurance ("OECA"), an alternative or modified approach may be used.

A. Purpose

This policy is intended to provide guidance to EPA staff in calculating an appropriate penalty amount in settlement of civil judicial and administrative actions involving Section 404 violations and

⁴ See 40 C.F.R. 230.2(q-1) (Special aquatic sites include sanctuaries and refuges, wetlands, mudflats, vegetative shallows, coral reefs and riffle and pool complexes).

⁵ See e.g., U.S. Fish and Wildlife Service: Report to Congress: Wetlands Losses in the United States 1780's to 1980's (1990).

⁶ See e.g., U.S. Fish and Wildlife Service: Wetlands of the United States: Current Status and Recent Trends (1984).

⁷ See e.g., U.S. v. Deaton, 209 F.3d 331 (4th Cir. 2000).

⁸ 33 U.S.C. § 1251(a).

related violations (e.g., failure to comply with a Section 308 request or a Section 309(a) order with respect to such a violation). The guidance is designed to promote a more consistent national approach to assessing settlement penalty amounts, while allowing EPA staff flexibility in arriving at specific penalty settlement amounts in a given case. Subject to the circumstances of a particular case, this policy provides the lowest penalty figure that the Federal Government should accept in settlement. The Federal Government reserves the right to seek any amount up to the statutory maximum where settlement is not possible, as well as where circumstances warrant application of a higher penalty than what would be provided for under this settlement policy.

This policy is meant to accomplish the following four objectives in the assessment of penalties for Section 404 violations. First, penalties should be large enough to deter noncompliance, both by the violator and others similarly situated. Second, the penalties should help ensure a level playing field by making certain that violators do not obtain an economic advantage over others who have complied in a timely fashion. Third, penalties should generally be consistent across the country to promote fair and equitable treatment of the regulated community. Finally, settlement penalties should be based on a fair and logical calculation methodology to promote expeditious resolution of Section 404 enforcement actions and their underlying violations.

B. Applicability

This policy applies to all CWA Section 404 civil judicial and administrative actions filed after the signature date of the policy, and to all such pending cases in which the government has not yet transmitted to the defendant or respondent a proposed settlement penalty amount. This policy revises and hereby supersedes the December 14, 1990 Guidance, "Clean Water Act Section 404 Civil Administrative Penalty Actions: Guidance on Calculating Settlement Amounts." Except as provided in Section II below, this policy is not intended for use by EPA, violators, administrative judges or courts in determining penalties at hearing or trial. This policy does not affect the discretion of Agency enforcement staff to request any amount up to the statutory maximum allowed by law.⁹ Finally, this policy does not apply to criminal cases that may be brought for the unauthorized discharge of dredged or fill material in violation of the CWA.

⁹ Because of the requirements of 40 C.F.R. §22.14(a) (4), administrative complaints filed under Part 22 must have either the amount of the civil penalty that the Agency is proposing to assess, and a brief explanation of the proposed penalty, or where a specific penalty demand is not made, a brief explanation of the severity of each violation alleged and a citation to the statutory penalty authority in Section 309(g)(3) applicable for each violation alleged in the complaint. Regional enforcement staff should follow the guidance provided on this subject in "Guidance on the Distinctions Among Pleading, Negotiating and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act," issued January 19, 1989, and in "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act," issued May 28, 1996.

C. Statutory Authorities

The Clean Water Act provides EPA with various enforcement mechanisms for responding to violations of Sections 301(a) and 404 for discharging without, or in violation of, a Section 404 permit. Under Section 309(a), the Agency is authorized to issue an administrative compliance order (AO) requiring a violator to cease an ongoing unauthorized discharge, to refrain from future illegal discharge activity, and to remove unauthorized fill and/or otherwise restore the site. Section 309(g) of the Act authorizes EPA to assess administrative penalties for, among other things, discharging dredged or fill material into waters of the United States without a Section 404 permit or in violation of a Section 404 permit. Section 309(g) establishes two classes of administrative penalties, which differ with respect to procedure and maximum assessment, for such violations. A Class I penalty, provided for under Section 309(g)(2)(A), may not exceed \$11,000 per violation, or a maximum amount of \$27,500. A Class II penalty under Section 309(g)(2)(B) may not exceed \$11,000 per day for each day during which the violation continues, or a maximum amount of \$137,500.¹⁰

EPA may also seek injunctive relief, criminal penalties (fines and/or imprisonment), and civil penalties through judicial action under CWA Sections 309(b), (c) and (d), respectively. Under these provisions, the Agency may refer cases to the Department of Justice (DOJ) for civil and/or criminal enforcement. Under Section 309(d), EPA may seek civil penalties of up to \$27,500 per day per violation in the federal district courts, for CWA violations including the unauthorized discharge of dredged or fill material into waters of the United States, violation of a Section 404 permit, or violation of a Section 309(a) administrative compliance order.

For purposes of calculating a penalty under Sections 309(d) or (g), a violation begins when dredged or fill material is discharged into waters of the United States without a Section 404 permit and continues to occur each day that the illegal discharge remains in place. With respect to a violation of a Section 309(a) compliance order, a violation begins when the order is violated and continues each day until the order is complied with.

¹⁰ The Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, issued pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410, enacted October 5, 1990; 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3701 note; Public Law 104-134, enacted April 26, 1996; 110 Stat. 1321), mandates that EPA adjust its civil monetary penalties for inflation every four years. Thus, the maximum penalty figures cited in this guidance reflect the initial ten percent increase from the amounts set forth in the Act. For violations occurring before January 30, 1997, the maximum penalty amounts the Agency may seek are those specified in the Act. The Agency is preparing to issue a revision to the Civil Monetary Adjustment Rule in the near future. After the effective date of the rule, the maximum penalties available are expected to be as follows: for civil judicial penalties under 309(d) - \$30,500 per day per violation, for Class I administrative penalties - \$12,000 per day per violation, \$30,000 maximum; for Class II penalties - \$12,000 per violation, \$152,500 maximum.

D. Statutory and Settlement Penalty Factors

Section 309(d) of the CWA sets forth the following penalty factors that district court judges are to use when determining an appropriate civil penalty: "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. Section 1319(d).

Section 309(g)(3) addresses the factors to be considered when determining an appropriate administrative penalty amount. It states that the Agency "shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require," 33 U.S.C. Section 1319(g)(3).

The penalty assessment factors in Sections 309(d) and 309(g) are substantively the same, and not in conflict. The references in Section 309(d) to "good faith efforts" and in Section 309(g)(3) to "culpability," for example, although oriented to different types of behavior, both measure the non-compliant conduct of the violator. Other factors, such as economic benefit, history of violations, and such other matters as justice may require, are essentially identical, and the remaining factors are just restatements of each other. Consequently, the penalty calculation methodology drawn from the statutory factors and set forth below can be applied to both administrative and judicial civil enforcement cases.

E. Choice of Forum

The application of this penalty settlement policy, through the calculation of an appropriate bottom-line penalty amount, is one factor for Agency personnel to consider when choosing an appropriate forum.¹¹ The case development team¹² should apply this policy to help determine whether to seek a penalty administratively or judicially. If the bottom-line penalty calculated under this policy exceeds the maximum penalty that can be achieved in an administrative proceeding, EPA should refer the matter to the Department of Justice for judicial enforcement.¹³ Cases should also be referred to

¹¹ OECA intends to issue additional guidance in the near future on determining the appropriate response for Section 404 violations.

¹² For purposes of this guidance, the case development team refers to the Agency 404 technical and legal staff responsible for developing and pursuing a particular administrative or judicial enforcement action.

¹³ For further guidance on choosing between administrative and judicial enforcement options, see "Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies," (August 28, 1987), which was attachment 2 to the August 28, 1987 "Guidance Documents and Delegations for

DOJ where court ordered injunctive relief is necessary to remedy a violation, or where the violator has failed to comply with an administrative compliance order or consent order.

II. ADMINISTRATIVE PENALTY PLEADING GUIDANCE

In complaints filed in civil judicial cases, the United States' general practice is not to request a specific proposed penalty, but instead to paraphrase the Clean Water Act in reciting a request for a penalty "up to" the statutory maximum. This is sometimes referred to as "notice pleading" for penalties. In contrast, in administrative complaints the Agency may use either a form of notice pleading or make a specific penalty request. See 40 C.F.R. 22.14(a)(4) (64 Fed. Reg. 40138, 40181 (July 23, 1999)). When including a specific penalty request in an administrative complaint, the Agency litigation team may elect to adapt the settlement methodology in Part III of this policy (Minimum Settlement Penalty Calculation) to establish a definitive penalty request in an administrative complaint.¹⁴

In using Part III of this policy to establish a specific penalty request in an administrative complaint, the litigation team should, after reasonable examination of the relevant facts and circumstances of the case (including any known defenses), make the most favorable factual assumptions, legal arguments, and judgments possible on behalf of the Agency. Because the specific penalty amount proposed in an administrative complaint will, for all practical purposes, be the most the Agency will be able to seek at a hearing (unless the complaint is subsequently amended) and will provide a starting point for settlement negotiations, such an administrative penalty request should be higher than the bottom-line settlement penalty amount calculated under Part III of this policy. Although appropriate for settlement calculations, the Adjustments in Part III.C. should not be applied to reduce the specific penalty amount requested in an administrative complaint.

The proposed administrative penalty amount should be consistent with the statutory factors identified in Section 309(g), because those factors would ultimately provide the basis for the penalty assessment of the presiding officer or administrative law judge.¹⁵ In any Class II administrative complaint under Section 309(g)(2)(B), the Agency litigation team should take into account the requirements of the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), P.L. 104-121 (1996), if the respondent qualifies as a small business under that statute. SBREFA by its terms does

Implementation of Administrative Penalty Authorities Contained in 1987 Clean Water Act Amendments."

¹⁴ Although this policy provides general guidelines on how EPA may select an appropriate penalty amount in an administrative complaint, it does not direct when an Agency litigation team should use penalty notice pleading and when it should plead for a sum certain.

¹⁵ In administrative cases under Part 22, the Agency is required to provide "[t]he amount of the civil penalty which is proposed and a brief explanation of the proposed penalty." 40 C.F.R. §22.14(a)(4)(i). In contrast, a settlement figure calculated under this policy and its supporting documentation are not subject to such disclosure requirements.

not apply to non-Administrative Procedures Act (“non-APA”) cases, and thus would not apply to Class I cases brought under Section 309(g)(2)(B).¹⁶

III. MINIMUM SETTLEMENT PENALTY CALCULATION

The case development team shall calculate the minimum settlement penalty for a Section 404 enforcement action consistent with the following formula (set forth in more detail in Attachment 1), and the factors described in this section:

$$\text{Penalty} = \text{Economic Benefit} + (\text{Preliminary Gravity Amount} \pm \text{Gravity Adjustment Factors}) - \text{Litigation Considerations} - \text{Ability to Pay} - \text{Mitigation Credit for SEPs}$$

The result of this calculation will be the minimum penalty amount that the government will accept in settlement of the case, in other words, the “bottom-line penalty” amount. As new or better information is obtained in the course of litigation or settlement negotiations, or if protracted litigation or settlement discussions unduly extend the final compliance date and/or the penalty payment date, the “bottom-line” penalty should be adjusted, either upwards or downwards as necessary, consistent with the factors laid out in this policy, and subject to Headquarters concurrence in appropriate cases. Each component of the penalty is discussed below. The results of these calculations should be documented as dollar amounts on the “Worksheet for Calculating Section 404 Settlement Penalty,” included as Appendix A. This calculation should be supported by a memorandum describing the rationale and basis for the data. As a general matter, the Agency should always seek a penalty that, at a minimum, recovers the economic benefit of noncompliance plus some amount reflecting the gravity of the violation.

A. Determining the Economic Benefit Component

Consistent with EPA’s February 1984 *Policy on Civil Penalties*, every effort should be made to calculate and recover the economic benefit of noncompliance.¹⁷ Persons who violate the CWA by discharging dredged and/or fill material without Section 404 permit authorization or in violation of a permit may have obtained an economic benefit by obtaining an illegal competitive advantage (“ICA”), or as the result of delayed or avoided costs, or by a combination of these or other factors. Taking into account ICA may be particularly appropriate in situations where on-site restoration is not feasible (e.g., where restoration would result in greater environmental damage), and a permit would not likely have been issued for the project in question. In such cases, the Agency may consider recovering the commercial gain the violator realized from illegally filling in the wetland or other water. The objective of

¹⁶ For a more extended discussion of SBREFA, see “Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act” (May 28, 1996).

¹⁷ See *Policy on Civil Penalties*, February 16, 1984, at 3.

calculating and recovering economic benefit is to place violators in no better financial position than they would have been had they complied with the law.

The BEN computer model should be used to calculate the economic benefit gained from delayed or avoided compliance costs.¹⁸ Economic benefit should be calculated from the date of the initial violation, (i.e., the date of the initial discharge of dredged or fill material). As a general rule, there should be no offset in an economic benefit calculation, in a delayed or avoided cost scenario, for costs the violator incurs as a result of undertaking the illegal activity (i.e., in the context of a 404 violation this would be the amount the violator spent to perform the original unauthorized dredging or filling activities), since, as specified in the BEN User's Manual, credit is only appropriate for cost savings that "are both documented and related to compliance."¹⁹

Because a violator may have obtained more than one type of economic benefit from its noncompliance, the case development team should ensure that the amount calculated represents the total economic benefit wrongfully obtained.²⁰ Examples of other types of economic benefit may include delayed or avoided permitting fees and associated costs (e.g., information collection and consultant fees), increased property values, profits from the temporary or permanent use of property, or other illegal competitive advantage to the extent that the gain would not have accrued but for the illegal discharge.²¹

B. Determination of the Gravity Component

¹⁸ The BEN model is found on the Agency's web site at <http://www.epa.gov/oeca/datasys/dsm2.html> along with the BEN User's Manual. EPA currently does not have an economic benefit model for calculating economic benefit from illegal competitive advantage. For further information on the use of the BEN model and guidance in its use, or for help in calculating ICA, contact the Financial Issues Helpline at (888) 326-6778. Since as a general rule all 404 civil judicial cases are deemed nationally significant, Headquarters and the Regions will consult on the appropriate determination of economic benefit in such cases. In administrative cases, when considering under what circumstances various costs may offset economic benefit, the Regions will need to consult with Headquarters.

¹⁹ BEN User's Manual, (September 1999), at 3-11.

²⁰ If an initial calculation of economic benefit yields a zero or negative result, the case development team should ensure that all possible forms of illegal competitive advantage have been analyzed and included if appropriate. (Where the economic benefit calculation yields a negative number, a zero should be entered in the minimum settlement penalty calculation for the economic benefit component.)

²¹ Additional examples include gains generated from such uses as agriculture (e.g., profits from the sale of crops), logging, aquaculture, receipt of a loan, rent or lease payments, mining of sand and gravel, or from the early use of a recreational site (e.g., golf course or ski resort), which the violator gained prior to ceasing operation or removing the unlawful discharge or otherwise restoring the property.

Removal of the economic benefit of noncompliance generally places violators in the same position they would have been in had they complied with the Act. Therefore, both deterrence and fundamental fairness are served by including an additional element to ensure that violators are adequately penalized.²² The following gravity calculation is based on a methodology that provides a logical scheme and uniform criteria to quantify the gravity component of the penalty based on the environmental and compliance significance of the violation(s) in question.

$$\text{Preliminary Gravity Amount} = (\text{sum of A factors} + \text{sum of B factors}) \times \text{M}$$

M (Multiplier) = \$500 for minor violations with low overall environmental and compliance significance, \$1,500 for violations with moderate overall environmental and compliance significance, and \$3,000-\$10,000²³ for major violations with a high degree of either environmental or compliance significance. Given the highly fact specific nature of 404 cases, this policy provides broad ranges for the factors set out below to afford the case development team broad discretion to assess the appropriate penalty in a given circumstance.

“A” FACTORS: ENVIRONMENTAL SIGNIFICANCE

<u>Factors</u>	<u>Value Assigned</u>
1. <u>Harm to Human Health or Welfare</u>	0-20

The case development team should consider whether the discharge of dredged or fill material has adversely impacted drinking water supplies, has resulted in (or is expected to result in) flooding, impaired commercial or sport fisheries or shellfish beds, or otherwise has adversely affected recreational, aesthetic, and economic values. The case development team should also consider whether the discharge has otherwise endangered the health or livelihood of persons by virtue of the chemical nature of the discharge (i.e., has the discharge resulted in a violation of any applicable toxic effluent standard or prohibition under section 307 of the CWA, in the release of a hazardous substance under 40 C.F.R. 117 or Subtitle C of RCRA,²⁴ or in an imminent and substantial endangerment under Section 504 of the Safe Drinking Water Act, Section 7003 of RCRA, or Section 106 of CERCLA).²⁵

²² See *Policy on Civil Penalties*, February 16, 1984, at 3.

²³ Looking at the totality of the circumstances, the case development team should use its best professional judgment to decide what amount to use as a multiplier for a such violations. For egregious violations with extreme environmental consequences, a higher value in this range should be used as a multiplier.

²⁴ 42 U.S.C. § 6973.

²⁵ 42 U.S.C. § 9606.

The greater the actual or potential threat to human health or welfare, the higher the value the case development team should assign to this factor. If the discharge has resulted in an imminent and substantial endangerment, the highest value for this factor should be used.

2. Extent of Aquatic Environment Impacted

0 - 20

Although the size (acreage) of a violation is not dispositive of the environmental significance of the violation (i.e., a small impact to a unique or critical water may have high environmental significance), all other factors being equal, the greater the acreage of waters filled or directly impacted, the higher the value the case development team should assign to this factor. Staff should consider how large the acreage impacted is in the case under consideration compared to other violations observed within the same watershed, regionally or nationally.²⁶

3. Severity of Impacts to the Aquatic Environment

0 - 20

The case development team should consider the overall impact of a defendant's discharges to waters of the United States.²⁷ Staff should also consider as part of this factor the extent to which the discharge of dredged or fill material has caused (or has threatened to cause) adverse impacts to, or destruction of waters of the United States, including the extent to which the discharge has impaired the flow or circulation or reduced the reach of waters of the United States, or has caused or contributed to violations of any applicable water quality standard. Under this factor, the case development team should also consider whether the violation has resulted in adverse impacts to life stages of aquatic life and other wildlife dependent on aquatic ecosystems, or has adversely impacted or destroyed wildlife habitat, including aquatic vegetation, waterfowl staging or nesting areas, and fisheries. The greater the risk of harm or actual impact to aquatic ecosystems, the higher the value the case development team should assign to this factor. If a defendant's violation has resulted in harm to an endangered or threatened species, or impacted endangered species habitat, or has otherwise significantly impacted ecosystem diversity, productivity, or stability, a value in the highest end of the range should be used.

4. Uniqueness/Sensitivity of the Affected Resource

0 - 20

The case development team should consider whether the affected ecosystem is nationally or regionally limited, of a type that has become rare due to cumulative impacts (e.g., Pocosin, vernal pools), or is relatively abundant. The more scarce the impacted ecosystem, the higher the value that

²⁶ In areas where there has been a substantial historic cumulative loss of waters of the United States, or in arid areas where acreage of waters is a small portion of the natural landscape, a high value should be assigned to even small acreage fills.

²⁷ As part of this factor, the case development team should also consider the temporary loss of wetlands functions and values.

staff should assign for this factor. Moreover, if the discharge occurred into any of the following, the case development team should generally assign a higher value to this factor: a site determined to be unsuitable under 40 C.F.R. 230.80; an area identified as having a Section 404(c) prohibition or restriction; a Section 303(d) impaired water; an area within the boundary of an Advance Identification of Disposal Areas (ADID); an outstanding natural resource water under a state anti-degradation policy; areas designated as federal, state, tribal, or local protected lands; or an area established as a restored or enhanced wetland under an approved mitigation plan.

5. Secondary or Off-Site Impacts

0 - 20

The case development team should consider to what extent the discharges caused, or threatened to cause, secondary or off-site impacts such as erosion and downstream sedimentation problems, nuisance species intrusion, wildlife corridor disruption, etc. The greater the amount of secondary impacts, the higher the value that should be assigned.

6. Duration of Violation

0 - 20

The case development team should consider the duration of the violation under this factor. Consideration should be given both to the length of time that the discharge activity occurred in waters of the U.S., and the length of time that dredged or fill material has remained in place in such waters. Generally, the longer the duration of the initial discharge activity, and/or the longer dredged or fill material has remained in place compared to other violations in the same watershed, regionally or nationally, the higher the value that should be assigned to this factor.

Mitigating Factors for Environmental Significance

It is possible in some wetlands cases for a violator to undo, or largely undo, the continuing environmental harm resulting from violations -- although past loss of functions and values cannot be restored. In cases in which the original wetland or other water is restored, or will be restored under an enforceable agreement, Agency enforcement staff may reduce the amount determined from the preliminary gravity calculation for Environmental Significance (i.e., by reducing the values assigned to one or more of the Environmental Significance factors). This offset should generally not be used in cases where off-site mitigation is undertaken in lieu of on-site restoration of the violation.²⁸ Wherever possible, the case development team should seek complete on-site restoration of the aquatic areas impacted.²⁹ In determining the gravity amount for environmental significance, the case development

²⁸ Where an after-the-fact has or will be issued for the discharge, the preliminary gravity amount may be reduced where the loss of waters is fully mitigated.

²⁹ See "Injunctive Relief Requirements in 404 Enforcement Actions" (September 29, 1999) .

team should focus on the net impairment of the wetlands or other waters after remediation is completed, rather than on the costs of the remediation to the violator. In addition, even where complete restoration occurs, the temporary loss of functions and values should still be considered in determining the Environmental Significance amount, unless those temporary losses have already been fully mitigated. Staff should also consider whether there is a risk that restoration may fail or be less than fully successful over time, when considering whether a reduction should be made for this factor.

“B” FACTORS: COMPLIANCE SIGNIFICANCE

Factors

Value Assigned

1. Degree of Culpability

1 - 20

The case development team should evaluate the overall culpability of the defendant (i.e., the degree of negligence, recklessness, intent or responsibility involved in committing the violation). The greater the degree of culpability, the higher the value that should be assigned to this factor.³⁰ The principal criteria for assessing culpability are the violator's previous experience with or knowledge of the Section 404 regulatory requirements, the degree of the violator's control over the illegal conduct, and the violator's motivation for undertaking the activity resulting in the violation.

The criterion for assessing the violator's experience with or knowledge of the Section 404 program is whether the violator knew or should have known of the need to obtain a Section 404 permit or of the adverse environmental consequences of the discharge prior to proceeding with the discharge activity. The greater the violator's knowledge of, experience with, and capability to understand the Section 404 regulatory requirements, and the greater the violator's ability to avoid the illegal conduct, the greater the culpability. Examples of circumstances demonstrating greater culpability include previous receipt of a Section 404 authorization or a prior independent opinion of the need for a permit or of permit requirements. In such circumstances, a value in the highest end of the range should be used.

With regard to the violator's control over the unlawful conduct, there may be some situations where the violator bears less than full responsibility or may share the liability for the occurrence of a violation. The case development team should assess the degree of culpability of each violator with respect to the violations in question.

³⁰ The case development team should separately consider the violator's "recalcitrance" as specified in the "Additional Adjustments to Gravity" section below, and should adjust the penalty accordingly based on the level of recalcitrance present (i.e., the violator's refusal or unjustified delay in preventing, mitigating, or remedying a violation or in otherwise failing to cooperate).

Finally, the motivation for the violation may be a factor evidencing greater culpability. If the violator has sought to obtain a windfall profit by destroying waters of the U.S. (e.g., by converting wetlands to uplands) through conscious or negligent disregard of the Section 404 permitting program, culpability should be considered high even though the violator will not in fact realize those profits and may have had little previous experience with the Section 404 program.

2. Compliance History of the Violator

0 - 20

The case development team should consider whether the defendant has a history of prior Section 404 violations including unpermitted discharge violations, permit violations, or a previous violation of an EPA administrative order. The greater the number of past violations and the more significant the violations were, the higher the value that should be assigned to this factor. The earlier violations need not relate to the same site as the present action. Prior history information may be obtained not only from EPA experience with the violator, but also from appropriate Corps Districts, other federal agencies' knowledge and records, and the violator's responses to Section 308 requests for information.

3. Need for Deterrence:

0-20

The case development team should consider the need to send a specific and/or general deterrence message for the violations at issue. Staff should consider the extent to which the violator appears likely to repeat the types of violations at issue and the prevalence of this type of violation in the regulated community. The greater the apparent likelihood of the violator to repeat the violation, or the more prevalent the violation at issue in the general community, the greater the need for a strong deterrent message and the higher the value that should be assigned to this factor.

ADDITIONAL ADJUSTMENTS TO GRAVITY

After establishing the preliminary gravity amount above, the case development team may adjust this amount to reflect the recalcitrance of the violator and other relevant aspects of the case as provided for below. In addition to the gravity adjustments discussed below, there may be situations where the gravity component may also be adjusted under EPA's Audit Policy.³¹

³¹ See "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" 65 Fed. Reg. 19618 (April 11, 2000).

Recalcitrance Adjustment Factor: The “recalcitrance” adjustment factor may be used to increase³² the penalty based on a violator’s bad faith, or unjustified delay in preventing, mitigating, or remedying the violation in question. As distinguished from culpability, which relates to the violator’s level of knowledge of the regulatory program and responsibility for a given violation, recalcitrance under this policy relates to the violator’s delay or refusal to comply with the law, to cease violating, to correct violations, or to otherwise cooperate with regulators once specific notice has been given and/or a violation has occurred. If a violator is, or has been, recalcitrant, the case development team may increase the penalty settlement amount accordingly. This factor applies, for example, to a person who continues violating after having been informed of his violation, fails to provide requested information, or physically threatens government personnel. If the defendant has violated either an Army Corps of Engineers’ cease and desist order or an EPA administrative order, or failed to respond to an EPA Section 308 information request, staff may account for this violation by using this factor.³³ The more serious the bad faith demonstrated or unjustified delay engendered by the violator, the higher the recalcitrance adjustment should be. Applying the recalcitrance factor may result in a recalcitrance gravity adjustment of up to 200 percent (200%) of the preliminary gravity amount. This factor is applied by multiplying the total preliminary gravity amount by a percentage between 0 and 200.

Quick Settlement Adjustment Factor: In order to provide an extra incentive for violators who make efforts to achieve an efficient and timely resolution of violations, and in recognition of a violator’s cooperativeness, EPA may reduce the preliminary gravity amount by 10 percent (10%) in administrative enforcement actions. This factor may only be applied if the case development team expects the violator to settle promptly and if the violation(s) at issue have or will be fully remediated. As a general rule, for purposes of this penalty reduction, in Class I administrative enforcement actions, a “quick settlement” is one in which the violator signs an administrative penalty order on consent within four months of the date the complaint was issued or within four months of when the government first sent the violator a written offer of settlement, whichever is earlier. For Class II administrative cases the controlling time period is six months. If the violator does not sign the administrative consent agreement within this time period, the adjustment generally should not be made available. If this reduction has been taken but the violator fails to settle quickly, this reduction should be withdrawn and the settlement penalty increased accordingly.

³² Once a violator has been informed of a violation, a prompt return to compliance is the minimum response expected, therefore, no downward adjustment is provided for by this policy for efforts made to come into compliance after being informed of a violation. (As discussed above, a prompt restoration of the violation would be a basis for lowering the gravity amount by reducing the Environmental Significance of the violation). Where a violator has made “good faith efforts to comply with the applicable requirement” prior to being given notice of the violation by the government, see Section 309(d), this fact may be taken into account by providing a lower value for the “Degree of Culpability” factor.

³³ In the alternative, a separate gravity calculation may be performed for such violations.

Other Factors as Justice May Require: This consideration encompasses factors that operate to reduce a penalty settlement amount, as well as factors that operate to increase a penalty settlement amount. Not every relevant circumstance can be anticipated ahead of time. An example of a mitigating factor is a circumstance where a violator has already paid a civil penalty for the same violations at issue in a case brought by another plaintiff. These costs may be considered when determining the appropriate penalty settlement.³⁴ Of course, the remaining settlement figure should be of a sufficient level to promote deterrence. Litigation considerations should not be double counted here.

C. Additional Reductions for Settlements

Inability to Pay: If the violator has raised the issue of inability to pay the proposed penalty, the Region should request whatever documentation is needed to ascertain the violator's financial condition.³⁵ Any statements of financial condition should be appropriately certified.³⁶ In order to promote settlement, EPA personnel should employ the Agency's ability to pay computer programs: ABEL, INDIPAY and MUNIPAY.³⁷ ABEL analyzes ability to pay claims from corporations and partnerships; INDIPAY analyzes claims from individuals; and MUNIPAY analyzes such claims from municipalities, towns, sewer authorities and drinking water authorities. Where the violations are egregious, or the violator refuses to comply with the law, the team may consider a bottom line that could affect the economic viability of the violator.

³⁴ If the defendant has previously paid civil penalties for the same violations to another plaintiff, this factor may be used to reduce the amount of the settlement penalty by no more than the amount previously paid for the same violations.

³⁵ For a discussion of what financial documents the Agency should seek, see Guidance on Determining a Violator's Ability to Pay a Civil Penalty, December 16, 1986, codified as General Enforcement Policy Compendium document PT.2-1. For further guidance on this issue and model interrogatories, contact the Financial Issues Helpline at (888) 326-6778.

³⁶ E.g., tax returns must be signed, and as a precaution, the litigation team should have the defendant/respondent fill out IRS form 8821, which authorizes the IRS to release tax information directly to the EPA. In that way, the Agency can verify the information in the tax returns.

³⁷ These models are available on the Agency's web site at <http://www.epa.gov/oeca/datasys/dsm2.html>. Because ABEL, MUNIPAY, and INDIPAY are limited in their approach, many entities that fail the analysis may still be able to afford to achieve full compliance and pay the entire penalty. Therefore, it is essential to examine the violator's other potential resources, such as from liquidation of certificates of deposit and money market funds, before reducing a bottom line penalty for inability to pay. It is recommended that a financial analyst/economist be contacted to review financial information to determine if a violator truly has an inability to pay a penalty. For further guidance in this area, contact the Agency's Financial Issues Helpline at (888) 326-6778.

Litigation Considerations: Certain enforcement cases may have mitigating factors that could be expected to persuade a court to assess a lower penalty amount. The simple existence of weaknesses or limitations in a case, however, should not automatically result in a litigation consideration reduction of the bottom line settlement penalty amount.³⁸ EPA may reduce the amount of the civil penalty it will accept at settlement to reflect weaknesses in its case where the facts demonstrate a substantial likelihood the government will not achieve a higher penalty at trial.

Adjustments for litigation considerations may be taken on a factual basis specific to the case. Before a complaint is filed, the application of certain litigation considerations may be premature, as the Agency may not have sufficient information to fully evaluate litigation risk including evidentiary matters, witness availability, and equitable defenses. Reductions for these litigation considerations are more likely to be appropriate after the Agency obtains an informed view, through discovery and settlement negotiations, of the strengths and weaknesses in its case. Pre-filing settlement negotiations are often helpful in identifying and evaluating litigation considerations, especially regarding potential equitable defenses, and thus reductions based on such litigation considerations may be appropriately taken before the complaint is filed.

Possible Litigation Considerations: While there is no universal list of litigation considerations, the following factors may be appropriate in evaluating whether the preliminary settlement penalty exceeds the penalty the Agency would likely obtain at trial:

- Troublesome facts and/or uncertain legal arguments such that the Agency faces a significant risk of not prevailing in the case or obtaining a nationally significant negative precedent at trial;
- Known problems with the reliability or admissibility of the government's evidence proving liability or supporting a civil penalty;
- The credibility, reliability, and availability of witnesses;³⁹

³⁸ In many situations, the circumstances of a particular case are already accounted for in the penalty calculation. For example, the gravity calculation will be less in those circumstances in which the period of violation was brief, the exceedances of the limitations were small, the pollutants were not toxic, or there is no evidence of environmental harm. The economic benefit calculation will also be smaller when the violator has already returned to compliance, because the period of violation will be shorter. Such mitigating circumstances should not be double counted as reductions for litigation considerations.

³⁹ The credibility and reliability of witnesses relates to their demeanor, reputation, truthfulness, and impeachability. For instance, if a government witness has made statements significantly contradictory to the position he is to support at trial, his credibility may be impeached by the respondent or the defendant. The availability of a witness will affect the settlement bottom-line if the witness cannot be produced at trial.

- The informed, expressed opinion of the judge assigned to the case, after evaluating the merits of the case;
- The record of the judge in any other environmental enforcement case presenting similar issues;
- Statements made by federal, state or local regulators that may allow the respondent or defendant to credibly argue that it believed it was complying with federal requirements;
- The development of new, relevant case law;
- Penalties awarded in the same judicial district in other Section 404 enforcement cases.

Not Litigation Considerations: In contrast to the above potential litigation considerations, the following factors should not be considered litigation considerations:

- A generalized view to avoid litigation or to avoid potential precedential areas of the law;⁴⁰
- A duplicative use of elements included or assumed elsewhere in the penalty policy, such as inability to pay, “good faith”⁴¹, lack of recalcitrance, or a lack of demonstrated environmental harm;⁴²
- Off-the-record statements by the court, before it has had a chance to evaluate the specific merits of the case;

⁴⁰ A generalized desire to minimize litigation costs is not a litigation consideration.

⁴¹ The efforts of the violator to achieve compliance or minimize the violations after EPA or a state has initiated an enforcement action do not constitute “good faith” efforts. If such efforts are undertaken before the regulatory agency initiates an enforcement response, the settlement penalty calculation already includes such efforts. This penalty policy assumes all members of the regulated community will make good faith efforts to both achieve compliance and remedy violations when they occur. See also f.n. 32.

⁴² Courts have considered the extent of environmental harm associated with violations in determining the “seriousness of violations” pursuant to the factors in Section 309(d), and have used the absence of any demonstrated or discrete identified environmental harm to impose less than the statutory maximum penalty. Proof of environmental harm, however, is neither necessary for liability nor for the assessment of penalties.

- The fact that the water of the United States in question is already polluted or that the water can assimilate additional pollution.⁴³

⁴³ See, e.g., Natural Resources Defense Council v. Texaco Refining and Mktg., 800 F. Supp. 1, 24 (D. Del. 1992).

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Supplemental Environmental Projects (“SEPs”) are defined by EPA as environmentally beneficial projects that a violator agrees to undertake as part of a settlement, but is not otherwise legally obligated to perform. Favorable penalty consideration is given because the SEP provides an environmental benefit above and beyond what is required to remedy the violation(s) at issue in the enforcement action. In determining whether a proposed SEP is acceptable under Agency policy, as well as the appropriate penalty offset for a SEP, Agency enforcement staff should refer to the “EPA Supplemental Projects Policy.”⁴⁴ Use of SEPs in a particular case is entirely within the discretion of EPA in administrative cases, and EPA and the Department of Justice in judicial cases. In determining the real cost of a SEP to a violator, the litigation team should use the PROJECT model.⁴⁵

SEPs are particularly encouraged in the Section 404 program if the SEP results in protection of a wetland resource or other special aquatic site. For example, purchase and dedicated use of buffer land around a wetland helps ensure the survival of wetland resources, and is an appropriate and valuable SEP, as is upland land acquisition lying in wetland mosaics. In addition, deeding over wetlands in perpetuity for the purpose of conservation promotes program interests and the goals of the Clean Water Act. It should be noted that restoration of any area of the violation, or any mitigation in the form of injunctive relief to remedy such violations (including mitigation for the temporal loss of wetlands functions and values), does not constitute a SEP.

V. DOCUMENTATION, APPROVALS, AND CONFIDENTIALITY

Each component of the minimum settlement penalty calculation (including all adjustments), as well as subsequent recalculations, should be clearly documented in the case file along with supporting materials and written explanations. In any case not otherwise subject to Headquarters concurrence, in which a settlement penalty in a Section 404 enforcement action may not comply with the provisions of this policy or where application of this policy appears inappropriate, the penalty must be approved in advance by Headquarters.

Except as provided in Section II, documentation and explanation of a particular penalty calculation constitute confidential information that is exempt from disclosure under the Freedom of

⁴⁴ See “Issuance of Final Supplemental Environmental Projects Policy,” Memorandum from Steven A. Herman to Regional Administrators (April 10, 1998). This policy is also available on the Internet at: <http://www.epa.gov/oeca/sep/sepfinal.html>.

⁴⁵ This model is very similar to the BEN computer model, and like the other models, it is available on the Agency’s web site at <http://www.epa.gov/oeca/datasys/dsm2.html>. For further information on the model and guidance in its use, contact the Financial Issues Helpline at (888) 326-6778.

Information Act, is outside the scope of discovery, and is protected by various privileges, including the attorney-client and attorney-work product privileges. While individual settlement penalty calculations under this policy are confidential documents, this policy is a public document that may be released to anyone upon request. In the conduct of settlement negotiations, the Agency may choose to release portions of the case-specific settlement calculations. Such information may only be used for settlement negotiations in the case at hand and may not be admitted into evidence in a trial or hearing, as provided by Rule 408 of the Federal Rules of Civil Procedure.

The policies and procedures set forth in this document and the accompanying attachment are intended for the guidance of government personnel. They are not intended, and cannot be relied on, to create any rights, defenses or claims, substantive or procedural, enforceable by any party in litigation with the United States. The policies set forth in this document do not have the force of law and are not legally binding on Agency personnel. The Agency reserves the right to act at variance with these procedures and to change them at any time without public notice.

**ATTACHMENT 1 TO CWA SECTION 404 SETTLEMENT
POLICY**

Case Name _____

Date _____

Prepared by _____

SETTLEMENT PENALTY CALCULATION WORKSHEET

STEP		AMOUNT
1.	Calculate the Economic Benefit (attach BEN printouts, and provide written explanation of calculations)	
2.	Calculate the Preliminary Gravity Amount (sum of A + B factors) x M	
3.	Additional Gravity Adjustments	
	a. Recalcitrance (add 0 to 200% x line 2)	
	b. Quick Settlement Reduction (subtract 10% x line 2)	
	c. Other Factors as Justice May Require	
	d. Total gravity adjustments (negative amount if net gravity reduction) (3.a + 3.b + 3.c)	
4.	Preliminary Penalty Amount (Lines 1 + 2 + 3d.)	
5.	Litigation Considerations (if any)	
6.	Ability to Pay Reduction (if any)	
7.	Reduction for SEPs (if any)	
8.	Bottom-Line Cash Settlement Penalty (Line 4 less lines 5, 6, and 7)	

EXHIBIT W

DECISION DOCUMENT NATIONWIDE PERMIT 14

This document discusses the factors considered by the Corps of Engineers (Corps) during the issuance process for this Nationwide Permit (NWP). This document contains: (1) the public interest review required by Corps regulations at 33 CFR 320.4(a)(1) and (2); (2) a discussion of the environmental considerations necessary to comply with the National Environmental Policy Act; and (3) the impact analysis specified in Subparts C through F of the 404(b)(1) Guidelines (40 CFR Part 230). This evaluation of the NWP includes a discussion of compliance with applicable laws, consideration of public comments, an alternatives analysis, and a general assessment of individual and cumulative impacts, including the general potential effects on each of the public interest factors specified at 33 CFR 320.4(a).

1.0 Text of the Nationwide Permit

Linear Transportation Projects. Activities required for the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than 1/2-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

This NWP also authorizes temporary structures, fills, and work necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) the loss of waters of the United States exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 31.) (Sections 10 and 404)

Note: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

1.1 Requirements

General conditions of the NWP are in the Federal Register notice announcing the issuance of this NWP. Pre-construction notification requirements, additional conditions, limitations, and restrictions are in 33 CFR part 330.

1.2 Statutory Authority

- Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403)
- Section 404 of the Clean Water Act (33 U.S.C. 1344)

1.3 Compliance with Related Laws (33 CFR 320.3)

1.3.1 General

NWPs are a type of general permit designed to authorize certain activities that have minimal individual and cumulative adverse effects on the aquatic environment and generally comply with the related laws cited in 33 CFR 320.3. Activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment cannot be authorized by NWPs. Individual review of each activity authorized by an NWP will not normally be performed, except when pre-construction notification to the Corps is required or when an applicant requests verification that an activity complies with an NWP. Potential adverse impacts and compliance with the laws cited in 33 CFR 320.3 are controlled by the terms and conditions of each NWP, regional and case-specific conditions, and the review process that is undertaken prior to the issuance of NWPs.

The evaluation of this NWP, and related documentation, considers compliance with each of the following laws, where applicable: Sections 401, 402, and 404 of the Clean Water Act; Section 307(c) of the Coastal Zone Management Act of 1972, as amended; Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the National Environmental Policy Act of 1969; the Fish and Wildlife Act of 1956; the Migratory Marine Game-Fish Act; the Fish and Wildlife Coordination Act, the Federal Power Act of 1920, as amended; the National Historic Preservation Act of 1966; the Interstate Land Sales Full Disclosure Act; the Endangered Species Act; the Deepwater Port Act of 1974; the Marine Mammal Protection Act of 1972; Section 7(a) of the Wild and Scenic Rivers Act; the Ocean Thermal Energy Act of 1980; the National Fishing Enhancement Act of 1984; the Magnuson-Stevens Fishery and Conservation and Management Act, the Bald and Golden Eagle Protection Act; and the Migratory Bird Treaty Act. In addition, compliance of the NWP with other Federal requirements, such as Executive Orders and Federal regulations addressing issues such as floodplains, essential fish habitat, and critical resource waters is considered.

1.3.2 Terms and Conditions

Many NWP have pre-construction notification requirements that trigger case-by-case review of certain activities. Two NWP general conditions require case-by-case review of all activities that may adversely affect Federally-listed endangered or threatened species or historic properties (i.e., general conditions 18 and 20). General condition 16 restricts the use of NWP for activities that are located in Federally-designated wild and scenic rivers. None of the NWP authorize the construction of artificial reefs. General condition 28 prohibits the use of an NWP with other NWP, except when the acreage loss of waters of the United States does not exceed the highest specified acreage limit of the NWP used to authorize the single and complete project.

In some cases, activities authorized by an NWP may require other federal, state, or local authorizations. Examples of such cases include, but are not limited to: activities that are in marine sanctuaries or affect marine sanctuaries or marine mammals; the ownership, construction, location, and operation of ocean thermal conversion facilities or deep water ports beyond the territorial seas; activities that result in discharges of dredged or fill material into waters of the United States and require Clean Water Act Section 401 water quality certification; or activities in a state operating under a coastal zone management program approved by the Secretary of Commerce under the Coastal Zone Management Act. In such cases, a provision of the NWP states that an NWP does not obviate the need to obtain other authorizations required by law. [33 CFR 330.4(b)(2)]

Additional safeguards include provisions that allow the Chief of Engineers, division engineers, and/or district engineers to: assert discretionary authority and require an individual permit for a specific activity; modify NWP for specific activities by adding special conditions on a case-by-case basis; add conditions on a regional or nationwide basis to certain NWP; or take action to suspend or revoke an NWP or NWP authorization for activities within a region or state. Regional conditions are imposed to protect important regional concerns and resources. [33 CFR 330.4(e) and 330.5]

1.3.3 Review Process

The analyses in this document and the coordination that was undertaken prior to the issuance of the NWP fulfill the requirements of the National Environmental Policy Act (NEPA), the Fish and Wildlife Coordination Act, and other acts promulgated to protect the quality of the environment.

All NWP that authorize activities that may result in discharges into waters of the United States require water quality certification. NWP that authorize activities within, or affecting land or water uses within a state that has a Federally-approved coastal zone management program, must also be certified as consistent with the state's program. The procedures to ensure that the NWP comply with these laws are described in 33 CFR 330.4(c) and (d), respectively.

EXHIBIT X

4. On August 29, 2014, Lahontan Water Board staff informed LADWP that the Lee Vining Creek Project required Clean Water Act section 401 water quality certification ("401 Water Quality Certification") and requested that LADWP submit a 401 Water Quality Certification application. LADWP believed that the Lee Vining Creek Project was routine maintenance that was exempt from Clean Water Act sections 401 and 404 requirements.

5. On September 10, 2014, Lahontan Water Board staff requested LADWP to submit an application for 401 Water Quality Certification for the proposed work in Lee Vining Creek. Lahontan Water Board staff stated that they would work with LADWP to obtain a long-term maintenance permit ("General Permit") for such work in the future.

6. On September 17, 2014, LADWP informed Lahontan Water Board staff of its intent to monitor water quality throughout the Lee Vining Creek Project and submitted a list of Best Management Practices ("BMPs") it would implement to protect water quality and maintain beneficial uses.

7. On September 18, 2014, Lahontan Water Board staff conducted a site inspection of the Lee Vining Creek Project. Lahontan Water Board staff witnessed activities in and disturbance to Lee Vining Creek below the ordinary high water mark ("OHWM"). Lahontan Water Board staff observed the following: 1) the placement of new permanent rock rip-rap and recently poured concrete below Lee Vining Creek's OHWM; and 2) an increase in turbidity downstream from the work area, as shown, below:

	Field Results	Lab Results
Upstream Turbidity	1 NTU	0.28 NTU
Downstream Turbidity	5 NTU	0.82 NTU

8. On September 25, 2014, Lahontan Water Board staff sent a Notice of Violation (the "NOV") and an inspection report which detailed the above observations. The NOV cited violations of the California Water Code ("Water Code") and the *Water Quality Control Plan for the Lahontan Region* ("Basin Plan").

9. The Prosecution Staff alleges that LADWP violated the Water Code and Basin Plan as follows:

- a. Violation 1: LADWP violated Water Code section 13376 and/or Clean Water Act section 301 by discharging rock rip rap, concrete, and earthen materials below the OHWM of Lee Vining Creek, portions of which are considered a water of the United States, without obtaining a dredge or fill material discharge permit and/or waste discharge permit from the Lahontan Water Board. Violation No. 1 occurred on eight different days during the period beginning on September 12, 2014 and ending on October 25, 2014.
- b. Violation 2: LADWP violated the Basin Plan through its work within Lee Vining Creek and on the Structure, which caused an increase in turbidity

greater than 10 percent above background natural levels, as shown in Paragraph 7, above. The Basin Plan establishes a narrative Water Quality Objective for turbidity that limits increases in turbidity caused by projects and/or waste discharges to 10 percent above natural levels. Violation No. 2 occurred on September 18, 2014, which represents a single day of violation.

10. On November 17, 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy ("Enforcement Policy"). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The Prosecution Staff considered and followed the methodology set forth in the Enforcement Policy for Violation Nos. 1 and 2, as shown in Exhibit A, which is attached hereto and incorporated by reference as though fully set forth herein.

11. The Parties have engaged in settlement negotiations and agree to settle the matter without administrative or civil litigation and present this Stipulation to the Lahontan Water Board for adoption as an Order pursuant to Government Code section 11415.60. The Prosecution Staff believes that the resolution of the alleged violations is fair and reasonable and fulfills its enforcement objectives, that no further action is warranted concerning the specific violations alleged in the NOV except as provided in this Stipulation and that this Stipulation is in the best interest of the public.

12. To resolve the proposed liability associated with the alleged violations expressed herein without formal administrative proceedings, the Parties have agreed that LADWP will pay \$95,000 ("Settlement Amount"). Pursuant to Enforcement Policy section VI.B (Settlement Considerations), the Parties agree to this Settlement Amount in consideration of hearing and/or litigation risks and the additional considerations discussed below in Paragraph 13. The Parties agree that LADWP will expend \$52,000 of the Settlement Amount toward a Supplemental Environmental Project ("SEP") as set forth below and in LADWP's SEP Proposal (Exhibit B). LADWP shall pay the remaining Settlement Amount of \$43,000 to the *State Water Pollution Cleanup and Abatement Account* in stipulated penalties.

13. **Additional Settlement Considerations:** The Parties agree to the following additional terms in entering this Stipulation:

- a. The Parties will work cooperatively to expedite the development and issuance of a General Permit for LADWP's maintenance and/or construction activities within the Lahontan Region.
- b. LADWP will assume the role of "Lead Agency" under the California Environmental Quality Act ("CEQA") for purposes of the above-referenced General Permit.

- c. The total Settlement Amount of \$95,000 is a result of the Prosecution Staff's negotiations with LADWP pursuant to Government Code section 11415.60 and Page 22 of the Enforcement Policy. Due to recent administrative considerations, staff costs are not being recovered as part of this settlement.

Section III: Stipulations

The Parties incorporate Paragraphs 1 through 13 by this reference, as if set forth fully herein, stipulate to entry of the Order set forth below ("Order"), and recommend that the Lahontan Water Board issue the Order to effectuate the settlement:

14. **Administrative Civil Liability:** LADWP hereby agrees to the imposition of an administrative civil liability totaling **\$95,000** as set forth in Paragraph 12 of Section II herein. Within thirty (30) days of the effective date of the Order, LADWP agrees to remit FORTY-THREE THOUSAND DOLLARS (\$43,000) by check, payable to the *State Water Pollution Cleanup and Abatement Account* and shall indicate on the check the number of the Order. LADWP shall send the original signed check to the State Water Resources Control Board, attention: Accounting, P.O. Box 100, Sacramento, CA 95812-0100, and shall send a copy to Lauri Kemper, Assistant Executive Officer, Lahontan Regional Water Quality Control Board, 2501 Lake Tahoe Boulevard, South Lake Tahoe, CA 96150. The Parties further agree that the remaining \$52,000 of this administrative civil liability shall be suspended pending completion of a SEP as outlined in this Stipulation and the Order.

15. **Supplemental Environmental Project:** The Parties agree that \$52,000 of the stipulated administrative civil liability shall be suspended pending completion of the SEP described in this paragraph and Exhibit B.

a. SEP Definitions:

- i. "Designated Lahontan Water Board Representative" – the representative from the Lahontan Water Board responsible for oversight of the SEP. The contact information for this representative will be determined by the Lahontan Water Board Executive Officer and will be transmitted to LADWP.
- ii. "Implementing Party" – the independent third party with whom LADWP has contracted or otherwise engaged to implement the SEP.
- iii. "Milestone Requirement" - a requirement with an established time schedule for meeting/ascertaining certain identified measurement of completed work. Upon the timely and successful completion of each Milestone Requirement, an amount of liability will be permanently suspended or excused as set forth in the SEP Description below. Except for the final milestone, the amount of liability suspended for any portion of a SEP cannot exceed the projected costs of performing that portion of the SEP.

- iv. "SEP Completion Date" – The date in which the SEP will be completed in its entirety.
- b. **SEP Description:** LADWP will contribute \$52,000 ("SEP Amount") to the United States Forest Service ("USFS" or "Implementing Party) to complete four restoration projects (collectively referred to as the "SEP") in the Owens River watershed. The Parties agree that this Stipulation includes performance of these four Milestone Requirements:
- i. **Witcher Creek Stabilization Project:** The project will: stabilize the hydraulic grade of Witcher Creek and create areas for floodplain attenuation and meadow restoration; provide short term benefit to and protection of downstream properties from increased erosion and storm water runoff in the Round Valley Fire burn area (near Bishop, California); and provide longer term benefits to water quality by slowing flows, enhancing the wetland/meadow surrounding the creek, managing sediment loads, and increasing the potential for groundwater recharge. The project cost is \$30,000. Background information on the project and detailed implementation plans are provided in the SEP Proposal included herein as Exhibit B.
 - ii. **Round Valley Fire Area Seed Collection and Planting Project:** Native seeds and seedlings will be used to revegetate upland and riparian areas within the Round Valley Fire burn area. The project will provide short and long term benefits to water quality, habitat, and the public in general by using native vegetation to stabilize the areas impacted by the fire. The project cost is \$7,000. Background information on the project and detailed implementation plans are provided in the SEP Proposal included herein as Exhibit B.
 - iii. **Mammoth Creek Parking Area Vegetation Restoration Project:** Areas within the Owens River watershed are negatively affected by high vehicular traffic and recreation. The project will restore riparian lands and limit parking near the Mammoth Creek to a smaller existing disturbed area. The project cost is \$8,000. Background information on the project and detailed implementation plans are provided in the SEP Proposal included herein as Exhibit B.
 - iv. **Mammoth Creek Road Re-Route and Stream Stabilization Project:** The project will reduce point source sedimentation and increase water quality benefits by allowing riparian vegetation to reestablish. The project cost is \$7,000. Background information on the project and detailed implementation plans are provided in the SEP Proposal included herein as Exhibit B.
- c. **SEP Policy:** The SEP meets the qualification criteria as specified in the State Water Board's Policy on Supplemental Environmental Projects, February 3, 2009 ("SEP Policy"), as follows:

- i. Orders containing a SEP that exceeds 50 percent of the total adjusted monetary assessment, must be approved by the Director of the State Water Board, Office of Enforcement ("Director"). The SEP Amount exceeds 50 percent of the total adjusted monetary assessment by \$4,500. Consistent with the SEP Policy, the Lahontan Water Board notified the Director of LADWP's SEP Proposal. The notification detailed the proposed SEP, the reasons why the Lahontan Water Board accepts the SEP in lieu of monetary liability payment, and the exceptional circumstances that justify exceeding the recommended percentage limit. The Director approved the adjusted assessment, finding a compelling justification for the proposed SEP as provided in the Director of Office of Enforcement's Determination of Compelling Justification included herein as Exhibit C.
 - ii. The SEP is not otherwise required of LADWP by any rule or regulation of any federal, state, or local entity, and the SEP is not mitigation to offset the impacts of LADWP project(s).
 - iii. The SEP benefits ground water or surface water quality and beneficial uses of waters of the State because the SEP will provide watershed restoration in the Inyo National Forest within the Owens River watershed.
 - iv. The SEP meets the nexus criteria because the SEP reduces existing and future sediment discharges to surface waters. A strong geographic nexus also exists between the area impacted by the alleged violations and the benefits to beneficial uses the SEP will enhance.
 - v. The SEP does not directly benefit the Lahontan Water Board, its members, its staff, or family of members or staff.
- d. **SEP Completion Date:** The SEP shall be completed in its entirety no later than September 21, 2016 ("SEP Completion Date"). If other circumstances beyond the reasonable control of LADWP and/or the Implementing Party prevent completion of the SEP by that date, the Executive Officer, or the Executive Officer's designee, may extend the SEP Completion Date. LADWP must send its request for an extension in writing with the necessary justification to the Executive Officer.
- e. **Representations and Agreements:** LADWP understands that its promise to implement the SEP described herein and Exhibit B is a material condition of this Stipulation. LADWP represents: 1) it will fund the SEP Amount as described in this Stipulation; 2) it will provide certifications and written reports to the Lahontan Water Board consistent with the terms of this Stipulation detailing the implementation of the SEP, and 3) it will guarantee implementation of the SEP by remaining liable for the SEP Amount in

accordance with Paragraph 15, subsections (k) and (l). LADWP agrees that the Lahontan Water Board has the right to require an audit of the funds expended by it to implement the SEP.

- f. **Publicity:** If LADWP or its agents or subcontractors or the Implementing Party publicizes one or more elements of the SEP, they shall state in a **prominent manner** that the project is being, or has been, undertaken as part of the settlement of an enforcement action by the Lahontan Water Board against LADWP.
- g. **Progress Reports and Inspections:** LADWP and/or the Implementing Party shall permit inspection of the SEP by Lahontan Water Board staff or its third party oversight staff at any time without notice. LADWP and/or the Implementing Party shall provide quarterly progress reports as follows:

QUARTERLY PROGRESS REPORTS	DUE DATE
First Progress Report	February 1, 2016
Second Progress Report	June 1, 2016

- h. **Certification of Completion:** No later than 15 days after the SEP Completion Date, LADWP shall submit a certified statement of completion of the SEP ("Certification of Completion"). The Certification of Completion shall be submitted under penalty of perjury to the Designated Lahontan Water Board Representative and the State Water Resources Control Board's Division of Financial Assistance, and signed by a responsible official representing LADWP. The Certification of Completion shall include the following:
 - i. Certification that the SEP, including each Milestone Requirement, has been completed in accordance with the terms of this Stipulation including Exhibit B. Documentation may include photographs, invoices, receipts, certifications, and other materials reasonably necessary for the Lahontan Water Board to evaluate the completion of the SEP and the costs incurred by LADWP and/or the Implementing Party.
 - ii. Certification documenting the expenditures by LADWP and the Implementing Party during the completion period for the SEP. In making such certification, the officials may rely upon normal project tracking systems that capture employee time expenditures and external payments to outside vendors such as environmental and information technology contractors or consultants. LADWP shall provide any additional information requested by Lahontan Water Board

staff or its third party oversight staff that is reasonably necessary to verify SEP expenditures.

- iii. Certification, under penalty of perjury, that LADWP and/or Implementing Party followed all applicable environmental laws and regulations in the implementation of the SEP including but not limited to the California Environmental Quality Act ("CEQA"), the federal Clean Water Act, and the Porter-Cologne Act. LADWP (or the Implementing Party on behalf of LADWP) shall, before the SEP implementation date, consult with other interested State agencies regarding potential impacts of the SEP. Other interested State agencies include, but are not limited to, the California Department of Fish and Wildlife. To ensure compliance with CEQA, where necessary, LADWP and/or the Implementing Party shall provide the Lahontan Water Board with the following documents from the lead agency;

1. Categorical or statutory exemption;
2. Negative Declaration if there are no "significant" impacts;
3. 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; or
4. Environmental Impact Report ("EIR") if there are "significant" impacts.

- i. **Third Party Audit:** If Lahontan Water Board staff obtains information that causes it to reasonably believe that LADWP or Implementing Party has not expended money in the amounts claimed by LADWP or Implementing Party, or has not adequately completed any of the work in the SEP, Lahontan Water Board staff may require, and LADWP shall submit, at its sole cost, a report prepared by an independent third party acceptable to Lahontan Water Board staff providing such party's professional opinion that LADWP and/or the Implementing Party has expended money in the amounts claimed by LADWP. In the event of such an audit, LADWP and the Implementing Party agree that they will provide the third-party auditor with access to all documents, excluding confidential and/or privileged documents, which the auditor requests. Such information shall be provided to Lahontan Water Board Staff within three months of the completion of LADWP's SEP obligations.
- j. **Lahontan Water Board Acceptance of Completed SEP:** Upon LADWP's satisfaction of its obligations under this Stipulation, the completion of the SEP, and any audits, Lahontan Water Board staff will issue a "Satisfaction of Order." The issuance of the Satisfaction of Order shall terminate any further obligations of LADWP and/or the Implementing Party under this Stipulation.
- k. **Failure to Expend All Suspended Administrative Civil Liability Funds on the Approved SEP:** In the event that LADWP is not able to demonstrate to the reasonable satisfaction of Lahontan Water Board staff that it and/or the Implementing Party has spent the entire SEP Amount for the completed SEP,

LADWP shall pay the difference between the SEP Amount and the amount LADWP can demonstrate was actually spent on the SEP, as an administrative civil liability. Payment shall be made to the *State Water Pollution Cleanup and Abatement Account* in accordance with the procedures set forth in Paragraph 14 of Section III herein.

- i. **Failure to Complete the SEP:** If the SEP is not fully implemented within the SEP Completion Date required by this Stipulation or there has been a material failure to satisfy a Milestone Requirement, the Designated Lahontan Water Board Representative shall issue a "Notice of Violation." As a consequence, LADWP shall be liable to pay the entire suspended Administrative Civil Liability or some portion thereof less the value of the completion of any Milestone Requirements. Unless otherwise ordered, LADWP shall not be entitled to any credit, offset, or reimbursement from the Lahontan Water Board for expenditures made on the SEP prior to the date of the Notice of Violation by the Lahontan Water Board. The amount of the suspended liability owed shall be determined via a "Motion for Payment of Suspended Liability" before the Lahontan Water Board, or its delegee. Upon determination by the Lahontan Water Board, or its delegee, of the amount assessed for failure to fully implement the SEP, the amount assessed shall be paid within 30 days after the service of the Lahontan Water Board's determination. Payment shall be made to the *State Water Pollution Cleanup and Abatement Account* in accordance with the procedures set forth in Paragraph 14 of Section III herein. In addition, LADWP shall be liable for the Lahontan Water Board's reasonable costs of enforcement, including but not limited to legal costs and expert witness fees. Payment of the assessed amount will satisfy LADWP's obligations to implement the SEP.

16. **Lahontan Water Board is Not Liable:** Neither the Lahontan Water Board members nor the Lahontan Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by LADWP, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulation and the Order, nor shall the Lahontan Water Board, its members or staff be held as parties to or guarantors of any contract entered into by LADWP, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulation and Order.

17. **LADWP's Covenant Not to Sue:** LADWP covenants not to sue or pursue any administrative or civil claim or claims against any State Agency or the State of California, or their officers, employees, representatives, agents, or attorneys arising out of or relating to the alleged violations addressed by this Stipulation and the Order or the SEP.

18. **Compliance with Applicable Laws:** LADWP understands that payment of administrative civil liability in accordance with the terms of this Stipulation and the Order or compliance with the terms of this Stipulation and the Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged

herein may subject them to further enforcement, including additional administrative civil liability.

19. **Attorney's Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

20. **Matters Addressed by Stipulation:** Upon adoption by the Lahontan Water Board as an Order, this Stipulation represents a final and binding resolution and settlement of all claims, violations or causes of action alleged herein. The provisions of this Paragraph are expressly conditioned on the full payment of the stipulated penalty amounts, in accordance with Paragraph 14 and completion of the SEP as specified in Paragraph 15.

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

22. **LADWP's Settling Denial of Liability:** In settling this matter, LADWP does not admit to any of the findings in this Stipulation or that it has been or is in violation of the Water Code, or any other federal, state, or local law or ordinance, provided, LADWP agrees that in the event of any future enforcement actions by the Lahontan Water Board, the Order may be used as evidence of a prior enforcement action consistent with Water Code sections 13327 and 13385.

23. **Public Notice:** The Lahontan Water Board Assistant Executive Officer posted for public comment a Notice of Proposed Settlement for resolution of LADWP's alleged violations at the Settlement Amount on April 24, 2015, fulfilling the 30-day notice and comment period requirement for a proposed settlement of a State enforcement action. The Parties agree that this Stipulation and proposed Order, as signed by the Parties, will be noticed for at least 10-days prior to being presented to the Lahontan Water Board for adoption. If the Lahontan Water Board Assistant Executive Officer or other Prosecution Staff receives significant new information that reasonably affects the propriety of presenting this Stipulation to the Lahontan Water Board for adoption as an Order by settlement, the Parties agree to meet and confer concerning any such objections and comments, and may agree to revise or adjust the Stipulation as necessary or advisable under the circumstances. Alternatively, the Assistant Executive Officer may unilaterally declare this Stipulation void and decide not to present the Order to the Lahontan Water Board. LADWP agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulation and Order.

24. **Interpretation:** This Stipulation shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. The Parties are represented by counsel in this matter.

25. **No Oral Modification:** This Stipulation 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 the Lahontan Water Board.

26. **Integration:** This Stipulation constitutes the entire agreement between the Parties and may not be amended or supplemented except as provided herein.

27. **If the Stipulation Does Not Take Effect:** In the event that this Stipulation does not take effect because it is not approved by the Lahontan Water Board, or its delegate, 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 Lahontan Water Board 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. The Parties agree to waive the following objections:

- a. Objections related to prejudice or bias of any of the Lahontan Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Lahontan 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 Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing 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.

28. **Waiver of Hearing:** LADWP has been informed of the rights provided by California Water Code section 13323, subdivision (b), and hereby waives its right to an evidentiary hearing before the Lahontan Water Board prior to the adoption of the Order. This Stipulation and the Order will be heard as a settlement agreement before the Lahontan Water Board, but the hearing will not be an evidentiary hearing.

29. **Waiver of Right to Petition or Appeal:** LADWP hereby waives its right to petition the Lahontan Water Board's adoption of the Order for review by the State Water Board, and further waives its rights, if any, to appeal the same to the California Superior Court and/or any California appellate level court.

30. **No Third Party Benefits:** Nothing in this Stipulation shall be deemed to create any rights in favor of, or to inure to the benefit of, any persons, who are not a signatory

to this Stipulation (third party), or to waive or release any defense or limitation against third party claims.

31. Necessity for Written Approvals: All approvals and decisions of the Lahontan Water Board under the terms of this Stipulation shall be communicated to LADWP in writing. No oral advice, guidance, suggestions or comments by employees or officials of the Lahontan Water Board regarding submissions or notices shall be construed to relieve the LADWP of its obligation to obtain any final written approval required by this Stipulation or the Order.

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

33. Authority of Executive Officer to Extend Due Dates: The Executive Officer or the Executive Officer's delegee may extend any of the due dates in this Stipulation upon the joint request of the Parties. Such extensions must be in writing.

34. Effective Date: The obligations in this Stipulation are effective and binding only upon the entry of an Order by the Lahontan Water Board which incorporates the terms of this Stipulation.

35. Severability: This Stipulation is severable; should any provision be found invalid the remainder shall remain in full force and effect.

36. Counterpart Signatories: This Stipulation 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.

IT IS SO STIPULATED.

**California Regional Water Quality Control Board Prosecution Team
Lahontan Region**

By: 
Lauri Kemper
Assistant Executive Officer

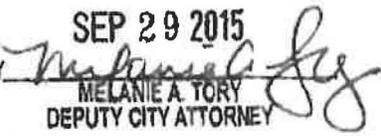
Date: October 5, 2015

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Los Angeles Department of Water and Power

By: 
Marcie Edwards
General Manager

APPROVED AS TO FORM AND LEGALITY
MICHAEL N. FEUER, CITY ATTORNEY

SEP 29 2015
BY 
MELANIE A. TORY
DEPUTY CITY ATTORNEY

Date: 10-2-15

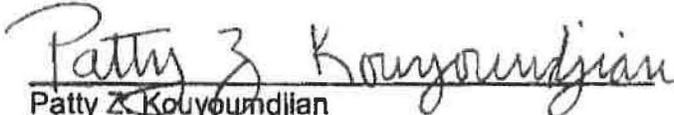
Order of the Regional Water Board

- 37. This Order incorporates the foregoing Stipulation.
- 38. In accepting the foregoing Stipulation, the Lahontan Water Board has considered, where applicable, each of the factors prescribed in Water Code section 13385(e). The Lahontan Water Board's consideration of these factors is based upon information obtained by the Lahontan Water Board staff in investigating Violation Nos. 1 and 2 or otherwise provided to the Lahontan Water Board.
- 39. This is an action taken for the protection of the environment and to enforce the laws and regulations administered by the Lahontan Water Board. The Lahontan Water Board finds that issuance of this Order is exempt from the provisions of CEQA (Public Resources Code, sections 21000 et seq.) in accordance with California Code of Regulations, title 14, sections 15061(b)(3), 15306, 15307, 15308, and 15321. This Order includes a work plan to implement a SEP in the Lahontan Region. To the extent this Order requires earth disturbing and revegetation activities not to exceed five acres in size and to assure restoration of stream habitat and prevent erosion, this Order is exempt from provisions of CEQA pursuant to California Code of Regulations, title 14, section 15333. If the Lahontan Water Board determines that implementation of any plan required by this Order will have a significant effect on the environment that is not otherwise exempt from CEQA, the Lahontan Water Board will conduct the necessary and appropriate environmental review prior to approval of the applicable plan. LADWP will bear the costs, including the Lahontan Water Board's costs, of determining whether implementation of any plan required by this Order will have a significant effect on the environment and, if so, in preparing and handling any documents necessary for environmental review. If necessary, LADWP and a consultant acceptable to the Lahontan Water Board shall enter into a memorandum of understanding with the board regarding such costs prior to undertaking any environmental review.

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Pursuant to Water Code section 13323 and Government Code section 11415.60, IT IS **HEREBY ORDERED** on behalf of the California Lahontan Regional Water Quality Control Board.


Patty Z. Kouyoumdjian
Executive Officer

Date: October 6, 2015

Exhibits:

- A. ACL Penalty Methodology
- B. SEP Proposal
- C. Director of Office of Enforcement's Determination of Compelling Justification

EXHIBIT A

ADMINISTRATIVE CIVIL LIABILITY METHODOLOGY

EXHIBIT A

ADMINISTRATIVE CIVIL LIABILITY METHODOLOGY

Lee Vining Creek Diversion Structure Unauthorized Discharges of Dredge and Fill Materials to Waters of the United States

There are two categories of violation, one involving multiple days of violation, resulting from Los Angeles Department of Water and Power's (LADWP) discharging dredge and fill materials to waters of the United States without a dredge/fill material discharge permit. The unauthorized discharges occurred as a result of LADWP's Lee Vining Creek Diversion Structure Project. The sources of information for the analysis, below, are Lahontan Water Board staff's observations during its September 18, 2014 site inspection, LADWP's Application for Clean Water Act section 401 Water Quality Certification (submitted November 7, 2014, after project completion), and the U.S. Army Corps of Engineers December 16, 2014 Nationwide Permit Verification.

Violation 1: **Water Code section 13376/Clean Water Act section 301** – LADWP discharged rock rip rap, concrete, and earthen materials below the ordinary high water mark (OHWM) of Lee Vining Creek, a water of the United States, without obtaining a dredge or fill material discharge permit and/or waste discharge permit from the Lahontan Water Board.

Violation 2: **Basin Plan Prohibition** – LADWP's work within Lee Vining Creek on September 18, 2014 caused between an approximately 300 - 500 percent increase in turbidity, which violates the *Water Quality Control Plan for the Lahontan Region* (Basin Plan) prohibition against discharges that cause a narrative water quality objective to be exceeded. The Basin Plan establishes a narrative water quality objective for turbidity that limits increases in turbidity caused by projects and/or waste discharges to 10 percent above natural levels.

Lahontan Water Board staff has evidence that Violation No. 1 occurred on eight different days during the period beginning on September 12, 2014 and ending on October 25, 2014. Each day that an unauthorized discharge of dredged or fill materials occurred below the OHWM of Lee Vining Creek, including within portions of the diversion structure, represents an individual day of violation of Water Code section 13376 and/or Clean Water Act section 301. Lahontan Water Board staff has evidence that Violation No. 2 occurred on September 18, 2014, which represents a single day of a violation of the above-referenced Basin Plan prohibition. Each violation is independently subject to administrative civil liability of up to \$10,000 per day of violation, pursuant to Water Code 13385.

Following is the justification for the values inserted into the ACL Methodology Calculator (attached).

Violation 1a – Discharge without Dredge/Fill Permit (Water Code section 13376/Clean Water Act section 301): Rock Rip Rap (September 18, 2014)

Potential for Harm, Factor 1 – Harm or Potential Harm to Beneficial Uses:

The Basin Plan identifies the following beneficial uses for Lee Vining Creek:

Municipal and Domestic Supply	Agricultural Supply*
Groundwater Recharge	Freshwater Replenishment
Hydropower Generation	Water Contact Recreation
Non-Contact Water Recreation	Commercial and Sportfishing
Cold Freshwater Habitat	Wildlife Habitat
Spawning, Reproduction, and Development	

*Agricultural Supply is only identified for waters upstream of the diversion structure.

“**Minor (1)**” was selected due to the limited extent of waters and aquatic habitat affected by the unauthorized discharge of rock fill (80 cubic yards) below Lee Vining Creek’s OHWM. Lahontan Water Board staff did not observe any significant adverse effects during its September 18, 2014 inspection. However, placing the unwashed rock onto the creek bed has the potential to adversely affect several of Lee Vining Creek’s beneficial uses as identified above, and as discussed below.

- **Non-Contact Water Recreation (REC-2):** Dust blowing off the rock as it dropped into place indicates the rock was not washed prior to placement. The unwashed rock and disturbance to the creek bed subject to flow likely resulted in the observed and documented increase in turbidity. Increases in turbidity reduce water clarity. Many local residents and visitors enjoy viewing clear-flowing Sierra Nevada mountain creeks and streams, such as Lee Vining Creek. Reducing water clarity can adversely affect the aesthetic experience for those hiking or driving by waters they expect to be clear, and thus, adversely affect the REC-2 beneficial use. However, the increase in turbidity in this case was minor (field results: from 1 NTU to 5 NTU; lab results: from 0.28 NTU to 0.82 NTU), and likely had little effect on the REC-2 beneficial use due to the minor decrease in water clarity caused by placing rip rap within a flowing portion of Lee Vining Creek.
- **Commercial and Sportfishing (COMM):** Lahontan Water Board staff observed numerous fish (rainbow and brown trout inhabit Lee Vining Creek) in the project area during the September 18, 2014 inspection. There were no measures/structures in place to isolate project activities from flowing waters and the fish that Lahontan Water Board staff observed during the inspection. These conditions potentially exposed the fish that were in close proximity to the project site to injury and/or death. Fish injuries and/or mortality due to project activities would reduce fish populations and represent an adverse impact to the COMM beneficial use. Additionally, increases in turbidity levels can affect fish feeding behavior. Fish rely, in part, upon sight to locate food. When turbidity levels increase to the point of inhibiting a fish’s

ability to see its food, it also inhibits the fish's ability to see bait or a fishing lure. Therefore, activities such as placing unwashed rock in flowing waters has the potential to increase turbidity levels to the point of inhibiting a fish's ability to see bait or a lure, adversely affecting the COMM beneficial use.

The absence of any observations of fish injury, mortality, or diminished ability to see food sources, bait, or a lure during Lahontan Water Board staff's September 18, 2014 inspection does not mean that such adverse impacts failed to occur, nor does the lack of such observations diminish the potential for such harm. Such adverse impacts could have occurred before, during, or after Lahontan Water Board staff's inspection, but at a level that could not be or was not measured, quantified, or observed. The potential for such adverse impacts is low, given the limited area affected by rock rip rap placement, fish mobility during such activity remaining high, and the resulting turbidity levels, which remained low.

- **Cold Freshwater Habitat (COLD):** The cold freshwater habitat beneficial use includes, but is not limited to, preserving and enhancing aquatic habitats, vegetation, fish, and wildlife, including invertebrates. As discussed above, placing the rock rip rap within the flowing waters of Lee Vining Creek exposed the fish that Lahontan Water Board staff observed during the September 18, 2014 inspection to potential injury and/or mortality. Placing the rock below Lee Vining Creek's OHWM also potentially buried and destroyed invertebrate habitat. Aquatic invertebrates provide a food source to fish inhabiting Lee Vining Creek and destroying invertebrate habitat can adversely affect fish growth, health and survivability. Fish injury and/or mortality, and invertebrate habitat destruction with its potential impacts to fish growth, health, and survivability, all represent adverse impacts to the COLD beneficial use. The absence of any observations of fish injury, mortality, or damage and/or destruction of invertebrate habitat during Lahontan Water Board staff's September 18, 2014 inspection does not mean that such adverse impacts failed to occur, nor does the lack of such observations diminish the potential for such harm. Such adverse impacts could have occurred before, during, or after Lahontan Water Board staff's inspection, but at a level that could not be or was not measured, quantified, or observed. The potential for and extent of such impacts is low and limited, respectively, given the very limited area of Lee Vining Creek affected by rock rip rap placement.
- **Wildlife Habitat (WLD):** As discussed above, placing the rock below Lee Vining Creek's OHWM has the potential to destroy invertebrate habitat. In addition to fish, aquatic invertebrates provide food sources for other organisms, such as birds that inhabit or visit Lee Vining Creek and its surrounding habitat. Destroying invertebrate habitat by placing rock below Lee Vining Creek's OHWM has the ability to adversely affect a food source for birds and other animals; and therefore, represents an adverse impact upon the WILD beneficial use. However, such impact was likely minor given the limited extent of potential invertebrate habitat disturbed/destroyed by placing the rock rip rap below Lee Vining Creek's OHWM.

- **Spawning, Reproduction, and Development (SPWN):** Lee Vining Creek supports a trout fishery, including brown trout that spawn in the fall. Placing the rock rip rap below Lee Vining Creek's OHWM could have destroyed spawning habitat during or just prior to the brown trout spawning season. Additionally, the potential adverse impacts to invertebrate habitat and populations and their effect upon fish food sources can also affect early fish development. The absence of any observations of damage and/or destruction of spawning habitat and/or invertebrate habitat during Lahontan Water Board staff's September 18, 2014 inspection does not mean that such adverse impacts failed to occur, nor does the lack of such observations diminish the potential for such harm. Such adverse impacts could have occurred before, during, or after Lahontan Water Board staff's inspection, but at a level that could not be or was not measured, quantified, or observed. The potential for and extent of such impacts is low and limited, respectively, given the very limited area of Lee Vining Creek affected by rock rip rap placement.

Potential for Harm, Factor 2 – The Physical, Chemical, Biological or Thermal Characteristics of the Discharge:

“**Moderate Risk (2)**” was selected due to the ability of rock rip rap and the fine sediment (dust) particles on the rock rip rap to smother spawning and invertebrate habitat. Aquatic invertebrate populations and fish eggs are not highly mobile and are therefore susceptible to the smothering characteristic of rock rip rap and fine sediment discharged into creek habitats. Adversely affecting these beneficial uses can lead to other beneficial uses, such as COMM, COLD, and WILD, being adversely impacted.

Potential for Harm, Factor 3 – Susceptibility to Cleanup or Abatement:

“**50 Percent or Greater (0)**” was selected, as more than 50 percent of the unauthorized rock fill and fine sediment (dust) is susceptible to cleanup (i.e., could be removed).

Potential for Harm, Factor 4 – Deviation from Requirement:

“**Major**” was selected as LADWP's actions resulted in an unauthorized discharge and rendered the requirement to obtain a dredge/fill permit and/or waste discharge permit prior to discharging dredge or fill materials and/or wastes to waters of the United States and the requirement to obtain 401 Water Quality Certification ineffective by disregarding the requirement, even though Lahontan Water Board staff repeatedly brought the issue to LADWP's attention. While LADWP staff explained reasons why it believed such a permit was not required, LADWP staff could not/would not provide Lahontan Water Board staff documentation confirming LADWP staff's position when requested to do so by Lahontan Water Board staff.

Additional Factor, Culpability:

“**1.4**” was selected, as it is clearly LADWP's responsibility to obtain all necessary permits for projects conducted on its facilities. Lahontan Water Board staff repeatedly

brought it to LADWP staff's attention that a 401 Water Quality Certification or other Lahontan Water Board permit was required for the project. In spite of Lahontan Water Board staff's repeated requests to either submit documentation supporting LADWP staff's initial position that a 401 Water Quality Certification was not required, or to submit an application for 401 Water Quality Certification, LADWP went forward with its project without doing either. Additionally, the U.S. Army Corps of Engineers (Army Corps) issued a Nationwide Permit Verification Letter, dated December 16, 2014, providing after-the-fact authorization for the project under Nationwide Permit (NWP) Nos. 13 and 33, indicating that a dredge/fill permit was actually required for the project triggering the requirement to also obtain 401 Water Quality Certification. Both NWPs required project applicants to obtain individual 401 Water Quality Certification from the Lahontan Water Board, as the State Water Board has not adopted a Technically Conditional 401 Water Quality Certification for these two permits, among others.

LADWP had enough time to submit documentation supporting its position, but did not. Given that the project was underway on September 18, 2014, despite LADWP staff statements on September 17, 2014 that no work other than biological surveys were underway, it may have been more difficult to submit an application for and to obtain 401 Water Quality Certification prior to beginning project construction. This set of circumstances lends support to the real possibility that LADWP willfully decided to proceed without obtaining all necessary permits. Therefore, LADWP failed to exercise ordinary care in conducting its in-stream work.

Additional Factor, Cleanup and Cooperation:

"1.5," the maximum value was selected given the lack of cooperation prior to and following the unauthorized discharge of rock fill into Lee Vining Creek, and the project in general. As discussed above, Lahontan Water Board staff repeatedly attempted to engage LADWP staff in an effort to ensure that LADWP had all necessary Lahontan Water Board permits. LADWP did not submit an application for 401 Water Quality Certification until November 7, 2014. This was 10 days following project completion on October 28, 2014, 43 days following Lahontan Water Board staff's September 25, 2014 Notice of Violation ordering LADWP to submit the application immediately, and 70 days following Lahontan Water Board staff's August 29, 2014 verbal notification to LADWP staff that a 401 Water Quality Certification was required for the project.

This failure to seek and obtain 401 Water Quality Certification also followed on-going discussions occurring for more than a year prior to the Lee Vining Creek Diversion Structure Project between Lahontan Water Board and LADWP staff regarding the Lahontan Water Board's 401 Water Quality Certification Program. Lahontan Water Board staff has clearly explained the types of project requiring 401 Water Quality Certification or other Lahontan Water Board permits during these discussions.

Additional Factor, History of Violations:

"1" was selected, as Lahontan Water Board staff has not been able to document similar

incidents, based upon a review of the California Integrated Water Quality System database.

Violation 1b - Discharge without Dredge/Fill Permit (Water Code section 13376/Clean Water Act section 301): Concrete (September 12, 2014, October 7, 2014, and October 20, 2014)

Potential for Harm, Factor 1 – Harm or Potential Harm to Beneficial Uses:

“Minor (1)” was selected based upon the lack of best management practices to isolate the areas for the new concrete low splash walls (10 cubic yards of concrete, September 12, 2014), weir walls (24 cubic yards of concrete, October 7, 2014), and downstream aprons (18 cubic yards of concrete, October 20, 2014), from creek flows during the concrete pours, and until the concrete could cure to the point it no longer presented a threatened waste discharge to Lee Vining Creek downstream of the diversion structure. The areas for the low splash walls, weir walls, and downstream aprons appear to be located within the diversion structure itself, but are also partially or totally located below Lee Vining Creek’s OHWM. The lack of isolation measures increases the potential for concrete waste discharges from within the diversion structure to creek waters either upstream or downstream of the structure. However, the use of concrete forms helps reduce the potential for such discharges and associated harm to beneficial uses.

Lahontan Water Board staff has greater concern regarding the September 12, 2014 and October 20, 2014 concrete pours for the low splash walls and downstream aprons, respectively. Staff’s concerns regarding the September 12, 2014 concrete pour rise from the fact that the creek above and below the diversion structure had not been isolated from project activities on/within the diversion structure. The failure to isolate the project area from the flowing creek significantly increased the potential for a concrete discharge to creek waters. Lahontan Water Board staff’s concerns regarding the October 20, 2014 concrete pour rise from the absence of any statement within the Construction Supervisor’s Log regarding the location of the pour. The Construction Supervisor’s Log specifically states “not in streambed” for the September 12, 2014 pour, and states “within the structure” for the October 7, 2014 pour. There is no similar statement in the Construction Supervisor’s Log for the October 20, 2014 pour. A concrete discharge to the creek could have caused the same adverse impacts to the COMM, COLD, WILD, and SPWN beneficial uses, as discussed above. Such impacts would occur as a result of the smothering (fine particles) and potentially hazardous (high pH) characteristics of concrete, and would likely be greater in severity, than those associated with the unauthorized rock rip rap placement below Lee Vining Creek’s OHWM. The absence of Lahontan Water Board staff observations of concrete discharges to creek waters and/or habitat during its September 18, 2014 inspection does not diminish the potential for such discharges and their associated potential adverse impacts to beneficial uses. The potential for such harm is partially reduced since most, if not all, of the concrete pour activities occurred within the diversion structure, and the diversion structure had been isolated from creek flows by the time the October 20, 2014 pour occurred.

Potential for Harm, Factor 2 – The Physical, Chemical, Biological or Thermal Characteristics of the Discharge:

“Above Moderate Risk (3)” was selected due to concrete’s ability to more completely smother invertebrate and spawning habitat than rock rip rap, and concrete’s high pH levels. The fine particle characteristic of wet concrete creates a much greater threat to the COLD, WILD, and SPWN beneficial uses than the rock and dust particles discussed above. Concrete is able to more completely cover invertebrate and spawning habitat, compared to rock that has specific contact points with the creek bed. An even greater threat to COMM, COLD, and WILD beneficial uses is concrete’s high pH characteristic. Concrete could introduce waste with pH levels near or potentially exceeding hazardous waste designation levels, which creates a direct threat to the fish that Lahontan Water Board staff observed in very close proximity to project activities, and other aquatic organisms inhabiting Lee Vining Creek upstream and downstream of the diversion structure. A concrete discharge to the creek, depending upon the discharge volume and creek flow conditions, creates substantial concern regarding receptor protection.

Potential for Harm, Factor 3 – Susceptibility to Cleanup or Abatement:

“50 Percent or Greater (0)” was selected, as more than 50 percent of the unauthorized concrete fill is susceptible to cleanup (i.e., could be removed).

Potential for Harm, Factor 4 – Deviation from Requirement:

“Major” was selected for the same reason provided for Violation 1a, above.

Additional Factor, Culpability:

“1.4” was selected for the same reasons provided for Violation 1a, above.

Additional Factor, Cleanup and Cooperation:

“1.5,” the maximum value was selected for the same reasons provided for Violation 1a, above.

Additional Factor, History of Violations:

“1” was selected for the same reason provided for Violation 1a, above.

Violation 1c - Discharge without Dredge/Fill Permit (Water Code section 13376/Clean Water Act section 301): Concrete Blocks (September 19, 2014)

Potential for Harm, Factor 1 – Harm or Potential Harm to Beneficial Uses:

“Minor (1)” was selected due to the limited extent of waters and aquatic habitat (approximately 1,000 square feet) temporarily affected by the unauthorized placement

of concrete blocks immediately adjacent to the diversion structure's upstream apron, but below Lee Vining Creek's OHWM. Placing the concrete blocks on the creek bed to form the upstream coffer dam would have temporarily smothered any existing invertebrate and spawning habitat. Placing the concrete blocks on the creek bed would have also likely increased turbidity levels similar to those created by the September 18, 2014 unauthorized discharge of rock rip rap within Lee Vining Creek. Therefore, it is reasonable to expect that any adverse impacts to REC-2, COMM, COLD, WILD, and SPWN beneficial uses would have been similar to those potential impacts discussed for Violation 1a, above.

Potential for Harm, Factor 2 – The Physical, Chemical, Biological or Thermal Characteristics of the Discharge:

“Minor Risk (1)” was selected for the same reason provide for Violation 1a, above. Cured concrete blocks do not present the same threat level to potential receptors that fresh concrete does. Cured concrete blocks would have characteristics more similar to the rock and fine dust particles discussed, above.

Potential for Harm, Factor 3 – Susceptibility to Cleanup or Abatement:

“50 Percent or Greater (0)” was selected, as 100 percent of the unauthorized concrete blocks placed below Lee Vining Creek's OHWM were removed.

Potential for Harm, Factor 4 – Deviation from Requirement:

“Major” was selected for the same reason provided for Violation 1a, above.

Additional Factor, Culpability:

“1.4” was selected for the same reasons provided for Violation 1a, above.

Additional Factor, Cleanup and Cooperation:

“1.5,” the maximum value was selected for the same reasons provided for Violation 1a, above.

Additional Factor, History of Violations:

“1” was selected for the same reason provided for Violation 1a, above.

Violation 1d - Discharge without Dredge/Fill Permit (Water Code section 13376/Clean Water Act section 301): Earthen Materials (September 19, 2014, September 25, 2014, October 21, 2014, and October 25, 2014)

“Moderate (3)” was selected due to the greater extent of waters and aquatic habitat affected by the unauthorized discharges of earthen materials below Lee Vining Creek's

OHWL, upstream and downstream of the diversion structure. On September 19, 2014, approximately 112 cubic yards of sediment that had accumulated on the diversion structures upstream apron was discharged into Lee Vining Creek, upstream of the concrete block coffer dam. The Army Corps' December 16, 2014 Nationwide Permit Verification indicates that the material was initially used to further support the upstream concrete block coffer dam, and then "was graded to the original contours of the stream channel" after the upstream coffer dam was removed. The upstream coffer dam was removed on October 25, 2014, according to the Construction Supervisor's Log.

On September 25, 2014, the downstream coffer dam was constructed, using 40.4 cubic yards of earthen materials. The coffer dam covered approximately 4,900 square feet of creek bed, according to the Army Corps' December 16, 2014 Nationwide Permit Verification. The material used to construct the downstream coffer dam was "adjacent streambed material," as identified by the Army Corps' December 16, 2014 Nationwide Permit Verification. LADWP's application is unclear regarding the source of the material used to construct the downstream coffer dam. On October 21, 2014, the downstream coffer dam was "regraded under water at the site" according to the Construction Supervisor's Log.

LADWP does not identify the creek area affected by each of these four unauthorized discharge events. Therefore, it is difficult, at best, to understand the areal extent of these discharges. However, it is likely that the amount of earthen material placed across a minimum of two locations below Lee Vining Creek's OHWM has had significant impacts to beneficial uses. The same five beneficial uses (REC-2, COMM, COLD, WILD, AND SPWN) discussed in Violation 1a, above, have been affected, but likely to a much more significant level than identified in Violation 1a, above, because of the type of material discharged.

- **Non-Contact Water Recreation (REC-2):** Redistributing 112 cubic yards of earthen material upstream of the diversion structure and 40.4 cubic yards of earthen material downstream of the diversion structure likely created significantly higher turbidity levels than those observed by Lahontan Water Board staff during its September 18, 2014 site inspection. Neither LADWP's application nor the Army Corps' Nationwide Permit Verification identify any measures taken to mitigate or reduce the effects of redistributing the earthen materials within the creek. The downstream coffer dam was removed prior to the upstream coffer dam, thus, removing any settling potential for suspended sediment generated by redistributing 112 cubic yards of earthen material upstream of the diversion structure. Anticipated turbidity levels generated by such activities would have definitely been noticed by anyone hiking or driving adjacent to Lee Vining Creek below the diversion structure. The adverse impact to the REC-2 beneficial use would have been significantly greater than that associated with placing the 80 cubic yards of unwashed rock into Lee Vining Creek.
- **Commercial and Sportfishing (COMM):** The potential for adverse impacts to the fish that Lahontan Water Board staff observed during its September 18, 2014

inspection is significantly greater during earthen fill discharge and redistribution events than those associated with the conditions discussed in Violation 1a, above. The amount of earthen materials discharged into Lee Vining Creek and then "regraded under water" likely created turbidity levels that would have adversely affected fish's ability to see bait or a lure. The suspended sediment concentrations could have been high enough to cause fish tissue damage. Fish could have also been injured or killed during the actual discharge or regrading of the earthen materials. There is a significant potential that the unauthorized earthen materials discharges had such effects upon fish species in the area, which represents at a minimum, a moderate adverse impact to the COMM beneficial use. It is unknown how long such impacts would persist.

- **Cold Freshwater Habitat (COLD):** As discussed in Violation 1a, above, the COLD beneficial use includes, but is not limited to, preserving and enhancing aquatic habitats, vegetation, fish, and wildlife, including invertebrates. Discharging the quantities of earthen materials associated with the upstream apron and downstream coffer dam, and then regrading the material likely resulted in a significant amount of creek bed disturbance and damage. Invertebrate habitat was undoubtedly disturbed and subsequently buried. Over time, invertebrates will recolonize these areas, but a food source for fish has likely been temporarily reduced by the unauthorized earthen material discharges to Lee Vining Creek. The likely reduction in food source may have adversely affected fish growth, health, and survivability as Lee Vining Creek fish populations were preparing for winter conditions. Fish injury and/or mortality, and invertebrate habitat destruction with its potential impacts to fish growth, health, and survivability, all represent adverse impacts to the COLD beneficial use. It is likely that adverse impacts to the COLD beneficial use occurred as a result of the unauthorized earthen material discharges to Lee Vining Creek. Such impacts likely occurred on a localized level for an unknown time period.
- **Wildlife Habitat (WILD):** As discussed above, discharging and redistributing earthen materials below Lee Vining Creek's OHWM likely destroyed invertebrate habitat. In addition to fish, aquatic invertebrates provide food sources for other organisms, such as birds that inhabit or visit Lee Vining Creek and its surrounding habitat. Destroying invertebrate habitat by discharging and grading earthen materials below Lee Vining Creek's OHWM likely adversely affected a food source for birds and other animals; as they were preparing for winter conditions. Such conditions represent at a minimum, a moderate adverse impact upon the WILD beneficial use, given the strong probability of resource damage over a significant area resulting from the unauthorized earthen material discharges.
- **Spawning, Reproduction, and Development (SPWN):** Lee Vining Creek supports a trout fishery, including brown trout that spawn in the fall. The creek bed disturbance associated with the unauthorized earthen material discharges would have likely destroyed any existing brown trout redds and the eggs that would have been in them. The discharge activities would have also likely disrupted any spawning activity in the creek near the diversion structure. Additionally, the potential

adverse impacts to invertebrate habitat and populations and their effect upon fish food sources can also affect early fish development. These are likely effects associated with the unauthorized earthen material discharges and represent, at a minimum, moderate adverse impacts to the SPWN beneficial use. It is unknown what the long-time, if any, impacts will be to the spawning, reproduction, and early development of the brown trout and other fish species near the project area.

Potential for Harm, Factor 2 – The Physical, Chemical, Biological or Thermal Characteristics of the Discharge:

“**Moderate Risk (2)**” was selected due the smothering characteristic the earthen materials can have on invertebrate populations and spawning habitat. Aquatic invertebrate populations and fish eggs are not highly mobile and are therefore susceptible to the smothering characteristic of creek bed and other earthen materials discharged into creek habitats.

Potential for Harm, Factor 3 – Susceptibility to Cleanup or Abatement:

“**50 Percent or Greater (0)**” was selected, as more than 50 percent of the unauthorized earthen material fill (dust) was susceptible to cleanup prior to the December 2014 storm events (i.e., could be removed).

Potential for Harm, Factor 4 – Deviation from Requirement:

“**Major**” was selected for the same reason provided for Violation 1a, above.

Additional Factor, Culpability:

“**1.4**” was selected for the same reasons provided for Violation 1a, above.

Additional Factor, Cleanup and Cooperation:

“**1.5,**” the maximum value was selected for the same reasons provided for Violation 1a, above.

Additional Factor, History of Violations:

“**1**” was selected for the same reason provided for Violation 1a, above.

Violation 2 – Violation of a Basin Plan Prohibition (September 18, 2014)

Potential for Harm, Factor 1 – Harm or Potential Harm to Beneficial Uses:

“**Minor (1)**” was selected given the low levels of turbidity. Based upon field data, the turbidity increased from 1 NTU to 5 NTU, comparing sampling results from upstream

and downstream of the project area. While this represents a 500 percent increase with the potential for harm (water quality objective limits increases to 10 percent), 5 NTU does not present an appreciable harm to beneficial uses given its low level and limited period.

Potential for Harm, Factor 2 – The Physical, Chemical, Biological or Thermal Characteristics of the Discharge:

“Minor Risk (1)” was selected due to the ability of fine sediment to smother spawning and invertebrate habitat. The fine sediment on the unwashed rock placed within the creek and the fine creek bed sediment that was likely re-suspended during the unauthorized rock placement have the ability to smother creek bed habitat further downstream. As discussed above, COLD, WILD, and SPWN beneficial uses can all be adversely affected by the fine sediment’s smothering (physical) characteristic. However, the unauthorized rock fill discharge poses only a minor threat to potential receptors given the limited area affected and limited amount of rock placed below Lee Vining Creek’s OHWM.

Potential for Harm, Factor 3 – Susceptibility to Cleanup or Abatement:

“1” was selected, as none of the re-suspended creekbed sediments nor the fine sediment on the rock being placed into the creek was susceptible to cleanup or abatement.

Potential for Harm, Factor 4 – Deviation from Requirement:

“Major” was selected as LADWP’s actions rendered the requirement to comply with the Basin Plan prohibition ineffective by disregarding the requirement. LADWP failed to take any steps, such as isolating the work area for rock slope protection from flowing waters or washing the rock to remove fine sediment and prevent it from being discharged to the creek. It is fortunate that the impact of LADWP’s failures were minor during Lahontan Water Board staff’s inspection; however, the lack of impact does not decrease LADWP’s disregard of the Lahontan Water Board’s Basin Plan prohibition.

Additional Factor, Culpability:

“1.3” was selected. LADWP is clearly responsible for implementing measures to maintain compliance with the Lahontan Water Board’s regulations and standards, with or without proper permits in hand. To that end, LADWP did provide a list of best management practices to be used during the project. Cofferdams and a temporary diversion around the work area to prevent the discharge of silt was identified for this project, but not implemented when LADWP was placing rock into the creek. LADWP’s Water Operations Labor Supervisor, Mr. Lee Powell, discussed with Lahontan Water Board staff plans to install two coffer dams and to isolate the work area from creek flows, but doing so was scheduled for the following week and prior to removing accumulated sediment on the upstream side of the diversion structure. Concrete repair

work was also to occur following installation of the coffer dam system; however, Lahontan Water Board staff observed during its inspection that concrete repair work had already started without the coffer dams in place. The failure to install identified measures intended to isolate the work area from creek flows could have been an oversight or scheduling error, rather than an intentional act to avoid the challenges and efforts to do so. As stated, above, LADWP staff intended to install the coffer dams the following week. Therefore, 1.3 was selected to reflect LADWP's known responsibility to comply with the Lahontan Water Board's regulations and standards, but delayed BMP implementation leading to the violation.

Additional Factor, Cleanup and Cooperation:

"1.5," the maximum value was selected given the lack of cooperation prior to the project in general, which likely contributed to the violation. Lahontan Water Board staff would have emphasized the need to isolate the project area during the entire project period, in addition to washing the rock prior to placement. Implementing these and other measures would have likely been made conditions of approval.

Additional Factor, History of Violations:

"1" was selected, as Lahontan Water Board staff has not been able to document similar incidents, based upon a review of the California Integrated Water Quality System database.

Determination of Total Base Liability Amount:

The Total Base Liability Amount is determined by adjusting the initial liability amount by the adjustment factors analyzed above. The Total Base Liability Amount for Violation Nos. 1 and 2 is \$118,942.29. The attached ACL Methodology Calculator explains this calculation in greater detail.

Ability to Pay:

No adjustment was made, as LADWP has the ability through its rate structure to pay the Total Base Liability Amount of \$118,942.29.

Economic Benefit:

LADWP to date has realized, at a minimum, a \$294 economic benefit. This is the difference between the 401 Water Quality Certification fee due (\$1,391) and the amount (\$1,097) LADWP submitted with its 401 Water Quality Certification application. This represents the minimum economic benefit realized by LADWP. Lahontan Water Board staff may have required additional mitigation measures if the project had been properly permitted.

Maximum and Minimum Liability Amounts:

A person who violates Water Code section 13376, a Basin Plan prohibition, or a requirement of Clean Water Act section 301, shall be liable civilly in accordance with Water Code section 13385. The maximum liability the Lahontan Water Board may assess pursuant to Water Code section 13385(c) is ten dollars (\$10) per gallon discharged but not cleaned up minus the first 1,000 gallons plus ten thousand dollars (\$10,000) for each day in which the violation occurs. Therefore, the maximum liability the Lahontan Water Board may assess for Violation Nos. 1 and 2 is \$569,360.

Water Code section 13385(e) establishes the derived economic benefit as a minimum liability. The Enforcement Policy further requires that:

The adjusted Total Base Liability shall be at least 10 percent higher than the Economic Benefit so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations.

Therefore, the Minimum Liability Amount for Violation Nos. 1 and 2 is \$323.40.

The attached ACL Methodology Calculator explains the above calculations in greater detail.

Final Liability Amount:

The total calculated civil liability amount in this matter is \$118,942.29. The attached ACL Methodology Calculator explains this calculation in greater detail.

Family Calculative Involvement Worksheet - Vendor Data, 2014

- 1. Select Potential Items for Discharge Validation
- 2. Select Characteristics of the Discharge
- 3. Select Responsibility for Change or Amendment
- 4. Select Inventory Item Standard
- 5. Check "Validable Items & per Gallery Day"
- 6. Other Values from the Values Highlighted Below

Select Item: 1-1000
 Select Item: 1-1000
 Select Item: 1-1000
 Select Item: 1-1000

Select Item: 1-1000
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Select Item: 1-1000
 Select Item: 1-1000
 Select Item: 1-1000
 Select Item: 1-1000

Step 1	Validation No-CMC 0078	Validation No-CMC 10178	Validation No-CMC 10178	Validation No-CMC 01378
Parental Alert Factor	1.000	1.000	1.000	1.000
Per Gallon Factor	1.000	1.000	1.000	1.000
Collars	1.000	1.000	1.000	1.000
Secondary Amount	1.000	1.000	1.000	1.000
High Storage	1.000	1.000	1.000	1.000
Total	5.321	5.321	5.321	5.321
Per Day Factor	1.000	1.000	1.000	1.000
Secondary Max per Day	1.000	1.000	1.000	1.000
Total	6.321	6.321	6.321	6.321
Initial Amount of the MCL	3,421.42	3,421.42	3,421.42	3,421.42
Compliance	1.4	1.4	1.4	1.4
Cleanup and Cooperation	4,800.00	4,800.00	4,800.00	4,800.00
Number of Violations	1.5	1.5	1.5	1.5
Maximum for Site Violation	1,200.00	1,200.00	1,200.00	1,200.00
Amount for this Violation	171,576.00	171,576.00	171,576.00	171,576.00
Step 5 Total Gross Liability Amount	171,576.00	171,576.00	171,576.00	171,576.00
Step 6 MCLs to Pay & to Correct in Discharge	118,842.25	118,842.25	118,842.25	118,842.25
Step 7 Other Factors on which May Require	118,842.25	118,842.25	118,842.25	118,842.25
Step 8 Economic Benefit	200.00	200.00	200.00	200.00
Step 9 Maximum Liability Amount	523.05	523.05	523.05	523.05
Step 10 Maximum Liability Amount	668,380.00	668,380.00	668,380.00	668,380.00
Step 11 Final Liability Amount	118,842.25	118,842.25	118,842.25	118,842.25

Family Day Range Generator

Start Date of Violation: 01/01/14
 End Date of Violation: 01/01/14

Maximum Days = Fixed (Steps 2 & 3) = 1
 Maximum Days = Fixed (Steps 2 & 3) + Days (Step 11) = 1

EXHIBIT Y

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

**COMPLAINT R2-2014-1030
ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF**

**CALIFORNIA WATER SERVICE COMPANY
UNAUTHORIZED DISCHARGE OF CHLORAMINATED POTABLE WATER TO
POLHEMUS AND SAN MATEO CREEKS
SAN MATEO COUNTY**

This complaint assesses an administrative civil liability (Complaint) pursuant to California Water Code section 13385 to California Water Service Company (hereinafter Discharger) for an unauthorized discharge of approximately 8,207,560 gallons of potable water with up to 2.6 milligrams per liter (mg/L) of residual choramines from its water main along Polhemus Road to Polhemus Creek and San Mateo Creek, located in the City of San Mateo. A \$3,060,700 liability is proposed for the alleged Water Code violation.

The Assistant Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board) hereby gives notice that:

1. The Discharger is alleged to have violated provisions of law for which the Regional Water Board may impose civil liability pursuant to California Water Code section 13385. This Complaint is issued under Water Code section 13323 and proposes to assess \$3,060,700 in penalties for the violations cited based on the considerations described herein.
2. Unless waived, the Regional Water Board will hold a hearing on this matter on February 11, 2015, in the Elihu M. Harris Building, First Floor Auditorium, 1515 Clay Street, Oakland, 94612. You or your representative(s) will have an opportunity to be heard and to contest the allegations in this complaint and the imposition of civil liability by the Regional Water Board. You will be mailed an agenda approximately ten days before the hearing date. You must submit all comments and written evidence concerning this Complaint to the Regional Water Board not later than 5 p.m. on December 17, 2014, so that such comments may be considered. Any written evidence submitted to the Regional Water Board after this date and time will not be accepted or responded to in writing.
3. At the hearing, the Regional Water Board will consider whether to affirm, reject, or modify the proposed administrative civil liability, or whether to refer the matter to the Attorney General for judicial civil liability. You can waive your right to a hearing to contest the allegations contained in this Complaint by signing and submitting the waiver and paying the civil liability in full or by taking other actions as described in the waiver form.

ALLEGATIONS

4. The Discharger is a water purveyor and operates a drinking water system in San Mateo County, California. The Discharger operates and maintains a potable water main located along

Polhemus Road and Polhemus Creek, in the City of San Mateo. Polhemus Creek is a tributary of San Mateo Creek, and both are waters of the State and of the United States.

5. From October 25 through October 29, 2013, the Discharger discharged approximately 8,207,560 gallons of potable water from a cracked bell joint in a 12-inch diameter water main buried 10 to 12 feet below the west side shoulder of Polhemus Road, along the bank of Polhemus Creek. The discharge flowed laterally underground until it surfaced at the bank of Polhemus Creek. The discharge then it flowed into Polhemus Creek and downstream approximately 0.3 miles into San Mateo Creek.
6. The discharge contained up to 2.6 milligrams per liter (mg/L) of residual chloramines, which is over 100 times the U.S. Environmental Protection Agency's acute water quality criterion (0.019 mg/L). The chloraminated water killed at least 276 fish in San Mateo Creek, including 70 rainbow trout/steelhead, 94 Sacramento sucker, 96 sculpin and 16 stickle-back.
7. The dead fish were first observed in San Mateo Creek on October 29, 2013, by San Francisco Public Utilities Commission (SFPUC) biologists, about 0.8 miles downstream of the confluence of Polhemus and San Mateo Creeks (see SFPUC memo dated November 1, 2013). California Department of Fish and Wildlife (CDFW) staff collected the dead fish on October 29 and 30, and November 1, 2013. Some of the dead fish were found displaced and stranded outside of the wet channel, likely due to the temporary increase in flow resulting from the discharge. SFPUC notified the Regional Water Board of the dead fish at approximately 9:30 a.m. on October 29, 2013.
8. The discharge also caused significant bank erosion and sedimentation at the discharge site and downstream (see photographs 3-7 of Regional Water Board staff inspection report photographs dated November 1, 2013, documenting erosion and turbid water observed). The discharge rate for the chloraminated water release was approximately 2,280 gallons per minute, almost seven times higher than ambient creek flows. These increased flows eroded the stream bed and banks thereby increasing turbidity and depositing sediment downstream. High turbidity can impair the feeding ability of fish and interfere with fish respiration; excessive sedimentation can impair fish spawning and rearing habitats.
9. The discharge began at approximately 11:30 p.m. on October 25, 2013. The Discharger's automatic supervisory control and data acquisition (SCADA) system generated notifications of a suction pressure drop in the vicinity of the discharge as early as 11:51 p.m. on October 25, 2013. However, the Discharger did not thoroughly investigate the cause of this pressure drop, instead attributing it to algae clogged meter screens in the supply line owned and operated by SFPUC, which supplies the Discharger's lines near the discharge site. The Discharger did not contact SFPUC to inquire about potential algal clogging, and the discharge and SCADA notifications continued.
10. The discharge occurred along a relatively steep and heavily vegetated section of Polhemus Creek. Although visible to an observer standing on the road shoulder, the discharge may have been difficult to see from a vehicle. At least one Discharger staff member failed to observe the discharge between October 25 and October 28. A Discharger staff member finally discovered the discharge at approximately 9:00 a.m. on October 28, 2013. The Discharger closed the main

valve and stopped the discharge at approximately 9:45 a.m. on October 28, and then took steps to repair the broken water main.

11. Upon discovery of the discharge, the Discharger placed de-chlorination tablets in the path of the seeping water on the bank above Polhemus Creek, and visually inspected and collected water samples from the creek within approximately 500 yards of the discharge point.
12. The Discharger did not notify the Regional Water Board or other resource agencies until the afternoon of October 29, 2013, after being notified by SFPUC of the dead fish downstream. By that time, SFPUC had already contacted the Regional Water Board.
13. The Discharger initially indicated that the spill was less than 50,000 gallons, and occurred during one day. Regional Water Board staff responded to the Discharger on October 30, 2013, and required the Discharger to submit a spill report within 5 working days.
14. On November 1, 2013, Regional Water Board staff inspected the discharge and observed significant damage due to creek bank scouring. SFPUC prepared a report the same day documenting the scope of the fish kill.
15. On November 6, 2013, the Discharger submitted a spill report indicating the discharge to be limited to 43,200 gallons over a period of one day. Based on the magnitude of the creek bank scour observed during the November 1 site inspection, and on the documented fish kill, Regional Water Board staff asked the Discharger to thoroughly investigate its records, including flow meters and pressure gauges, and resubmit a spill report by November 14.
16. On November 18, 2013, the Discharger submitted a revised spill report stating that, based on the SCADA readings, the discharge occurred from October 25 through October 29, and totaled 8,207,560 gallons.

ALLEGED VIOLATIONS

17. The Discharger violated Water Code section 13376, Clean Water Act section 301 and the Water Quality Control Plan for the San Francisco Bay Region by discharging approximately 8,207,560 gallons of potable drinking water containing up to 2.6 mg/L of chloramine into Polhemus Creek and San Mateo Creek on October 25 to 29, 2013.

LEGAL AUTHORITY

18. Water Code section 13376 prohibits the discharge of pollutants or dredged or fill materials to navigable waters of the United States except as authorized by waste discharge requirements or dredged or fill material permits. A person who violates Water Code section 13376 is liable civilly under Water Code section 13385, subdivision (a)(1).
19. The Regional Water Board's Water Quality Control Plan for the San Francisco Bay Region, Chapter 4, Table 4-1, prohibition 1, prohibits discharges with "particular characteristics of concern to beneficial uses ... to any non-tidal water" The Regional Water Board issued the

prohibition pursuant to Water Code section 13243. A person who violates prohibitions issued pursuant to Section 13243 is liable civilly under Water Code section 13385, subdivision (a)(4).

20. Section 301 of the Federal Water Pollution Control Act ("Clean Water Act") (33 U.S.C. § 1311) prohibits the discharge of pollutants to waters of the United States except in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit. A person who violates Clean Water Act section 301 is liable civilly under Water Code section 13385, subdivision (a)(5).
21. Water Code section 13385, subdivision (c), authorizes the Regional Water Board to impose administrative civil liability for violations of section 13385, subdivision (a), in an amount not to exceed the sum of both of the following (1) ten thousand dollars (\$10,000) for each day in which each violation occurs; and (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.
22. Pursuant to Water Code section 13385, subdivision (e), in determining the amount of any civil liability imposed under section 13385, subdivision (c), the Regional Water Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, 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 violations, and other matters that justice may require.
23. On November 17, 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. 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 sections 13327 and 13385(e). The entire Enforcement Policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final11179.pdf
24. This enforcement action is exempt from the provisions of the California Environmental Quality Act, California Public Resources Code section 21000 et seq., in accordance with California Code of Regulations, Title 14, section 15321.
25. There are no statutes of limitation that apply to administrative proceedings. The statutes of limitation that refer to "actions" and "special proceedings" and are contained in the Code of Civil Procedure apply to judicial proceedings, not administrative proceeding. (See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, Section 405(2), p. 510.)

PROPOSED CIVIL LIABILITY

26. **Maximum Liability:** The violation occurred over 4 days, and the volume discharged but not cleaned up is estimated at 8,207,560 gallons. Therefore, the maximum administrative civil liability the Regional Water Board may impose is \$82,105,600.
27. **Minimum Liability:** According to Water Code section 13385, subdivision (e), at a minimum, liability shall be assessed at a level that recovers the economic benefit or saving, if any, derived from the violations.
28. **Proposed Liability:** Based on consideration of the above facts, after applying the Enforcement Policy penalty methodology as set forth in Exhibit A, the Assistant Executive Officer of the Regional Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of \$3,060,700.
29. Notwithstanding the issuance of this Complaint, the Regional Water Board and/or the State Water Board shall retain the authority to assess additional penalties for further unauthorized discharge for which penalties have not yet been assessed or for violations that may subsequently occur.



Dyan C. Whyte
Assistant Executive Officer

November 17, 2014

Date

Exhibit A –Factors Considered to Determine Administrative Civil Liability

EXHIBIT A

Alleged Violations and Factors Considered in Determining Administrative Civil Liability for California Water Service Company Unauthorized Discharge of Chloraminated Potable Water to Polhemus and San Mateo Creeks, San Mateo County

The State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for assessing administrative civil liability based on the factors in Water Code sections 13327 and 13385 subdivision (e).

Each factor in the Enforcement Policy and its corresponding category, adjustment, or amount for the alleged violation is presented below.

ALLEGED VIOLATION

For five consecutive days, October 25 to October 29, 2013, the California Water Service Company (Cal Water) released approximately 8,207,560 gallons of potable water with up to 2.6 milligrams per liter (mg/L) of residual chloramines to Polhemus Creek and San Mateo Creek in violation of the Water Quality Control Plan for the San Francisco Bay Basin, Chapter 4, Prohibition 1, Water Code section 13376, and Section 301 of the Clean Water Act (33 U.S.C. § 1311). The discharge resulted from a cracked bell joint in a 12-inch-diameter water main buried 10 to 12 feet below the west side shoulder of Polhemus Road in the City of San Mateo.

ADMINISTRATIVE CIVIL LIABILITY CALCULATION STEPS

Step 1 – Potential for Harm for Discharge Violations

The “potential harm” factor considers the harm to beneficial uses that resulted, or may result, from exposure to the pollutants in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the harm or potential harm to beneficial uses; (2) the degree of toxicity of the discharge, and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses is negligible (0) to major (5).

For the violation, the potential harm to beneficial uses is **above moderate (i.e., a score of 4)**. The discharge contained up to 2.6 mg/L residual chloramine, which is over 100 times the U.S. EPA’s acute water quality criterion of 0.019 mg/L. The chloraminated water killed at least 276 fish, including 70 rainbow trout /steelhead, 94 Sacramento sucker, 96 sculpin, and 16 stickle-back in San Mateo Creek. The dead fish were first observed on October 29, 2013, by San

Francisco Public Utilities Commission (SFPUC) biologists in San Mateo Creek, about 0.8 miles downstream of the confluence of Polhemus and San Mateo creeks (See Attachment A, SFPUC biologist memo dated November 1, 2013). The California Department of Fish and Wildlife warden and biologists collected the dead fish on October 29 and 30, and November 1, 2013. Some of the dead fish were found displaced and stranded outside of the wet channel likely due to the temporary increase in flow resulting from the discharge.

Additionally, the discharge also caused significant bank erosion in Polhemus Creek and subsequently sediment deposition in both Polhemus and San Mateo creeks. (See photographs 3-7 of Attachment B, Regional Water Board staff inspection report photographs dated November 1, 2013, documenting erosion and turbid water observed.) The average discharge flow rate was approximately 2,280 gallons per minute¹, which is almost seven times higher than the ambient creek flow rate². The increased discharge eroded the stream bed and banks thereby increasing turbidity and depositing sediment downstream. High turbidity can impair the feeding ability of fish and interfere with fish respiration; excessive sedimentation can impair fish spawning and rearing habitats.

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

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material.

For the violation, the risk or threat of the discharge is **moderate (i.e., a score of 2)**. The discharge was potable water with chloramine at concentrations up to 2.6 mg/L. Chlorine or chloramine exhibits toxicity to aquatic life even at low concentrations, and the U.S. EPA Water Quality Criterion for chlorine or chloramine to prevent acute (lethal) effects to aquatic life is 0.019 mg/L.

Factor 3: Susceptibility to Cleanup or Abatement

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 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.

For the violation, the discharge was **not susceptible to cleanup or abatement (i.e., factor of 1)**. The discharged material flowed into and commingled with ambient water flowing in Polhemus and San Mateo creeks. The discharge occurred at the top of the Polhemus Creek bank and less than 0.3 mile from the confluence with San Mateo Creek.

¹ Average discharge flow rate was calculated based on a total discharge volume of 8.21 million gallons occurring over a period of approximately 60 hours.

² Based on the United States Geological Survey's flow gauge data, the average water flow rate of San Mateo Creek upstream of the confluence of Polhemus Creek between October 25 and 29, 2013, was approximately 0.79 cubic feet per second or 355 gallons per minute. The creek ambient flow data was obtained at <http://waterdata.usgs.gov/ca/nwis>, USGS 11162753 San Mateo C BL LO Crystal Spring RES NR San Mateo California.

Step 2 – Assessments for Discharge Violations

When there is a discharge, the Regional Water Board determines an initial liability amount on a per-gallon and/or a per-day basis using the sum of the Potential for Harm scores from Step 1 and a determination of degree of Deviation from Requirement.

For the violation, the sum of the three factors from Step 1 is 7. The degree of Deviation for the violation is **moderate**. The requirement violated involved, among other things, a discharge of pollutants without authorization. The intent of this requirement is to allow the Regional Water Board an opportunity to issue a permit establishing discharge requirements to protect water quality and beneficial uses. The discharge was unintentional, so failure to obtain a permit only partially compromised the effectiveness of the requirement. This is because had the Discharger applied and received a permit, the discharge would have likely violated the permit. Moreover, the general prohibitions on discharges to any non-tidal water and discharges without an NPDES permit were only partially compromised, because Cal Water was not permitted and was not under specific order prohibiting the discharge. The application of the "moderate" deviation factor here is due to the unique circumstances of this case, and is not intended to be precedential.

For the violation, the Water Board Prosecution Staff used both per-gallon and per-day factors. The resulting per-gallon and per-day multiplier factor is 0.2, based on a Potential for Harm score of 7 and a "**moderate**" Deviation from Requirement.

Initial Liability Amount

The Enforcement Policy allows for an adjusted maximum per gallon assessment for "High Volume Discharge." This discharge qualifies as a high volume discharge because it is similar to recycled water and reducing the maximum amount does not result in an inappropriately small penalty. So, a maximum \$1 per gallon is used to determine the initial liability. The initial liability for the violation is calculated on a per-gallon and per-day basis as follows:

Per Gallon Liability: $(8,206,560 \text{ gallons}) \times (0.2) \times (\$1/\text{gallons}) = \$1,641,312$

Per Day Liability: $\$10,000/\text{day} \times (0.2) \times (5 \text{ days}) = \$10,000$

Total Initial Liability = \$1,651,312

Step 3 – Per Day Assessment for Non-Discharge Violations

This assessment is for a discharge violation. Step 3 applies to non-discharge violations.

Step 4 – Adjustments to Determine Initial Liability for Violation

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

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is used, with a higher multiplier for negligent behavior.

For the violation, the culpability multiplier is **1.2**, because Cal Water did not exercise reasonable care in reacting to a pressure drop it detected on October 25, 2013, the first day of the discharge. The discharge continued until a Cal Water operator noticed water surfacing through the road bed on Polhemus Road and took actions to stop and fix the problem. At least one Cal Water inspector failed to observe the discharge during inspections between October 25 and October 28. Moreover, Cal Water's supervisory control and data acquisition (SCADA) system had sent notifications to its operators and managers of a suction pressure drop for pump MPS 26 beginning on October 25, 2013, at or around 11:51 p.m. Despite this notification, Cal Water did not thoroughly investigate the cause of the pressure drop and instead stated that it attributed the pressure drop to algae clogging meter screens on the supply line owned and operated by the SFPUC. Cal Water provided no evidence to support that this was a reasonable assumption to make at the time. Cal Water also did not consult with SFPUC staff at the time about its suspicion of algal growth or screen clogging within the SFPUC supply system³. Evidence shows that Cal Water staff did not contact SFPUC until October 28, 2013, after it discovered the discharge (based on Cal Water's June 14, 2014, additional information report). SFPUC then sent crews to inspect its own system on the same day it received a call from Cal Water and found no problem within SFPUC's system and communicated its findings to Cal Water crews working to repair the broken pipeline at the shoulder of Polhemus Road.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is used, with a higher multiplier when there is a lack of cooperation.

For the violation, the cleanup and cooperation factor multiplier is **1.4**.

Given the relative proximity of the discharge point to Polhemus and San Mateo creeks, there was little opportunity to "cleanup" or mitigate impacts to the creeks. Cal Water did deploy dechlorination tables in its response on October 28, 2013, immediately prior to closing the valve and stopping the discharge. Cal Water did not inspect far downstream on Polhemus Creek, and it

³ On August 6, 2014, Water Board asked Cal Water to provide all communication records between SFPUC and Cal Water staff between October 25 and October 28, 2013, concerning clogging of meter screens and algal bloom in SFPUC's water supply system. Cal Water could provide no such records.

did not inspect San Mateo Creek at all, and Cal Water did not make any attempts to place dechlorination tablets in the creeks.

Overall, Cal Water's cooperation in the investigation was poor. First, it did not thoroughly review past records to accurately and timely report the incident. Second, it was not forthcoming with information to Water Board staff which impeded Water Board staff's investigation and assessment of the extent and impacts of the discharge. Details of each are as explained below:

- (1) Cal Water discovered the discharge on October 28, 2013, at or around 9:00 a.m., but did not thoroughly review its records to accurately determine the full magnitude and potential for harm from the discharge. It simply assumed the discharge occurred for only one day at 20 to 30 gallons per minute based on visual observations. Because of this incorrect assumption, its inspection of Polhemus Creek involved just the immediate area within 500 yards of the discharge point.
- (2) Cal Water did not timely notify the Water Board or other resource agencies of the discharge after it discovered the discharge. Cal Water only provided notice to the Regional Water Board 5 hours after it was notified by the SFPUC on October 29, 2013, at or around 9:30 a.m., that SFPUC biologists had discovered dead fish during a routine fish population survey in San Mateo Creek. These dead fish were about 1.1 mile downstream of the discharge point.
- (3) On October 29, 2013, at or around 2:30 p.m., Water Board staff received a telephone message from Dale Gonzales with Cal Water of the discharge indicating that the estimated volume was less than 50,000 gallons for one day, and that the SFPUC had found dead fish downstream. Water Board staff responded to Mr. Gonzales' message on October 30, 2013, and required Cal Water to submit a spill report within five working days.
- (4) On November 1, 2013, Water Board staff inspected the scene and observed significant creek bank erosion from the incident. Water Board staff asked Mr. Tony Carrasco, Cal Water's District Manager, how it determined the volume to be 43,200 gallons and duration to be only one day considering the significant amount of erosion. Mr. Carrasco said Cal Water inspects the local control system every day around 9:15 a.m. Based on this inspection routine, Mr. Carrasco indicated that Cal Water's operator, Mr. Mike Utz, inspected the local control system on Sunday, October 27, 2013, around 9:15 a.m., and Mr. Utz did not notice or observe any leak that day. Mr. Carrasco further indicated that Mr. Utz discovered the leak on Monday, October 28, 2013, around 9:15 a.m. during the routine daily inspection. Mr. Utz was not available for an interview during the scheduled site inspection for Water Board staff to verify the information.⁴ Mr. Carrasco added that Cal Water staff had spoken with Mike Weisenberger with the SFPUC about the incident.

⁴ Water Board staff later learned that Mr. Carrasco's above statement was in error. In fact, the discharge was discovered by Cal Water Operator Mr. Alex Tomaloff not Mr. Utz based on Cal Water's June 4, 2014, submittal. Mr. Utz is the local manager for the Bayshore area, and not on duty operator during the days of discharge.

Upon returning from the site inspection on November 1, Water Board staff contacted Mr. Weisenberger (SFPUC) to ask if he was contacted by Cal Water staff the week of October 20 – 25, and to ask about the nature of the communication. Mr. Weisenberger confirmed that he was contacted by Cal Water but could not remember the exact date only that it was on a weekday. Mr. Weisenberger further indicated that Cal Water staff had asked about a pressure drop in the system, and, following the Cal Water phone call, he sent his inspector to check SFPUC's system and found no problem.

- (5) On November 6, 2013, Cal Water submitted the spill report for the incident reporting it as 43,200 gallons for one day. However, based on Water Board staff inspection observation of significant creek bank scouring, the magnitude of the fish kill, and evidence from SFPUC staff that Cal Water operators had observed a pressure drop in its system, Water Board staff required Cal Water to thoroughly investigate its records, including flow meters and pressure gauges, and resubmit a spill report by November 14, 2013.
- (6) On November 18, 2013, Cal Water resubmitted a spill report that revised its discharge to approximately 8,207,560 gallons and for five days. The revised values were based on Cal Water SCADA readings.
- (7) On April 3, 2014, Water Board staff required that Cal Water provide copies of its records including its SCADA data, a chronological account of Cal Water personnel actions and communications just before and during the incident, and a narrative explanation of what happened.
- (8) On May 15, 2014, Water Board staff served Cal Water with a subpoena for the information it requested on April 3, 2014, after several reminders and waiting a reasonable time for the information and not receiving it.
- (9) On June 4, 2014, Cal Water submitted the additional information and records originally requested by Water Board staff on April 3, 2014.
- (10) On August 6, 2014, Water Board staff requested Cal Water provide clarification and additional records to substantiate some of the statements it made in its June 4 submittal.
- (11) On August 11, 2014, Cal Water provided the additional records and clarifications requested, but only after at least six reminders from Water Board staff.

History of Violations

This factor is used to increase the liability when there is a history of repeat violations using a minimum multiplier of 1.1.

For the violation, the history factor multiplier is **1.1** because Cal Water had a similar violation in the past. In 2009, the Water Board issued administrative civil liability Order R2-2009-0006

against Cal Water imposing a \$200,000 fine for an unplanned discharge of chlorinated potable water to Polhemus Creek that also resulted in a fish kill.

Step 5 – Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2.

Total Base Liability Amount

Total Base Liability = \$1,651,312 (Initial Liability) x 1.2 (Culpability Multiplier) x 1.4 (Cleanup and Cooperation Multiplier) x 1.1 (History of Violations Multiplier)

Total Base Liability = **\$3,051,625**

Step 6 – Ability to Pay and to Continue in Business

The Enforcement Policy provides that if the Water Board has sufficient financial information to assess the violator's ability to pay the Total Base Liability, or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability amount may be adjusted downward if warranted.

In this case, the Water Board Prosecution Staff has sufficient information to suggest Cal Water has the ability to pay the proposed liability. Cal Water is the largest subsidiary of the California Water Service Group, which is the third largest investor-owned water utility in the United States. Cal Water Group has more than 490,000 customers, more than \$500 million in annual revenue, and more than \$1.5 billion in gross utility plant assets, compared to \$434 million in long-term debt, according to the corporation annual report. In 2013, Cal Water Group reported its annual net income of \$47.254 million.⁵ The proposed liability is about 6 percent of this net income.

Step 7 – Other Factors as Justice May Require

Regional Water Board prosecution staff incurred \$9,038 in staff costs to investigate this case and prepare this analysis and supporting information. This consists time spent by all members of the prosecution team based on the low end of the salary range for each classification. The Assistant Executive Officer intends to seek additional liability for staff costs incurred in bringing the matter to settlement or hearing. Although the final amount for such costs cannot be determined until completion of the matter, such costs could be quite substantial when additional investigation and analysis is required or if there is a hearing on this matter before the Regional Water Board.

⁵ Financial data taken from California Water Service Group's 2013 Annual Report, page 27 (available at <http://ir.calwatergroup.com/getattachment/a2c7f9cf-bb3d-4504-a8f5-e9e849a1fc89/2013-Annual-Report>)

Step 8 – Economic Benefit

The Enforcement Policy directs the Water Board to determine any economic benefit associated with the violations and to recover the economic benefit gained plus 10 percent in the liability assessment.

We did not find evidence of significant economic benefit associated with the violation. The alleged violation was an accident without a direct cause associated with economic benefit. Reasonable diligence in investigating the cause of the pressure drop detected on October 25 would have resulted in earlier detection of the discharge, which in turn would have resulted in earlier outlay of funds to fix the break by four days and higher costs for completing the fix on a weekend. This time value savings and avoidance of higher weekend costs are negligible relative to the calculated Total Base Liability.

Step 9 – Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount*

The Enforcement Policy requires that the minimum liability amount imposed not to be below a Discharger's economic benefit plus 10 percent. The proposed liability is substantially more than Cal Water's economic benefit plus 10 percent. The mandatory minimum penalty statute does not apply to this discharge because it is unauthorized.

b) *Maximum Liability Amount*

The maximum administrative civil liability amount is the maximum amount allowed by Water Code section 13385: (1) \$10,000 for each day in which the violation occurs; and (2) \$10 for each gallons exceeding 1,000 gallons that is discharged and not cleaned up. The maximum liability for the violation is \$82,105,600.

Step 10 – Final Liability Amount

The final liability amount proposed is **\$3,060,700 (rounded)** for the discharge to Polhemus and San Mateo creeks of over 8 million gallons of chloraminated potable water on October 25 to 28, 2013. This amount is based on consideration of the penalty factors discussed above, it is the sum of the Total Base Liability plus staff costs, and it is within the maximum and minimum liability amounts.

Attachment A – SFPUC biologist memo dated November 1, 2013

Attachment B – Regional Water Board staff inspection photographs dated November 1, 2013

EXHIBIT Z

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
ORDER NO. R9-2011-0057**

**SETTLEMENT AGREEMENT AND STIPULATION FOR ORDER
AND ADMINISTRATIVE CIVIL LIABILITY ORDER
SANTA MARGARITA WATER DISTRICT**

**FOR VIOLATIONS OF PROHIBITIONS CONTAINED IN ORDER NOS.
2006-0003-DWQ AND R9-2007-0005, SECTION 301 OF THE CLEAN WATER ACT
AND CALIFORNIA WATER CODE SECTION 13376, COMPLAINT NO. R9-2011-0023**

Section I: Introduction

This Settlement Agreement and Stipulation for Order ("Stipulation") and Administrative Civil Liability Order (the "Order") are entered into in reference to an adjudicative proceeding initiated by the issuance of Administrative Civil Liability Complaint No. R9-2011-0023, dated March 10, 2011 (the "Complaint"). The parties to this proceeding are the San Diego Regional Water Quality Control Board Prosecution Staff ("Prosecution Staff") and Santa Margarita Water District ("Discharger") (collectively the "Parties"). The Stipulation is presented to the San Diego Regional Water Quality Control Board ("San Diego Water Board") for adoption as an Order, by settlement, pursuant to Government Code section 11415.60.

Section II: Recitals

1. The Discharger is the owner and operator of approximately 600 miles of sewer pipe, 19 sewer lift stations, and three sewage treatment plants, providing wastewater treatment services to 150,000 residents and businesses within southern Orange County. The Discharger provides sewer service to portions of the cities of Rancho Santa Margarita, Mission Viejo, and San Clemente, as well as unincorporated county areas within its sphere of influence. The Plano Lift Station facility, located at 21384 Antonio Parkway, Rancho Santa Margarita and the 24-inch force sewer main associated with it (the "Facility") are key facilities which transmit wastewater from portions of the Cities of Lake Forest and Rancho Santa Margarita and unincorporated County areas to the Chiquita Wastewater Treatment Plant.
2. The Discharger's sewage collection system, including the Facility, is subject to the requirements set forth in State Water Board Order No. 2006-0003-DWQ, *Statewide General Waste Discharge Requirements for Sanitary Sewer Systems* and San Diego Water Board Order No. R9-2007-0005, *Waste Discharge Requirements for Sewage Collection Systems in the San Diego Region*.
3. The Complaint as issued recommends an administrative civil liability totaling \$1,731,970 for violations of Prohibitions contained in Order Nos. 2006-0003-DWQ and R9-2007-0005, Section 301 of the Clean Water Act and California Water Code (Water

3. The Complaint as issued recommends an administrative civil liability totaling \$1,731,970 for violations of Prohibitions contained in Order Nos. 2006-0003-DWQ and R9-2007-0005, Section 301 of the Clean Water Act and California Water Code (Water Code) section 13376 between March 23, 2010 and March 30, 2010. The violations resulted from the discharge of 2.293 million gallons of raw sewage from a ruptured sewer force main into waters of the United States. The proposed civil liability includes estimated economic benefit of \$667 and staff costs of \$10,500.

4. The Parties have engaged in settlement negotiations and based on substantial evidence provided by the Discharger and not available to the Prosecution Staff at the time of the Complaint's issuance, agree to settle the matter without administrative or civil litigation and by presenting this Stipulation to the San Diego Water Board for adoption as an Order pursuant to Government Code section 11415.60. To resolve by consent and without further administrative proceedings all alleged violations of Water Code section 13350(a) set forth in the Complaint, the Parties have agreed to the imposition of \$890,000 in civil liability against the Discharger. Discharger shall pay a total of \$445,000 to the State Water Resources Control Board Cleanup and Abatement Account no later than 30 days following the San Diego Water Board's adoption of this Order. The remaining \$445,000 in liability is suspended upon completion of a Supplemental Environmental Project ("SEP") (\$140,000) and the Enhanced Compliance Action ("ECA") (\$305,000) set forth in this Stipulation and Order. Discharger shall expend at a minimum \$140,000 to complete the SEP and \$305,000 to complete the ECA in accordance with the terms of this Stipulation and Order.

5. Subsequent to the issuance of the Complaint and in the course of settlement discussions between the Parties, the Discharger provided the following substantial evidence to the Prosecution Staff that justified a downward adjustment in two of the factors utilized in the penalty calculation methodology as required by the 2009 State Water Resources Control Board Water Quality Enforcement Policy.

- a. Based on the information provided by the Discharger, Prosecution Staff recommended that the Factor 1 (Step 1) *Potential for Harm for Discharge Violations* score be reduced from a score of 4.5 (between "above moderate" and "major") to a score of 4 ("above moderate" harm). While construction of the earthen berm to impound the raw sewage within a mile section of Tijeras Creek negatively impacted beneficial uses of the Creek for well over five days, which in accordance with the penalty calculation methodology guidelines would allow for a finding of major harm in Step 1, this minimized much greater harm to the beneficial uses of the downstream waters, and as such it is reasonable to lower the score to above moderate harm.
- b. Additionally, the Adjustment Factor for *Culpability* in Step 4 of the methodology was reduced from a score of 1.0 to a score of 0.75 because the Discharger could not have reasonably expected the Plano force main to be corroding from the interior since the pipe was well within its life expectancy.

- c. The downward adjustment of these two factors resulted in lowering the recommended liability amount under the Enforcement Policy from \$1,731,970 in the Complaint to \$890,000 (including staff costs).

6. The Prosecution Staff avers 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 Stipulation, and that this Stipulation is in the best interest of the public.

7. SEP Description – Starr Ranch Invasive Control and Restoration Project:

The goals for funding the first year of this project are to restore 0.5 to 2.0 acres of riparian and stream habitat within Bell Canyon Creek, and aid in training volunteers in stream bioassessment protocols. Additionally, upland habitat along the Bell Canyon watershed within the Audubon Starr Ranch Sanctuary will be restored to coastal sage scrub habitat by the removal of the invasive artichoke thistle. The invasive control and restoration project is completely non-chemical, research-based (i.e. uses adaptive management), and landscape scale (i.e. both riparian and upland). The riparian project is supervised by the Director of Research and Education and staffed by two seasonal interns, recent college graduates who live on site for eight months. Interns recruit and supervise volunteers and Orange County Conservation Corps crews to remove priority invasives and also to do active and passive restoration in 0.5 – 2.0 new acres per year along the Bell Canyon riparian corridor, which is 4.7 miles long and approximately 232 acres. The Starr Ranch upland project removes invasives and restores two rare habitats, coastal sage scrub and native grassland. A seasonal field crew of five recent college graduates, who also live on site, add 20 - 30 new upland acres per year and use experimentally-derived methods to control artichoke thistle.

Quantitative and qualitative monitoring results will indicate success of invasive control and passive and active restoration. To assess performance, data will be analyzed to detect trends of native vs. invasive cover as well as native woody plant density in both active and passive restoration sites. Detailed plans for achieving the goal(s) are provided in the Starr Ranch Invasive Control and Restoration Project - Implementation Schedule and Milestones included herein as part of the SEP description, Attachment A.

The San Diego Water Board acknowledges that the total cost of the three year SEP exceeds the Discharger's contribution to the project (\$140,000). However, implementation of the first year of this project will provide stand-alone benefits to the riparian and upland habitat restoration and enhancement which will continue to be maintained and monitored regardless of implementation of years two and three of the project. For this reason, the Audubon Starr Ranch Sanctuary (or "Implementing Party") will complete the first year of the SEP utilizing the funds provided by the Discharger, and seek funding for years two and three from alternative funding sources.

8. **SEP Completion Date:** The first year's work under the SEP, as described in paragraph 7, shall be completed in its entirety no later than October 15, 2012 (the "SEP Completion Period"). If other circumstances beyond the reasonable control of Audubon Starr Ranch Sanctuary or the Discharger prevent completion of the first year's work under the SEP by that date, San Diego Water Board staff may extend the SEP Completion Period by up to one (1) year, to October 15, 2013. The Discharger must send its request for an extension in writing with necessary justification to the Designated San Diego Water Board Representative no later than September 14, 2012.

9. **Agreement of Discharger to Fund, Report and Guarantee Implementation of SEP:** The Discharger represents that: (1) It will fund the SEP in the amount as described in this Stipulation and Order; (2) It will provide certifications and written reports to the San Diego Water Board consistent with the terms of this Stipulation detailing the implementation of the SEP, and (3) Discharger will guarantee implementation of the SEP identified in Attachment A by remaining liable for \$140,000 of suspended administrative liability until the SEP is completed and accepted by the San Diego Water Board in accordance with the terms of this Stipulation. The Discharger agrees that the San Diego Water Board has the right to require an audit of the funds expended by it to implement the SEP.

10. **Agreement of Audubon Starr Ranch Sanctuary to Accept SEP Funds and Implement SEP:** As a material consideration for the San Diego Water Board's acceptance of this Stipulation, Audubon Starr Ranch Sanctuary represents that it will utilize the funds provided to it by the Discharger to implement those portions of the SEP designated as a "Year 1" in the Schedule for Performance included in the SEP description, Attachment A. Audubon Starr Ranch Sanctuary understands that its promise to implement the SEP, in its entirety and in accordance with the schedule for implementation, is a material condition of this settlement of liability between the Discharger and the Prosecution Team. Audubon Starr Ranch Sanctuary agrees that the San Diego Water Board staff, or its designated representative, has the right to: (1) inspect the SEP at any time without notice; (2) require an audit of the funds expended by Audubon Starr Ranch Sanctuary to implement the SEP; and (3) require implementation of the SEP in accordance with the terms of this Stipulation and Order if Audubon Starr Ranch Sanctuary has received funds for that purpose from the Discharger.

Audubon Starr Ranch Sanctuary agrees to submit to the jurisdiction of the San Diego Water Board to enforce the terms of this Stipulation and Order and the implementation of the SEP and agrees to provide all such information requested by the Discharger to enable the Discharger to fulfill its reporting and certification obligations to the San Diego Water Board regarding the SEP, as set forth herein.

11. **SEP Oversight:** Discharger agrees to oversee implementation of the SEP. Additional oversight of the SEP will be provided by the San Diego Water Board. The Discharger is solely responsible for paying for all reasonable oversight costs incurred by the San Diego Water Board to oversee the SEP. The SEP oversight costs are in addition to the total administrative civil liability imposed against the Discharger and are not credited toward the Discharger's obligation to fund the SEP. Reasonable oversight tasks to be performed by the San Diego Water Board include but are not limited to, updating CIWQS, reviewing and evaluating progress, reviewing the final completion report, verifying completion of the project with a site inspection and auditing appropriate expenditure of funds.

12. **Certification of SEP Funding:** The Discharger shall provide evidence to the San Diego Water Board of payment in full (\$140,000) to Audubon Starr Ranch Sanctuary in support of the SEP no later than 30 days following the San Diego Water Board's adoption of this Order. Failure to pay the full SEP amount by this date will result in the full SEP amount (\$140,000) being immediately due and payable to the State Water Resources Control Board for deposit into the Cleanup and Abatement Account.

13. **SEP Progress Reports:** The Discharger shall provide quarterly reports of progress to a Designated San Diego Water Board Representative, and the State Water Resources Control Board's Division of Financial Assistance, continuing through submittal of the final report described in Paragraph 14. If no activity occurred during a particular quarter, a quarterly report so stating shall be submitted. Quarterly reports must be submitted in accordance with the following schedule:

Reporting Period	Due Date
January - March	April 30
April - June	July 31
July - September	October 31
October - December	January 31

14. **Certification of Completion of SEP and Final Report:** On or before December 1, 2012 (or December 1, 2013, if an extension to the completion date is granted), the Discharger shall submit a certified statement of completion of the SEP ("Certification of Completion"). The Certification of Completion shall be submitted under penalty of perjury, to the Designated San Diego Water Board Representative and the State Water Resources Control Board's Division of Financial Assistance, by a responsible corporate official representing the Discharger. The Certification of Completion shall include following:

- a. Certification that the SEP has been completed in accordance with the terms of this Stipulated Order. 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 Discharger.

- b. Certification documenting the expenditures by the Discharger and Implementing Party during the completion period for the SEP. The Implementing Parties' expenditures may be external payments to outside vendors or contractors implementing 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 certification need not address any costs incurred by the San Diego Water Board for oversight. Audubon Starr Ranch Sanctuary may submit a separate certification of expenditures on the Discharger's behalf. The Discharger (or the Implementing Party on the Discharger's behalf) shall provide any additional information requested by the San Diego Water Board staff which is reasonably necessary to verify SEP expenditures.
- c. Certification, under penalty of perjury, that the Discharger and/or Implementing Party followed all applicable environmental laws and regulations in the implementation of the SEP including but not limited to the California Environmental Quality Act (CEQA), the federal Clean Water Act, and the Porter-Cologne Act. Audubon Starr Ranch Sanctuary may submit a separate certification of compliance on the Discharger's behalf. To ensure compliance with CEQA where necessary the Discharger and/or Implementing Party shall provide the San Diego Water Board with the following documents from the lead agency prior to commencing SEP implementation if applicable:
 - i. Categorical or statutory exemptions relied upon by the Implementing Party;
 - ii. Negative Declaration if there are no potentially "significant" impacts;
 - iii. Mitigated Negative Declaration if there are potentially "significant" impacts but revisions to the project have been made or may be made to avoid or mitigate those potentially significant impacts; or
 - iv. Environmental Impact Report (EIR)

In addition, by December 1, 2013 (or December 1, 2014, if an extension to the completion date is granted), Audubon Starr Ranch Sanctuary shall submit a final report to the Designated San Diego Water Board Representative which includes a discussion of the monitoring activities and results conducted during the year following completion of the SEP.

15. San Diego Water Board Acceptance of Completed SEP: Upon the Discharger's satisfaction of its SEP obligations under this Stipulation and completion of the SEP and any audit requested by the San Diego Water Board, San Diego Water Board staff shall send the Discharger a letter recognizing satisfactory completion of its obligations under the SEP. This letter shall terminate any further SEP obligations of the Discharger and result in a permanent stay of the \$140,000 SEP liability imposed on the Discharger by this Stipulation and Order.

16. **Failure to Expend all Suspended Administrative Civil Liability Funds on the Approved SEP:** In the event that Discharger and/or the Implementing Party is not able to demonstrate to the reasonable satisfaction of the San Diego Water Board staff that the entire SEP Amount has been spent to complete the components of the SEP for which the Discharger is financially responsible, Discharger shall pay the difference between the Suspended Administrative Civil Liability and the amount the Discharger can demonstrate was actually spent on the SEP, as an administrative civil liability. The Discharger shall pay the additional administrative liability within 30 days of its receipt of notice of the San Diego Water Board's determination that the Discharger has failed to demonstrate that the entire SEP Amount has been spent to complete the SEP components.

17. **Failure to Complete the SEP:** If the SEP is not fully implemented within the SEP Completion Period (as defined in Paragraph 8) required by this Stipulation, the Designated San Diego Water Board Representative shall issue a Notice of Violation. As a consequence, the Discharger shall be liable to pay the entire Suspended Liability or, some portion thereof, or the Discharger and/or Implementing Party may be compelled to complete the SEP.

18. **Publicity:** Should the Discharger, the Implementing Party or its agents or subcontractors publicize one or more elements of the SEP, it shall state in a **prominent manner** that the Project is being partially funded by the discharger pursuant to San Diego Water Board Order No. R9-2011-0057.

19. **ECA Description:** The Plano Forcemain Realignment Project shall consist of the design and realignment of the portion of the Plano Forcemain that extends easterly from the Plano Lift Station to a point of connection (to the continuation of the existing force main) that is on the east side of Tijeras Creek. The project will consider two realignment alternatives to remove the forcemain from the banks and bed of Tijeras Creek and thus avoid the direct discharge of sewage to the creek in the event of a forcemain failure. The two alternatives and proposed timelines for the project are described in the ECA summary in attachment B. Subject to the California Environmental Quality Act and SMWD Board action, work will start immediately and, subject to unforeseeable/uncontrollable delays will be completed within two years based on the proposed schedule.

20. **ECA Costs:** The installed cost estimate for the ECA is approximately \$1,560,000 (Attachment B). The amount of liability to be suspended upon completion of the ECA is \$305,000 (ECA Amount). No additional liability above and beyond the \$305,000 shall be suspended for costs incurred to complete the ECA.

21. **ECA Progress Reports:** The Discharger shall provide annual reports of ECA progress to San Diego Water Board staff, commencing on November 1, 2011, and annually thereafter until the certification of performance is provided as described in paragraph 24, below.

22. Failure to Complete ECA: If the project as described is determined to be infeasible, or the Discharger fails to complete the ECA by October 1, 2013, as required by this Stipulation and Order, the San Diego Water Board shall issue a Notice of Violation (NOV). If other circumstances beyond the reasonable control of the Discharger prevent completion of the ECA by that date, San Diego Water Board staff may extend the SEP Completion Period by up to one (1) year, to October 1, 2014. The Discharger must send its request for an extension in writing with necessary justification to the Designated San Diego Water Board Representative no later than September 14, 2013. As a consequence, the Discharger shall be liable to pay the State Water Resources Control Board Cleanup and Abatement Account the suspended liability of \$305,000 within 30 days of receipt of the NOV.

23. ECA Oversight: Discharger will oversee implementation of the ECA. Additional oversight of the ECA will be provided by the San Diego Water Board. The Discharger is solely responsible for paying all reasonable oversight costs incurred by the San Diego Water Board to oversee the ECA. The ECA oversight costs are in addition to the total administrative civil liability imposed against the Discharger and are not credited toward the Discharger's obligation to fund the ECA. Reasonable oversight tasks to be performed by the San Diego Water Board include but are not limited to, updating CIWQS, reviewing and evaluating progress, reviewing the final completion report, verifying completion of the project with a site inspection and auditing appropriate expenditure of funds.

24. Certification of Performance of ECA: On or before December 1, 2013, the Discharger shall provide a report to Designated San Diego Water Board staff, containing documentation demonstrating completion of the ECA and detailing fund expenditures. The report shall be submitted under penalty of perjury, stating that the ECA has been completed in accordance with the terms of this Stipulation and Order. 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 ECA and the costs incurred by the Discharger.

25. Third Party Financial Audit of ECA: At the written request of the San Diego Water Board Executive Officer or designee, the Discharger, 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's(ies') professional opinion that the Discharger has expended money in the amounts claimed by the Discharger directly on the ECA Project. The written request shall specify the reasons why the audit is being requested. The audit report shall be provided to San Diego Water Board staff within three (3) months of notice from San Diego Water Board staff to the Discharger of the need for an independent third party audit. The audit need not address any costs incurred by the San Diego Water Board for oversight.

26. Failure to Expend all Suspended Administrative Civil Liability Funds on the Approved ECA: In the event that Discharger is not able to demonstrate to the reasonable satisfaction of the San Diego Water Board staff that the entire ECA Amount has been spent for the completed ECA Project, as described, Discharger shall pay the difference between the Suspended Administrative Civil Liability and the amount Discharger can demonstrate was actually spent on the described ECA Project, as an administrative civil liability. The Discharger shall pay the additional administrative liability within 30 days of its receipt of notice of the San Diego Water Board staff's determination that the Discharger has failed to demonstrate that the entire ECA Amount has been spent to complete the ECA.

Section III: Stipulations

27. The Parties incorporate Paragraphs 1 through 26 by this reference as if set forth fully herein, stipulate to the entry of this Order as set forth below, and recommend that the San Diego Water Board issue this Order to effectuate the settlement.

28. This Stipulation is entered into by the Parties to resolve by consent and without further administrative proceedings certain violations of Order Nos. 2006-0003-DWQ and R9-2007-0005, Section 301 of the Clean Water Act and California Water Code (Water Code) section 13376, set forth in the Complaint and detailed above in Paragraphs 3 through 5.

29. The Discharger hereby agrees to pay the administrative civil liability totaling \$890,000 as set forth in Paragraph 4 of Section II herein. Further, the Parties agree that \$445,000 of this administrative civil liability shall be suspended pending completion of: (1) the SEP as set forth in Paragraphs 7 through 18 of Section II herein; and (2) the ECA Project as particularly described in Paragraphs 19 through 26 of Section II herein.

30. The Discharger understands that payment in accordance with this Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged in the Complaint may subject it to further enforcement, including additional administrative civil liability.

31. Should the Discharger enter into bankruptcy proceedings before all payments are paid in full, the Discharger agrees, to the extent allowable under applicable law, to not seek to discharge any of these penalties in bankruptcy proceedings.

32. Each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

33. The Discharger understands that the terms of the Settlement Agreement and proposed Order must be noticed for a 30-day public review and comment period prior to consideration by the San Diego Water Board. In the event objections are raised during the public comment period for the Order, the San Diego Water Board or the Executive Officer may, under certain circumstances, require a public hearing regarding the Order. In that event, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the Order as necessary or advisable under the circumstances.

34. The Parties agree that the procedure contemplated for adopting the Order by the San Diego Water Board and review of this Stipulation 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 under the circumstances.

35. This Stipulation and Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. The Discharger is represented by counsel in this matter.

36. This Stipulation and 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.

37. This Stipulation may be executed in counterparts and by facsimile signature.

38. 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 Resources Control Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the San Diego Water Board 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. 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 Stipulation and/or 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.

39. The Discharger has been informed of the rights provided by CWC section 13323 (b), and hereby waives its right to a hearing before the San Diego Water Board prior to the adoption of the Order.

40. 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 Resources Control Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court. The Discharger reserves the right to seek review by the State Water Resources Control Board of any revisions made by the San Diego Water Board prior to adoption of the Order, and to participate as a designated party in any proceeding brought by any other aggrieved party relating to the subject matter of the Stipulation and Order.

41. The Discharger and Audubon Starr Ranch Sanctuary covenant not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, their officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any matter addressed herein.

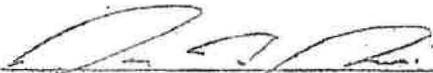
42. Neither the San Diego Water Board members nor the San Diego Water Board staff or State Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by the Discharger (or the Implementing Party where applicable) its 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 Dischargers, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulation and Order.

43. The Assistant Executive Officer warrants by signing below that he has the authority to execute the Stipulation on behalf of the Prosecution Team. The person signing on behalf of the Discharger warrants by signing below that he has the legal authority to bind the Discharger to the terms of this Stipulation. The person signing on behalf of Audubon Starr Ranch Sanctuary warrants by signing below that he or she has the legal authority to bind Audubon Starr Ranch Sanctuary to the applicable terms of this Stipulation. The Parties hereto have caused this Stipulation to be executed by their respective officers on the dates set forth, and the Stipulation is effective as of the most recent date signed.

44. This Stipulation is effective and binding on the Parties upon the execution of this Order.

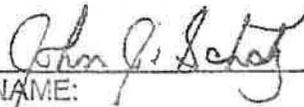
IT IS SO STIPULATED.

California Regional Water Quality Control Board Prosecution Team
San Diego Region

By: 
James G. Smith, Assistant Executive Officer

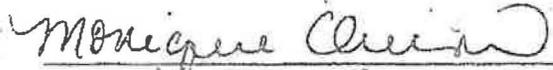
Date: 19 July 2011

Santa Margarita Water District

By: 
NAME: John J. Schatz

Date: 8/25/11

National Audubon Society, Inc.

By: 
NAME: Monique Quinn, CEO

Date: 8/25/11

Section IV: Findings of the San Diego Water Board

45. The San Diego Water Board incorporates Paragraphs 1 through 44 by this reference as if set forth fully herein.

46. The Parties believe that settlement of this matter is in the best interest of the People of the State. Therefore, to settle the Complaint, the Discharger hereby agrees to comply with the terms and conditions of this Order.

47. The San Diego Water Board finds that the Recitals set forth herein in Section II are true.

48. This Stipulation and Order are severable; should any provision be found invalid the remainder shall remain in full force and effect.

49. In accepting this settlement, the San Diego Water Board has considered, where applicable, each of the factors prescribed in CWC sections 13327 and 13350. 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 for this matter.

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 Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 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 Discharger fails to perform any of its obligations under the Order.

52. 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.

The attached Agreement between the Assistant Executive Officer and the Dischargers is approved pursuant to Government Code section 11415.60 and is incorporated by reference into this 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 the California Regional Water Quality Control Board, San Diego Region, on ~~August 10~~, 2011.

September 14



DAVID W. GIBSON
Executive Officer

Date: September 19, 2011

EXHIBIT AA



California Regional Water Quality Control Board

Santa Ana Region

3737 Main Street, Suite 500, Riverside, Calif
Phone (951) 782-4130 • FAX (951) 781-6288 • TI
www.waterboards.ca.gov/santaar

Linda S. Adams
Secretary for
Environmental Protection

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July 29, 2010

Fred Wilson, City Administrator
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

Sent To Fred Wilson City of Hunt. Beach
 Street, Apt. No. or PO Box No. 2000 Main St
 City, State, Zip+4 Huntington Beh. CA 92648
 PS Form 3800, August 2006 See Reverse for Instructions

TRANSMITTAL OF ADMINISTRATIVE CIVIL LIABILITY (ACL) COMPLAINT TO THE CITY OF HUNTINGTON BEACH, ACL COMPLAINT NO. R8-2010-0004

Dear Mr. Wilson:

Enclosed is a certified copy of Administrative Civil Liability Complaint No. R8-2010-0004 (hereinafter "the Complaint"). The Complaint alleges that the City of Huntington Beach violated provisions of its Municipal Separate Storm Sewer System (MS4) Permit by discharging untreated wastewater (sewage) to the MS4 system and to waters of the United States, for which a penalty may be imposed under the Water Code Section 13385(a)(2). The Complaint proposes that administrative civil liability in the amount of one hundred fifty thousand seven hundred fifty dollars (\$150,750) be imposed as authorized under Water Code Section 13385(c)(1). Also enclosed are a Waiver Form and a Hearing Procedure that sets forth important requirements and deadlines for participation in the hearing. Additionally, a Fact Sheet that describes the Complaint process and explains what the City of Huntington Beach can expect and its obligations as the process proceeds is available at:
http://www.waterboards.ca.gov/santaana/public_notices/enforcement_actions.shtml

If preferred, a hard copy of the Fact Sheet may be obtained by contacting Stephen D. Mayville at (951) 782-4992.

Please read each document carefully. This Complaint may result in the issuance of an order by the Regional Board requiring that you pay a penalty.

Unless waived, a public hearing on this matter will be held during the Regional Board meeting on September 16, 2010. The staff report regarding this Complaint and the meeting agenda will be mailed to you not less than 10 days prior to the hearing.

Pursuant to California Water Code Section 13323, the City of Huntington Beach may waive its right to a hearing. Should the City of Huntington Beach waive its right to a hearing and pay the proposed assessment, the Regional Board may not hold a public hearing on this matter. If the City of Huntington Beach chooses to waive its right to a hearing, please sign and submit the

California Environmental Protection Agency

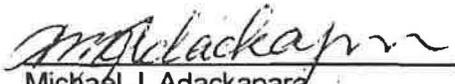


enclosed Waiver Form to this office by August 10, 2010. If the City waives its right to a hearing and agree to pay the assessed amount, a check for one hundred fifty thousand seven hundred fifty dollars (\$150,750) made payable to the State Water Pollution Cleanup and Abatement Account should be submitted by August 30, 2010. The Waiver Form and the check should be sent to the Regional Board office in the enclosed pre-printed envelope.

If the City of Huntington Beach does not wish to waive its right to a hearing, requesting a pre-hearing meeting, as set forth in the Hearing Procedure is recommended. Should you wish to schedule a pre-hearing meeting, please submit your request prior to August 10, 2010.

If you have any questions about the Complaint or the enclosed documents, please contact me at (951) 782-3238, or you may contact Stephen D. Mayville, Chief of Enforcement, at (951) 782-4992 (smayville@waterboards.ca.gov). All legal questions should be directed to Ann Carroll at (916) 322-3227 (acarroll@waterboards.ca.gov), Staff Counsel, Office of Enforcement.

Sincerely,


Michael J. Adackapara
Division Chief
Regional Board Prosecution Team

Enclosures: Complaint No. R8-2010-0004, Waiver Form, Hearing Procedure and Preprinted Envelope

Cc with a copy of the complaint (by electronic mail only):

Board Members
Executive Officer (Regional Board Advisory Team)
State Water Resources Control Board, Office of Chief Counsel – David Rice (Regional Board Advisory Team Attorney)
State Water Resources Control Board, Division of Water Quality – Bruce Fujimoto
State Water Resources Control Board, Office of Enforcement – Ann Carroll (Regional Board Prosecution Team Attorney)
U.S. Environmental Protection Agency, Region 9 (WTR-7) – Ken Greenberg
Orange County Public Works Department – Chris Crompton
Ocean View School District – Alan G. Rasmussen

State of California
California Regional Water Quality Control Board
Santa Ana Region

IN THE MATTER OF:)

The City of Huntington Beach)
2000 Main Street)
Huntington Beach, CA 92648)

Complaint No. R8-2010-0004
for
Administrative Civil Liability

Attn: Mr. Fred Wilson)

YOU ARE HEREBY GIVEN NOTICE THAT:

1. The City of Huntington Beach (hereinafter "Huntington Beach" or "the City") is alleged to have violated provisions of law for which the California Regional Water Quality Control Board, Santa Ana Region (hereinafter "Regional Board"), may impose administrative civil liability, pursuant to California Water Code (hereinafter "CWC") Section 13385.
2. A hearing concerning this Complaint will be held before the Regional Board within 90 days of the date of issuance of this Complaint, unless, pursuant to CWC Section 13323, the City waives its right to a hearing. Waiver procedures are specified in the attached Waiver Form. The hearing on this matter is scheduled for the Regional Board's regular meeting on September 16, 2010 at the City Council Chambers of Loma Linda located at 25541 Barton Road, Loma Linda, California. Huntington Beach, or its representative(s), will have an opportunity to appear and be heard and to contest the allegations in this Complaint and the imposition of civil liability by the Regional Board.
3. If a hearing is held on this matter, the Regional Board will consider whether to affirm, reject, or modify the proposed administrative civil liability or whether to refer the matter to the Attorney General for recovery of judicial civil liability. If this matter proceeds to hearing, the Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent to the issuance of this Complaint through hearing.

THE COMPLAINT IS BASED ON THE FOLLOWING FACTORS:

4. On January 23, 2009, Huntington Beach notified Regional Board staff that it had discovered that sewage was being discharged from the Oak View Branch Library (hereinafter "the Library") located at 17241 Oak Lane in the City of Huntington Beach to the City's street and storm drain system. The City reported that during the

Library's construction the sanitary sewer lines from the Library were mistakenly connected to a storm drain system that emptied to a curb outlet on Nichols Street.

5. Huntington Beach constructed the Library on the premises of Oak View Elementary School with permission from the Ocean View School District to support the Ocean View School District project Healthy Start (SB620). The City completed the construction in two phases.
 - a) For each phase, Huntington Beach issued a Notice of Completion that specified that all construction work was completed according to the plans and specifications and to the satisfaction of the City Engineer of Huntington Beach and that said work was accepted by the City Council of Huntington Beach.
 - b) Huntington Beach issued a Notice of Completion for construction of Phase I of the Library on October 2, 1995.
 - c) Huntington Beach issued a Notice of Completion for construction of Phase II of the Library on April 19, 1999.
6. Upon completion of Phase I of the Library, the City donated the Library to the Ocean View School District. However, the City continued, and still continues, to maintain the Library on behalf of the Ocean View School District.
7. Phase I of the Library included the construction of a men's and a women's restroom and a janitor's room. Each restroom included one water closet and one lavatory and the janitor's room included one mop sink. In accordance with the Site Plans for construction of the Library, a new sanitary sewer line from the Library was to be connected to the Oak View Elementary School's existing six-inch sanitary sewer line.
8. The Site Plans for the Library indicated approximately 65-feet of four-inch diameter and 80-feet of six-inch diameter vitrified clay pipe to connect the sanitary sewer line from the Library to the Oak View Elementary School's existing six-inch sanitary sewer line. A note on sheet P-1 of the Site Plan states, "EXISTING 6" SEWER LINE, FIELD VERIFY".
9. Sheet P-1 of the Site Plan also notes a manhole located in a paved open area between the Library and an existing building at the Oak View Elementary School. Another notation written on sheet P-1 of the Site Plan by this manhole reads, "EXISTING MANHOLE, VERIFY IF SEWER LINE EXIST. CONTR. MAY CONNECT TO THIS POINT." The contractor exercised this option and connected the Library's sanitary sewer line to the "sewer line" that existed between the Library and the school. Neither the contractor nor the City verified if this sewer line was actually a sanitary sewer line. The "sewer line" to which the Library's sanitary sewer line was connected is a storm drain that discharged to Nichols Street through a curb outlet.
10. The Site Plan for construction of the Oak View Elementary School, approved by the State of California, Office of Architecture and Construction, on September 19, 1966,

and revised on September 27, 1966, identifies a six-inch diameter cast iron storm drain located in the same area as the manhole identified in the Library's Site Plan, Sheet P-1 (see paragraph 9, above). Furthermore, the Site Plan for the Oak View Elementary School identifies a clean out in the same general area as the manhole identified in the Site Plan, Sheet P-1, for the Library. The school Site Plan also indicates that this storm drain discharged to a curb outlet on Nichols Street. Had the contractor for the Library or the City checked the Site Plan for the school or verified that the sewer lines existed as per the Library's Site Plan notations, this error could have been eliminated. Because of this negligence, sanitary wastes from the Library's restrooms were discharged to Nichols Street, from where it was discharged to the City's municipal separate storm sewer system (hereinafter "MS4") and ultimately into waters of the United States.

11. On April 19, 1999, the City certified completion of Phase II of the Library. The Phase II project expanded the Library as well as provided an additional restroom and break room. The restroom included one water closet, one lavatory, and one floor drain. The break room included one sink. The sanitary sewer line for the Phase II expansion project tied into the existing sanitary sewer line for the Library at a sewer drain drop box located just outside of the Library along the northern exterior wall. As such, sanitary wastes from the Phase II library expansion project were also discharged to the City's MS4 system and to waters of the United States.
12. The City became aware of the sewage discharges to Nichols Street on April 3, 2007 when City staff responded to an odor complaint from a resident reporting a "sewage like" odor thought to be originating from the Rainbow Disposal transfer station located at 17121 Nichols Street. Following inspection of the Rainbow Disposal transfer station, Huntington Beach staff determined that the odor was noticeably stronger across the street from the transfer station. City staff reported a "black oozing scum" originating from a curb outlet located on the eastern side of Nichols Street adjacent to the Oak View Elementary School. City staff reported the discharge traveled north along the curb and gutter of Nichols Street.
13. On April 5, 2007, Huntington Beach issued a Notice of Noncompliance, dated April 4, 2007, to the Ocean View School District for unauthorized discharges to the City's storm drain system.
14. The Ocean View School District reported to the City that the discharges to Nichols Street were believed to be wash water originating from daily cleaning and hosing down of an outdoor eating area located at Oak View Elementary School. Wash water originating from this area would discharge into floor drains that connected to the storm drain system that discharged to the curb outlet along Nichols Street.
15. In the summer of 2007, the Ocean View School District reported to the City that the wash water from the outdoor eating area and the floor drains were rerouted to the sewer drop box located along the northern exterior wall of the Library. The Ocean View School District believed that discharges from the drop box were conveyed to

the Ocean View Elementary School's existing sanitary sewer lateral line that discharged to the local sanitary sewer.

16. On October 30, 2008, Huntington Beach staff noted discharges from the curb outlet to Nichols Street were still occurring.
17. On November 3, 2008, City staff provided dye tablets to Ocean View School District staff to assist with identifying the source(s) of the discharge.
18. On January 12, 2009, Ocean View School District staff informed Huntington Beach that the sanitary sewer lines from the restrooms of the Library were connected to the curb outlet along Nichols Street.
19. On January 15, 2009, City staff and Ocean View School District staff conducted another dye test to confirm the illicit connection to the storm drain system. That same day, after confirmation of the illicit connection to the storm drain system, City staff removed the toilets from the restrooms at the Library and provided portable toilets to serve the Library's patrons. In addition, City staff plugged the two curb cores at the discharge point to Nichols Street to prevent further discharges.
20. On February 4, 2009, the City and Ocean View School District began construction to reroute the sanitary sewer line from the Library to the Oak View Elementary School's existing sanitary sewer line. Construction was completed on February 24, 2009.
21. Untreated sewage from the Library was discharged to the City's storm drain system from October 2, 1995 to January 15, 2009. During this period, untreated sewage from the Library was discharged to the curb outlet on Nichols Street. These discharges to Nichols Street would surface flow along Nichols Street curb and gutter in a northerly direction to a storm drain catch basin located at the corner of Nichols Street and Belsito Drive, approximately 110 yards north of the curb outlet or flow to storm drain inlets located on Warner Avenue, located approximately 0.2 miles north. Discharges into the storm drain system along Nichols Street and Warner Avenue discharge into the East Garden Grove Wintersburg Flood Control Channel and ultimately empty into Bolsa Bay and Bolsa Chica Ecological Reserve.
22. Untreated sewage discharges to the storm drain system can cause or contribute to storm water and other surface water contamination. Further, untreated sewage contains high levels of pathogens, including bacteria, protozoa, and viruses, as well as nutrients, and other pollutants. If discharged, these pollutants pose health risks to the public and have the potential to impact the beneficial uses of the receiving waters.
23. The Water Quality Control Plan for the Santa Ana River Basin (Basin Plan) designates beneficial uses of waterbodies within the Region. Bolsa Bay's designated beneficial uses include: water contact recreation; non-contact water recreation; commercial and sportfishing; biological habitats of special significance;

wildlife habitat; rare, threatened or endangered species; marine habitat; and, shellfish harvesting. Bolsa Bay Ecological Reserve's designated beneficial uses include: water contact recreation; non-contact water recreation; biological habitats of special significance; wildlife habitat; rare, threatened or endangered species; marine habitat; and, estuarine habitat. The discharge of untreated sewage from the Library may have resulted in impacts to the designated beneficial uses of Bolsa Bay and Bolsa Chica Ecological Reserve.

24. On January 18, 2002, the Regional Board adopted Municipal Separate Storm Sewer System Permit, Order No. R8-2002-0010, National Pollutant Discharge Elimination System Permit No. CAS618030 (hereinafter "MS4 Permit") to regulate urban storm water runoff for the County of Orange, Orange County Flood Control District, and Incorporated Cities of Orange County, which includes Huntington Beach. The MS4 Permit was renewed on May 22, 2009 by Order No. R8-2009-0030.
25. Provision III, subsections 1 and 2 of the MS4 Permit prohibit the discharge of non-storm water into the MS4 systems and the discharge of storm water containing pollutants that have not been reduced to the maximum extent practicable to waters of the United States. Provision III, subsection 7 requires that the discharges from MS4s shall be in compliance with the applicable discharge prohibitions contained in Chapter 5 of the Basin Plan. Chapter 5 of the Basin Plan prohibits the discharge of untreated sewage to surface waters. Provision VII of the MS4 Permit requires that illegal connections to MS4s be investigated and eliminated.
26. The City is alleged to have violated provisions of its MS4 Permit by discharging untreated sewage to waters of the United States for which a civil liability may be assessed administratively as per CWC Section 13385(a)(2).
27. Pursuant to CWC Section 13385(c), the Regional Board may administratively assess civil liability in an amount not to exceed the sum of the following:
 - A. Ten thousand dollars (\$10,000) for each day in which the violation occurs; and,
 - B. Where there is a discharge, any portion of which is not susceptible to clean up 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.
28. Pursuant to CWC Section 13385(c), the maximum liability for the violation cited above is \$48,540,000, based on 4,854 days of discharge (October 2, 1995 to January 15, 2009) at \$10,000 per day. Because the volume of untreated sewage discharged to the waters of the United States cannot be estimated, a per-gallon assessment is not included.

29. CWC Section 13385(e) specifies factors that the Regional Board shall consider in establishing the amount of civil liability. The Water Quality Enforcement Policy (hereinafter "the Policy") adopted by the State Water Resources Control Board on November 19, 2009, establishes a methodology for assessing administrative civil liability pursuant to this statute. Use of methodology addresses the factors in CWC section 13385(e). The policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf
30. Attachment A presents the administrative civil liability derived from the use of the penalty methodology in the Policy. In summary, this amount is based on the following:
- A. The Policy establishes an alternative approach to penalty calculations for multiple day violations that occurred without the knowledge or control of the violator. Regional Board staff has determined that Huntington Beach was unaware of the discharge of untreated sewage to Nichols Street, and subsequently to its MS4 system and the waters of the United States, and therefore did not take appropriate action to cease the discharge until becoming aware of the violation in January 2009. The discharge of untreated sewage to the storm drain system occurred from October 2, 1995 to January 15, 2009, for a total of 4,854 days. Using the alternative approach to penalty calculation for multiple day violations, the civil liability is assessed based on 167 days of violation (see page 18 of the Policy for details).
 - B. The Policy also requires a consideration of the potential for harm from the discharge of untreated sewage. The assessed penalty on a per day basis is \$167,000 (167 days X \$10,000/day X 0.1 = \$167,000 [adjusted for potential harm factor=0.1]). This amount is then adjusted based on the City's culpability, cleanup effort and cooperation, and history of violations. As indicated above, the City acted swiftly to eliminate the illegal discharges once it became aware of the problem. However, prior to construction and connection of the Library's sanitary sewer line to the sewer system, the City failed to verify that the sewer line designated for connection in the Site Plan was actually a sanitary sewer line. Thus, the adjusted liability is \$125,250 (\$167,000 X 1 [culpability] X 0.75 [cleanup effort and cooperation] X 1 [history of violations] = \$125,250).
 - C. CWC Section 13385(e) and the Policy also require consideration of economic benefit or savings, if any, resulting from the violations and other matters as justice may require. Regional Board staff has determined that the City did not realize any significant savings from its failure to verify if the sanitary sewer from the Library was indeed connected to a sanitary sewer lateral line from the school. The actual sanitary sewer lateral line from the school was further away than the storm sewer. Based on the United States Environmental Protection Agency BEN Model, the City saved approximately \$26,400 in deferred costs associated with proper installation of the sewer line. The Policy requires that the proposed

assessment be at least 10% higher than the economic benefit or savings received.

- D. The costs of investigation and enforcement incurred by the Regional Board Prosecution staff are considered as one of the "other factors as justice may require," and should be included in the liability assessed. Investigation costs have been estimated to be \$25,500 (170 hours at \$150 per hour=\$25,500). Staff costs are then added to the proposed liability amount for a total of \$150,750 (\$125,250+\$25,500=\$150,750).

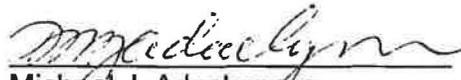
31. After consideration of the factors in accordance with the CWC section 13385(e) and the Policy, the Division Chief proposes that civil liability be imposed on the City of Huntington Beach in the amount of one hundred fifty thousand seven hundred fifty dollars (**\$150,750**) for discharging untreated sewage to waters of the United States in violation of its MS4 Permit.

WAIVER OF HEARING

The City of Huntington Beach may waive its right to a hearing. If the City chooses to do so, please sign the attached Waiver Form and return it, together with a check for \$150,750 payable to the State Water Pollution Cleanup and Abatement Account, in the enclosed preprinted envelope. If the City waives its right to a hearing and pay the assessed amount, the Regional Board may not hold a hearing regarding this complaint.

If you have any questions, please contact Stephen D. Mayville at (951) 782-4992 or Kirk Larkin at (951) 320-2182.

July 29, 2010
Date


Michael J. Adackapara
Division Chief
Regional Board Prosecution Team

Penalty Calculation Methodology Worksheet - Version Date: 7/7/2010

Instructions
 1. Select Potential Harm for Discharge Violations
 2. Select Characteristics of the Discharge
 3. Select Susceptibility to Cleanup or Abatement
 4. Select Deviation from Standard
 5. Click Determine Harm & per Gallon/Day
 6. Enter Values into the Yellow highlighted fields

Select Item 1: Minor
 Select Item 3: Discharged material poses above moderate risk
 Select Item 5: Discharge Susceptible to Clean up or Abatement
 Select Item Moderate

Discharger Name/ID: City of Huntington Beach, Oak View Branch Library

			Violation	
Discharge Violations	Step 1	Potential Harm Factor (Generated from Button)	5	
	Step 2	Per Gallon Factor (Generated from Button)	0.1	
		Gallons		
		Statutory / Adjusted Max per Gallon (\$)		
		Total		\$
Discharge Violations	Step 2	Per Day Factor (Generated from Button)	0.1	
		Days	167	
		Statutory Max per Day	10000.00	
		Total		\$ 167,000
	Non-Discharge Violations	Step 3	Per Day Factor	
		Days		
		Statutory Max per Day		
		Total		\$
Initial Amount of the ACL			\$	167,000.00
Add'l Factors	Step 4	Culpability	1	\$ 167,000.00
		Cleanup and Cooperation	0.75	\$ 125,250.00
		History of Violations	1	\$ 125,250.00
	Step 5 Total Base Liability Amount		\$	125,250.00
	Step 6	Ability to Pay & to Continue in Business	1	\$ 125,250.00
	Step 7	Other Factors as Justice May Require	1	\$ 125,250.00
		Staff Costs	\$ 25,500	\$ 150,750.00
	Step 8	Economic Benefit	\$ 26,400	\$ 150,750.00
	Step 9	Minimum Liability Amount		
		Maximum Liability Amount	\$ 48,550,000	
	Step 10 Final Liability Amount		\$	150,750.00

Penalty Day Range Generator

Start Date of Violation= 10/2/95
 End Date of Violation= 1/15/09

Maximum Days Fined (Steps 2 & 3) = 4855 Days
 Minimum Days Fined (Steps 2 & 3) = 42 Days

EXHIBIT BB

ATTACHMENT B to Order No. R9-2014-0008

CITY OF ESCONDIDO Hale Avenue Resource Recovery Facility (HARRF) San Diego County **Discussion of Penalty Calculation Factors**

The following summary of factors provides factual and analytical evidence to support the proposed Administrative Civil Liability (ACL) recommended penalty against the City of Escondido (City) for illegal discharge of sewage on August 28, 2011.

1.0 Discharger Information

The City provides wastewater collection (regulated under State Water Board Order No. 2006-003-DWQ and San Diego Water Board Order No. R9-2007-0005), wastewater treatment (regulated under NPDES Order No. R9-2010-0032) and ocean discharge (regulated under NPDES Order No. R9-2010-0086) for the City of Escondido and the Rancho Bernardo area of the City of San Diego. The City owns and operates the Hale Avenue Resource Recovery Facility (HARRF), a wastewater treatment plant located at 1521 Hale Avenue in the City of Escondido, San Diego County. The HARRF is an activated sludge, secondary treatment facility with an average daily flow of 16.5 million gallons.

2.0 Application of Water Board's Enforcement Policy¹

Pursuant to the penalty calculation methodology set forth in the Enforcement Policy, the following is a summary of the calculated monetary assessment for the illegal discharge of sewage to the waters of the United States that occurred on August 28, 2011.

SSO Violation and Analysis

Date: August 28, 2011

Alleged Cause of Sanitary Sewer Overflow (SSO): The HAARF influent pump station (IPS) shut down due to the component failure of the Uninterruptable Power Supply (UPS). The UPS unit provides power to the Programmable Logic Controller (PLC) that monitors/controls the operation of the influent pumps. The PLC is an electronic device that monitors/controls influent pump performance and network alarms to the Supervisory Control And Data Acquisition (SCADA) system. The resulting loss of power to the PLC caused the influent pump shutdown which led to a sewer backup and overflow upstream of the IPS, and therefore upstream of the treatment plant.

¹ Water Board's Enforcement Policy available at: http://www.waterboards.ca.gov/water_issues/programs/enforcement/policy.shtml

SSO Event Description: The City reported that the UPS failed to provide power to the PLC unit at the IPS as well as its auto dial system connected to the SCADA. The City estimated that the SSO duration was 23 minutes based on SCADA data and hydraulic grade line analysis (taking into consideration freeboard capacities of wet well and pipelines).

Factor 1: Harm or Potential Harm to Beneficial Uses = 3

Moderate threat to beneficial uses (i.e. impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects)

- The discharge of raw sewage reached Escondido Creek, which has the beneficial uses of municipal and domestic supply (MUN); agricultural supply (AGR); hydropower generation (POW); contact water recreation (REC1); non-contact water recreation (REC2); warm freshwater habitat (WARM); cold freshwater habitat (COLD); and wildlife habitat (WILD).
- The Department of Environmental Health (County) posted warning signs at Cardiff State Beach because of reasonable expectation of contamination from the spill. The postings lasted several days.
- The City posted warning signs at public access points along Escondido Creek and San Elijo Lagoon.
- The City cleaned up/disinfected a wetted area around the Green Tree Mobile Home Estates storage area upgradient of the treatment plant.
- No cleanup/spill recovery occurred along Escondido Creek. Samples were collected along Escondido Creek by the City for bacteriological analysis, and results showed elevated contaminants both upstream and downstream of the spill source.
- Existing high levels of coliform in the creek challenge the ability to precisely determine the adverse effect of the spill.

Factor 2: Physical, Chemical, Biological or Thermal Characteristics of the Discharge = 3

An above-moderate risk or direct threat to potential receptors due to high levels of human pathogens, suspended solids, toxic pollutants, nutrients, oil, and grease, etc. in sewage.

Factor 3: Susceptibility to Cleanup of Abatement = 1

Less than 50 percent of the discharge was susceptible to cleanup or abatement.

Deviation from Requirement = Major

The requirement has been rendered ineffective.

- The City is in violation of numerous discharge prohibitions contained in Orders Nos. 2006-0003-DWQ and R9-2007-0005. While the City did not consciously disregard these requirements, the magnitude and duration of the spill to surface waters rendered the essential functions of the Discharge Prohibitions completely ineffective.

Volume Discharged, Gallons = 180,700 Gallons

- According to the City's April 29, 2013 response to the NOV/13267, the estimated discharge volume has been revised from 249,840 gallons to 180,700 gallons based on actual IPS testing and hydraulic grade line analysis.
- This new volume calculation was submitted and certified in CIWQS as of November 14, 2013.

High Volume Discharge = \$2 per gallon

- For large sewage discharges, page 14 of the Enforcement Policy allows the use of \$2.00 per gallon discharged. Where reducing the maximum amount results in an inappropriately small penalty, a higher amount, up to the maximum per gallon amount (\$10 per gallon), may be used. In this case the calculated penalty falls between the minimum and maximum liabilities available per the enforcement policy, provides a deterrent effect to the regulated community and is considered a reasonable penalty.

Per Gallon Assessment for Discharge Violations = \$111,414

Score based on (Per Gallon Factor) X (# gallons subject to penalty) X (adjusted per gallon penalty)
(0.310) X (179,700 gallons) X (\$2/gallon) = \$111,414

- Potential for Harm = 7 (i.e. sum of factors 1-3)
- Major Deviation
- Per gallon factor= 0.310 (Table 1, Page 14 of the Enforcement Policy)
- 179,700 gallons was used for penalty calculations (i.e. 180,700, less the first 1,000 gallons spilled and not cleaned up).
- Maximum penalty = \$10 per gallon discharged but not cleaned up, exceeding 1,000 gallons, per California Code section 13385(c)(2)
- Adjusted maximum penalty for high volume spills is \$2 per gallon.

Per Day Assessment for Discharge Violations = \$3,100

Score based on (Potential for Harm) X (Extent of Deviation from Requirement)
(\$10,000) X (0.310) = \$3,100

- Potential for Harm = 7 (i.e. sum of factors 1-3)
- Major Deviation
- Per day factor = 0.310 (Table 2, Page 15 of the Enforcement Policy)
- Maximum penalty = \$10,000 per day per California Code section 13385(c)(1)
- One day of violation

Initial Liability Amount = \$114,514

Per gallon assessment + per day assessment = Initial Liability Amount
(\$111,414) + (\$3,100) = \$114,514

Culpability = 1.2

The multiplying factor range is 0.5 to 1.5, where a higher multiplier is for intentional or negligent behavior.

- City installed "redundancy" system at the IPS by installing UPS unit for the PLC but failed to keep logs/records of preventive maintenance/testing of UPS/PLC/Alarm systems.
- City claimed that it replaced dry cell batteries of UPS unit but could not provide documentation/receipts of purchased dry cell batteries.
- As a mitigating factor, the City did provide an immediate response (operator was on duty at the time of spill); other operators/support personnel were at the scene to quickly cease the discharge of raw sewage to surface waters.

Cleanup and Cooperation = 0.8

The multiplying factor range is 0.75 to 1.5 where a lower multiplier is for a high degree of voluntary cleanup and cooperation.

- City performed cleanup and disinfection works on wetted areas around the Green Tree Mobile Home Estates (impacted areas of SSO source).
- City was proactive in returning to compliance by providing direct power supply to the PLC (UPS bypassed); increasing preventive maintenance on wet well level units (bubbler and floater); and installing smart covers to three manholes near the IPS.
- City posted warning signs during/after the SSO event to alert the public. Bacteriological samples were collected in coordination with the County Department of Environmental Health.
- City hired a technical consultant and submitted its technical report and other requested information on time.

History of Violations = 1.1

Where there is a history of violations, a minimum multiplier of 1.1 should be used.

- From 2003 to 2005, the City reported a total of 5 SSOs under Order No. R9-2007-0005 (ranging from 120 to 2,610 gallons).
- From 2007 to 2011, the City reported a total of 24 SSOs under Order No. 2006-003 (ranging from 5 to 180,700 gallons). Eleven were classified as Category 1 spills (i.e. greater than 1,000 gallons and/or reaching receiving waters).
- 10 additional smaller SSOs occurred after the August 28, 2011 SSO – (ranging from 20 to 809 gallons). Six of these spills were from private laterals, and none of the four public spills were in the vicinity of the August 28, 2011 discharge.
- None of the prior reported SSOs were caused by PLC failure.
- Other NPDES violations consist of three deficient monitoring reports, but no effluent violations.

Total Base Liability Amount = \$120,926.78

Initial liability X Culpability X Cleanup and Cooperation X History of Violations = Total Base Liability
 $114,514 \times 1.2 \times 0.8 \times 1.1 = \$120,926.78$

Ability to Pay = 1 (yes)

The City's Comprehensive Annual Financial Report (CAFR) for the Fiscal Year Ending June 30, 2012 indicates it has the potential ability to pay an ACL of up to at least \$500,000. The CAFR shows current assets as \$37,842,450, current liabilities as \$5,231,484, and current net assets as \$32,610,966.

Economic Benefit = \$6,224

The City's failure to maintain the UPS is estimated to have a cost savings of approximately \$1,000 per year. These cost savings occurred from 2006 to 2011. Using USEPA's model for calculating economic benefit (i.e. BEN model) this totals \$5,971. An additional \$253 in savings is estimated as the avoided cost of treating the spilled sewage, thereby totaling \$6,224 in economic benefit.

Maximum and Minimum Liability Amounts = \$6,846 - \$1,807,000

CWC 13385(e) requires that, "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 Enforcement Policy (Step 8) further explains that "The adjusted Total Base Liability Amount shall be at least ten percent higher than the Economic Benefit Amount so that liabilities are not construed as the cost of doing business..." The Total Base Liability Amount of \$120,926.78 exceeds the minimum liability amount of \$6,846 by more than ten percent.

The statutory maximum liability amount, pursuant to Water Code Section 13385(c) (1) and (2), is \$1,807,000. The Total Base Liability Amount of \$120,926.78 is less than the statutory maximum liability amount.

Other Factors as Justice May Require = \$13,000 (staff costs)

Staff costs for investigation amount to \$20,700 at an estimated \$150/hour. For settlement purposes, the parties agreed to recover \$13,000 in staff costs.

3.0 FINAL LIABILITY AMOUNT = \$133,927

Total Base Liability + Staff Costs = Final Liability Amount

\$120,926.78 + \$13,000 = \$133,926.78

\$133,926.78 rounded to the nearest whole dollar = \$133,927

4.0 DOCUMENTS TO BE INCLUDED IN THE RECORD

Title	Source
1. <u>California Water Code</u>	hyperlink
2. <u>Clean Water Act</u>	hyperlink
3. <u>Water Quality Control Plan for the San Diego Basin</u>	hyperlink
4. <u>State Water Resources Control Board Order No. 2006-003-DWQ</u>	hyperlink
5. <u>San Diego Water Board Order No. R9-2007-0005</u>	hyperlink
6. <u>San Diego Water Board Order No. R9-2010-0086</u>	hyperlink
7. CalEMA Spill Notification Report 8/28/2011	ECM DH 255383
8. CIWQS Spill Report (draft and final)	ECM DH 1347258 ECM DH 1347259
9. SDWB Inspection Report 8/29/2011	ECM DH 1347242
10. Escondido Spill Update 8/29/2011	ECM DH 1347245
11. City of Escondido Voluntary Report 11/11	ECM DH 261955
12. Escondido Creek Conservancy Letter re: Spill 1/26/12	ECM DH 270415
13. Notice of Violation No. R9-2013-0081 and RTR 4/29/2013	ECM DH 1061132
14. (certified mail return receipt)	ECM DH 1062269
15. Prosecution Team Follow-up Inspection Report 6/5/2013	ECM DH 1347900
16. City Response to Investigative Order 6/7/2013	ECM DH 1347329 ECM DH 1347248 ECM DH 1347320
17. 2011-2012 HAARF Historic Flow Data	ECM DH 1347333
18. Escondido 8/28/2011 SSO Volume Calculation	ECM DH 1347320
19. Summary of Staff Costs	ECM DH 1347893
20. Spill Location Map	ECM DH 1347325
21. EPA BEN model calculations	ECM DH 1347891

Attachment A
Discharger: City of Escondido

Penalty Methodology Table
Stipulated Order No. R9-2014-0008

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]
Sewage Spill	3	3	1	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	
1	7	major	yes	0.31	\$2.00

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	
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
sewage spill	1.2	0.8	1.1	yes	na

Step 5: Total Base Liability Amount
Sum of Steps 1- 4
\$120,927

Step 8: Economic Benefit
\$6,224

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

Step 9	
Minimum Liability Amount	Maximum Liability Amount
\$6,846	\$1,807,000

Step 7: Other Factors as Justice May Require	
Investigative Costs	Other
\$13,000	na

Step 10: Final Liability Amount
\$133,927

EXHIBIT CC

State of California
California Regional Water Board Quality Control Board
Santa Ana Region

IN THE MATTER OF:

Irvine Ranch Water District)	Complaint No. R8-2010-0059
15600 Sand Canyon Avenue)	for
Irvine, CA 92618-3102)	Administrative Civil Liability
)	
Attn: Mr. Paul D. Jones)	

YOU ARE HEREBY GIVEN NOTICE THAT:

1. The Irvine Ranch Water District (hereinafter IRWD or the Discharger) is alleged to have violated provisions of law for which the California Regional Water Quality Control Board, Santa Ana Region (hereinafter Regional Board), may impose administrative civil liability, pursuant to California Water Code (hereinafter "CWC") Section 13385.
2. A hearing concerning this Complaint will be held before the Regional Board within 90 days of the date of issuance of this Complaint, unless, pursuant to CWC Section 13323, IRWD waives its right to a hearing. The waiver procedures are specified in the attached Waiver Form. The hearing in this matter is scheduled for the Regional Board's regular meeting on January 21, 2011, at the City Council Chambers, City of Loma Linda, 25541 Barton Road, Loma Linda, California. IRWD, or its representative, will have the opportunity to appear and be heard and to contest the allegations in this Complaint and the imposition of civil liability by the Regional Board.
3. If a hearing is held on this matter, the Regional Board will consider whether to affirm, reject, or modify the proposed administrative civil liability or whether to refer the matter to the Attorney General for recovery of judicial civil liability. If this matter proceeds to hearing, the Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent to the issuance of this Complaint through hearing.

THE COMPLAINT IS BASED ON THE FOLLOWING FACTORS:

4. IRWD owns and operates a sanitary sewer system which consists of 800 miles of pipelines and several lift (pump) stations, and is regulated under the State Water Resources Control Board's General Waste Discharge Requirements for Sanitary Sewer Systems, Water Quality Order No. 2006-0003-DWQ (hereinafter "SSO Order"). Provision C.1 of the SSO Order prohibits the discharge of sanitary sewer overflows to waters of the United

States. Section 13376 of the California Water Code also prohibits the discharge of pollutants to waters of the United States without an NPDES permit.

5. IRWD's sewer system contains sanitary wastewater. Untreated sanitary wastewater contains high levels of bacteria, pathogens, nutrients and other pollutants. If discharged, these pollutants have the potential to impact the beneficial uses of the receiving waters. IRWD is alleged to have violated California Water Code (CWC) §13350 by discharging untreated wastewater to waters of the United States in violation of the prohibition against such discharges contained in the SSO Order. The Discharger also violated Section 13376 of the CWC by discharging pollutants to waters of the United States without filing a report of waste discharge.
6. Provision C. 1 of the SSO Order states, "Any SSO¹ that results in a discharge of untreated or partially treated wastewater (sewage) to waters of the United States is prohibited" And CWC Section 13376 states, "Any person discharging pollutants or proposing to discharge pollutants to within 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, except that no report need 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."
7. On July 2, 2010, at approximately 11:30 a.m., an overflow of sewage was reported from IRWD's Newport Coast sanitary sewer pump station due to a crack in a forcemain 12" PVC Tee fitting outside the pump station dry well. The discharge was to the planter area between the street curb (Newport Coast Road) and the pump station from where it was discharged to Buck Gully Creek and into Pacific Ocean. The discharge continued for approximately 10 hours.
8. From 11:30 a.m. to 1:05 p.m., the spill continued at a discharge rate of 200 gallons per minute (gpm). It was not contained and it went into Buck Gully Creek approximately 3 miles inland from Little Corona Del Mar Beach. Then gravel bags were deployed around the spill area and the spill was 93% contained by 1:05 p.m. Approximately 15 gpm continued to leak through the gravel bags into Buck Gully Creek. At 9:30 p.m., the Discharger managed to completely stop the spill with the installation of an emergency bypass line.
9. Finally at 6:00 p.m. a gravel bag containment berm was built along Buck Gully Creek at the entrance to Little Corona Del Mar Beach. The gravel bag containment berm did not provide a complete containment for the spilled sewage. A combined total of 26,725 gallons of untreated sewage were

¹ SSO=Sanitary sewer overflow

discharged into Buck Gully Creek (from 11:30 a.m. to 9:30 p.m. on July 2, 2010) and eventually to Little Corona Del Mar Beach. According to IRWD reports, an estimated 5,850 gallons of the sewage discharged into Buck Gully Creek were recovered and returned to the collection system, thereby reducing the discharged volume to the Pacific Ocean to 20,875 gallons ($26,725 - 5,850 = 20,875$). IRWD continued to pump from the Buck Gully Creek containment area until 9:30 a.m. on July 4, 2010.

10. At 12:35 p.m. on July 2, 2010, the Orange County Health Care Agency closed Little Corona Del Mar Beach as a precautionary measure. It was reopened in the morning on July 5, 2010. Due to logistic reasons, the Health Care Agency was not able to collect beach water samples the day the spill occurred. The water quality samples collected on July 3 and 4, 2010 did not exceed the state standards.
11. The area where the spilled sewage was discharged into the ocean is located within Robert E. Badham (Newport Coast) Area of Special Biological Significance (ASBS). The Ocean Plan provides special protections for areas designated as ASBSs that include a prohibition on discharge of wastes to ASBSs. The discharge was also in violation of this Ocean Plan prohibition.
12. The Water Quality Control Plan for the Santa Ana River Basin (hereinafter "Basin Plan") designates beneficial uses of waterbodies within the Region. The nearshore zone of the Pacific Ocean along Orange County coastline has designated beneficial uses that include, among others, water contact recreation and non-contact water recreation. Buck Gully Creek is a natural drainage course that conveys urban runoff to the ASBS. The discharge of sewage from IRWD's sanitary sewer system had the potential to impact the designated beneficial uses of the ASBS (Pacific Ocean) and caused the Orange County Environmental Health Care Agency to close Little Corona Del Mar Beach.
13. For the violations cited above, civil liability may be assessed administratively either under CWC Section 13350 or 13385, but not both (see Section 13350(j)). Since the discharge was to waters of the United States, it is appropriate to use CWC Section 13385.
14. Pursuant to CWC §13385, the Regional Board may impose civil liability administratively both on a daily basis [per CWC §13385(c)(1)] and on a per gallon basis [per CWC §13385(c)(2)].
14. CWC §13385(c)(2) states that civil liability on a per gallon basis may not exceed ten dollars (\$10) for each gallon of waste discharged but has not been cleaned up, excluding the first 1,000 gallons. The maximum liability on a per gallon basis for the violation cited above is \$198,750 $\{(20,875 - 1,000) \times \$10 = \$198,750\}$. Based on one day of violation, the penalty

on a per day basis is \$10,000. The total initial assessment before any adjustments is: \$208,750.

15. CWC §13385(e) specifies factors that the Regional Board shall consider in establishing the amount of civil liability. The Water Quality Enforcement Policy (hereinafter "the Policy") adopted by the State Water Resources Control Board on November 19, 2009, establishes a methodology for assessing administrative civil liability pursuant to this statute. Use of this methodology addresses the factors in CWC section 13385(e). The policy can be found at: http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf
16. Attachment A presents the administrative civil liability derived from the use of the penalty methodology in the Policy. In summary, this amount is based on the following:
 - A. The Policy requires a consideration of the potential for harm from the discharge of untreated sewage. The beach was closed for three days as a precautionary measure; so the impact on beneficial use is considered as moderate (see Page 12 of the Policy). The discharged material posed an above moderate risk, and more than 50% of the discharge was susceptible to cleanup (see Page 13 of the Policy); that gives a total score of 6. Using Table 1 on Page 14 of the Policy, we get a per gallon factor of 0.22, considering this as a major deviation from requirement. With a per gallon factor of 0.22, the per gallon penalty is: $\$198,750 \times 0.22 = \$43,725$.
 - B. Similarly using a per day factor of 0.22 from Table 2 on Page 15 of the Policy, the per day penalty is $\$10,000 \times 0.22 = \$2,200$. The total assessed penalty based on per gallon and per day is: $\$43,725 + \$2,200 = \$45,925$.
 - C. This amount is then adjusted based on the discharger's culpability, cleanup effort and cooperation, and history of violations (see Table 4 on Page 17 of the Policy). According to IRWD's spill incident report, the spill was caused by a failure of a Schedule 80 PVC fitting that was not in conformance with IRWD's Construction Manual (the Construction Manual requires C-900). The report indicates that IRWD staff directed such a change that was not consistent with its own policies.
 - D. IRWD's response to the spill incident was prompt, and they mobilized staff, equipment and mutual aid support from surrounding municipal agencies to control most of the overflowing sewage. They also mobilized contractor resources to make emergency repairs to the forcemain once the bypass system was put into operation.
 - E. However, they failed to implement an effective containment system at the spill site and at the mouth of Buck Gully Creek where it discharged to the ASBS. The containment system at the mouth of Buck Gully Creek was built after 6.5 hours had lapsed from discovery of the spill. With proper planning and implementation, the spill could have been fully contained within the spill site if effective containment berms were built. By using

November 9, 2010

gravel bags, the sewage continued to leak through the containment berms at both locations. As a precautionary measure, IRWD continued to pump from the containment structure at the mouth of Buck Gully Creek for another two days after the spill was fully contained. The Discharger had a number of sewage system overflows in the past few years for which the Regional Board has assessed penalties. After consideration of these factors a value of 0.9 is assigned for culpability, 0.75 for cleanup and cooperation and 1.1 for history of violations (see Page 17, Table 4 of the Policy). Using these values, the adjusted civil liability is \$34,099 ($\$45,925 \times 0.9 \times 0.75 \times 1.1$).

F. CWC Section 13385(e) and the Policy also require consideration of economic benefit or savings, if any, resulting from the violations and other matters as justice may require. Regional Board staff has determined that IRWD did not realize any significant savings because the spill was accidental which could not be predicted (i.e. due to a broken forcemain), nor did they realize any substantial savings in their response to the spill incident.

G. The costs of investigation and enforcement incurred by the Regional Board Prosecution staff are considered as one of the "other factors as justice may require," and should be included in the liability assessed. Investigation costs have been estimated to be \$9,000 (60 hours at \$150 per hour=\$9,000). Staff costs are then added to the proposed liability amount for a total of \$43,099 ($\$34,099 + \$9,000 = \$43,099$).

17. After consideration of the above factors, the Division Chief proposes that civil liability be imposed on the Discharger in the amount of forty three thousand ninety-nine dollars (\$43,099) for the discharge of sewage to waters of the United States.

WAIVER OF HEARING

The Discharger may waive its right to a hearing. If the Discharger chooses to do so, please sign the attached Waiver Form and return it in the enclosed preprinted envelope. If the Discharger waives its right to a hearing and pay the assessed amount, the Regional Board may not hold a hearing regarding this complaint.

If you have any questions, please contact Stephen D. Mayville at (951) 782-4992.

11/09/10
Date



Michael J. Adackapara
Division Chief
Regional Board Prosecution Team

Discharger Name/ID: **ACLC R8-2010-0059 Attachment 'A'**

			Total Collection System Overflow	
Discharge Violations	Step 1	Potential Harm Factor (Generated from Button)		
	Step 2	Per Gallon Factor (Generated from Button)		
		Gallons	19,875	
		Statutory / Adjusted Max per Gallon (\$)	\$ 10	
		Total		\$ 43,725
	Step 3	Per Day Factor (Generated from Button)		
Days		1		
Statutory Max per Day		\$ 10,000		
	Total		\$ 2,200	
Non-Discharge Violations	Step 3	Per Day Factor		
		Days		
		Statutory Max per Day		
		Total		\$ -
Initial Amount of the ACL			\$	45,925.00
Additional Factors	Step 4	Culpability	0.9	\$ 41,332.50
		Cleanup and Cooperation	0.75	\$ 30,999.38
		History of Violations	1.1	\$ 34,099.31
	Step 5	Total Base Liability Amount		\$ 34,099.31
	Step 6	Ability to Pay & to Continue in Business		\$ -
	Step 7	Other Factors as Justice May Require		\$ -
	Staff Costs	\$ 9,000	\$ 9,000.00	
Step 8	Economic Benefit		\$ 9,000.00	
Step 9	Minimum Liability Amount			
	Maximum Liability Amount			
Step 10	Final Liability Amount		\$ 43,099.31	

EXHIBIT DD

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

ORDER NO. R9-2010-0008

**IMPOSING
ADMINISTRATIVE CIVIL LIABILITY
PURSUANT TO SETTLEMENT AGREEMENT
AGAINST
CITY OF CARLSBAD
FOR ALLEGED VIOLATIONS OF
CLEAN WATER ACT § 401 WATER QUALITY CERTIFICATION ORDER
FOR TECHNICALLY-CONDITIONED CERTIFICATION
AND
WAIVER OF WASTE DISCHARGE REQUIREMENTS TO THE
CITY OF CARLSBAD
AGUA HEDIONDA CREEK EMERGENCY DREDGE PROJECT
CERTIFICATION NO. 06C-007**

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) has been presented with a proposed settlement of claims for administrative civil liability against the City of Carlsbad (City). The settlement was developed during negotiations between the San Diego Water Board's Prosecution Staff and the City. This Administrative Civil Liability (ACL) Order and the attached Settlement Agreement (Agreement) resolve the alleged violations described in the August 11, 2008, Notice of Violation (NOV) No. R9-2008-0099 to the City through the payment of an administrative civil liability in the amount of \$47,647 and the compliance with certain mitigation requirements detailed herein. The NOV specifically alleged violations of Clean Water Act section 401 Water Quality Certification Order for Technically-Conditioned Certification and Waiver of Waste Discharge Requirements issued to the City for the Agua Hedionda Creek Emergency Dredge Project, dated March 2, 2006 (WQ Certification No. 06C-007).

In accepting the proposed settlement, the San Diego Water Board has considered each of the factors prescribed in Water Code section 13385, as set out more fully below. The San Diego Water Board's consideration of these factors is based upon information obtained by the San Diego Water Board in investigating the claims or otherwise provided to the San Diego Water Board, including the information and comments received from the public. Such consideration recognized that the City purchased and directed previously purchased mitigation credit from the North County Habitat Bank to fulfill the mitigation requirements for WQ Certification No. 06C-007. In addition, the administrative civil liability will allow the San Diego Water Board to recover its staff costs in investigating the claims and pursuing an enforcement action.

A Notice of Proposed Settlement has been published in the San Diego Union-Tribune, a paper of general circulation in the San Diego area, notifying the public of the review period and soliciting public comments on the terms of the settlement. The proposed settlement supports the assessment of the administrative civil liability in the amount of \$47,647 and the implementation of the specified mitigation requirements for the full and final resolution of each of the claims and alleged violations set forth herein, and is in the public interest.

HAVING PROVIDED PUBLIC NOTICE OF THE PROPOSED SETTLEMENT FOR PUBLIC COMMENT, THE SAN DIEGO WATER BOARD FINDS:

1. Alleged Violations of San Diego Water Board issued WQ Certification No. 06C-007 for Failure to Complete Mitigation Requirements

The following represents a summary of the facts and alleged violations as they appear in the files of the San Diego Water Board.

The City failed to construct and complete mitigation for all impacts that occurred during its project as required by WQ Certification No. 06C-007 for 814 days (October 1, 2007, to December 23, 2009). Specifically, the City failed to do the following:

- a. Create wetlands within the Carlsbad Hydrologic Unit at a 2:1 ratio for permanent project impacts (WQ Certification Condition C.1) (The project permanently impacted 0.5 acres. Therefore, the City was required to create 1.0 acre of wetlands.);
- b. Enhance or restore wetlands within the Carlsbad Hydrologic Unit at a 1:1 ratio for permanent project impacts (WQ Certification Condition C.1) (The City was required to enhance or restore 0.5 acres.); and
- c. Enhance waters of the U.S./State within the Carlsbad Hydrologic Unit at a 1:1 ratio for temporary project impacts (WQ Certification Condition C.2) (The project's actual temporarily impacts were 3.06 acres. Therefore, the City was required to enhance 3.06 acres.).

In response to the August 11, 2008, NOV, the City notified the San Diego Water Board that on August 16, 2007, it purchased "0.96 credit of Created/Restored wetland/riparian mitigation from the North County Habitat Bank" (NCHB) located east of Interstate 5 along the south side of Palomar Airport Road. The NCHB site is within the Carlsbad Hydrologic Unit. Furthermore, the City stated that it believed that the outstanding Project mitigation requirements would be addressed in a yet-to-be-issued San Diego Water Board Water Quality Certification for a future comprehensive dredge project by the City on Agua Hedionda Creek.

Upon further investigation by the San Diego Water Board, it was determined that 0.96 "credit" in this instance equated to 0.48 acres of created wetlands from NCHB. Accordingly, the Prosecution Team recognized the purchase of the 0.48 acres towards compliance with the 1.0 acre creation requirement.

After the Prosecution Team agreed to recommend the settlement terms contained in the Agreement, the City directed NCHB to credit the Project with 0.02 acres of creation credit from an August 16, 2007, City purchase for a total of 0.5 acres of creation credit. Although 0.5 acres of creation credit is only half of the amount required under Condition C.1 (based upon the adjusted permanent impacts of 0.5 acres), the City bought fully functional (i.e., meeting success criteria) wetland acreage from the NCHB and not newly-created wetland acreage that had not yet fulfilled success criteria.

Accordingly, the Agreement proposes accepting 0.5 acres of creation credit at NCHB to satisfy WQ Certification No. 06C-007 original mitigation requirement that 1 acre of wetlands be created within the Carlsbad Hydrologic Unit. Furthermore, the City purchased an additional 3.56 acres of enhancement credits from the NCHB on or about December 30, 2009, with the intent of satisfying the remaining mitigation requirements.

2. Administrative Civil Liability Authority

The San Diego Water Board may impose civil liability pursuant to Water Code section 13385(a) [emphasis added]:

Any person who violates any of the following shall be liable civilly in accordance with this section:

- (1) Section 13375 or 13376.
- (2) Any waste discharge requirements or dredged or fill material permit issued pursuant to this chapter or any *water quality certification* issued pursuant to Section 13160.
- (3) Any requirements established pursuant to Section 13383.
- (4) Any order or prohibition issued pursuant to Section 13243 or Article 1 (commencing with Section 13300) of Chapter 5, if the activity subject to the order or prohibition is subject to regulation under this chapter.
- (5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.
- (6) Any requirement imposed in a pretreatment program approved pursuant to waste discharge requirements issued under Section 13377 or approved pursuant to a permit issued by the administrator.

Furthermore, Water Code section 13385(c) provides that:

Civil liability may be imposed administratively by the state board or regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 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.

The San Diego Water Board alleges that the City violated WQ Certification No. 06C-007 Condition C.9 by failing to complete the mitigation requirements by September 30, 2007. Therefore the San Diego Water Board is authorized to impose civil liability pursuant to Water Code section 13385(a)(2).

3. Maximum Civil Liability Amount

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this matter is ten thousand dollars (\$10,000) per day of violation. Section 13385(e) requires that when pursuing liability under Water Code section 13385 "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 City allegedly failed to mitigate the Project impacts from October 1, 2007, through December 23, 2009, a total of 814 days. Therefore the maximum liability that the San Diego Water Board could assess is \$8.14 million.

4. Factors Affecting the Amount of Civil Liability

Water Code section 13385(e) requires the San Diego Water Board to consider several factors when determining the amount of civil liability to impose. 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." The San Diego Water Board has considered these factors in determining the amount of administrative civil liability imposed under this ACL Order.

a. **The Nature, Circumstances, Extent, and Gravity of the Alleged Violations**

The loss of wetlands is of a grave concern to the San Diego Water Board. It is estimated that California has lost as much as 91 percent of its original wetlands. Wetlands are valuable because they improve water quality, recharge water supplies, reduce the risk of flooding, and provide fish and wildlife habitat. Therefore, the San Diego Water Board requires creation of wetlands when projects destroy them. The City's failure to timely comply with the mitigation requirements of WQ Certification No. 06C-007 resulted in the temporary loss of valuable and much needed wetlands.

WQ Certification No. 06C-007

On March 2, 2006, the Executive Officer issued WQ Certification No. 06C-007 to the City for the Agua Hedionda Creek Emergency Dredge Project (Project). The Project removed approximately 15,000 cubic yards of accumulated sediment by backhoe and excavator from Agua Hedionda Creek and Calavera Creek to protect 210 residential units from potential flooding during a 100-year storm event. The City reported that it initiated the dredging project on March 6, 2006, and completed the project on March 25, 2006. The Certification was issued to address the anticipated environmental impacts to wetlands by requiring the City to mitigate for 0.8 acres of permanent and 4.2 acres of temporary impacts of the Project by September 30, 2007.

Condition C.1. of WQ Certification No. 06C-007 requires the City to mitigate the permanent impacts to vegetated waters of the U.S. by creating wetlands at a 2:1 ratio, and enhancement or restoration on a 1:1 ratio within the Carlsbad Hydrologic Unit.

Condition C.2. of WQ Certification No. 06C-007 requires the City to mitigate the temporary impacts to vegetated waters of the U.S. by enhancing at a 1:1 ratio of waters of the U.S./State within the Carlsbad Hydrologic Unit.

Condition C.9. of WQ Certification No. 06C-007 requires the City to complete mitigation for all impacts no later than September 30, 2007. On July 2, 2008, the San Diego Water Board inspected the proposed mitigation site at Lake Calavera within the City of Carlsbad and noted that no mitigation work had been conducted nor completed. A follow-up inspection on September 25, 2008, confirmed that no mitigation work has been conducted at Lake Calavera.

On November 17, 2008, over a year after WQ Certification No. 06C-007 required mitigation to be completed, the City reported that the actual

measured permanent impacts to wetlands in Agua Hedionda Creek due to the Project were 0.5 acres and temporary impacts to the jurisdictional streambed were 3.06 acres. Applying the adjusted after-project impact measurements to WQ Certification No. 06C-007, the City was required to complete the following mitigation by September 30, 2007:

- (1) Create 1.0 acre of wetlands (2:1) within the Carlsbad Hydrologic Unit and enhance or restore 0.5 acres of wetlands (1:1) within the Carlsbad Hydrologic Unit to address the permanent impacts; and
- (2) Enhance 3.06 acres of waters of the U.S./State (1:1) within the Carlsbad Hydrologic Unit to address the temporary impacts.

Notice of Violation of WQ Certification No. 06C-007

On August 11, 2008, the San Diego Water Board issued Notice of Violation No. R9-2008-0099 to the City for failing to construct and complete mitigation by September 30, 2007, in violation of WQ Certification No. 06C-007.

b. Whether Discharge is Susceptible to Cleanup or Abatement and Degree of Toxicity

These factors do not apply to the alleged violation.

c. Ability to Pay and Ability to Continue its Business

According to the City Finance Department, the City's Operating Budget for Fiscal Year 2009-10 totals \$191.1 million, with revenues for the year estimated at \$194.6 million. The City's revenues are projected to exceed budgeted expenses by \$3.5 million. Therefore, it appears that the City can pay the recommended civil liability for the alleged violations and continue to operate.

d. Any Voluntary Cleanup Efforts Undertaken by the City

This factor does not apply to the alleged violation.

e. Prior History of Violations

In 2006 the San Diego Water Board imposed an administrative civil liability (ACL Order No. R9-2006-0009) in the amount of \$23,900 against the City for violations of the statewide general construction storm water permit (Order 99-08-DWQ). The San Diego Water Board has also issued enforcement actions, including ACLs, against the City's Municipal Water District for violations associated with discharges of wastewater.

f. Degree of Culpability

The City has a moderate degree of culpability. The City applied for the Certification; did not contest the mitigation requirements; and completed the project that incurred environmental impacts. Then, the City made an attempt to partially satisfy some of the mitigation requirements prior to the September 2007 deadline for completion of mitigation. The City's degree of culpability was lessened due to miscommunication between the City and San Diego Water Board staff. The City made efforts to communicate desired mitigation changes to the San Diego Water Board and mistakenly interpreted a lack of written response from the San Diego Water Board as tacit approval for the changes. However, the communication from the City was at times conflicting and/or indirect.

g. Economic Benefit or Savings Resulting From the Alleged Violations

The San Diego Water Board is required to recover economic benefit as a minimum liability pursuant to Water Code section 13385(e). Furthermore, the State Board Water Quality Enforcement Policy provides that assessment of liability should at a minimum take away whatever economic savings a violator gains as a result of the violations.

The City gained an economic benefit from the delay in mitigating the environmental impacts from the Project. Prosecution staff estimates that the City could have enhanced City property for \$75,000 per acre. Thus the City enjoyed an economic benefit of approximately \$32,897 by delaying the enhancement. This estimate was calculated using the U.S. EPA BEN model.

h. Other Matters as Justice May Require

Estimated staff costs for investigation, enforcement, enforcement follow up, and preparation of this ACL Order are \$14,750.

The City did timely comply with some of the mitigation requirements. The City intended to satisfy requirements for habitat creation to offset permanent impacts by purchasing a sufficient amount of creation credits from the NCHB prior to the September 30, 2007. The insufficiency of the creation acreage actually purchased was due to NCHB's accounting practices and not intentional negligence by the City. Furthermore, as discussed in more detail above in finding 1, the City has acted quickly to satisfy the mitigation requirement of the Agreement by directing NCHB to credit the Project and purchasing additional acres of enhancement credits from the NCHB with the intent of satisfying the remaining mitigation requirements.

5. City's Waiver of Right to Petition

As provided in paragraph two of the Agreement, the City covenants and agrees that if the San Diego Water Board approves this ACL Order as specified herein, as part of the settlement, including attachments, the City will not contest or otherwise challenge this ACL Order before the State Board, or any court.

6. Notification of Interested Parties

The San Diego Water Board notified the City and interested parties of its intent to consider the proposed settlement during its meeting of May 12, 2010. The San Diego Water Board, in a public meeting, heard and considered all comments related to the proposed settlement.

7. Other Parties' Right to Petition

Any person aggrieved by this action of the San Diego Water Board may petition the State Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Board must *receive* the petition by 5 p.m., thirty (30) days after the date of this ACL Order, except that if the thirtieth (30th) day following the date of this ACL Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Board by 5 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions can be found on the Internet at http://www.waterboards.ca.gov/public_notices/petitions/water_quality/index.shtml or will be provided upon request.

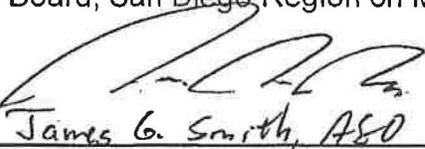
8. California Environmental Quality Act

This enforcement action is being taken by the San Diego Water Board to enforce provisions of the Water Code and as such, is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.) in accordance with California Code of Regulations, title 14, section 15321.

IT IS HEREBY ORDERED THAT:

The attached Agreement between the Assistant Executive Officer and the City of Carlsbad is approved pursuant to Government Code section 11415.60 and is incorporated by reference into this 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 the California Regional Water Quality Control Board, San Diego Region on May 12, 2010.



for DAVID W. GIBSON
Executive Officer

EXHIBIT EE

**ATTACHMENT A to ACL Complaint R5-2013-0589:
Specific Factors Considered for Civil Liability
State Route 108 East Sonora Bypass Stage 2 Project, Tuolumne County**

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code (CWC) section 13385(e). Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.

Violation 1: Violation of Section A.1 of the Caltrans Storm Water Permit

Section A.1 of the Caltrans Storm Water Permit (Order 99-06-DWQ) prohibits the discharge of runoff from construction sites containing pollutants which have not been reduced using Best Available Technology Economically Achievable (BAT) for toxic pollutants and Best Conventional Pollutant Control Technology (BCT) for conventional pollutants to waters of the United States. The Caltrans Storm Water Permit requires the use of best management practices (BMPs) that meet the BAT/BCT standard to control pollutants in construction site runoff. The Mono East abutment area was not protected with erosion control BMPs during several storm events from October to December 2012. As discussed below, the violation occurred over a period of 24 days between 17 November 2012 and 27 December 2012, when at least 822,701 gallons of turbid storm water discharged to an ephemeral tributary to Curtis Creek, a water of the United States. Caltrans (Discharger) violated section A.1 because the discharge contained a conventional pollutant, turbidity, which was not reduced using BCT.

Step 1 – Potential for Harm for Discharge Violations

The “potential harm to beneficial uses” factor considers the harm to beneficial uses that may result from exposure to the pollutants in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential to harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses is negligible (0) to major (5). In this case the potential harm to beneficial uses was determined to be moderate (i.e. a score of 3), which is defined as a “*moderate threat to beneficial uses (i.e. impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects).*”

The Discharger failed to implement appropriate erosion and sediment control BMPs prior to storm events in October, November, and December 2012. This failure resulted in at least 822,701 gallons of sediment-laden discharges in November and December to an ephemeral creek tributary to Curtis Creek. Curtis Creek flows to Don Pedro Reservoir. The beneficial uses of Don Pedro Reservoir, as stated in the Basin Plan, are: municipal and domestic supply; hydropower generation; water contact recreation; non-contact water recreation; warm freshwater habitat; cold freshwater habitat; and wildlife habitat.

In many of their documents, Caltrans and the Water Board refer to the ephemeral creek near the Project's Mono Way east abutment as “Algerine Ditch”. Labeling this drainage course as Algerine Ditch is a misnomer, however, because the historic Algerine Ditch begins several miles to the southwest on

Curtis Creek near Lambert Lake and extends approximately 10 miles south and west past the Algerine School site to Blue Gulch Reservoir, according to the 2012 *Tuolumne Utilities District Ditch Sustainability Project Historic Evaluation Report*. According to the report, the USGS mapped ditch is inaccurate in many locations, but it is clear from the report that the ditch does not extend north of Lambert Lake. However, for consistency with the previous agency documents, the term "Algerine Ditch" is used here to refer to the unnamed tributary to Curtis Creek which passes the Mono Way east abutment area and connects to Curtis Creek south of Camage Avenue.

"Algerine Ditch" was identified as a water of the United States and subject to regulation under Section 404 of the federal Clean Water Act (CWA) in the Natural Environment Study (NES) prepared by Caltrans for the Project in 2008. Caltrans applied for and received a CWA section 404 permit, a CWA 401 certification, and a California Department of Fish and Wildlife streambed alteration permit for its construction activities in the creek and other Project areas. The NES identified suitable habitats for multiple special-status species within the Project's Biological Study Area. The species included valley elderberry beetle (VELB); San Joaquin Roach; California red legged frog; western pond turtle; coast horned lizard; multiple bat species; multiple nesting bird species, and multiple plant species. The California Natural Diversity Database (CNDDDB) lists Sierra Nevada yellow-legged frog, San Joaquin roach, and other species as occurring in the area of the Standard USGS 7.5' quadrangle map. Curtis Creek and "Algerine Ditch" are within the Standard map, so these species may have been impacted by sediment discharged from the Project.

Discharges of sediment to surface waters can cloud the receiving water, thereby reducing the amount of sunlight reaching aquatic plants, clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease. The discharge of sediment negatively impacts aquatic organisms.

Board staff, accompanied by Department of Fish and Wildlife staff, inspected "Algerine Ditch" on both 5 December 2013 and 13 December 2012. The Mono East abutment is at the headwaters of "Algerine Ditch" and no background samples were available above the Project. At Standard Road, approximately one mile downstream of the discharge location, Board staff observed significant accumulation of red sediment along the sides of the creek, on the rocks, and in the blackberry bushes. The red sediment was due to the release from the Mono East abutment, and was distinctly different than the native dark brown creek substrate. Downstream of Standard Road, the creek enters a series of ponds, all of which were filled with red sediment. "Algerine Ditch" continues through Sierra Pacific Industry (SPI) property and enters Curtis Creek approximately 2 miles below the Mono East abutment. According to SPI personnel, red sediment discharges were observed in "Algerine Ditch" numerous times during November-December 2012.

Given the measured turbidity levels and the observed volume of sediment settled in the creek channel and banks during the two inspections, Board staff determined that the discharge of sediment impacted benthic macroinvertebrates, which are an important food source for fish. The discharge may have also impacted the multiple special-status species listed above. The discharges took place at the headwaters of a small stream, and relatively little dilution was available to mitigate the impact of the discharges. In addition, impact of the sediment discharges was observed over a relatively long stretch of the stream, at least one mile from the project site. The impacts may have extended further, but neither Board staff nor Caltrans staff investigated beyond that point. Sediment was discharged repeatedly over a period of 24 days between 22 October 2012 and 27 December 2013. During these discharge events, turbidity measurements of storm water leaving the construction site recorded by the Discharger ranged from 26

nephelometric turbidity units (NTU) up to 7,368 NTU, with the majority of measurements above 1,700 NTU. As noted above, neither Board staff, Caltrans, nor the contractor's qualified SWPPP practitioner (QSP) were able to collect an upstream sample because the discharge location was at the headwaters of "Algerine Ditch".

Based on the above discussion the amount of sediment released is considered to have a moderate potential to harm beneficial uses, as defined in the Enforcement Policy.

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

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. In this case, a score of 2 was assigned. A score of 2 is defined as the chemical and/or physical characteristics of the "*discharged material poses moderate risk or threat to potential receptors (i.e. chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection)*". Discharges of sediment can cloud the receiving water (which reduces the amount of sunlight reaching aquatic plants), clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease, which can also negatively impact aquatic life and aquatic habitat. Therefore, a score of 2 is appropriate.

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% 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. In this case, sediment discharged was dispersed by storm water over a long distance and cleanup or abatement would not be possible. Therefore, a factor of 1 is assigned.

Final Score – "Potential for Harm"

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a final score of 6 was calculated. The total score is then used in Step 2 below.

Step 2 – Assessment for Discharge Violations

This step addresses penalties based on both a per-gallon and a per-day basis for discharge violations.

Per Gallon Assessments for Discharge Violations

When there is a discharge, the Central Valley Water Board is to determine the initial liability amount on a per gallon basis using the Potential for Harm score from Step 1 and the extent of Deviation from Requirement of the violation. The Potential for Harm score from Step 1 is 6 and the extent of Deviation from Requirements¹ is considered Major because the requirement was rendered ineffective based on the lack of effective erosion control BMPs which caused large amounts of eroded sediment to be discharged to "Algerine Ditch". Table 1 of the Enforcement Policy (p. 14) is used to determine a "per gallon factor" based on the total score from Step 1 and the level of Deviation from Requirement. For this particular case, the factor is **0.22**. This value is multiplied by the volume of discharge and the per gallon civil liability, as described below.

¹ The "Deviation from Requirement" reflects the extent to which the violation deviates from the specific requirement. In this case, the requirement (i.e., permit Prohibition A.1) was to use BAT/BCT to prevent discharges of turbid storm water.

For the penalty calculation, Board staff used an extremely conservative estimate of 822,701 gallons for the volume of discharge. The following paragraphs describe how the volume was determined.

On 20 December 2012, Board staff issued a Notice of Violation (NOV) to Caltrans for turbid discharges from the site. In the NOV, staff requested a volume estimate for discharges from the Mono East abutment portion of the site. Responses to the NOV were received on 1 February and 8 February 2013, including volume estimates. These volume estimates used the USDA TR-55 method to estimate runoff from eight sub-watersheds associated with the Mono East abutment.

According to the estimates, four of the eight sub-sheds contained sediment traps. The sub-sheds with sediment traps were calculated to never discharge because the available storage volume in the sediment traps was greater than the runoff generated during each storm, with the exception of one sub-shed that had a sediment trap under construction during the first rain event. According to these initial volume estimates, a total of approximately 931,476 gallons of storm water discharged from the Mono East abutment portion of the site.

On 13 August 2013, Caltrans submitted a Technical Memorandum revising the original volume estimates. This revised estimate recalculated the runoff volume from four of the eight sub-watersheds identified in the February calculations that did not contain sediment traps. The estimate refined the watershed areas and soil cover used to select runoff curve numbers used in the USDA TR-55 method to estimate runoff volume. This revised estimate did not recalculate runoff from the four sub-watersheds identified in the February estimates that contained sediment traps. The revised estimate showed that a total of 699,583 gallons of storm water was discharged from sheds that did not contain sediment traps. The Technical Memorandum did not address the sub-sheds that contained sediment traps and Caltrans asserted that these sub-sheds did not discharge at any point during the storm season.

Water Board staff identified several issues with these volume estimates. The estimates calculated a volume of runoff from eight separate sub-watersheds associated with the Mono East abutment portion of the project. Of these eight sub-watersheds, four contain sediment traps which have a certain capacity to store water, reducing the volume discharged from the site during a storm event. According to the Caltrans runoff estimates, the sheds containing sediment traps never discharged. The volume estimates assume that these sediment traps were empty prior to each storm event and had available capacity sufficient to capture the volume of runoff generated during each storm event. However, Water Board inspection reports document runoff from several of these sheds during storm events. Also, Board staff inspection photos show several sediment traps containing water prior to storm events. In addition, water was pumped between sediment traps during storm events in an attempt to move water to traps that had remaining capacity to store water. None of the runoff calculations account for this movement of water between sediment traps, or the fact that the sediment basins were known to overflow.

Also, the TR-55 method assumes an average antecedent runoff condition prior to each storm event. This assumes that the available capacity for the soil to infiltrate rainwater prior to discharging is equal over all storm events and greatly overestimates the infiltration rate at the beginning of a storm if the storm event begins when soils are already saturated from previous storms. According to the USDA's TR-55 manual, there are several limitations to this method. The equations used in this method do not account for rainfall duration or intensity. Also, the initial abstraction variable (all losses including evaporation and infiltration) is generalized based on data

from agricultural watersheds (relatively flat topography, not the steep slope of the abutment) and does not account for saturated soils prior to a storm event. For the Mono East abutment, Board staff documented during inspections that soils were saturated prior to rain events.

On 20 August 2013, Board staff requested that Caltrans reevaluate the volume estimates based sediment trap pre-storm observations, documented discharges from sediment traps, and pre-storm soil conditions explained above. In addition, Board staff requested the addition of two qualifying storm events that occurred between 22-24 October 2012 and 9-11 November 2012. On 17 September 2013, Caltrans responded to the request. The revised volume estimate did not address pre-storm sediment trap condition, pre-storm soil moisture conditions, or pumping of water between sediment traps. The September volume estimates added a total of 425 gallons of runoff during the 9-11 November 2013 storm event, for a total runoff estimate of 700,307 gallons.

Staff does not believe that Caltrans' volume calculations accurately reflect the amount of sediment-laden stormwater discharged from the site based on the factors described above. In an attempt to correct one of the deficiencies in the estimates, Board staff recalculated the estimates assuming that 80% of the runoff generated in a shed containing a sediment trap remained in the sediment trap at the beginning of the next storm, reducing the available capacity of the trap to contain water during the next storm event. Based on this assumption, Board staff estimates that a minimum of 822,701 gallons of sediment-laden storm water was discharged from the site in the area related to the Mono East abutment.

For the purposes of the penalty calculation, Water Board staff is using a discharge volume of 822,701 gallons (of this amount, 818,119 gallons subject to penalties as described below). Caltrans was repeatedly asked to reevaluate the volume estimates and did not provide Board staff with information that reflected the observed site conditions. This was taken into account in the cleanup and cooperation factor, below.

The maximum civil liability allowed under Water Code section 13385 is \$10 per gallon discharged. This amount was used for discharges from the Mono East abutment with the exception of the discharges associated with qualifying rain events² (QREs) 4 and 7. Because of the volume of the Mono East abutment discharges related with QREs 4 and 7, as shown in the table below, Board staff used the "high volume" discount of \$2 per gallon instead of \$10 per gallon, as described by the Enforcement Policy. For QREs 4 and 7, it is appropriate to use the \$2 per gallon value in calculating the liability because of the significant volume of discharges. The Enforcement Policy also states that when using a value less than the statutory maximum of \$10/gallon results in an inappropriately small penalty, a higher amount, up to the statutory maximum, may be used. Board staff considered the final penalty amount, and believes that the amount is appropriate. However, if other factors such as the violator's conduct factors were to be reduced, then the final penalty would not be appropriate and staff would need to re-evaluate whether a value greater than \$2/gallon should be used in the calculation.

Water Code section 13385(c)(2) states that the civil liability amount is to be based on the number of gallons discharged but not cleaned up, over 1,000 gallons for each spill event. According to the volume

² A "qualifying rain event" is defined in the NPDES *General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities*, Order No. 2009-0009-DWQ, as "Any event that produces 0.5 inches or more precipitation with a 48 hour or greater period between rain events."

estimates, there were six qualifying rain events in which discharge took place. As shown in the table below, the total volume subject to penalties is 818,119 gallons.

Qualifying Rain Event	Dates	Total Runoff Volume (gallons)	Total Subject To Penalties (Volume - 1,000 gallons)	Days of Violation Subject to Penalties
#1	22-24 Oct 2012	0	0	0
#2	9-11 Nov 2012	425	0	0
#3	17-22 Nov 2012	53,144	52,144	6
#4	29 Nov-6 Dec 2012	466,168	465,168	8
#5	11-13 Dec 2012	157	0	0
#6	16-18 Dec 2012	11,868	10,868	3
#7	21-27 Dec 2012	290,939	289,939	7
Total			818,119	24

Per Day Assessments for Discharge Violations

When there is a discharge, the Water Board is to determine the initial liability amount on a per day basis using the same Potential for Harm score from Step 1 and the same Extent of Deviation from Requirements used in the per-gallon analysis. The Potential for Harm score from Step 1 is 6 and the Extent of Deviation from Requirements is considered to be **Major**. Therefore the "per day" factor is **0.22** (as determined from Table 2 in the Enforcement Policy). The Per Day Assessment is calculated as $(0.22) \times (\text{number of days}) \times \$10,000$ per day.

Violation 1 – Initial Liability Amount

The initial liability amount for the discharge violations is as follows:

Per Gallon Liability:

1. 17 through 22 November 2012: $\$10 \times (53,144 - 1,000) \times 0.22 = \$114,717$
2. 29 November through 6 December 2012: $\$2 \times (466,168 - 1,000) \times 0.22 = \$204,674$
3. 16 through 18 December 2012: $\$10 \times (11,868 - 1,000) \times 0.22 = \$23,910$
4. 21 through 27 December 2012: $\$2 \times (290,939 - 1,000) \times 0.22 = \$127,573$

Per Day Liability:

5. 17 through 22 November 2012: $\$10,000 \times 0.22 \times 6 \text{ days} = \$13,200$
6. 29 November through 6 December 2012: $\$10,000 \times 0.22 \times 8 \text{ days} = \$17,600$
7. 16 through 18 December 2012: $\$10,000 \times 0.22 \times 3 \text{ days} = \$6,600$
8. 21 through 27 December 2012: $\$10,000 \times 0.22 \times 7 \text{ days} = \$15,400$

Total Initial Liability = \$523,674

Step 3 – Per Day Assessment for Non-Discharge Violations

In this case, this factor does not apply because Violation #1 is related to a discharge and the liability was determined in Step 2.

Step 4 – Adjustment Factors

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

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.4** because of the Discharger's repeated failure to implement appropriate BMPs prior to several forecasted multi-day storm events, despite multiple warnings from Board staff. These failures to implement BMPs led to the discharges of turbid water which could have been avoided had appropriate BMPs been in place prior to the forecasted storm events. The Discharger did not anticipate what a reasonable person would have and did not implement appropriate measures to avoid the violations. The Discharger knowingly approved construction activities in the rainy season, allowed work to continue almost to the start of the storm event, and then violated the Permit conditions by not installing required BMPs prior to forecasted storm events.

In addition, because Board staff was so concerned about the site and the potential for discharge, ten inspections were conducted between 16 October 2012 and 19 February 2013. Water Board staff expended much greater time and effort on this site than on any other site in recent memory; and repeatedly reminded Caltrans that it was out of compliance with Construction General Permit and Caltrans Storm Water Permit requirements. The inspection reports are summarized below:

- 16 October 2012 - Board staff inspected the Project site with Caltrans storm water staff. Board staff observed the contractor, Teichert Construction, conducting significant earth work in multiple areas of the project. Some areas of the project were mostly completed and both sediment and erosion control BMPs had been implemented. However, large portions of the site were not protected with either erosion or sediment control BMPs.

Board staff was very concerned about the eastern area of the Project where two large bridge abutments were under construction on the east and west sides of Mono Way. According to the construction schedule at the time of the inspection, these areas were not scheduled to be completed until November. Board staff attended a portion of a weekly construction meeting with Caltrans and its contractors and expressed concern about the lack of erosion control BMPs given the impending rainy season and the storm water problems experienced by Caltrans during its Stage 1 Sonora Bypass project in 2002.

- 19 November 2012 - On morning of 19 November 2012, Board staff conducted an inspection following a rain event that began on 17 November 2012 and produced approximately two inches of precipitation. Board staff inspected the site with the Teichert Construction project manager.

During the inspection, Board staff observed numerous sediment and erosion control issues including a lack of BMPs and a turbid discharge from the Mono Way east abutment area into "Algerine Ditch", a water of the United States. Although perimeter sediment control BMPs were observed, there were no erosion control BMPs on the east abutment. Board staff observed rill erosion on the abutment soils and found that sediment had discharged over the perimeter BMPs, overwhelmed the silt fence and retention basin,

and had been transported down "Algerine Ditch" a significant distance offsite. Board staff observed evidence of the turbid storm water discharge approximately 100 yards downstream of the abutment.

Board staff also observed sediment discharges in some other areas of the Project where BMPs were installed. On several of these slopes, fiber rolls were installed underneath the jute mat, which is not a typical installation and makes maintenance of the BMPs difficult.

At the end of the inspection, Board staff expressed concern about the lack of effective erosion control BMPs to the contractor's project manager. Staff also communicated that the unprotected Mono East abutment was of immediate concern and clearly not in compliance with the Construction General Permit and the Caltrans Storm Water Permit.

- 29 November 2012 - On 29 November 2012, Board staff conducted an inspection prior to a rain event. The inspection was conducted with Caltrans and the contractor's qualified SWPPP practitioner (QSP).

Board staff observed rilling and significant erosion of the Mono Way east abutment, the slopes around the abutment, and at the base of the abutment. In addition, significant erosion was also observed east of the abutment, extending to Argyle Road. Several additional storm water retention basins had been constructed at the base of the abutment. The basins appeared to be holding water at the time of this inspection, but were not large enough to contain the volume of water from a significant storm event. The contractor had installed fiber rolls and jute netting on the upper portion of the northwest side of the abutment. The jute netting and fiber rolls did not extend down the entire slope. The remaining portions of the east abutment lacked erosion control BMPs.

In the area east and upslope of the Mono Way east abutment, Board staff observed that minimal erosion control and sediment control BMPs had been installed. This area drains away from the abutment and has multiple discharge locations tributary to surface water.

- 3 December 2012 - Board staff conducted an inspection following a rain event that began on 29 November 2012 and produced approximately five inches of precipitation. The inspection was conducted with Caltrans staff and the contractor's QSP.

Since the 29 November 2012 inspection, significant additional erosion had occurred on the Mono Way east abutment. Staff observed increased rilling on the abutment, on the slopes around the abutment, and at the base of the abutment. A majority of the abutment still lacked erosion control BMPs. Staff observed several sediment control BMP failures in the area and evidence of turbid discharges to "Algerine Ditch". Staff also observed that the contractor was pumping water from the basins installed near the toe of the abutment to a pond upslope of the abutment to reduce the amount of runoff discharged to "Algerine Ditch".

In the area upslope and east of the Mono Way east abutment, Board staff observed the pond where storm water was being pumped into from the base of the Mono Way east abutment. At the time of the inspection, the pond was nearly full and had previously overflowed and discharged to the north. Board staff observed that the areas upslope of

the pond were largely unprotected and poorly stabilized, and evidence of erosion and a turbid discharge to surface water from these areas to the south was observed.

The contractor was using the area at the base of the Mono Way crossing as an equipment laydown yard. The yard consisted primarily of a dirt surface. Board staff observed evidence of erosion and sediment discharge to surface water from the laydown yard.

- 5 December 2012 - Board staff conducted an inspection during a rain event. This inspection focused on the area of the Mono Way east abutment. The inspection was conducted with Caltrans staff, a Department of Fish and Wildlife warden, the Contractor's QSP, and the Contractor's Qualified SWPPP Developer (QSD). During the inspection, Board staff observed several BMP failures and multiple discharges of turbid water to "Algerine Ditch".

Staff observed that the Mono Way east abutment slopes still lacked erosion control BMPs. Staff observed a significant amount of rilling, greater than what was observed during the 3 December 2012 inspection. The contractor was pumping water from several storm water basins at the base of the abutment into the pond at the top of the abutment. Staff observed sediment-laden storm water running down the abutment in several locations and discharging into "Algerine Ditch".

Staff inspected the upslope area when the contractor was pumping water from the basins at the base of the abutment. The pond was nearly full and BMPs in the graded areas around the pond were marginal or absent. Staff observed significant erosion and turbid storm water flowing south off the site.

Since the 3 December 2012 inspection, the contractor had placed some rock at the equipment laydown yard, but the area was still mainly a dirt surface with no erosion controls. Board staff observed a discharge of sediment-laden storm water from the lay down area into "Algerine Ditch".

Staff observed somewhat turbid water in "Algerine Ditch" approximately 100-feet south of the Mono Way east abutment at the beginning of the inspection around 8:30 AM, early in the rain event. At noon, after a few hours of rain, the water in "Algerine Ditch" approximately 100-feet south of the Mono Way east abutment was very turbid. The turbid flow had a distinctive red color that was not present in other drainages or creeks in the area. Board staff collected a storm water sample from "Algerine Ditch" immediately downstream of the site from under the bridge where the ditch crossed under Serrana Road. Board staff analyzed the sample for turbidity using a Hach 2100 P turbidity meter and determined that the sample had a turbidity of approximately 9,000 NTU.

Staff traced the flow of turbid storm water in "Algerine Ditch" approximately one mile downstream, where the creek crosses under Standard Road.

- 13 December 2012 - Board staff conducted a brief Project inspection prior to conducting a joint inspection with the California Department of Fish and Wildlife. Staff observed that the Mono Way east abutment remained largely unprotected with erosion control BMPs.

The contractor had installed an additional construction entrance to the area at the base of the abutment and installed a new culvert to direct storm water flows under this entrance. In addition, Board staff observed highly turbid water in "Algerine Ditch" approximately one-half mile downstream when the creek crosses under Standard Road, caused by erosion from the Mono Way east abutment during the 11/12 December 2013 rain event.

- 7 January 2013 - Board staff conducted an inspection following a minor rain event that produced less than one-half inch of rain on 6 and 7 January 2012. Board staff was not joined by Caltrans or the contractor on this inspection.

Board staff observed that plastic sheeting had been placed on the front face of the Mono Way east abutment. The upper side flanks on the abutment were covered with erosion control blanket; however, the erosion control blanket did not extend down the entire slope. At the time of the inspection, the contractor was placing rock at the base of the abutment.

At the time of the inspection, the basin upslope of the Mono Way east abutment was nearly empty. The contractor had installed three Baker tanks adjacent to the basin for additional water storage. A large pump was installed in the pond to transfer water into the tanks. Staff observed a lack of erosion control BMPs in the area around the pond. In addition, the area to the east of the basin and Baker tanks did not contain erosion control BMPs and had significant rilling through the area. Evidence of offsite discharges during previous storm events was also observed in this area.

- 14 January 2013 - Board staff conducted an inspection with Caltrans staff. During the inspection, the contractor was placing plastic on and around the Mono Way east abutment. Board staff observed active construction including notching at the top of the abutment for placement of the bridge deck. The pond in the upslope area of the abutment still contained water and no erosion control BMPs had been installed in this area. The contractor had also installed a rock road to the top of the abutment, but the areas to both sides of the road were not protected with erosion control BMPs.
- 29 January 2013 - On 29 January 2013, Board staff conducted an inspection with Caltrans and Tuolumne County staff. Board staff observed major improvements in BMP implementation across the site.

Board staff observed that the majority of the Mono Way east abutment was covered in plastic sheeting with work to completely cover the abutment underway. The area to the east and upslope of the Mono Way east abutment was completely covered with plastic and or straw mulch. The basin upslope of the abutment was nearly empty and three 20,000-gallon Baker tanks had been installed adjacent to the basin for additional water storage.

- 19 February 2013 - Board staff conducted an inspection with Caltrans staff. The entire Project was now protected with plastic, straw mulch, erosion control blanket, or other storm water management BMPs. An active treatment system (ATS) had also been installed onsite.

Board staff observed that the areas where BMPs had previously failed had been fully repaired. The storm water retention basins near the Mono Way east abutment were mostly empty with capacity to capture storm water for either discharge or transfer to the ATS for treatment prior to discharge. According to the QSD, the ATS system had been fully tested, had a 160,000 gallon storage capacity, and was designed to treat storm water at a rate of 900 gallons per minute.

These inspections show that Caltrans was aware of the BMP deficiencies prior to the first major storm event and elected to continue to allow construction rather than installation of erosion and sediment control BMPs. Given the above, a culpability of 1.4 is appropriate.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **1.3** because of the cooperation exhibited by the Discharger to return into compliance. Water Board staff conducted several inspections prior to the first discharge event and reminded the Discharger of the storm water BMP requirements and urged them to stabilize the Mono East abutment as soon as possible. The abutment was not stabilized for five storm events which produced 24 days of precipitation over a span of 40 days (17 November 2012 – 27 December 2012). While Caltrans did maintain and improve sediment traps and regraded shoulders to reduce discharge, it did not install permit-compliant BMPs or a treatment system until late January 2013.

History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.0 is to be used, and is to be increased as necessary. In this case, a multiplier of **1.1** was used because there have been previous discharge violations from similar projects constructed by Caltrans. For example, similar discharges of turbid storm water occurred from the first phase of the Sonora Bypass Project, according to the NOV issued to Caltrans District 10 by the Central Valley Water Board in May 2003. Caltrans District 10 also received an NOV for failure to implement appropriate sediment control BMPs at its I-5 widening project in Stockton on 6 March 2012. On 27 January 2010, the Central Valley Water Board issued an ACL Order/Stipulated Agreement to Caltrans for the discharge of 319,000 gallons of turbid storm water at the Lincoln Bypass Project in District 3. Other Regional Water Boards have also issued ACL Complaints to Caltrans. In 2009, the U.S. EPA found significant violations when it audited Caltrans' compliance with the Caltrans Storm Water Permit (Order 99-06-DWQ). As a result of the audit, U.S. EPA issued an Order for Compliance to Caltrans in 2010, in part, for failure to implement adequate structural and nonstructural BMPs at construction sites and failure to proactively implement its construction storm water management program year-round. U.S. EPA found Caltrans was not prepared to implement and was not implementing adequate BMPs at the beginning of its defined "rainy season". U.S. EPA also cited Caltrans' failure to conduct and document adequate inspections and enforcement at construction sites. The statewide violations found by the U.S. EPA mirror the violations that Water Board staff found at the Sonora Bypass Project. While Board staff is using a multiplier of 1.1 for this penalty calculation, it could be argued that given Caltrans' history of violation, a higher multiplier would be more appropriate.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 2.

Violation #1 – Total Base Liability Amount

Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations
Multiplier = Total Base Liability

$$\$523,674 \times 1.4 \times 1.3 \times 1.1 = \$1,048,395$$

Total Base Liability = \$1,048,395

Violation 2: Violation of Section A.6 of the Caltrans Storm Water Permit

Section A.6 of the Caltrans Storm Water Permit prohibits the discharge of sand, silt, clay or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity, or discoloration in waters of the State or which unreasonably affect or threaten to affect beneficial uses of such waters. Board staff considered the Discharger to be in violation of this requirement over a period of 24 days when at least 822,701 gallons of storm water with turbidities that ranged from 26 nephelometric turbidity units (NTU) up to 7,368 NTU (with the majority of measurements above 1,700 NTU) was discharged off site between 17 November 2012 and 27 December 2012.

Step 1 – Potential for Harm for Discharge Violations

The “potential harm to beneficial uses” factor considers the harm to beneficial uses that may result from exposure to the pollutants in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential to harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses is negligible (0) to major (5). In this case the potential harm to beneficial uses was determined to be **moderate** (i.e. a score of 3), which is defined as a “*moderate threat to beneficial uses (i.e. impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects).*”

The Discharger failed to implement appropriate erosion and sediment control BMPs prior to storm events in October, November, and December 2012. This failure resulted in at least 822,701 gallons of sediment-laden discharges in November and December to “Algerine Ditch”, a tributary to Curtis Creek, which flows to Don Pedro Reservoir. The beneficial uses of Don Pedro Reservoir, as stated in the Basin Plan, are: municipal and domestic supply; hydropower generation; water contact recreation; non-contact water recreation; warm freshwater habitat; cold freshwater habitat; and wildlife habitat.

“Algerine Ditch” was identified as a water of the United States and subject to regulation under Section 404 of the federal Clean Water Act (CWA) in the Natural Environment Study (NES) prepared by Caltrans for the Project in 2008. Caltrans applied for and received a CWA section 404 permit, a CWA 401 certification, and a California Department of Fish and Wildlife streambed alteration permit for its construction activities in the creek and other Project areas. The NES identified suitable habitats for multiple special-status species within the Project’s Biological Study Area. The species included valley elderberry beetle (VELB); San Joaquin Roach; California red legged frog; western pond turtle; coast

horned lizard; multiple bat species; multiple nesting bird species, and multiple plant species. The California Natural Diversity Database (CNDDDB) lists Sierra Nevada yellow-legged frog, San Joaquin roach, and other species as occurring in the area of the Standard USGS 7.5' quadrangle map. Curtis Creek and "Algerine Ditch" are within the Standard map, so these species may have been impacted by sediment discharged from the Project.

Discharges of sediment to surface waters can cloud the receiving water, thereby reducing the amount of sunlight reaching aquatic plants, clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease. The discharge of sediment negatively impacts aquatic organisms.

Board staff, accompanied by Department of Fish and Wildlife staff inspected "Algerine Ditch" on both 5 December 2013 and 13 December 2012. The Mono East abutment is at the headwaters of "Algerine Ditch" and no background samples were available above the Project. At Standard Road approximately one mile downstream of the discharge location, Board staff observed significant accumulation of red sediment along the sides of the creek, on the rocks, and in the blackberry bushes. The red sediment was due to the release from the Mono East abutment and was distinctly different than the native dark brown creek substrate. Downstream of Standard Road, the creek enters a series of ponds, all of which were filled with red sediment. "Algerine Ditch" continues through Sierra Pacific Industry (SPI) property and enters Curtis Creek approximately 2 miles below the Mono East abutment. According to SPI personnel, red sediment discharges were observed in "Algerine Ditch" numerous times during November-December 2012.

Given the measured turbidity levels and the observed volume of sediment settled in the creek channel and banks during the two inspections, Board staff determined that the discharge of sediment impacted benthic macroinvertebrates, which are an important food source for fish. The discharge may have also impacted the multiple special-status species listed above. The discharges took place at the headwaters of a small stream, and relatively little dilution was available to mitigate the impact of the discharges. In addition, impact of the sediment discharges was observed over a relatively long stretch of the stream, at least one mile from the project site. The impacts may have extended further, but neither Board staff nor Caltrans staff investigated beyond that point. Sediment was discharged repeatedly over a period of 24 days between 22 October 2012 and 27 December 2013. During these discharge events, turbidity measurements of storm water leaving the construction site recorded by the Discharger ranged from 26 nephelometric turbidity units (NTU) up to 7,368 NTU, with the majority of measurements above 1,700 NTU. As noted above, neither Board staff, Caltrans, nor the contractor's QSP was able to collect an upstream sample because the discharge location was at the headwaters of "Algerine Ditch".

Based on the above discussion the amount of sediment released is considered to have a moderate potential to harm beneficial uses, as defined in the Enforcement Policy.

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

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. In this case, a score of **2** was assigned. A score of 2 is defined as the chemical and/or physical characteristics of the "discharged material poses moderate risk or threat to potential receptors (*i.e. chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection*)". Discharges of sediment can cloud the receiving water (which reduces the amount of sunlight reaching aquatic plants), clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials

such as nutrients, metals, and oils and grease, which can also negatively impact aquatic life and aquatic habitat. Therefore, a score of 2 is appropriate.

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% 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. In this case, sediment discharged was dispersed by storm water over a long distance and cleanup or abatement would not be possible. Therefore, a factor of 1 is assigned.

Final Score – “Potential for Harm”

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a final score of 6 was calculated. The total score is then used in Step 2 below.

Step 2 – Assessment for Discharge Violations

This step addresses penalties based on both a per-gallon and a per-day basis for discharge violations.

Per Gallon Assessments for Discharge Violations

When there is a discharge, the Central Valley Water Board is to determine the initial liability amount on a per gallon basis using the Potential for Harm score from Step 1 and the extent of Deviation from Requirement of the violation. The Potential for Harm score from Step 1 is 6 and the extent of Deviation from Requirements is considered **Major** because the requirement (i.e., the Prohibition) was rendered ineffective based on the lack of effective erosion control BMPs which caused large amounts of eroded sediment to be discharged to “Algerine Ditch”. Table 1 of the Enforcement Policy (p. 14) is used to determine a “per gallon factor” based on the total score from Step 1 and the level of Deviation from Requirement. For this particular case, the factor is **0.22**. This value is multiplied by the volume of discharge and the per gallon civil liability, as described below.

As explained for Violation 1, Water Board staff is using a total of 822,701 gallons discharged over 24 days for the purposes of penalty calculation. Staff does not believe that this is an accurate volume and feels that it is a substantial underestimate based on the factors described above. Caltrans was repeatedly asked to re-evaluate the volume estimates and did not provide Board staff with information that reflected site conditions. This was taken into account in the cleanup and cooperation factor, below.

The maximum civil liability allowed under Water Code section 13385 is \$10 per gallon discharged. This amount was used for discharges from the Mono East abutment with the exception of the discharges associated with qualifying rain events (QREs) 4 and 7. Because of the volume of the Mono East abutment discharges related with QREs 4 and 7, as shown in the table below, Board staff used the “high volume” discount of \$2 per gallon instead of \$10 per gallon, as described by the Enforcement Policy. For QREs 4 and 7, it is appropriate to use the \$2 per gallon value in calculating the liability because of the significant volume of discharges. The Enforcement Policy also states that when using a value less than the statutory maximum of \$10/gallon results in an inappropriately small penalty, a higher amount, up to the statutory maximum, may be used. Board staff considered the final penalty amount, and believes that the amount is appropriate. However, if other factors such as the violator’s conduct factors were to be reduced, then the final penalty would not be appropriate and staff would need to re-evaluate whether a value greater than \$2/gallon should be used in the calculation.

Water Code section 13385(c)(2) states that the civil liability amount is to be based on the number of gallons discharged but not cleaned up, over 1,000 gallons for each spill event. According to the volume estimates, there were six qualifying rain events in which discharge took place. As shown in the table below, the total volume subject to penalties is 818,119 gallons. The Per Gallon Assessment is calculated as $(0.31) \times (\text{spill volume} - 1,000) \times (\$2 \text{ per gallon})$.

Qualifying Rain Event	Dates	Total Runoff Volume (gallons)	Total Subject To Penalties (Volume - 1,000 gallons)	Days of Violation Subject to Penalties
#1	22-24 Oct 2012	0	0	0
#2	9-11 Nov 2012	425	0	0
#3	17-22 Nov 2012	53,144	52,144	6
#4	29 Nov-6 Dec 2012	466,168	465,168	8
#5	11-13 Dec 2012	157	0	0
#6	16-18 Dec 2012	11,868	10,868	3
#7	21-27 Dec 2012	290,939	289,939	7
Total			818,119	24

Per Day Assessments for Discharge Violations

When there is a discharge, the Water Board is to determine the initial liability amount on a per day basis using the same Potential for Harm score from Step 1 and the same Extent of Deviation from Requirements used in the per-gallon analysis. The Potential for Harm score from Step 1 is **6** and the Extent of Deviation from Requirements is considered to be **Major**. Therefore the "per day" factor is **0.22** (as determined from Table 2 in the Enforcement Policy). The Per Day Assessment is calculated as $(0.22) \times (\text{number of days}) \times \$10,000 \text{ per day}$.

Violation 2 – Initial Liability Amount

The initial liability amount for the discharge violations is as follows:

Per Gallon Liability:

1. 17 through 22 November 2012: $\$10 \times (53,144 - 1,000) \times 0.22 = \$114,717$
2. 29 November through 6 December 2012: $\$2 \times (466,168 - 1,000) \times 0.22 = \$204,674$
3. 16 through 18 December 2012: $\$10 \times (11,868 - 1,000) \times 0.22 = \$23,910$
4. 21 through 27 December 2012: $\$2 \times (290,939 - 1,000) \times 0.22 = \$127,573$

Per Day Liability:

5. 17 through 22 November 2012: $\$10,000 \times 0.22 \times 6 \text{ days} = \$13,200$
6. 29 November through 6 December 2012: $\$10,000 \times 0.22 \times 8 \text{ days} = \$17,600$
7. 16 through 18 December 2012: $\$10,000 \times 0.22 \times 3 \text{ days} = \$6,600$
8. 21 through 27 December 2012: $\$10,000 \times 0.22 \times 7 \text{ days} = \$15,400$

Total Initial Liability = \$523,674

Step 3 – Per Day Assessment for Non-Discharge Violations

In this case, this factor does not apply because Violation #2 is related to a discharge and the liability was determined in Step 2.

Step 4 – Adjustment Factors

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

Culpability

A factor of **1.4** is appropriate for this violation; the same factors described for Violation No. 1 are applicable to this violation.

Cleanup and Cooperation

A factor of **1.3** is appropriate for this violation; the same factors described in Violation No. 1 are applicable to this violation.

History of Violations

A factor of **1.1** is appropriate for this violation; the same factors described for Violation No. 1 are applicable to this violation.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 2.

Violation 2 – Total Base Liability Amount

Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$523,674 \times 1.4 \times 1.3 \times 1.1 = \$1,048,395$$

Total Base Liability = **\$1,048,395**

Violation 3: Violation of Requirement E.4 of the Construction General Permit

The Construction General Permit (Order 2009-0009-DWQ as amended by Orders 2010-0014-DWQ and 2012-0006-DWQ), Attachment D, Requirement E.4, requires Risk Level 2 dischargers to apply linear sediment control BMPs to comply with sheet flow lengths listed in Table 1 of Attachment D of the permit. The Sonora Bypass project was determined to be Risk Level 2 under the terms of the Construction General Permit. The maximum sheet flow lengths listed in Table 1 of Attachment D range from 10 to 20 feet, dependent on slope. Linear sediment controls are required to prevent rilling/gullies which concentrate flow and increase water flow velocities. Increased water flow velocities increase erosion and sediment transport. This requirement was in effect during rain events while the abutment was being built (i.e., active construction area in the terms of the Construction General Permit) and at all times once the abutment was at final elevation (i.e., inactive construction area in the terms of the Construction General Permit). According to Caltrans, earthwork on the Mono East abutment was completed on 15 November 2012. During the period between 16 October 2012 and 15 November 2012 when earthwork was occurring on the abutment, there were two qualifying rain events consisting of six days of rain. On 29 January 2013, the Mono East abutment was covered with plastic and Board staff considered Caltrans to be in compliance beginning on 30 January 2013.

Board staff considered the Discharger to be in violation of the linear sediment control BMP requirements during the six days prior to 15 November 2012. Following the completion of the earthwork on the Mono East abutment, Board staff considered the Discharger to be in violation of this requirement for 76 days from 15 November 2012 through 29 January 2013, for a total of 82 days of violation.

Step 1 – Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2 – Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3 – Per Day Assessment for Non-Discharge Violations

The “per day” factor is calculated for each non-discharge violation considering the (a) potential for harm and (b) the extent of the deviation from the applicable requirements.

Potential for Harm: The Enforcement Policy requires determination of whether the characteristics of the violation resulted in a minor, moderate, or major potential for harm or threat to beneficial uses. In this case, a lack of appropriate linear sediment control BMPs had the potential to impact beneficial uses.

During the period from 16 October 2012 through 29 January 2013, prior to installation of the plastic sheeting, rainfall caused erosion which could have been reduced using appropriate linear sediment control BMPs to trap a portion of the sediment and slow the flow of runoff. The Discharger did, however, increase the size of retention basins in late November 2012 in an effort to minimize turbid runoff and sediment transport offsite. However, based on inspections conducted by Board staff, these basins were undersized and not fully effective at preventing turbid discharges. Therefore, the potential for harm to beneficial uses is determined to be **Moderate**, which is defined as “*The characteristics of the violation present a substantial threat to beneficial uses and/or the circumstances of the violation indicate a substantial potential for harm. Most incidents would be considered to present a moderate potential for harm.*”

Deviation from Requirement: The Enforcement Policy requires determination of whether the violation represents either a minor, moderate, or major deviation from the applicable requirements. No linear sediment control BMPs or grade breaks were installed on the slopes of the Mono East abutment. The deviation from the applicable requirement (i.e., Requirement E.4 of the Construction General Permit) is determined to be **Major**, which is defined as “*The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).*”

Using Table 3 in the Enforcement Policy, the Per Day Factor of **0.55** is assigned. This value is to be multiplied by the days of violation and the maximum per day penalty, as shown below.

Violation 3 – Initial Liability Amount

The initial liability amounts for the violations calculated on a per-day basis, are as follows: 6 days of violation prior to 15 November 2012 and 76 days of violation from 15 November 2012 to 29 January 2013 for a total of 82 days of violation.

$$82 \text{ days} \times \$10,000 \times 0.55 = \$451,000$$

Total Initial Liability = **\$451,000**

Step 4 – Adjustment Factors

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

Culpability

A factor of **1.4** is appropriate for this violation; the same factors described for Violation No. 1 are applicable to this violation.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **1.3** because of the cooperation exhibited by the Discharger to return into compliance. Water Board staff conducted numerous inspections prior to the first discharge event reminding the Discharger of the storm water BMP requirements including linear sediment controls at the Mono East abutment as soon as possible. Effective linear sediment control BMPs were not installed between 16 October 2012 and 29 January 2013 which contributed to the turbid discharge cited in Violations 1 and 2, above.

History of Violations

A factor of **1.1** is appropriate for this violation; the same factors described for Violation No. 1 are applicable to this violation.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 3.

Violation 3 – Total Base Liability Amount

Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$451,000 \times 1.4 \times 1.3 \times 1.1 = \$902,902$$

Total Base Liability = **\$902,902**

Violation 4: Violation of Construction General Permit, Requirement E.3

The Construction General Permit, Attachment D, Requirement E.3, requires Risk Level 2 dischargers to implement appropriate erosion control BMPs including runoff control and soil stabilization in conjunction with sediment control BMPs in active construction areas. The Sonora Bypass project was determined to be Risk Level 2.

Board staff considered the Discharger to be in violation of the erosion and sediment control BMP requirements for active areas during qualifying rain events starting on 16 October 2012 (the date of the

first inspection) through 3 December 2012 (the date that Board staff were informed that there would not be further activity in this area and that the abutment was inactive due to saturated soil conditions).

Active construction areas are defined in the General Permit as: "*areas undergoing land surface disturbance. This includes construction activity during the preliminary stage, mass grading stage, streets and utilities stage and the vertical construction stage.*" Active areas must have appropriate erosion and sediment controls installed prior to rainfall but not between rain events. The General Permit defines inactive areas of construction as "*areas of construction activity that have been disturbed and are not scheduled to be re-disturbed for at least 14 days.*" Inactive areas must have effective soil cover during the entire period of inactivity, regardless of rainfall. Between 16 October and 3 December 2012, there were four qualifying rain events which lasted for 16 days; therefore, the Discharger was in violation of this provision for 16 days.

During the storm events prior to 3 December 2012, inadequate erosion and sediment control BMPs caused sediment to be mobilized into the retention basins. Violation 4 is for the period of 16 days of rainfall that occurred while the area was still considered active and the Discharger failed to have adequate erosion and sediment control BMPs installed at the site.

Step 1 – Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2 – Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3 – Per Day Assessment for Non-Discharge Violations

The "per day" factor is calculated for each non-discharge violation considering the (a) potential for harm and (b) the extent of the deviation from the applicable requirements.

Potential for Harm: The Enforcement Policy requires determination of whether the characteristics of the violation resulted in a minor, moderate, or major potential for harm or threat to beneficial uses. In this case, a lack of appropriate erosion and sediment control BMPs had the potential to impact beneficial uses. During the 16 October 2012 through 3 December 2012 period prior to installation of the plastic sheeting, rainfall caused massive erosion which could have been reduced using appropriate combination of erosion control and sediment control BMPs to limit erosion and capture a portion of the sediment that ultimately discharged. The Discharger did, however, increase the size of retention basins in late November 2012 in an effort to minimize turbid runoff and sediment transport offsite. However, based on inspections conducted by Board staff, these basins were undersized and not very effective. Therefore, the potential for harm to beneficial uses based on the BMPs in place is determined to be **Moderate**, which is defined as "*The characteristics of the violation present a substantial threat to beneficial uses and/or the circumstances of the violation indicate a substantial potential for harm. Most incidents would be considered to present a moderate potential for harm.*"

Deviation from Requirement: The Enforcement Policy requires determination of whether the violation represents either a minor, moderate, or major deviation from the applicable requirements. No erosion or sediment control BMPs were installed on the slopes of the Mono East abutment. The deviation from the applicable requirement (i.e., Requirement E.3 of the Construction General Permit) is determined to be **Major**, which is defined as "*The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).*"

Using Table 3 in the Enforcement Policy, the Per Day Factor of **0.55** is assigned. This value is to be multiplied by the days of violation and the maximum per day penalty, as shown below.

Violation 4 – Initial Liability Amount

The initial liability amounts for the violations, calculated on a per-day basis, are based on four QREs between 16 October 2012 through 3 December 2012 which totaled 16 days of rain:

$$16 \text{ days} \times \$10,000 \times 0.55 = \$88,000$$

Total Base Liability = **\$88,000**

Step 4 – Adjustment Factors

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

Culpability

A factor of **1.4** is appropriate for this violation; the same factors described for Violation No. 1 are applicable to this violation.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **1.3** because of the cooperation exhibited by the Discharger to return into compliance. Water Board staff conducted several inspections prior to the first discharge event reminding the Discharger of the storm water BMP requirements including erosion and sediment controls at the Mono East abutment as soon as possible. Effective erosion and sediment control BMPs were not installed in active areas prior to rain events between 16 October 2012 and 3 December 2012 which contributed to the turbid discharge cited in Violations 1 and 2 (above) during these rain events.

History of Violations

A factor of **1.1** is appropriate for this violation; the same factors described for Violation No. 1 are applicable to this violation.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 3.

Violation #4 – Total Base Liability Amount

Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$88,000 \times 1.4 \times 1.3 \times 1.1 = \$176,176$$

Total Base Liability = **\$176,176**

Violation 5: Violation of Requirement D.2 of the Construction General Permit

The Construction General Permit, Attachment D, Requirement D.2, requires Risk Level 2 dischargers to implement appropriate erosion control BMPs for inactive areas. The Sonora Bypass project was determined to be Risk Level 2.

Board staff considered the Discharger to be in violation of the erosion control BMP requirements between 4 December 2012 (the date that Mono Way East abutment was considered inactive) until plastic sheeting completely protected the abutment from erosion on 29 January 2013. Inactive areas must have effective soil cover during the entire period of inactivity, regardless of rainfall.

Step 1 – Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2 – Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3 – Per Day Assessment for Non-Discharge Violations

The “per day” factor is calculated for each non-discharge violation or group of violations considering the (a) potential for harm and (b) the extent of the deviation from the applicable requirements.

Potential for Harm: The Enforcement Policy requires determination of whether the characteristics of the violation resulted in a minor, moderate, or major potential for harm or threat to beneficial uses. The characteristics of the violation present either a minor, moderate, or major potential for harm or threat to beneficial uses. In this case, a lack of appropriate erosion and sediment control BMPs had the potential to impact beneficial uses. During the 4 December 2012 through 29 January 2013 period prior to installation of the plastic sheeting, rainfall caused erosion which could have been reduced using appropriate combination of erosion control and sediment control BMPs to limit erosion and capture a portion of the sediment that ultimately discharged. The Discharger did, however, increase the size of retention basins in late November 2012 in an effort to minimize turbid runoff and sediment transport offsite. However, based on inspections conducted by Board staff, these basins were undersized and not fully effective. Therefore, the potential for harm to beneficial uses based on the BMPs in place is determined to be **Moderate**, which is defined as “*The characteristics of the violation present a substantial threat to beneficial uses and/or the circumstances of the violation indicate a substantial potential for harm. Most incidents would be considered to present a moderate potential for harm.*”

Deviation from Requirement: The Enforcement Policy requires determination of whether the violation represents either a minor, moderate, or major deviation from the applicable requirements. No erosion or sediment control BMPs were installed on the slopes of the Mono East abutment. The deviation from the applicable requirement (i.e., Requirement D.2 of the Construction General Permit) is determined to be **Major**, which is defined as “*The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).*”

Using Table 3 in the Enforcement Policy, the Per Day Factor of **0.55** is assigned. This value is to be multiplied by the days of violation and the maximum per day penalty, as shown below.

Violation 5 – Initial Liability Amount

The initial liability amounts for the violations, calculated on a per-day basis, are as follows, based on 57 days from 4 December 2012 through 29 January 2013:

$$57 \text{ days} \times \$10,000 \times 0.55 = \$313,500$$

Total Initial Liability = **\$313,500**

Step 4 – Adjustment Factors

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

Culpability

A factor of **1.4** is appropriate for this violation; the same factors described for Violation No. 1 are applicable to this violation.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **1.3** because of the cooperation exhibited by the Discharger to return into compliance. Water Board staff conducted several inspections prior to the first discharge event reminding the Discharger of the storm water BMP requirements including erosion control soil cover for inactive areas at the Mono East abutment as soon as possible. Effective erosion control soil cover was not installed for 57 days after the abutment was considered inactive on 4 December 2013. The lack of soil cover contributed to the turbid discharge cited in Violation #s 1 and 2, above.

History of Violations

A factor of **1.1** is appropriate for this violation; the same factors described for Violation No. 1 are applicable to this violation.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 3.

Violation 5 – Total Base Liability Amount

Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$313,500 \times 1.4 \times 1.3 \times 1.1 = \$627,627$$

Total Base Liability = **\$627,627**

COMBINED TOTAL BASE LIABILITY AND FACTORS APPLIED TO ALL VIOLATIONS

The combined Total Base Liability Amount for the five violations is **\$3,803,495** (\$1,048,395 + \$1,048,395 + \$902,902 + \$176,176 + \$627,627 = \$3,803,495).

The following factors apply to the combined Total Base Liability Amounts for all of the violations discussed above.

STEP 6 – Ability to Pay and Continue in Business

The ability to pay and to continue in business must be considered when assessing administrative civil liabilities. Caltrans is a California state agency with an annual budget of over \$12 billion. Given this information, the combined Total Base Liability Amount was not adjusted for the Discharger's ability to pay.

STEP 7 – Other Factors as Justice May Require

The costs of investigation and enforcement are "other factors as justice may require", and could be added to the liability amount. The Central Valley Water Board has incurred over \$20,000 in staff costs associated with the investigation and enforcement of the violations alleged herein. While this amount could be added to the penalty, given recent State Water Board guidance, it is not.

STEP 8 – Economic Benefit

Pursuant to CWC 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 violations of the Caltrans Storm Water Permit and General Construction Permit were due to failure to implement appropriate erosion and sediment control BMPs as listed in the site specific SWPPP.

The Enforcement Policy states (p. 21) that the total liability shall be at least 10% higher than the economic benefit, "so that liabilities are not construed as the cost of doing business and the assessed liability provides a meaningful deterrent to future violations." Caltrans incurred an economic benefit by not installing temporary BMPs prior to the seven qualifying rain events (QREs). Caltrans also incurred an economic benefit by working through the rainy season and finishing the Phase 2 Sonora Bypass project in November 2013 instead of July 2014 as originally planned, approximately eight months ahead of schedule. Because Caltrans worked through the rain to complete the earthwork on the Mono Way abutment (i.e., the area that led to the violations), Caltrans was able to complete the bridge construction through the winter instead of waiting until spring, and therefore finished the entire Project eight months ahead of schedule.

The economic benefit for not installing temporary BMPs was estimated based on installation and maintenance costs of temporary bonded fiber matrix (BFM) and fiber rolls for the seven QREs. Although requested, Caltrans did not provide detailed costs of BMP installation. Therefore, Water Board staff estimated the cost of the BMPs that were not installed based on a 25 January 2013 document posted to the Caltrans payment website. This document showed the unit costs for fiber rolls and BFM for the Project. Board staff estimated that 22.1 acres needed these temporary BMPs during the seven QREs, based on the 1 February 2013 Montgomery Associates' NOV response. The cost of the temporary BMPs was estimated to be \$456,374.

Board staff also estimated the economic benefit for completing the Project in November 2013 instead of July 2014. This estimate was done by estimating what Caltrans staff costs for the Project would have been if they had kept working until July 2014. In order to estimate what would have been spent if the Project was completed per the original schedule, Water Board staff requested that Caltrans provide monthly project cost sheets for the period of January to September 2013. However, this information was not submitted. Therefore, Board staff estimated based on observations during its inspections, an average of eight Caltrans staff members would have been assigned to the Project during the eight month period from November 2013 to July 2014. Board staff also assumed that the average annual salary, including overhead, was \$100,000 per person. Using these values, the savings in staff cost was estimated to be \$533,000. These savings represent an avoided cost to Caltrans on this project because finishing the Project early allowed these people to be assigned to other projects.

The U.S. Environmental Protection Agency developed the BEN computer model to calculate the economic benefit a discharger derives from delaying and/or avoiding compliance with environmental regulations. The State Water Board's Senior Economist used the BEN model and the above two values to estimate that the overall economic benefit of noncompliance was \$480,204 for the temporary BMPs and \$549,828 for the staffing and oversight costs, totaling \$1,030,032 in economic benefit.

Pursuant to the Enforcement Policy, the total proposed liability amount should be at least 10% higher than the calculated economic benefit. The proposed liability exceeds the economic benefit plus 10% which is calculated to be \$1,133,035.

STEP 9 – Maximum and Minimum Liability Amounts

Minimum Liability Amount: Economic benefit plus 10% or **\$1,133,035**.

Maximum Liability Amount: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13385. For discharge violations 1 and 2, the maximum liability is \$10/gallon plus \$10,000 per day. For non-discharge violations 3, 4, and 5, the maximum liability is \$10,000 per day. As shown in the table below, the statutory maximum amount for the alleged violations is **\$18,392,380**.

Statutory Maximum Liability Amount

Violation #1 – (818,119 gallons x \$10/gallon) + (24 days x \$10,000/day) = \$8,421,190

Violation #2 – (818,119 gallons x \$10/gallon) + (24 days x \$10,000/day) = \$8,421,190

Violation #3 – 82 days x \$10,000/day = \$820,000

Violation #4 – 16 days x \$10,000/day = \$160,000

Violation #5 – 57 days x \$10,000/day = \$570,000

Total Statutory Maximum Liability – \$8,421,190 + \$8,421,190 + \$820,000 + \$160,000 + \$570,000 = **\$18,392,380**

The maximum liability amount for each violation must be compared with the liability calculated using the Enforcement Policy’s penalty calculation method. If the liability calculated using the Enforcement Policy is above the statutory maximum for a particular violation, then the statutory maximum is used. As shown in the table below, the statutory maximum was used for violations 3, 4, and 5 because the penalty calculation amount is above the statutory maximum allowed by the Water Code.

<u>Statutory Maximum Liability and Total Base Liability Analysis</u>			
	Statutory Maximum Liability	Penalty Calculation Liability	Proposed Liability
Violation #1	\$8,421,190	\$1,048,395	\$1,477,282
Violation #2	\$8,421,190	\$1,048,395	\$1,477,282
Violation #3	\$820,000	\$902,902	\$820,000
Violation #4	\$160,000	\$176,176	\$160,000
Violation #5	\$570,000	\$627,627	\$570,000
		Total	\$3,646,790

STEP 10 – Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the alleged violations is **\$3,646,790**. This liability falls within the statutory maximum and minimum liability amounts.

EXHIBIT B

**Exhibit B – ACL Order R5-2014-0568
California Department of Transportation
State Route 108 East Sonora Bypass Stage 2 Project**

Mariposa Supplemental Environmental Project Description

1. Overview

The Central Valley Water Board is tasked with protecting waters from pollution and minimizing deleterious impacts to the environment, or to public health and safety. The California Department of Transportation (Caltrans) is tasked with designing, constructing, and maintenance of state highways. Caltrans must operate within the guidelines specified under the State Water Board's Construction Storm Water General Permit and/or the Statewide Caltrans Storm Water Permit in addition to permits from other resource agencies. In certain cases, upsets to storm water best management practices (BMPs) causing a discharge to a receiving water body can be mitigated through an early detection system allowing for a quicker notification and thus quicker response and mitigation. The proposed Supplemental Environmental Project (SEP) includes setup and monitoring of a remote section of the Merced River and collecting sound and defensible data to aid in faster response to possible BMP upsets or shortcomings and bringing about faster mitigation.

2. Proposed Project

- a. **Project Title:** Mariposa SEP: Real Time Monitoring of the Merced River Prior to and During Removal of Slide Debris
- b. **Geographic Area of Interest:** Mariposa County, remote section of the Merced River Canyon where the Ferguson Slide covers State Route 140.
- c. **Name and Contact Information for Responsible Entity:**

Cliff Adams, PE
Supervising Construction Branch Chief
California Department of Transportation
1110 W. Kettleman Lane, Suite 35
Lodi, CA, 95240
(209) 333-6923
- d. **Estimated Cost of the Project:** The California Department of Transportation (Caltrans) will spend at least \$443,000 for the direct cost of purchasing, fabrication, installing, and maintenance of the in-stream samplers. Other direct costs include installation of a telemetry unit for reporting data, software development for uploading data onto the California Data Exchange Center (CDEC), data management and processing, quarterly and final reporting, and response due to data flags outside the normal parameters.
- e. **Project Description:** The Ferguson landslide, also commonly called the Ferguson Slide, is an active landslide in the Merced River canyon which in 2006 blocked State Route 140, a primary access road to Yosemite National Park.

The slide began on April 29, 2006, and initially the highway remained open, with active monitoring and occasional temporary closures. By May 28, the road was closed permanently, stopping access to the park from Mariposa and severely impacting the local economy. Revenue via the hospitality market dropped extensively, which included wages, profits to small business owners, and county government income from occupancy taxes. A State of Emergency was declared in June 2006 for Mariposa County.

A detour involving construction of two temporary bridges alleviated a significant portion of the economic impact to the area, however, the detour via the bridges is one-way and controlled by traffic lights. This sometimes results in significant traffic delays at the height of the tourist season.

In July 2013, California Governor Jerry Brown signed Assembly Bill 1973, which mandated that the permanent reconstruction of Highway 140 could not include bridges over the river. That left Caltrans only with the option of removing the landslide prior to implementing rehabilitation of the highway.

The reach of the Merced River adjacent to the removal activities has been designated a Wild-and-Scenic River. Although slide removal activities will not be conducted within the river, the proximity of the river has caused Caltrans to address construction activities as a Risk Level 2 project versus seeking an erosion waiver or Risk Level 1 status under the Construction General Permit (CGP). In an effort to gain an understanding of the river dynamics, Caltrans proposes to set up two real time monitoring arrays upstream and downstream of the project to monitor for pH and Turbidity. Data would be collected prior to removal activities and during removal of the slide talus.

Data would be transmitted to certain project responders should any spikes in turbidity or changes in pH occur that differ by a certain percentage over baseline readings determined by the pre-construction data. This would provide early notification and faster response to any upsets that might occur as a result of the slide removal. Current requirements in the CGP require sampling only during business hours and safe weather conditions. As such, possible upsets are easily missed as are temporal changes in river quality due to natural processes. Stakeholders will benefit from having access to the data which can be uploaded to CDEC.

By the end of the project, Caltrans will have extensively monitored two sites and possibly provided a way to mitigate discharges through a remote and early detection system designed to improve response times to possible upsets for projects proximal to sensitive water bodies or within sensitive watersheds.

f. Water Body, Beneficial Use, or Pollutants Addressed by the Project: The project area resides within the Merced River Hydrologic Unit and the North Fork Merced Hydrologic Area. The specific Hydrologic Sub-Area Number is 537.30, which includes the Beneficial Uses listed for the Merced River from its source to McClure Lake. Measurements of turbidity taken during recent site visits range from 0.51 NTU up to 2.96 NTU. The majority of the recent readings have ranged from 0.51 to 1.45 NTU. Given the exceptionally high quality shown by recent measurements, the allowable increase in turbidity during slide removal operations would be no greater than 1 NTU. Recent pH readings have ranged from 7.68 to 8.45. The Basin Plan criteria for pH is that pH shall not be depressed below 6.5 nor raised above 8.5.

The area has an average annual rainfall of over 45 inches per year, yet the area has endured two extremely dry seasons with the upper regions receiving less than average snow pack. Within the project area, local topography slopes sharply to the river and likewise, so do the local drainages. There will be significant run-on to the project from higher elevations and flow within the drainages will likely exceed capabilities of most conventional BMPs. Pre-construction monitoring will also assist Caltrans in

determining areas within the slide that might require additional attention in order to reduce turbid flows that could reach the river. Also, since the surrounding area is characterized by steep terrain, with little vegetative cover due to drought and past fires, changes in water quality prior to construction during heavy or extended rains will assist in gaining a perspective on the physical attributes of the watershed as it relates to pH and turbidity.

g. Project Tasks, Budget, and Deliverables:

1. Prepare and Submit a Study Plan. The proposed equipment monitoring stations and continuous monitoring instrumentation will be provided in a study plan consisting of design drawings. The design drawings will identify the proposed instrumentation and telemetry processes, and the proposed station locations.

Estimated Cost: \$8,000

Deliverable: A Study Plan detailing components to be included in the monitoring instrumentation and exact locations of the monitoring stations and their relation to the Ferguson Slide site.

Due Date: 31 January 2015

2. Pre-Field Preparation and Fabrication Phase. The monitoring stations will consist of two in-stream monitoring stations and spar or faring systems. The monitoring stations will likely include two Campbell Scientific OBS500 turbidity sensors, two solid state pH sensors, two integrated data loggers, two solar battery panel systems, remote cameras and two telemetry units. Because of the remoteness of the site, wireless telemetry will not be feasible. Consequently, hard-wire telemetry will be accomplished through an existing telephone cable and a repeater serving as a remote base station. The system will be constructed at the site to convey the data from the logger to an existing telephone cable. The SDI-12 pressure sensors will be provided to record variations in stream flows and depths. The feasibility of cellular telemetry units will be re-examined should the Contractor upgrade the telephone system.

The spar or faring systems will be fabricated to prevent cavitation, turbulence and shed river debris and secure sensors on the river bed. The feasibility of a spar or faring system will be determined after a field visit(s) to confirm the optimal placement of the system. The system will be designed such as not to interfere with recreational use of the Merced River.

Estimated Cost: \$58,000

Deliverable: The initial Quarterly Report, covering the calendar quarter from 1 October 2014 to 31 December 2014, will include information on the specific monitoring system selected, how data transmittal will take place, any equipment and/or installation problems, field sampling results, and any observations to the river due to rain or other physical processes such as movement of the slide. The summary of field inspections conducted will include representative photographs of the site for the reporting period.

Due Date: 31 January 2015

3. Field Testing/Startup Phase. Following installation, the monitoring stations will be field tested and telemetry units activated. Sensor calibration and telemetry testing will be conducted.

While this task is ongoing, Caltrans (via the Consultant) will mobilize staff to perform grab samples beginning 15 October 2014 until the monitoring system is in place and operational. Grab samples will be conducted at same locations proposed under Task 1 (Study Plan), for the same constituents and will be triggered by CGP QREs (not to exceed five sampling events per month).

Estimated Cost: \$80,000

Deliverable: A description of the work conducted under the field testing/start-up phase will be included in the initial Quarterly Report and thereafter as needed until this task is completed. Items to be reported on include any equipment and/or installation problems, field sampling results, and any observations to the river due to rain or other physical processes such as movement of the slide. The Summary of field inspections conducted will include representative photographs of the site for the reporting period.

Due Date: 31 January 2015, and subsequent quarterly reports until this task is completed.

4. Task 4 – Operations and Maintenance Phase. Caltrans estimates an initially high level of effort from field staff to understand the river dynamics and water quality exceedances experienced during non-construction periods. This high level of effort would taper off after a reasonable certainty of causation for the exceedances. For costing purposes, the estimated on-site field response to the seasonal water quality exceedances is two (2) times per week from November 2014 to January 2015. After January 2015, we should have a better understanding of the exceedances and thereby eliminate the false positives, on-site field response is reduced to once per week.

Continuous water quality monitoring instrumentation shall be serviced monthly to ensure the monitoring unit placement and operations continue as planned. Field grab samples will be taken during routine maintenance schedules to ensure comparable correlation with the in-stream sensors.

Estimated Cost: \$131,000

Deliverable: Progress Reports will be included in each Quarterly Report and will include any maintenance issues, results of field sampling, correlation issues of field testing and in stream sensors, data upload problems, noting actions requiring changes in instrument placement, and unusual items noted during field responses and other site visits. Note that the reporting period for the Quarterly Reports will be the calendar quarter starting with the last quarter of 2014 (1 October 2014 to 31 December 2014). Quarterly Reports will be submitted one month after the reporting period ends on the due dates shown below. Six quarterly reports will be submitted as part of this SEP.

Due Dates: 31 January 2015, 30 April 2015, 31 July 2015, 31 October 2015, 31 January 2016, and 30 April 2016

5. Data Management and Processing. Field data will be uploaded to a third-party server for real-time data access by stakeholders. The metrics used to present data (e.g., spreadsheets, graphs) will be displayed and automated flagging parameter will be established to alert users of data spikes, anomalies or threshold exceedances. These flags will be automatically recorded, relayed to the user for data review and may possibly require dispatching field personnel to the site for resolution. A Quality Assurance Project Plan (QAPP) will be developed to address the data management processes.

Estimated Cost: \$93,000

Deliverable: The QAPP will include detailed data management processes that will be used to submit data. Document will be consistent with other Caltrans QAPP reports to ensure consistency and data compatibility.

Due Date: 31 January 2015

6. Water Quality Reporting. Water quality data collected will be provided monthly and formatted to be compatible to California Data Exchange Center (CDEC) reporting system.

Estimated Cost: \$73,000

Deliverables: Progress Report will be included in each Quarterly Report and will include a summary of data collected within the reporting period, a description of all the tasks performed during the reporting period such as routine maintenance, grab sample results, any revisions to the monitoring locations, money spent to date, any staffing problems, or other issues encountered during the reporting period.

Due Dates: 31 January 2015, 30 April 2015, 31 July 2015, 31 October 2015, 31 January 2016, and 30 April 2016.

7. Final Report

The Final Report will consist of a comprehensive reporting of all tasks, operation and maintenance activities, sampling results, and expenditures to date. It will also summarize previously submitted Quarterly Reports and any issues encountered and their resolution, and will include the information listed in Section 9 of the Settlement Agreement.

Deliverable: Final Report

Due date: 1 May 2016

3. Compliance with SEP Criteria

The proposed project meets the criteria set forth in the State Water Resources Control Board's 3 February 2009 Policy on Supplemental Environmental Projects (SEP Policy) as described below.

a. Beyond Obligations of Discharger

This SEP contains only measures that go above and beyond applicable obligations of the Discharger: Caltrans has no obligation to implement this project. (SEP Policy C.1.).

1. The Construction General Permit (CGP) requires that Risk Level 2 Dischargers collect samples only during regular business hours and only if conditions are safe to collect samples. This SEP proposes monitoring 24 hours/day, during non-business hours and during unsafe conditions.
2. Monitoring will begin approximately 4 months prior to removal of the slide and will continue through slide removal. Data will be uploaded to the California Data Exchange Center (CDEC). The preconstruction monitoring will provide useful baseline information on the River dynamics in this remote section of the Merced River Canyon. The CGP does not require constant monitoring prior to construction or sharing of the data on CDEC. Data from manual sampling will be uploaded to SMARTS as required by the CGP.
3. An automated warning system will alert key personnel on a 24/7 basis if any turbidity or pH spikes occur. These personnel will respond to ascertain if a BMP upset occurred and determine if they can mitigate the problem or if additional personnel will be required. Since this is an unstable area prone to slides, it is anticipated that responders, for obvious safety reasons, will mobilize when light conditions are favorable for collection of visual data. The CGP does not require constant monitoring of construction sites and, as such, does not require any response actions during non-working hours, including weekends and holidays if no trades are active on a construction site.

b. Water Quality Benefits

This project shall directly benefit or study surface water quality or quantity, and the beneficial uses of the State. (SEP Policy C.2.)

The Real Time Surface Water Monitoring Program will improve water quality in the identified watershed because it provides for real-time notification of appropriate responders if water quality is compromised based on comparison to real time collection of ambient or baseline data collected prior to any construction activities. Learning how the River reacts to rain events, upstream slides, reservoir releases, etc. will provide a visual cue to construction workers of a potential for discharge event and early response to deployed BMPs or take other corrective action(s). This real-time notification will allow them to respond, abate the pollution at the source and implement appropriate mitigation measures. This is preferential to the delay experienced from a discharger waiting to call in and report a discharge or waiting for the discharge to be noticed and called in by a member of the public. Real-time notification will decrease the response time and allow for appropriate minimization and abatement actions to occur during or shortly after the discharge event. Stakeholders will benefit from being able to access the data as the software has the ability to directly upload to CDEC.

c. No Direct Benefit

The SEP does not directly benefit, in a fiscal manner, the Central Valley Water Board's functions, its members, or its staff. Neither will Caltrans board, board functions, or staff benefit from the SEP. All of the funds will be used for the project as described. None of the recipients are connected to Caltrans. (SEP Policy C.3.)

d. Nexus

The SEP described here has a nexus with the nature or location of the discharge violation. A nexus exists if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future. Since Caltrans oversees projects similar in nature and in a variety of locations deemed sensitive, early warning of possible discharges will reduce response time and provide for faster mitigation of any upsets thus minimizing the impacts resulting from such discharges in the Central Valley Region and statewide. (SEP Policy D.2, E.)

e. Additional Qualification Criteria

- i. The proposed SEP project involves documented support by the U.S. Forest Service and the Fresno Regional Water Quality Control Board. (SEP Policy D.1.)
- ii. The proposed SEP provides a region-wide and state-wide use as evidenced by the current use of remote real time sampling at the Caltrans Willits Bypass project. (SEP Policy D.2.)
- iii. The proposed SEP project does not require review pursuant to the California Environmental Quality Act. (SEP Policy D.3.)
- iv. The SEP proposal does not anticipate being the basis for additional funding from other sources. (SEP Policy D.4.)

- v. The entity responsible for the project is Caltrans, a State agency with institutional stability and capacity to complete the SEP and comply with the work product and reporting requirements set forth here. (SEP Policy D.5.)
- vi. The SEP proposal includes success criteria and monitoring requirements. (SEP Policy D.6.)

EXHIBIT C

**Exhibit C – ACL Order R5-2014-0568
California Department of Transportation
State Route 108 East Sonora Bypass Stage 2 Project**

Enhanced Compliance Action Project Description

Enhanced Compliance Action Project:

Between 23 March 2014 and 12 May 2014, Caltrans conducted an Enhanced Compliance Action (ECA) at drainage location 8 (DL-8) on State Route 108 in the area of the recently constructed East Sonora Bypass Stage 2 Project. DL-8 is located on the far eastern end of the project upslope from the Mono East abutment. The project consisted of installing a sediment trap, re-grading the area to flow into the sediment trap, and installing channels with rock slope protection in the flow line to direct water into the newly-installed sediment trap. Water Board staff considers this project an ECA as this area was previously stabilized and Caltrans elected to make a capital improvement to enhance storm water BMPs in this area beyond those required by law. Caltrans submitted invoices and an engineer's daily reports on 17 July 2014 documenting the work conducted and funds expended to complete the ECA at DL-8. The following table summarizes the ECA costs submitted by Caltrans.

<u>BMP Improvement</u>	<u>Cost</u>
Re-grade SR 108 to a 0.5% slope towards the sediment trap	\$11,229
Sediment Trap Installation	\$39,739
Channel Installation	\$46,471
RSP Channel Protection	\$33,385
Final Stabilization of re-graded area	\$17,895
Total	\$148,719

EXHIBIT FF

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

TECHNICAL ANALYSIS

Order No. R9-2014-0044

**Settlement Agreement and Stipulation for Entry of
Administrative Civil Liability Order
Scripps Mesa Developers, LLC,**

Noncompliance with

State Water Resources Control Board

Order No. 2009-0009-DWQ

***National Pollutant Discharge Elimination System (NPDES)
General Permit for Storm Water Discharges Associated with
Construction and Land Disturbance Activities***

Water Code section 13376

and

Clean Water Act section 301

Prepared

by

Frank Melbourn

**Water Resource Control Engineer
Compliance Assurance Unit**

December 12, 2014

A. Introduction

This technical analysis provides a summary of factual and analytical evidence that support the findings in Order No. R9-2014-0044, Settlement Agreement and Stipulation for Entry of Order (Stipulated Order) assessing civil liability in the amount of **\$286,324** against Scripps Mesa Developers, LLC (Discharger) for violations of California State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, [as Amended by Order No. 2010-0014-DWQ] National Pollutant Discharge Elimination System, General Permit No. CAS000002, Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction and Land Disturbance Activities (Construction Storm Water Permit or CSWP). See Exhibit 1, Construction Storm Water Permit, and federal Clean Water Act section 301.

The Stipulated Order was entered into because the Discharger failed to comply with the terms and conditions of the Construction Storm Water Permit during the ongoing construction of the 2,200 unit apartment community, referred to as *Casa Mira View* (Casa Mira View or Project or Site) located on 41.31 acres within the City of San Diego's Mira Mesa community. The Site lies within the Miramar Reservoir Hydrologic Area (HA) (906.10) of the Peñasquitos Hydrologic Unit. Storm water discharges from the Site drain to an unnamed tributary to Los Peñasquitos Creek. See Figure 1. Site Location Map.



Figure 1. Site Location Map. Location of Casa Mira View Construction site (outlined in red) at 11241, 11267, and 11285 Westview Parkway, San Diego, California 92126.

**Technical Analysis for
Settlement Agreement and Stipulation for
Entry of ACL Order No. R9-2014-0044
Casa Mira View**

December 12, 2014

The Project developer is Garden Communities. Scripps Mesa Developers, LLC (Phase 2 and 3) and Scripps Mesa Developers II, LLC (Phase 1) own the properties that make up the Project, and all three entities are owned by the same parent company. Stuart Posnock is the contact for all three entities. See Exhibit 2, March 31, 2014, Sheppard Mullin letter. On October 1, 2008, Stuart Posnock, acting as the property owners' and developer's representative, filed a Notice of Intent (NOI) to comply with the waste discharge requirements of *Order No. 99-08-DWQ, National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000002, Waste Discharge Requirements (WDRs) for Discharges of Storm Water Runoff Associated with Construction Activity* (Order No. 99-08-DWQ) for the Project with the State Water Board. The NOI stated that construction activities would begin in November 2008. On October 7, 2008, the State Water Board processed the NOI and assigned Waste Discharge Identification (WDID) No. 9 37C353628 to the Project.

On June 30, 2010, Stuart Posnock, the approved signatory of Scripps Mesa Developers, LLC, the Legally Responsible Person (LRP) for the Project, certified the Project under the Construction Storm Water Permit. See Exhibit 3, NOI. In addition, he characterized the Project as being "Risk Level 3." Pursuant to Construction Storm Water Permit section VIII, dischargers "calculate the site's sediment risk and receiving water risk during periods of soil exposure (i.e. grading and site stabilization)." "Risk Level 3" is assigned to "projects with high receiving water risk and high sediment risk." (CSWP Rationale § J.1.a.) Mr. Posnock certified his "Yes" response to the NOI question of whether the Site's disturbed areas discharge directly or indirectly into a 303(d) listed water body impaired by sediment, or that the Site's disturbed areas are located within a sub-watershed draining into a 303(d) listed water body impaired by sediment.

B. Construction Storm Water Permit

The Construction Storm Water Permit authorizes discharges of storm water associated with construction activity as long as the best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) are implemented to reduce or eliminate pollutants in storm water runoff. BAT/BCT technologies include passive systems such as erosion and sediment control best management practices (BMPs¹) as well as structural controls, as necessary, to achieve compliance with water quality standards. The Construction Storm Water Permit identifies effective erosion control measures such as preserving existing vegetation where feasible, limiting disturbance, and stabilizing and re-vegetating disturbed areas as soon as possible after grading or construction activities.

The Construction Storm Water Permit further identifies erosion control BMPs as the primary means of preventing storm water contamination. The Construction Storm Water Permit identifies sediment controls as the secondary means of preventing storm water contamination. The Construction Storm Water Permit further states that when erosion control techniques are ineffective, sediment control techniques should be used to capture any soil that becomes eroded.

C. Alleged Violations

The following allegations against the Discharger are the basis for assessing administrative civil liability pursuant to Water Code section 13385, and also appear in the Stipulated Order:

1. Discharge of sediment laden storm water runoff into storm drain;
2. Failure to monitor storm water effluent;
3. Failure to implement erosion control BMPs;
4. Failure to implement sediment control BMPs;
5. Failure to implement housekeeping BMPs; and
6. Failure to complete inspection checklist.

¹ Best management practices (BMPs) "means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.' BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." (40 CFR § 122.2)

D. October 25, 2010, Inspection

While inspecting the Site with a Garden Communities employee, San Diego Water Board inspector Christina Arias observed the pumping of highly turbid sediment laden water from the Site into an off-site Caltrans storm drain. She immediately ordered that the discharge be stopped, and she confirmed that it was stopped. She further documented finished slopes without erosion control BMPs, and inadequate perimeter and site entrance sediment control BMPs. The later resulted in observed sediment discharges to the street. On November 3, 2010, the San Diego Water Board issued Notice of Violation (NOV) No. R9-2010-0146 to the Discharger. See Exhibit 4, NOV No. R9-2010-0146.²

On November 16, 2010, Ground Service Technology, Inc., Discharger's Qualified Storm Water Pollution Prevention Plan (SWPPP) Practitioner (QSP) submitted a report documenting the actions taken onsite to correct the violations noted in the San Diego Water Board's inspection report and Notice of Violation No. R9-2010-0146.

E. November 22, 2010, Inspection

On November 22, 2010, Christina Arias inspected the Site and confirmed the corrections. See Exhibit 5, November 22, 2010, Inspection Entry.

F. January 9 and 14, 2014, Inspections

Christina Arias inspected the Site on January 9, 2014. She noted numerous violations of the Construction Storm Water Permit; specifically that trash was strewn throughout the Site, stockpiles were exposed, slopes were unprotected, chemical containers were without secondary containment, and concrete washout bins were leaking. These violations were consistently unaddressed as evidenced by unsigned QSP site inspection reports between October 2013 through December 2013 (See section G below.) and repetition of the same violations.

A follow-up inspection was conducted by Christina Arias on January 14, 2014. She noted that some of the deficiencies had been corrected, but that sediment control BMPs were missing at a construction site entrance and that inadequate sediment BMPs were observed along a paved roadway.

The noted violations from both inspections were written up in inspection reports attached to NOV No. R9-2014-0018 issued to Garden Communities on February 18, 2014. See Exhibit 6, NOV No. R9-2014-0018.

² The NOV transmittal includes a copy of the October 25, 2010, San Diego Water Board inspection report.

G. QSP Site Inspection Reports

Ground Service Technology, Inc. conducted weekly site inspections for the Discharger. These reports documented the failure of the Discharger to implement effective erosion and sediment control BMPs, as well as Housekeeping BMPs. See Exhibit 7, March 7, 2014, Sheppard Mullin letter.

H. September 30, 2014, Inspection

Christina Arias inspected the Site on September 30, 2014, and she found the Site to generally be in compliance with the Construction Storm Water Permit. Ms. Arias advised the Discharger to add additional erosion and sediment control BMPs to the northwest corner of the Site.

I. Beneficial Uses of Affected Waters

The 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 Basin Plan also designates water quality objectives to protect the designated beneficial uses. Water Code section 13350(h) defines "water quality objectives" as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."

The Basin Plan designates the following beneficial uses for the "unnamed tributary 6.10" to Los Peñasquitos Creek:

1. Agricultural Supply (AGR);
2. Industrial Service Supply (IND);
3. Contact Water Recreation (REC-1);
4. Non-contact Water Recreation (REC-2);
5. Warm Freshwater Habitat (WARM);
6. Wildlife Habitat (WILD); and
7. Rare, Threatened, or Endangered Species (RARE).

J. Determination of Administration Civil Liability

An administrative civil liability may be imposed pursuant to the procedures in Water Code section 13323. The Stipulated Order alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing civil liability, and the proposed civil liability. Pursuant to the relevant portions of Water Code section 13385(a)

Any person who violates any of the following shall be liable civilly in accordance with this section:

1. Section 13375 or 13376.
2. Any waste discharge requirements or dredged and fill material permit.
3. Any requirements established pursuant to section 13383.

Furthermore, Water Code section 13385 (c) provides that

Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with section 13323) of Chapter 5 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.

Water Code section 13385(e) requires the consideration of several factors when determining the amount of civil liability to impose. These factors include: “[T]he 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.”

K. Alleged Violations

Dischargers are required to ensure that the Project is in compliance with the requirements of the Construction Storm Water Permit. The Stipulated Order alleges the following violations:

The submitted inspection reports on the following dates did not include "implementation dates:" October 7, 15, and 24, 2013; November 5, 12, 19, and 25, 2013; December 3, 9, 18, and 26, 2013; and January 2, 2014. Therefore it is unclear whether the recommended corrective actions for noted "failures or other shortcomings" were completed. See Exhibit 7, March 7, 2014, Sheppard Mullin letter. Failure to correct BMP deficiencies increases the likelihood of a sediment discharge and decreases the pollutant removal effectiveness of the Site's BMPs.

L. Penalty Calculation

The State Water Board's Water Quality Enforcement Policy (Enforcement Policy) provides a penalty calculation methodology for the State Water Board and the nine Regional Water Quality Control Boards (collectively Water Boards) 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.

Pursuant to the Enforcement Policy, when there is a discharge, Water Boards shall determine an initial liability factor based on the Potential for Harm score and the extent of Deviation from Requirements for the violation. Water Boards shall calculate the Potential for Harm 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 will be 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. If applicable, the Water Board shall also determine an initial liability amount on a per gallon basis using the Potential for Harm score and the extent of Deviation of Requirement of the violation.

For each non-discharge violation, the Water Boards shall calculate an initial liability factor, considering the Potential for Harm and extent of Deviation from Requirements. Water Boards shall use the matrix set forth in the Enforcement Policy that corresponds to the appropriate Potential for Harm and the Deviation from Requirement categories.

Pursuant to the Enforcement Policy, Water Boards shall use three adjustment factors for modification of the initial liability amount. These factors include: culpability; cleanup and cooperation; and history of violations. The initial liability amount can be increased or decreased based on these adjustment factors. Additional adjustments may be used regarding multiple violations resulting from the same incident and multiple day violations.

**Violation No. 1: Discharge of Sediment Laden Water (1 day)
October 25, 2010**

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 San Diego Water Board Prosecution Team (Prosecution Team) assigns a score of **3 (Moderate)** out of 5 for Factor 1 of the penalty calculation. The Enforcement Policy defines “Moderate” as “moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects). A score of 3 (Moderate) is selected because:

1. Sediment was directly discharged during dry weather into the MS4 connected to the unnamed tributary to Los Peñasquitos Creek, which is being considered for federal Clean Water Act section 303(d) listing as an impaired water body for turbidity;
2. Impacts to the unnamed tributary were likely, due to the high turbidity and large volume of the discharge; resulting in temporary restrictions on beneficial uses;
3. Los Peñasquitos Creek discharges into Los Peñasquitos Lagoon, which is a federal Clean Water Act section 303(d) listed impaired water body for sedimentation/silt, and a designated Natural Preserve by the State Park and Recreation Commission.
4. Sediment discharges negatively impact Contact Water Recreation (REC-1), Warm Freshwater Habitat (WARM), Wildlife Habitat (WILD), and Rare, Threatened, or Endangered Species (RARE) beneficial uses.

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

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental and ecosystem health exposure pathways. In this matter, the Prosecution Team assigns the discharge of sediment to receiving waters a score of 2. The Enforcement Policy defines a score of 2 as "[d]ischarged 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." A score of 2 is selected because:

1. Sediment discharges diminish the physical quality of in-stream waterways by altering or obstructing flows and affecting existing riparian functions.
2. Sediment acts as a binding carrier to other toxic constituents like metals and organic contaminants (i.e. pesticides and PCBs).
3. Sediment discharges affect the quality of receiving waters and the ability to support habitat related beneficial uses by reducing visibility and impacting biotic feeding and reproduction. Sediment discharges can increase receiving water turbidity levels.
4. Sediment discharges cause acute effects on the invertebrate aquatic community.

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. Less than 50 percent of the discharge was susceptible to cleanup or abatement. Accordingly, the Prosecution team assigns a score of 1 (one) to the penalty calculation for Factor 3.

Final Score - "Potential for Harm"

Based on the above determinations, the Potential for Harm final score for this discharge violation is 6 (six).

Step 2 - Assessments for Discharge Violations

Water Code section 13385 states that a Regional Water Board may impose civil liability on a daily basis, a per gallon basis, or both. Due to the difficulty in accurately determining the volume of sediment discharged during the discharge event, civil liability was only calculated on a per day basis for the violation.

Per Day Assessments for Discharge Violations

The Water Boards shall calculate an initial liability factor for each discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements.

Deviation from Requirement

The Prosecution Team assigns a Deviation from Requirement score of **Major** because Order No. 2009-0009-DWQ prohibits all discharges other than storm water from construction sites to waters of the United States unless otherwise authorized by an NPDES permit. Pollutants were discharged to waters of the United States from the Project without NPDES Permit authorization. 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).

Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of 6 and "Deviation from Requirement" factor of "Major," the "Per Day Factor" for discharging sediment from the Project to the MS4/unnamed tributary to Los Peñasquitos Creek, Los Peñasquitos Creek and Los Peñasquitos Lagoon is **0.220** in Table 2 of the Enforcement Policy. Pursuant to Water Code section 13385 the maximum civil liability for these violations is ten thousand dollars (\$10,000) per day of violation (per violation). Calculating the Per Day Assessment is achieved by multiplying:

$$(\text{Per Day Factor}) \times (\text{Statutory Maximum Liability}) = (0.220) \times (\$10,000) = \$2,200$$

Step 3 - Per Day Assessments for Non-Discharge Violations

Step 3 does not apply to discharge violations.

Step 4 -Adjustment Factors

Culpability

The Prosecution Team assigns a culpability multiplier of **1.5** out of a range from 0.5 to 1.5 for these violations for the following reasons:

1. Discharger intentionally discharged sediment laden storm water runoff into a Caltrans storm drain inlet connected to a tributary of Los Peñasquitos Lagoon, a CWA section 303(d) listed impaired water body for sedimentation/silt;

EXHIBIT GG

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

ORDER NO. R9-2011-0048

ADMINISTRATIVE ASSESSMENT OF CIVIL LIABILITY
AGAINST
JACK EITZEN
38175 VIA VISTA GRANDE, MURRIETA
FOR
VIOLATIONS OF
WATER QUALITY CONTROL PLAN, SAN DIEGO BASIN (BASIN PLAN),
AND STATE BOARD ORDER NO. 99-08-DWQ

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) having held a public hearing on October 12, 2011, to hear evidence and comments on the allegations contained in Administrative Civil Liability Complaint No. R9-2010-0084, dated September 28, 2010, and deliberating on the evidence presented at the public hearing and in the record, after determining the allegations contained in the Complaint to be true, having provided public notice thereof and not less than thirty (30) days for public comment and on the recommendation for administrative assessment of Civil Liability in the amount of \$381,450 finds as follows:

1. Jack Eitzen submitted a Notice of Intent to comply with the requirements of State Board Order No. 99-08-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated With Construction Activity* on December 21, 2005, for the construction of a single family residence located at 38175 Via Vista Grande in Murrieta, California.
2. Jack Eitzen is required to comply with the requirements of Order No. 99-08-DWQ as well as the Waste Discharge Prohibitions contained in the Basin Plan during construction activities.
3. Waste Discharge Prohibition No. 1 of the Basin Plan states that the discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in California Water Code section 13050, is prohibited.

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4. Waste Discharge Prohibition No. 14 of the Basin Plan states that 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.
5. Discharge Prohibition A.2 of Order No. 99-08-DWQ states that discharge of materials other than storm water which are not otherwise authorized by an NPDES permit to a municipal separate storm sewer system (MS4) or waters of the nation is prohibited, except as allowed in Special Provisions of Construction Activity, C.2.
6. Special Provision for Construction Activity C.2 states that all dischargers shall develop and implement a Storm Water Pollution Prevention Plan (SWPPP) in accordance with Section a: Storm Water Pollution Prevention Plan. The discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the best available technology/best conventional pollutant control technology (BAT/BCT) performance standard.
7. On or before December 16, 2008, Jack Eitzen discharged waste including earthen materials into waters of the state during construction activities. The discharged material remained in state waters through the date the Complaint was issued. The number of days of violation (December 16, 2008 to September 28, 2010) is 645.
8. On January 28, 2008 and December 15, 2008, Jack Eitzen discharged sediment to the County of Riverside MS4 without using BAT/BCT during construction activities. The number of days of violation is 2.
9. Between October 19, 2007 and January 28, 2008 (102 days) and October 30, 2008 and December 16, 2008 (48 days), Jack Eitzen failed to have a SWPPP on site during construction activity and failed to implement adequate best management practices (BMPs) to reduce pollutants in storm water discharges. The number of days of violation is 150.
10. Issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (pub. Resources Code, § 21000 et seq.) pursuant to section 15321(a)(2), Chapter 3, Title 14 of the California Code of Regulations. This action is also exempt from the provisions of CEQA in accordance with section 15061(b)(3) of Chapter 3, Title 14 of the California Code of Regulations because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

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11. Water Code section 13350 provides that any person who violates any waste discharge requirement issued by a Regional Water Board shall be civilly liable. Water Code section 13350(e)(1) provides that civil liability on a per day basis may not exceed five thousand dollars (\$5,000) for each day the violation occurs or ten dollars (\$10) per gallon discharged, but not both. The discharge of waste to waters of the state in violation of Basin Plan Prohibitions 1 and 14 is subject to the provisions of Water Code section 13350.
12. Water Code section 13385 provides that any person who violations any waste discharge requirement issued by a Regional Water Board shall be civilly liable. Water Code section 13385(c)(1) and (2) provides that civil liability on a per day basis may not exceed 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. The discharge of sediment to an MS4 and failure to implement an adequate SWPPP in violation of State Board Order No. 99-08-DWQ are subject to the provisions of Water Code section 13385.
13. The amount of discretionary assessment proposed is based upon consideration of factors contained in Water Code section 13327. Section 13327 specifies the factors that the San Diego Water Board shall consider in establishing the amount of discretionary liability for the alleged violations, which include: the nature, circumstance, extent, and gravity of the violations, the ability to pay, the effect on the ability to continue in business, prior history of violation, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
14. The penalty calculation methodology within section VI of the Water Quality Enforcement Policy incorporates the factors of Water Code section 13327. An analysis of the penalty calculation methodology for this matter is included in the Technical Analysis for the Complaint, and the Penalty Calculation Methodology is attached to this Order as Exhibit 1. Each of the three violations is calculated individually to determine the total penalty amount.

Violation 1: Discharges of Waste to Waters of the State

15. Step 1 determinines the potential for harm from the discharge violation based on (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. First, the San Diego Water Board finds that discharge of fill and construction materials to waters of the state resulted in major harm or potential harm to the beneficial uses of waters of the state. Therefore, a score of 5 is appropriate for this factor.

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16. Second, the San Diego Water Board considered the physical, chemical, biological, or thermal characteristics of the discharge. The materials discharged are inert, however they have diminished the physical quality of in-stream waterways and significantly impacted the existing riparian habitat for flora and fauna. A score of 2, representing a moderate risk or threat, is therefore appropriate for this factor.
17. Third, the susceptibility of the discharge to cleanup is given a score of 0 because the discharged materials remain on site and can be removed. After adding the total from the three factors for Step 1, the total potential for harm is 7.
18. Step 2 of the penalty calculation assesses the base liability amount for the discharge violations. This is determined using the potential for harm, the deviation from the requirement, the total per day factor, the days of violation, and the statutory maximum penalty per day. The potential for harm, as determined in Step 1 and shown in Findings 15-17, is 7.
19. The second factor is the deviation from the requirements, which reflects the extent to which the violation deviates from the specific requirement that was violated. The discharge of waste to waters of the state is a major deviation from the required standards (the Basin Plan Prohibitions). The San Diego Water Board finds that the category of "Major" is appropriate.
20. The Per Day Factor is determined from Table 2 in the Water Quality Enforcement Policy using the Potential for Harm and the Deviation from Requirement, a "7" and a "Major" as described above in Findings 15-17 and 19. Under Table 2, the Per Day Factor for this violation is 0.310.
21. There were 645 days of violation and the statutory maximum penalty per day is \$5,000 under Water Code section 13350(e)(1). The initial base liability is determined by multiplying the total per day factor (0.310) by the number of days of violation (645) by the statutory maximum penalty (\$5,000). Based on this equation, the Initial Base Liability for the discharge of wastes to waters of the state is \$999,750.
22. Step 4 involves adjusting the Initial Base Liability based on the discharger's culpability, the discharger's efforts to cleanup or cooperate, and the discharger's compliance history. First, the San Diego Water Board considered an adjustment factor based on the discharger's culpability. Jack Eitzen intentionally discharged waste to waters of the state while conducting grading activities associated with his parcel on Via Vista Grande. He also intentionally discharged wastes to waters of the state without filing a Report of Waste Discharge with the San Diego Water Board. Therefore, the appropriate adjustment for the culpability factor is 1.5.

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23. Second, the San Diego Water Board finds the adjustment with regards to cleanup or cooperation is 1.5 because Jack Eitzen failed to cleanup the discharged sediment and rock and failed to cooperate with the San Diego Water Board. The San Diego Water Board notified Jack Eitzen numerous times of the violations, and he made no attempt to remove the discharged sediment and rock and correct the violations.
24. Third, the San Diego Water Board considered an adjustment factor for Jack Eitzen's history of violations. Jack Eitzen has no history of any violations, and therefore the appropriate adjustment factor is 1.
25. The San Diego Water Board also finds that an adjustment to the Initial Base Liability for the per-day basis for liability is appropriate for violations lasting more than 30 days because the violation resulted in no economic benefit from the illegal conduct that can be measured on a daily basis. Therefore, it is appropriate to use the alternate approach to penalty calculation recommended by the Prosecution Team in the Technical Analysis to assess penalties for a total of 48 days. The number of adjusted days of violation is greater than the minimum adjusted number of days allowed because the minimum number of days is not an adequate deterrent. The appropriate adjusted days of violation is determined by assessing a violation on the first day of the violation, an assessment for each five day period of the violation until the 30th day, and then an assessment for each fifteen (15) days of violation, which totals 48 days of violation.
26. Adjusting the Initial Base Liability as described in Findings 15-25 above, results in a Total Base Liability of \$167,400 for discharges of waste into waters of the state. Exhibit 1 details the calculations that involve the above-discussed factors in determining the Total Base Liability.
27. The record contains sufficient information that Jack Eitzen has the ability to pay the Total Base Liability amount. Therefore, the Total Base Liability is not reduced to reflect an inability to continue in business.
28. Staff costs associated with investigating the violations and preparing the enforcement action for all three violations total \$9,450 and as recommended in the Enforcement Policy, this amount is added to the liability amount. This addition is shown in Step 7 of the penalty calculation methodology in Exhibit 1.
29. The Enforcement Policy directs the San Diego Water Board to consider any economic benefit of the violations to the discharger. The Prosecution Team estimated that the economic benefit to Jack Eitzen for the violation of discharges of waste to waters of the state is \$5,663. This is the amount it

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would have cost Jack Eitzen in equipment rental and labor costs to properly transport the sediment and rocks to an appropriate disposal site.

30. The Enforcement Policy also directs the San Diego Water Board to consider any maximum or minimum liability amount associated with a violation and recommends the board recover at least ten percent more than the economic benefit. Water Code 13350 does not require a minimum liability when there is a discharge but no cleanup and abatement order has been issued. The maximum penalty is \$5,000 per day of violation. The violation occurred for 645 days, and so the maximum liability amount is \$3,225,000. The minimum liability is economic benefit plus ten percent, which is \$6,229.
31. The penalty calculation methodology analysis described in the Technical Analysis, and discussed in Findings 15-30 above, together with the evidence received, supports an administrative civil liability against Jack Eitzen for discharging wastes to waters of the state in the amount of \$167,400, plus staff costs.

Violation 2: Discharges of Sediment to a Municipal Storm Sewer System (MS4) Tributary to Waters of the Nation

32. Step 1 determined the potential for harm from the discharge violation based on (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. First, the San Diego Water Board finds that discharge of sediment to the County of Riverside's MS4 tributary to Murrieta Creek resulted in moderate harm or potential harm to beneficial uses. Therefore, a score of 3 or "Moderate" is appropriate for this factor.
33. Second, the San Diego Water Board considered the physical, chemical, biological, or thermal characteristics of the discharge. The discharged suspended sediment can cause a significant risk or threat to aquatic organisms. A score of 2, representing a moderate risk or threat, is therefore appropriate for this factor.
34. Third, the susceptibility of the discharge to cleanup is given a score of 1 because removal of all the discharged sediment is unfeasible since much of it washed away off site. After adding the total from the three factors for Step 1, the total potential for harm is 6.
35. Step 2 of the penalty calculation assesses the base liability amount for the discharge violations. This is determined using the potential for harm, the deviation from the requirement, the total per day factor, the days of violation, and the statutory maximum penalty per day. The potential for harm was determined in Step 1, as shown in Findings 32-34, and is 6.

36. The second factor is the deviation from the requirements, which reflects the extent to which the violation deviates from the specific requirement that was violated. Jack Eitzen's discharges of waste from construction activities to an MS4 tributary to waters of the nation indicated a total disregard for the requirements and renders them ineffective. The San Diego Water Board finds that the category of "Major" is appropriate.
37. The Per Day Factor is determined from Table 2 in the Water Quality Enforcement Policy using the Potential for Harm and the Deviation from Requirement, a "6" and a "Major" as described above in Findings 32-34 and 36. Under Table 2, the Per Day Factor for this violation is 0.220.
38. There were 2 days of violation and the statutory maximum penalty per day is \$10,000 under Water Code section 13385(c)(1) and (2). Therefore the initial liability from Steps 1 and is determined by multiplying the total per day factor (0.220) by the number of days of violation (2) by the statutory maximum penalty (\$10,000). Based on this equation, the Initial Base Liability for the discharge of wastes to waters of the state is \$4,400.
39. Step 4 involves adjusting the Initial Base Liability based on the discharger's culpability, the discharger's efforts to cleanup or cooperate, and the discharger's compliance history. First, the San Diego Water Board considered an adjustment factor based on the discharger's culpability. Jack Eitzen intentionally and repeatedly ignored the County's demands to install adequate BMPs at the construction site while continuing with mass grading activities on a steep slope. Therefore, the appropriate adjustment for the culpability factor is 1.5.
40. Second, the San Diego Water Board finds the adjustment with regards to cooperation is 1.0 because Jack Eitzen did voluntarily cleanup sediment discharged to downstream properties and the exposed portion of the MS4.
41. Third, the San Diego Water Board considered an adjustment factor for Jack Eitzen's history of violations. Jack Eitzen has no history of any violations, and therefore the appropriate adjustment factor is 1.
42. The Prosecution Team only had evidence indicating two days of discharges of sediment from the construction site, and so the reduction for multiple days of violation does not apply to this violation.
43. Adjusting the Initial Base Liability as described in Findings 32-42 above, results in a Total Base Liability of \$6,600 for discharges of sediment to a MS4 tributary to waters of the nation. Exhibit 1 details the calculations that involve the above-discussed factors in determining the Total Base Liability.

44. The record contains sufficient information that Jack Eitzen has the ability to pay the Total Base Liability amount. Therefore, the Total Base Liability is not reduced to reflect an inability to continue in business.
45. Staff costs associated with investigating the violations and preparing the enforcement action for all three violations total \$9,450 and as recommended in the Enforcement Policy, this amount is added to the liability amount. This addition is shown in Step 7 of the penalty calculation methodology in Exhibit 1.
46. The Enforcement Policy directs the San Diego Water Board to consider any economic benefit of the violations to the discharger. The Prosecution Team determined that Jack Eitzen derived no economic benefit from discharging sediment to an MS4 tributary to waters of the nation.
47. The Enforcement Policy also directs the San Diego Water Board to consider any maximum or minimum liability amount associated with a violation and recommends the board recover at least ten percent more than the economic benefit. There is no minimum penalty since there was no economic benefit derived from discharging the sediment to the MS4 tributary to waters of the nation. The maximum penalty is \$10,000 per day of violation. The violation occurred for 2 days, and so the maximum liability amount is \$20,000.
48. The penalty calculation methodology analysis described in the Technical Analysis, and discussed in Findings 32-47 above, together with the evidence received, supports an administrative civil liability against Jack Eitzen for discharging sediment to the MS4 tributary to waters of the nation in the amount of \$6,600, plus staff costs.

Violation 3: Failure to Develop and Implement an Adequate
Storm Water Pollution Protection Plan (SWPPP)

49. As shown in the penalty calculation methodology, Steps 1 and 2 of the Analysis do not apply to the failure to develop and implement an adequate SWPPP because they are non-discharge violations.
50. In determining Step 3, the San Diego Water Board considered the potential for harm and the deviation from requirements to determine the total per day factor. First, the potential for harm is "moderate" because failure to develop and implement a SWPP caused at least two massive discharges of sediment to the MS4 tributary to waters of the nation. The impacts to beneficial uses from the discharge and deposition of large amounts of sediment can be substantial.

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51. Second, the deviation from requirements is "Major" in this case. Order No. 99-08-DWQ requires all dischargers to develop and implement a SWPP and failure to implement an adequate SWPP is a significant deviation from the requirement.
52. Based on the potential for harm as "moderate" and the deviation from requirements as "major," Table 3 in the Water Quality Enforcement Policy states that the per day factor is 0.55. Using the per day factor of 0.55 multiplied by the total days of violation (150 days), multiplied by the statutory maximum liability of \$10,000 per day of violation, the Initial Base Liability under Step 3 of the Analysis is \$825,000.
53. Step 4 involves adjusting the Initial Base Liability based on the discharger's culpability, the discharger's efforts to cleanup or cooperate, and the discharger's compliance history. First, the San Diego Water Board considered an adjustment factor based on the discharger's culpability. Jack Eitzen began mass grading operations at a construction site located on a steep slope at the beginning of the rainy season with inadequate BMPs and failed to comply with repeated directives to implement adequate and effective BMPs. Therefore, the appropriate adjustment for the culpability factor is 1.5.
54. Second, the San Diego Water Board finds the adjustment with regards to cooperation is 1.5 because Jack Eitzen failed to comply with repeated directives by the County and San Diego Water Board to install and maintain adequate BMPs for effective sediment and erosion control.
55. Third, the San Diego Water Board considered an adjustment factor for Jack Eitzen's history of violations. Jack Eitzen has no history of any violations, and therefore the appropriate adjustment factor is 1.
56. The San Diego Water Board also finds that an adjustment to the Initial Base Liability for the per-day basis for liability is appropriate for violations lasting more than 30 days because the violation resulted in no economic benefit from the illegal conduct that can be measured on a daily basis. Therefore, it is appropriate to use the alternate approach to penalty calculation recommended by the Prosecution Team in the Technical Analysis to assess penalties for 16 days of violation for failing to develop and implement an adequate SWPP rather than 150 days.
57. Adjusting the Initial Base Liability as described in Findings 49-56 above, results in a Total Base Liability of \$198,000 for failure to develop and implement an adequate SWPP. Exhibit 1 details the calculations that involve the above-discussed factors in determining the Total Base Liability.

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58. The record contains sufficient information that Jack Eitzen has the ability to pay the Total Base Liability amount. Therefore, the Total Base Liability is not reduced to reflect an inability to continue in business.

59. Staff costs associated with investigating the violations and preparing the enforcement action for all three violations total \$9,450 and as recommended in the Enforcement Policy, this amount is added to the liability amount. This addition is shown in Step 7 of the penalty calculation methodology in Exhibit 1.

60. The Enforcement Policy directs the San Diego Water Board to consider any economic benefit of the violations to the discharger. The total economic benefit to Jack Eitzen is estimated at \$45,000. The Prosecution Team calculated that adequate BMPs on the three-acre site would have been \$15,000 a year, and that the construction site lacked adequate BMPs for two years, bringing the total cost for BMPs to \$30,000. Because of the unusually steep slopes at the site, BMPs would be more extensive and expensive than a typical construction site, and so an adjustment factor of 1.5 is appropriate, making the total economic benefit that Jack Eitzen received by not implementing appropriate and adequate BMPs to control erosion and sediment \$45,000.

61. The Enforcement Policy also directs the San Diego Water Board to consider any maximum or minimum liability amount associated with a violation and recommends the board recover at least ten percent more than the economic benefit. The maximum liability for failure to develop and implement an adequate SWPPP for 150 days is \$1,500,000. The minimum liability is the estimated economic benefit discussed in Finding 60, plus ten percent, which is \$49,500.

62. The penalty calculation methodology analysis described in the Technical Analysis, and discussed in Findings 49-61 above, together with the evidence received, supports an administrative civil liability against Jack Eitzen for failure to develop and implement an adequate SWPP in the amount of \$198,000, plus staff costs.

IT IS HEREBY ORDERED, pursuant to Water Code sections 13350 and 13385, that civil liability be imposed upon Jack Eitzen in the amount of \$381,450 for the discharge of earthen material into waters of the state between December 16, 2008 and September 21, 2010, the discharge of sediment to an MS4 on January 8, 2008 and December 15, 2008, and failure to develop and implement an adequate SWPPP between October 19, 2007 and January 28, 2008, and October 30, 2008 and December 16, 2008.

Jack Eitzen

38175 Via Vista Grande, Murrieta

1. Jack Eitzen shall submit a check to the San Diego Water Board in the amount of three hundred eighty one thousand four hundred fifty dollars (\$381,450) payable to the "State Water Resources Control Board" for deposit into the Waste Discharge Permit Fund and Cleanup and Abatement Account within thirty (30) days of adoption of this Order.
2. Fulfillment of Jack Eitzen's obligations under this Order constitutes full and final satisfaction of any and all liability for each allegation in Complaint No. R9-2010-0084.
3. The Executive Officer is authorized to refer this matter to the Office of the Attorney General for collection or other enforcement if Jack Eitzen fails to comply with payment of the liability as detailed in paragraph 1.

I, David W. Gibson, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an Order imposing civil liability assessed by the California Regional Water Quality Control Board, San Diego Region October 12, 2011.



DAVID W. GIBSON
Executive Officer

Exhibit 1: Penalty Methodology Decisions for ACL Order No. R9-2011-0048

Place ID: 755683

Reg. Msr: 402035

SMARTS AppID: 288214

SMARTS Enf. ID: 402035

Step 1: Potential Harm Factor				
Violations	Harm/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]
Violation 1-Discharge of fill to waters of the state	5	2	0	7
Violation 2-Discharge of sediment to MS4	3	2	1	6
Violation 3-Failure to implement adequate SWPPP				

Step 2: Assessments for Discharge Violations-No Per Gallon Discharge Violations					
Violations	Per Day Factor				Statutory Max per Day [section 13xxx]
	Potential for Harm [0 - 10]	Deviation from Requirement [minor, moderate, major]	Total Per Day Factor	Days of Violation	
Violation 1	7	Major	0.31	645	\$5,000
Violation 2	6	Major	0.22	2	\$10,000

Step 3: Per Day Assessments for Non-Discharge Violations					
Violations	Per Day Factor				Statutory/ Adjusted Max [section 13xxx]
	Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total Per Day Factor	Days of Violation	
Violation 3	Moderate	Major	0.55	150	\$10,000

Initial Liability From Steps 1 - 3	
Violation 1:	$(.31) \times (645) \times (5,000) = \$999,750$
Violation 2:	$(0.22) \times (2) \times (\$10,000) = \$4,400$
Violation 3:	$(0.55) \times (150) \times (\$10,000) = \$825,000$

Step 4: Adjustments					
Violations	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Multiple Violations (Same Incident)	Adjusted Days of Violation
Violation 1	1.5	1.5	1	n/a	48
Violation 2	1.5	1	1	n/a	n/a
Violation 3	1.5	1.5	1	n/a	16

Step 5: Total Base Liability Amount	
(Per day Factor x statutory maximum) x (Step 4 Adjustments)	
Violation 1:	$(0.31) \times (\$5,000) \times (1.5) \times (1.5) \times (1) \times (48) = \$167,400$
Violation 2:	$(0.22) \times (\$10,000) \times (1.5) \times (1) \times (1) \times (2) = \$6,600$
Violation 3:	$(0.55) \times (\$10,000) \times (1.5) \times (1.5) \times (1) \times (16) = \$198,000$

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	Other
\$9,450	n/a

Step 8: Economic Benefit	
Violation 1:	\$5,663
Violation 2:	\$0
Violation 3:	\$45,000

Step 9: Maximum and Minimum Liability Amounts		
	Minimum	Maximum
Violation 1	\$6,229	\$3,225,000
Violation 2	\$0	\$20,000
Violation 3	\$49,500	\$1,500,000

Step 10: Final Liability Amount	
(total base liability) + (other factors)	
(\$372,000) + (\$9,450) = \$381,450	

EXHIBIT HH

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

ORDER NO. R9-2011-0049

ADMINISTRATIVE ASSESSMENT OF CIVIL LIABILITY
AGAINST
JACK EITZEN
38155 VIA VISTA GRANDE, MURRIETA
FOR
VIOLATIONS OF
STATE BOARD ORDER NO. 99-08-DWQ

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) having held a public hearing on October 12, 2011, to hear evidence and comments on the allegations contained in Administrative Civil Liability Complaint No. R9-2010-0104, dated November 15, 2010, and deliberating on the evidence presented at the public hearing and in the record, after determining the allegations contained in the Complaint to be true, having provided public notice thereof and not less than thirty (30) days for public comment and on the recommendation for administrative assessment of Civil Liability in the amount of \$301,950 finds as follows:

1. Jack Eitzen submitted a Notice of Intent to comply with the requirements of State Board Order No. 99-08-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated With Construction Activity* on December 21, 2005, for the construction of a single family residence located at 38155 Via Vista Grande in Murrieta, California.
2. Jack Eitzen is required to comply with the requirements of Order No. 99-08-DWQ during construction activities.
3. Special Provision for Construction Activity C.2 states that all dischargers shall develop and implement a Storm Water Pollution Prevention Plan (SWPPP) in accordance with Section a: Storm Water Pollution Prevention Plan. The discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the best available technology/best conventional pollutant control technology (BAT/BCT) performance standard.

4. Between January 2, 2008 and March 13, 2008 (72 days), September 24, 2008 and December 23, 2008 (91 days) and February 11, 2010 and March 30, 2010 (48 days) Jack Eitzen failed to have a SWPPP on site during construction activity and failed to implement adequate best management practices (BMPs) to reduce pollutants in storm water discharges. The number of days of violation is 211.
5. Issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (pub. Resources Code, § 21000 et seq.) pursuant to section 15321(a)(2), Chapter 3, Title 14 of the California Code of Regulations. This action is also exempt from the provisions of CEQA in accordance with section 15061(b)(3) of Chapter 3, Title 14 of the California Code of Regulations because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.
6. Water Code section 13385 provides that any person who violates any waste discharge requirement issued by a Regional Water Board shall be civilly liable. Water Code section 13385(c)(1) and (2) provides that civil liability on a per day basis may not exceed 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.
7. The amount of discretionary assessment proposed is based upon consideration of factors contained in Water Code section 13327. Section 13327 specifies the factors that the San Diego Water Board shall consider in establishing the amount of discretionary liability for the alleged violations, which include: the nature, circumstance, extent, and gravity of the violations, the ability to pay, the effect on the ability to continue in business, prior history of violation, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
8. The penalty calculation methodology within section VI of the Water Quality Enforcement Policy incorporates the factors of Water Code section 13327. An analysis of the penalty calculation methodology for this matter is included in the Technical Analysis for the Complaint, and the Penalty Calculation Methodology is attached to this Order as Exhibit 1. As shown in the penalty calculation methodology, Steps 1 and 2 of the Analysis do not apply to the failure to develop and implement an adequate SWPP because it is a non-discharge violation.
9. In determining Step 3, the San Diego Water Board considered the potential for harm and the deviation from requirements to determine the total per day factor. First, the potential for harm is "moderate" because the failure to develop and implement a SWPP posed a substantial threat to beneficial uses

- due to the lack of adequate erosion and sediment control BMPs on disturbed areas of the construction site during consecutive rainy seasons. The impacts to beneficial uses from the discharge and deposition of large amounts of sediment can be substantial.
10. Second, the deviation from requirements is "Major" in this case. Order No. 99-08-DWQ requires all dischargers to develop and implement a SWPP and failure to implement an adequate SWPP is a significant deviation from the requirement.
 11. Based on the potential for harm as "moderate" and the deviation from requirements as "major," Table 3 in the Water Quality Enforcement Policy states that the per day factor is 0.55. Using the per day factor of 0.55 multiplied by the total days of violation (211 days), multiplied by the statutory maximum liability of \$10,000 per day of violation, the Initial Base Liability under Step 3 of the Analysis is \$1,160,500.
 12. Step 4 involves adjusting the Initial Base Liability based on the discharger's culpability, the discharger's efforts to cleanup or cooperate, and the discharger's compliance history. First, the San Diego Water Board considered an adjustment factor based on the discharger's culpability. Jack Eitzen began mass grading operations at a construction site located on a steep slope at the beginning of the rainy season with inadequate BMPs and failed to comply with repeated directives to implement adequate and effective BMPs. Therefore, the appropriate adjustment for the culpability factor is 1.5.
 13. Second, the San Diego Water Board finds the adjustment with regards to cleanup or cooperation is 1.5 because Jack Eitzen failed to comply with repeated directives by the County and San Diego Water Board to install and maintain adequate BMPs for effective sediment and erosion control.
 14. Third, the San Diego Water Board considered an adjustment factor for Jack Eitzen's history of violations. Jack Eitzen has no history of any violations, and therefore the appropriate adjustment factor is 1.
 15. The San Diego Water Board also finds that an adjustment to the Initial Base Liability for the per-day basis for liability is appropriate for violations lasting more than 30 days because the violation resulted in no economic benefit from the illegal conduct that can be measured on a daily basis. Therefore, it is appropriate to use the alternate approach to penalty calculation recommended by the Prosecution Team in the Technical Analysis to assess penalties for 24 days of violation for failing to develop and implement an adequate SWPP rather than a total of 211 days: 72 days from January 2, 2008 to March 13, 2008, 91 days from September 24, 2008 to December 23, 2008, and 48 days from February 11, 2010 to March 30, 2010.

16. Adjusting the Initial Base Liability as described in Findings 8-15 above, results in a Total Base Liability of \$297,000 for failure to develop and implement an adequate SWPP. Exhibit 1 details the calculations that involve the above-discussed factors in determining the Total Base Liability.
17. The record contains sufficient information that Jack Eitzen has the ability to pay the Total Base Liability amount. Therefore, the Total Base Liability is not reduced to reflect an inability to continue in business.
18. Staff costs associated with investigating the violation and preparing the enforcement action total \$4,950 and as recommended in the Enforcement Policy, this amount is added to the liability amount. This addition is shown in Step 7 of the penalty calculation methodology in Exhibit 1.
19. The Enforcement Policy directs the San Diego Water Board to consider any economic benefit of the violations to the discharger. The total economic benefit to Jack Eitzen is estimated at \$15,000. The Prosecution Team calculated that adequate BMPs on the one-acre site would have been \$5,000 a year, and that the construction site lacked adequate BMPs for two years, bringing the total cost for BMPs to \$10,000. Because of the unusually steep slopes at the site, BMPs would be more extensive and expensive than a typical construction site, and so an adjustment factor of 1.5 is appropriate, making the total economic benefit that Jack Eitzen received by not implementing appropriate and adequate BMPs to control erosion and sediment \$15,000.
20. The Enforcement Policy also directs the San Diego Water Board to consider any maximum or minimum liability amount associated with a violation and recommends the board recover at least ten percent more than the economic benefit. The maximum liability for failure to develop and implement an adequate SWPPP for 211 days is \$2,110,000. The minimum liability is the estimated economic benefit discussed in Finding 19, plus ten percent, which is \$16,500.
21. The penalty calculation methodology analysis described in the Technical Analysis, and discussed in Findings 8-20 above, together with the evidence received, supports an administrative civil liability against Jack Eitzen for failure to develop and implement an adequate SWPP in the amount of \$301,950.

IT IS HEREBY ORDERED, pursuant to Water Code section 13385, that civil liability be imposed upon Jack Eitzen in the amount of \$301,950 for failure to develop and implement an adequate SWPPP between January 2, 2008 and

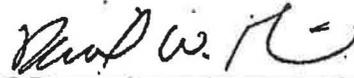
ACL Order No. R9-2011-0049
Jack Eitzen
38155 Via Vista Grande, Murrieta

Page 5 of 5

March 13, 2008, September 24, 2008 and December 23, 2008, and February 11, 2010 and March 30, 2010.

1. Jack Eitzen shall submit a check to the San Diego Water Board in the amount of three hundred one thousand nine hundred fifty dollars (\$301,950), payable to the "State Water Resources Control Board" for deposit into the Cleanup and Abatement Account within thirty (30) days of adoption of this Order.
2. Fulfillment of Jack Eitzen's obligations under this Order constitutes full and final satisfaction of any and all liability for each allegation in Complaint No. R9-2010-0104.
3. The Executive Officer is authorized to refer this matter to the Office of the Attorney General for collection or other enforcement if Jack Eitzen fails to comply with payment of the liability as detailed in paragraph 1.

I, David W. Gibson, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an Order imposing civil liability assessed by the California Regional Water Quality Control Board, San Diego Region on October 12, 2011.



DAVID W. GIBSON
Executive Officer

Exhibit 1: Penalty Methodology Decisions for ACL Order No. R9-2011-0104

SMARTS App ID: 288215
SMART Enf. ID: 402985

Exhibit No. 1
 Discharger: Mr. Jack Eltzen

Penalty Methodology Decisions
 ACL Order No. R9-2011-0049

Step 1: Potential Harm Factor

Violations	Harm/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]
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No Discharge Violations

Step 2: Assessments for Discharge Violations

Violations	Per Gallon Factor					Statutory or Policy Max per Gallon [\$]
	Potential for Harm [0 - 10]	Deviation from Requirement [minor, moderate, major]	High Volume Discharges [yes / no]	Gallons Discharged	Total Per Gallon Factor	

No Discharge Violations

Violations	Per Day Factor				Statutory Max per Day [section 13xxx]
	Potential for Harm [0 - 10]	Deviation from Requirement [minor, moderate, major]	Total Per Day Factor	Days of Violation	

No Discharge Violations

Step 3: Per Day Assesments for Non-Discharge Violations

Violations	Per Day Factor				Statutory/ Adjusted Max [section 13xxx]
	Potential for Harm [minor, moderate, major]	Deviation from Requirement [minor, moderate, major]	Total Per Day Factor	Days of Violation	
Violation 1	Moderate	Major	0.55	211	\$10,000

Initial Liability From Steps 1 - 3

Violation 1: (.55) x (211) x (\$10,000) = \$1,160,500

Step 4: Adjustments

Violations	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Multiple Violations (Same Incident)	Adjusted Days of Violation
Violation 1	1.5	1.5	1	n/a	24

Step 5: Total Base Liability Amount

(Per day Factor x statutory maximum) x (Step 4 Adjustments)

Violation 1: (0.55) x (\$10,000) x (1.5) x (1.5) x (1) x (24) = \$297,000

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

Other

\$4,950

n/a

Step 8: Economic Benefit

\$15,000

Step 9: Maximum and Minimum Liability Amounts

	Minimum	Maximum
Violation 1	\$16,500	\$2,110,000

Step 10: Final Liability Amount

(total base liability) + (other factors)

(\$297,000) + (\$4,950) = \$301,950

Exhibit No. 1
 Discharger: Mr. Jack Eitzen

Penalty Methodology Decisions
 ACL Order No. R9-2011-0049

Step 1: Potential Harm Factor

Violations	Harm/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 }
------------	---	--	--	--

No Discharge Violations

Step 2: Assessments for Discharge Violations

Violations	Per Gallon Factor					Statutory or Policy Max per Gallon { \$ }
	Potential for Harm { 0 - 10 }	Deviation from Requirement { minor, moderate, major }	High Volume Discharges { yes / no }	Gallons Discharged	Total Per Gallon Factor	

No Discharge Violations

Violations	Per Day Factor				Statutory Max per Day { section 13xxx }
	Potential for Harm { 0 - 10 }	Deviation from Requirement { minor, moderate, major }	Total Per Day Factor	Days of Violation	

No Discharge Violations

Step 3: Per Day Assessments for Non-Discharge Violations

Violations	Per Day Factor				Statutory/ Adjusted Max { section 13xxx }
	Potential for Harm { minor, moderate, major }	Deviation from Requirement { minor, moderate, major }	Total Per Day Factor	Days of Violation	
Violation 1	Moderate	Major	0.55	211	\$10,000

Initial Liability From Steps 1 - 3

Violation 1: (.55) x (211) x (\$10,000) = \$1,160,500

Step 4: Adjustments

Violations	Culpability { 0.5 - 1.5 }	Cleanup and Cooperation { 0.75 - 1.5 }	History of Violations	Multiple Violations (Same Incident)	Adjusted Days of Violation
Violation 1	1.5	1.5	1	n/a	24

Step 5: Total Base Liability Amount

(Per day Factor x statutory maximum) x (Step 4 Adjustments)

Violation 1: (0.55) x (\$10,000) x (1.5) x (1.5) x (1) x (24) = \$297,000

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	Other
\$4,950	n/a

Step 8: Economic Benefit

\$15,000

Step 9: Maximum and Minimum Liability Amounts

	Minimum	Maximum
Violation 1	\$16,500	\$2,110,000

Step 10: Final Liability Amount

(total base liability) - (other factors)

(\$297,000) + (\$4,950) = \$301,950

FOR COURT USE ONLY

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):

Kathryn M. Megli
Attorney General of California
600 West Broadway Street, Suite 1800
San Diego, CA 92101

TELEPHONE NO.: (619) 645-2612

FAX NO.: (619) 645-2271

ATTORNEY FOR (Name): State Water Resources Control Board

ORIGINAL

No fee pursuant to
Government Code
Section 6103

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Riverside

STREET ADDRESS: 4050 Main Street

MAILING ADDRESS: 4050 Main Street

CITY AND ZIP CODE: Riverside, CA 92501

BRANCH NAME: Riverside Historic Courthouse

CASE NAME:

In the Matter of: JACK EITZEN, an individual

CASE NUMBER:

RIC1507661

JUDGE:

DEPT:

CIVIL CASE COVER SHEET

Unlimited (Amount demanded exceeds \$25,000) Limited (Amount demanded is \$25,000 or less)

Complex Case Designation

Counter Joinder
Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort

Auto (22)
 Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)
 Product liability (24)
 Medical malpractice (45)
 Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort

Business tort/unfair business practice (07)
 Civil rights (08)
 Defamation (13)
 Fraud (16)
 Intellectual property (19)
 Professional negligence (25)
 Other non-PI/PD/WD tort (35)

Employment

Wrongful termination (36)
 Other employment (15)

Contract

Breach of contract/warranty (06)
 Rule 3.740 collections (09)
 Other collections (09)
 Insurance coverage (18)
 Other contract (37)

Real Property

Eminent domain/Inverse condemnation (14)
 Wrongful eviction (33)
 Other real property (26)

Unlawful Detainer

Commercial (31)
 Residential (32)
 Drugs (38)

Judicial Review

Asset forfeiture (05)
 Petition re: arbitration award (11)
 Writ of mandate (02)
 Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)

Antitrust/Trade regulation (03)
 Construction defect (10)
 Mass tort (40)
 Securities litigation (28)
 Environmental/Toxic tort (30)
 Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment

Enforcement of judgment (20)

Miscellaneous Civil Complaint

RICO (27)
 Other complaint (not specified above) (42)

Miscellaneous Civil Petition

Partnership and corporate governance (21)
 Other petition (not specified above) (43)

2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

- a. Large number of separately represented parties
- b. Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
- c. Substantial amount of documentary evidence
- d. Large number of witnesses
- e. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
- f. Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive

4. Number of causes of action (specify): not applicable

5. This case is is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: 6/24/15

Kathryn M. Megli

(TYPE OR PRINT NAME)

Kathryn Megli
(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

4050 Main Street
Riverside, CA 92501
www.riverside.courts.ca.gov

NOTICE OF DEPARTMENT ASSIGNMENT

IN THE MATTER OF JACK EITZEN

CASE NO. RIC1507661

This case has been assigned to the HONORABLE Assigned Judge in Department 02 for all purposes.

Any disqualification pursuant to CCP section 170.6 shall be filed in accordance with that section.

The filing party shall serve a copy of this notice on all parties.

Requests for accommodations can be made by submitting Judicial Council form MC-410 no fewer than five court days before the hearing. See California Rules of Court, rule 1.100.

CERTIFICATE OF MAILING

I certify that I am currently employed by the Superior Court of California, County of Riverside, and that I am not a party to this action or proceeding. In my capacity, I am familiar with the practices and procedures used in connection with the mailing of correspondence. Such correspondence is deposited in the outgoing mail of the Superior Court. Outgoing mail is delivered to and mailed by the United States Postal Service, postage prepaid, the same day in the ordinary course of business. I certify that I served a copy of the foregoing NOTICE on this date, by depositing said copy as stated above.

Court Executive Officer/Clerk

Date: 06/29/15

by: _____

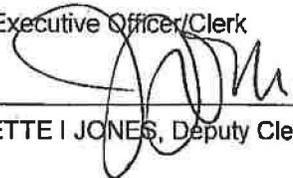

JULIETTE I JONES, Deputy Clerk

EXHIBIT II

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R4-2010-0023-R

IN THE MATTER OF

BALCOM RANCH
21099 SOUTH MOUNTAIN ROAD, SANTA PAULA, CA

This Complaint is issued to Balcom Ranch (hereafter Discharger) pursuant to California Water Code (Water Code) section 13261, which authorizes the imposition of Administrative Civil Liability, and Water Code section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on evidence that the Discharger violated Water Code section 13260 by failing to submit a report of waste discharge or, alternatively, by failing to submit a Notice of Intent to comply with the Los Angeles Regional Water Quality Control Board's (Regional Board) *Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands within the Los Angeles Region*, Order Nos. R4-2005-0080 and R4-2010-0186, when so requested by the Regional Board.

The Executive Officer of the Regional Board alleges the following:

Background

1. Balcom Ranch owns the property located at 21099 South Mountain Road in the City of Santa Paula, County of Ventura, near the intersection of South Mountain Road and Balcom Canyon Road. The property is comprised of Assessor Parcel Numbers (APN) 046-0-150-140 and 046-0-150-320. According to Ventura County Assessor records, the Discharger owns approximately 108 acres for these two parcels. The property is in close proximity to the Santa Clara River, an impaired waterbody. Balcom Ranch is a California Partnership.
2. Water Code section 13260, subdivision (a), requires that any person discharging waste or proposing to discharge waste in the Los Angeles Region, which includes the coastal watersheds of Los Angeles and Ventura Counties, that could affect the quality of the waters of the State, other than into a community sewer system, shall file with the Regional Board a report of waste discharge (ROWD).
3. Water Code section 13264 provides that no person may discharge waste unless they have filed a ROWD and until the Regional Board has issued waste discharge requirements under section 13263 or waived such requirements under section 13269.
4. Pursuant to Water Code section 13269, the Regional Board adopted Order No. R4-2005-0080, the *Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands within the Los Angeles Region* (Conditional Waiver), on November

3, 2005. The Regional Board renewed the Conditional Waiver in Order No. R4-2010-0186 on October 7, 2010, and in Order No. R4-2015-0202 on October 8, 2015. The Conditional Waiver regulates discharges of waste from irrigated lands including surface discharges (also known as irrigation return flows or tailwater), subsurface discharges through drainage systems that lower the water table below irrigated lands (also known as tile drains), discharges to groundwater, and stormwater runoff flowing from irrigated lands. Discharges from irrigated lands can and do contain wastes, as defined in Water Code section 13050, that could affect the waters of the state. Agricultural activities can generate pollutants such as sediment, metals, salts, nitrogen, pesticides, herbicides, nutrients, and fertilizers. Unregulated discharges of water containing these pollutants from irrigated agricultural operations to receiving water bodies can degrade water quality and impair beneficial uses.

5. Order No. R4-2005-0080 required all existing commercial irrigated farming operations in the Los Angeles Region to submit a Notice of Intent to enroll in the Conditional Waiver, submit a Monitoring and Reporting Program (MRP) Plan, and submit a Quality Assurance Project Plan (QAPP), individually or as a member of a Discharger Group, by August 3, 2006. Public notification regarding the adoption of the Conditional Waiver included a Notice of Public Hearing on August 30, 2005, a September 27, 2005 newspaper notice published in the Ventura County Star, Thousand Oaks Star, Oxnard Star, Simi Valley Star, Moorpark Star, and Camarillo Star, as well as a letter mailed to agriculture stakeholders (addressed to interested parties) on April 17, 2006.
6. Agricultural dischargers may comply with Water Code section 13264 for discharges of waste from their irrigated agricultural lands by submitting an individual ROWD under section 13260, leading to individual waste discharge requirements under section 13263, or by submitting a Notice of Intent, either individually or as a member of a Discharger Group, to comply with the Conditional Waiver. Agricultural dischargers in Ventura County may join Ventura County Agriculture Irrigated Lands Group (VCAILG), or another Regional Board-approved Discharger Group, as a cost-effective way to comply with the requirements of the Conditional Waiver.
7. According to available records, including, but not limited to, information from the Ventura County Assessor, a Regional Board staff site visit on November 17, 2009, and prior testimony and evidence provided by the Discharger, a commercial irrigated farming operation is operated on the Discharger's property. A significant portion of the property is used to grow commercial citrus crops. The Discharger uses furrow irrigation to irrigate its citrus orchards, and applies nutrients to the soil. Some of the acreage is operated by a tenant who grows row crops and some is utilized for non-irrigated purposes (e.g., roads, buildings, and support structures). By owning and/or operating irrigated land, the Discharger is subject to the Conditional Waiver.
8. On January 23, 2007, the Regional Board's Executive Officer sent an official notice to the Discharger entitled "Notice to Comply with the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands within the Los Angeles

Region" (Notice to Comply). This Notice to Comply directed the Discharger to comply with the terms of the Conditional Waiver by first submitting a Notice of Intent, MRP Plan, and a QAPP, individually or as a member of a Discharger Group. Alternatively, if the Discharger did not enroll in the Conditional Waiver, the Discharger was required to submit a ROWD in order to apply for individual waste discharge requirements. Finally, if the property was not commercially irrigated agriculture, and therefore not subject to the Conditional Waiver, the Discharger was asked to provide such information to the Regional Board. This Notice to Comply was sent to Balcom Ranch's mailing address - 943 South Burnside Avenue, Los Angeles, CA 90036. Although the Discharger has denied that they had previously seen the letter, the Discharger signed for subsequent correspondence sent to this address (see below) and has acknowledged that this is one of the mailing addresses the Discharger uses.

9. The Discharger failed to respond to the January 23, 2007 Notice to Comply, either by: a) submitting a Notice of Intent, MRP Plan, and QAPP to comply with the Conditional Waiver individually, b) providing proof of Discharger Group membership, c) submitting a ROWD, or d) by providing information showing that the operation was not a commercial irrigated farming operation.
10. On November 15, 2007, the Executive Officer issued the Discharger a Notice of Violation for each parcel for failure to enroll under the Conditional Waiver. These Notices of Violation once again directed the Discharger to immediately comply with the terms of the Conditional Waiver and to submit a Notice of Intent, MRP Plan, and QAPP, or to join a Discharger Group. Regional Board staff mailed the November 15, 2007 Notices of Violation by certified mail, and received a return receipt for each Notice of Violation confirming delivery to the Discharger at the same mailing address as the January 23, 2007 Notice to Comply.
11. The Discharger failed to respond to the November 15, 2007 Notice of Violation either by submitting a Notice of Intent, MRP Plan, and QAPP to comply with the Conditional Waiver, providing proof of Discharger Group membership, or submitting a ROWD.
12. On November 17, 2009, Regional Board staff conducted a site visit of APNs 046-0-150-140 and 046-0-150-320. The purpose of the visit was two-fold: to find a contact person for the Discharger, who had not responded to staff's prior contacts; and to verify that the property had not been converted to a non-agricultural use. Regional Board staff drove the southern boundary of parcel 046-0-150-140 (South Mountain Road), then driving through an open gate, the eastern boundary of parcel 046-0-150-140 ("north-south dirt road"), and the southern boundary of parcel 046-0-150-320 ("east-west dirt road"). Regional Board staff stopped at a barn/work area in an attempt to locate Discharger personnel. No one was present. Otherwise, Regional Board staff did not leave the dirt road. South Mountain Road is a public street. From South Mountain Road, Regional Board staff could see that at least some portion of the property was used for citrus groves, thereby verifying that a portion of the property's land use is irrigated agriculture.

Procedural History

13. On February 18, 2010, the Executive Officer issued Administrative Civil Liability Complaint No. R4-2010-0023 (hereafter Original Complaint) against the Discharger for failing to submit a ROWD or Notice of Intent to comply with the Conditional Waiver after being so requested by the Regional Board. In addition to seeking civil liability, the intent of the Original Complaint was to encourage compliance. The Executive Officer recommended that the Regional Board assess the Discharger \$35,700, provided that the Discharger submitted the required documentation to come into compliance within 30 days of the date of the Original Complaint. The Executive Officer sought higher penalties in the amount of \$400 per day for each day past 30 days from the date of the Original Complaint up to the date that the Discharger submitted the required documentation.
14. The Discharger waived the 90-day hearing requirement in order to engage in settlement discussions. Settlement discussions were not successful and the matter was scheduled for a hearing.
15. On March 17, 2011, a hearing before a Regional Board Hearing Panel was held on the Original Complaint. Based on the written record and evidence presented at the hearing, the Panel determined that the Discharger violated Water Code section 13260 by failing to submit a ROWD or a Notice of Intent, either individually or as a member of a Discharger Group, to comply with the Conditional Waiver, despite at least two notices by the Regional Board. As of the date of that hearing, the Discharger had still not come into compliance by submitting the required documentation. Therefore, the Panel recommended that the Regional Board impose administrative civil liability in the amount of \$193,850 on the Discharger pursuant to Water Code section 13261 for the pre- and post-Complaint violation.
16. On March 21, 2011, the Discharger notified Regional Board staff that it intended to join VCAILG. The Discharger thereafter provided Regional Board staff with copies of the enrollment documents. Based on these documents, it appears that the Discharger submitted them via fax to VCAILG on March 22, 2011, and VCAILG processed the Discharger's enrollment on April 5, 2011. Regional Board staff confirmed that the Discharger's enrollment was completed.
17. On July 14, 2011, after considering the Hearing Panel's report and making an independent review of the record, the Regional Board concurred with the Panel's findings and recommendation and issued Order on Complaint No. R4-2010-0023, assessing administrative civil liability on Balcom Ranch in the amount of \$193,850.
18. On August 15, 2011, the Discharger appealed the Regional Board's decision to adopt Order on Complaint No. R4-2010-0023 by filing a petition with the State Water Resources Control Board (State Water Board). On October 2, 2012, the State Water Board dismissed the petition.

19. The Discharger sought a petition for writ of mandate in the Superior Court (Court) for the County of Ventura challenging Order on Complaint No. R4-2010-0023. On April 28, 2015, Judge O'Neill issued a minute order expressing concern with the "enormity of the penalty" imposed pursuant to Water Code section 13261 and indicated he would remand the matter for further proceedings. The Court found that the Regional Board's findings concerning the Discharger's failure to comply with Water Code section 13260 are supported by substantial evidence. The Court further noted that the remand is limited to the issue of the penalty calculation and the appropriate weight to be given to the factors applicable pursuant to Water Code section 13327. In no particular order, the Court specifically stated that the most significant evidentiary factors contributing to its conclusion were the following:
- a) The nature of the offense, which involves no allegation of unlawful discharges;
 - b) The mechanical daily formula used to compute the post-complaint portion (\$158,500), which constituted over 80% of the total penalty. The Court found it noteworthy that a much harsher penalty formula was applied despite the fact that most of that time was prior to the hearing;
 - c) The fact that many months of time on which the penalty was based, both pre- and post-complaint, consisted of periods where no enforcement took place due to no apparent fault of the Discharger;
 - d) Despite a mutual agreement in 2010 to postpone the formal hearing for what turned out to be several months to allow for settlement discussions, the penalty mounted at the rate of \$400 per day;
 - e) The failure to give any mitigating weight to the evidence concerning the Discharger's negative financial situation, which was unrebutted; and
 - f) The Discharger's prompt compliance once the hearing actually took place.
20. On June 4, 2015, the Court entered Judgment Granting Peremptory Writ of Administrative Mandate and issued a Peremptory Writ of Administrative Mandate against the Regional Board. The writ ordered the Regional Board to vacate the administrative civil liability of \$193,850.
21. On October 2, 2015, pursuant to the Court's writ of mandate, the Regional Board vacated Order on Complaint No. R4-2010-0023.
22. As a result of the pre-hearing conference on November 12, 2015, the remand hearing on this Complaint has been scheduled to be conducted before the Regional Board during its meeting on April 14, 2016. The purpose of the hearing is to consider relevant evidence, testimony, and legal argument regarding the penalty calculation and the appropriate weight to be given to the factors applicable pursuant to Water Code section 13327.

Violation in Administrative Civil Liability Complaint No. R4-2010-0023-R

23. The Discharger violated Water Code section 13260 by failing to submit a ROWD for individual waste discharge requirements or a Notice of Intent, either individually or as a member of a Discharger Group, to comply with the Conditional Waiver by August 3, 2006, despite at least two subsequent notices by the Regional Board, and is therefore subject to civil liability pursuant to Water Code section 13261. The Discharger's liability as to this violation is not an issue in this remand proceeding because the Court found that the Regional Board's findings concerning the Discharger's failure to comply with Water Code section 13260 are supported by substantial evidence. The purpose of the remand hearing is to consider relevant evidence, testimony, and legal argument regarding the penalty calculation and the appropriate weight to be given to the factors applicable pursuant to Water Code section 13327.
24. The Executive Officer alleges that the number of days of violation is 1,222 days beginning on November 15, 2007, the date of the Notice of Violation, through March 21, 2011, the date prior to the Discharger submitting documentation to join VCAILG. While the Regional Board can assess penalties starting from the January 23, 2007 Notice to Comply, the Executive Officer is recommending that penalties be calculated starting from the November 15, 2007 Notice of Violation because there is documentation that the two Notices of Violation were received by the Discharger at its mailing address. Regional Board staff mailed the November 15, 2007 Notices of Violation by certified mail and received a return receipt confirming delivery to the Discharger.

Calculation of Penalties Under Water Code Section 13261

25. Water Code section 13261, subdivision (a), states, "A person who fails to furnish a report [ROWD] or pay a fee under Section 13260 when so requested by a regional board is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b)."
26. Water Code section 13261, subdivision (b)(1), states, "Civil liability may be administratively imposed by a regional board or the state board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount that may not exceed one thousand dollars (\$1,000) for each day in which the violation occurs."
27. Maximum Administrative Civil Liability Pursuant to Water Code section 13261: Pursuant to Water Code section 13261, subdivision (b)(1), civil liability may be administratively imposed by the Regional Board for violation of Water Code section 13260 in an amount not exceeding one thousand dollars (\$1,000) for each day in which the violation occurs. The Executive Officer alleges that the number of days of violation total 1,222 days spanning from November 15, 2007 through March 21, 2011.

The maximum administrative civil liability that may be assessed by the Regional Board during this timeframe for the violation pursuant to Water Code section 13261, subdivision (b)(1), is \$1,222,000 (one million two hundred twenty-two thousand dollars).

28. Minimum Administrative Civil Liability: Pursuant to the State Water Board's Water Quality Enforcement Policy (Enforcement Policy), administrative civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts or omissions that constitute the violation plus ten percent. The economic benefit gained by the Discharger's non-compliance has been calculated. The Executive Officer estimates that the Discharger's economic benefit of noncompliance is \$4,489.88. Therefore, the minimum administrative civil liability that must be assessed pursuant to the Enforcement Policy is \$4,938.87 (i.e.; $\$4,489.88 \times (\$4,489.88 \times 10\%)$).

Proposed Administrative Civil Liability

29. Pursuant to Water Code section 13327, in determining the amount of any discretionary civil liability imposed under Water Code section 13261, the Regional Board is required to take into account the nature, circumstances, extent, and gravity of the violation, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, 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.
30. On November 17, 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Enforcement Policy, which governs enforcement proceedings by the regional water quality control boards and the State Water Board under the Porter-Cologne Water Quality Control Act. The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a 10-step methodology for assessing discretionary administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a discretionary civil liability as outlined in Water Code section 13327.
31. The proposed administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment A, attached hereto and incorporated herein by reference. The proposed administrative civil liability takes into account the factors outlined in Water Code section 13327.
32. As described above, the maximum administrative civil liability for the violation described herein is \$1,222,000. The Enforcement Policy requires that the minimum administrative civil liability imposed be at least 10% higher than the estimated economic benefit of \$4,489.88, so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations. In this case, the economic benefit amount, plus 10%, is \$4,938.87. Based on consideration of the above

facts and after applying the penalty methodology and allowing for staff costs pursuant to the Enforcement Policy, the Executive Officer of the Regional Board proposes that civil liability be imposed administratively on the Discharger in the amount of **\$51,045**. The specific factors considered in this proposed penalty are detailed in Attachment A.

Regulatory Considerations

33. Administrative civil liability may be imposed pursuant to the procedures described in Water Code section 13323. An administrative civil liability complaint alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability to be imposed, and the proposed administrative civil liability.
34. Issuance of this Administrative Civil Liability Complaint to enforce Water Code Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321(a)(2).

BALCOM RANCH IS HEREBY GIVEN NOTICE THAT:

1. The Executive Officer of the Regional Board proposes an administrative civil liability in the amount of \$51,045. The amount of the proposed administrative civil liability is based upon existing evidence, a review of the factors cited in Water Code section 13327, as well as the State Water Board's Enforcement Policy, and includes consideration of the economic benefit or savings resulting from the violation.
2. As a result of the pre-hearing conference on November 12, 2015, the remand hearing on this Complaint has been scheduled to be conducted before the Regional Board during its meeting on April 14, 2016. This hearing date is conditioned on the Discharger's express waiver to hold a hearing within 90 days of issuance of this Complaint. At the pre-hearing conference, the Discharger specifically agreed to submit the Hearing Waiver Form waiving the 90-day hearing requirement no later than **January 12, 2016**. To do so, the Discharger should complete the attached Hearing Waiver Form (checking the box next to Option #2) and return it to the Prosecution Team and Advisory Team by **January 12, 2016**.
3. The Discharger may also waive its right to a hearing entirely and pay the proposed administrative civil liability. To do so, the Discharger should complete the attached Hearing Waiver Form (checking the box next to Option #1) and return it to the Prosecution Team, along with payment for the proposed administrative civil liability of **\$51,045**, by **January 19, 2016**.

Administrative Civil Liability Complaint No. R4-2010-0023-R
Balcom Ranch

4. If a hearing is held, the Regional Board will hear testimony and arguments and decide whether to affirm, reject, or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.
5. If the matter proceeds to hearing, the Executive Officer reserves the right to amend the proposed amount of civil liability to conform to the evidence presented.

Samuel Unger
Samuel Unger, PE
Executive Officer

Jan. 8, 2016
Date

Hearing Waiver Form
Attachment A: 10-Step Penalty Calculation Methodology

EXHIBIT JJ

Santa Ana Region (hereinafter "Regional Board"), may impose administrative civil liability, pursuant to California Water Code (hereinafter "CWC") §13385.

2. A hearing concerning this Complaint will be held before the Regional Board within ninety (90) days of the date of issuance of this Complaint, unless, pursuant to CWC §13323, Dischargers waive their right to a hearing. Waiver procedures are specified in the attached Waiver Form. The hearing on this matter is scheduled for the Regional Board's regular meeting on January 21, 2011 at the City Council Chambers of City of Loma Linda, California. Dischargers, or their representative(s), will have the opportunity to appear and be heard and to contest the allegations in this Complaint and the imposition of civil liability by the Regional Board.
3. If a hearing is held on this matter, the Regional Board will consider whether to affirm, reject, or modify the proposed administrative civil liability or whether to refer the matter to the Attorney General for recovery of judicial civil liability. If this matter proceeds to hearing, the Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent to the issuance of this Complaint through hearing.

THIS COMPLAINT IS BASED ON THE FOLLOWING FACTORS:

4. Caltrans is responsible for the design, construction, management, and maintenance of the State's highway system, including freeways, bridges, tunnels, maintenance facilities, and related properties, and facilities.
5. Caltrans contracted with MCM and Skanska to complete various segments of the I-215 Widening Project and with SANBAG for oversight responsibilities as described in a Construction Cooperative Agreement. While Caltrans is jointly and severally liable for all the violations described in this Complaint, MCM is jointly and severally liable for violations arising from the project "Segments" that it worked on: 3, 5 and 11, and SANBAG and Skanska are jointly and severally liable for violations arising from Segments 1 and 2.
6. Section 402(p) of the Clean Water Act requires that pollutants in storm water runoff from municipal separate storm sewer systems (MS4s), including highway and freeway systems, be regulated under the National Pollutant Discharge Elimination System (NPDES) permit. The Clean Water Act also requires that industrial activities, including construction activities on one or more acres, be regulated under the NPDES permit.
7. Storm water runoff from Caltrans highways, properties, activities and facilities, including construction activities, are regulated under the State Water Resources Control Board's Caltrans Storm Water Permit, Order No. 99-06-DWQ, NPDES No. CAS000003, (hereinafter "Caltrans Permit"). Provision A.1 of the Caltrans

Permit in part requires that the discharge of runoff from construction sites containing pollutants which have not been reduced using Best Available Technology economically achievable (BAT) for toxic pollutants and Best Conventional Pollutant Control Technology (BCT) for conventional pollutant to waters of the United States be prohibited.

8. Provision H.2 of the Caltrans Permit also requires that Caltrans construction activities shall be in compliance with the requirements of the State's General Permit for Construction Activities (hereinafter "Construction General Permit"). [Order No. 99-08-DWQ, renewed by Order No. 2009-0009-DWQ, NPDES No. CAS000002]. The violations cited below occurred prior to the effective date of Order No. 2009-0009-DWQ. As such any reference to the Construction General Permit is to Order No. 99-08-DWQ. The Caltrans and the Construction General Permits are hereinafter referred to as the "NPDES Permits."
9. The NPDES Permits require implementation of Best Management Practices (BMPs) to control and abate the discharge of pollutants in storm water discharges. Provision C.2 of the Construction General Permit requires the dischargers of storm water from construction sites to develop and implement a Storm Water Pollution Prevention Plan (hereinafter "SWPPP"), emphasizing BMPs, designed to reduce/eliminate migration of sediment and other pollutants to storm drains and/or receiving waters.
10. Provision E.1 of the Caltrans Permit requires the maintenance and implementation of a Storm Water Management Plan (hereinafter "SWMP"). The SWMP describes BMP categories used by Caltrans, the process to identify BMPs, and the BMP implementation process. The SWMP describes the minimum procedures and practices Caltrans shall use to reduce the discharge of pollutants in storm water discharges from facilities and activities owned or operated by Caltrans.
11. The BMPs identified in the SWMP are further described in detail in Appendix D of the SWMP, in the Statewide Storm Water Practice Guidelines (hereinafter "Guidelines"). The Guidelines describe in detail the minimum BMPs that should be implemented by Caltrans to reduce pollutants in storm water runoff. These BMPs should be designed to meet BAT/BCT standards for construction sites to control or reduce the discharge of pollutants to waters of the United States.
12. The SWPPP, SWMP, and Guidelines are enforceable components of the Caltrans Permit.
13. MCM and Skanska are responsible for complying with the terms of the NPDES Permits. SANBAG is responsible for the portions of the Project it oversaw pursuant to the Construction Cooperative Agreement. As used in this Complaint, SANBAG is considered a "contractor" on the Project.

14. The I-215 Widening Project includes the widening of I-215 from south of Orange Show Road overcrossing to University Parkway undercrossing, in the city of San Bernardino, San Bernardino County. The Project is being constructed in several phases. The project includes the addition of HOV lanes, construction of new bridges, widening of existing bridges, replacing existing bridges, construction of retaining walls and concrete barriers, improvements to local streets, improvements to drainage systems and construction of new drainage systems. A summary of the construction notifications received at the Regional Board office include:

- A) A Notice of Construction from Caltrans, dated January 14, 2008, for Segment 3 of the I-215 Widening Project: Segment 3 involves the widening of I-215 from 0.3 km south of Orange Show Road overcrossing to 0.3 km south of Rialto Avenue undercrossing. The Notice of Construction listed the tentative project start date as January 2, 2008 and the tentative end date as May 5, 2011. The total construction area was listed as 88.8 acres and the total disturbed area was listed as 29.1 acres. This segment included the widening of the bridge over Lytle Creek and the widening of an existing bridge over Warm Creek and construction of two new bridges over Warm Creek.
- B) A Notice of Construction from Caltrans, dated October 14, 2009, for Segments 1 and 2 of the I-215 Widening Project: Segments 1 and 2 involve the widening of I-215 from 0.2 km south of Redlands Loop overhead to 0.7 km north of 16th Street overcrossing and on Route 259 from 0.9 km North of Baseline Street overcrossing to Highland Avenue overcrossing. The Notice of Construction listed the tentative project start date as October 19, 2009 and the tentative end date as October 25, 2013. The total construction area was listed as 124.94 acres.
- C) A Notice of Construction from Caltrans, dated February 23, 2009, for Segments 5 and 11 of the I-215 Widening Project: Segments 5 and 11 involve the widening of I-215 from north of 16th Street to University Parkway undercrossing and on Interstate 210 from east of 27th Street undercrossing to the 210/215 interchange. The project will also include improvements to the I-215 and I-210 interchange. The Notice of Construction listed the tentative project start date as September 1, 2009 and the tentative end date as November 15, 2013. The total construction area was listed as 215 acres and the total disturbed area was listed as 128 acres. This segment included the construction of two infiltration basins and two detention basins along I-215 at southbound PM 9.84, northbound PM 9.87, southbound PM 9.74 and northbound PM 9.89, respectively.

15. The Caltrans Permit states, in part, the following:

A) General Discharge Prohibitions A.6:

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

B) Receiving Water Limitations for Construction Activities C-2.2:

"The SWPPP developed for the construction activity covered by this NPDES Permit shall be designed and implemented such that storm water discharges and authorized nonstorm water discharges shall not cause or contribute to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan and/or applicable RWQCB's Basin Plan."

C) Receiving Water Limitations for Construction Activities C-2.3:

"Should it be determined by Caltrans, SWRCB or RWQCB staff that storm water discharges and/or authorized nonstorm water discharges are causing or contributing to an exceedance of an applicable water quality standard, Caltrans shall: (a) Implement corrective measures immediately following discovery that water quality standards were exceeded...."

D) Construction Program Management H.4:

"Caltrans shall plan, site, and develop roads and highways in a manner that protects water quality, beneficial uses of water and minimizes erosion and sedimentation."

E) Highway Maintenance Activities I.a(3):

"Identify road segments with slopes that are prone to erosion and discharge of sediment and stabilize these slopes to the extent possible."

F) Construction Site BMPs 4.5:

"The temporary control practices deployed on construction sites will be regularly inspected in accordance with Section 4.2 of the Guidelines, and improperly installed or damaged practices shall be corrected immediately, or by a later date and time, if requested by the Contractor and approved by the RE [Resident Engineer] in writing, but not later than the onset of subsequent rain events."

16. The Construction General Permit states, in part, the following:

A) Discharge Prohibition A.3:

"Storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance."

B) Special Provision For Construction Activity C.2:

"All dischargers shall develop and implement a SWPPP in accordance with Section A: Storm Water Pollution Prevention Plan. The discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the BAT/BCT performance standard."

C) Section A – Storm Water Pollution Prevention Plan A.6:

"At a minimum, the discharger/operator must implement an effective combination of erosion and sediment control on all disturbed areas during the rainy season."

D) Section A – Storm Water Pollution Prevention Plan A.8:

"Sediment control BMPs are required at appropriate locations along the site perimeter and at all operational internal inlets to the storm drain system at all times during the rainy season."

E) Section A – Storm Water Pollution Prevention Plan A.11:

"...Inspections will be performed before and after storm events and once each 24-hour period during extended storm events to identify BMP effectiveness and implement repairs or design changes as soon as feasible depending upon field conditions...All corrective maintenance to BMPs shall be performed as soon as possible after the conclusion of each storm depending upon worker safety."

17. The Guidelines state, in part, the following:

- A) Table 4-4 specifies that slopes in active disturbed soil areas with slope inclinations greater than 1:20 (V:H) and slope lengths greater than 3 meters are required to have temporary sediment controls and barriers in place prior to predicted rain during the rainy season.

18. The SWPPP developed for Segment 3 states, in part, the following:

- A) Section 500.3.5 Sediment Controls, Implementation of Temporary Sediment Controls:

"During the rainy season, temporary sediment controls will be implemented at the draining perimeter of disturbed soil areas, at the toe of slopes steeper than 1:20, at storm drain inlets and at outfall areas at all times."

19. On December 29, 2008, Caltrans notified (via a Notice of Discharge or NOD) the Regional Board of the discharge of sediment laden storm water runoff from the construction site into Lytle Creek during a storm event that occurred on December 15, 2008. The report indicated that sediment overflowed a gravel bag berm located along the perimeter of the disturbed soil area along the northern channel wall of Lytle Creek. This is a violation of the General Discharge Prohibitions A.6 and Receiving Water Limitations for Construction Activities C-2.2 of the Caltrans Permit, Discharge Prohibitions Section A.3, Special Provisions for Construction Activity C.2, and SWPPP requirements A.6 of the General Permit. Caltrans failed to implement an effective combination of erosion and sediment controls to minimize erosion and effectively control the discharge of sediment from the disturbed soil area. The discharge of sediment from the construction site impacted or threatened to impact the beneficial uses of waters of the United States. Caltrans proposed to clean-up and maintain the previously placed BMP and indicated that the area will be monitored on a weekly basis and additional BMPs will be installed as necessary.
20. On July 1, 2009, the Caltrans Resident Engineer managing Segment 3 of the Project was informed of the results of a SWPPP review conducted on July 1, 2009 by the Caltrans San Bernardino County Storm Water Coordinator. The SWPPP review identified the need to remove built up sediment accumulated behind the gravel bag berm located along the perimeter of the disturbed soil area along the northern channel wall of Lytle Creek. This is a violation of Construction Site BMPs 4.5 of the Caltrans Permit and Section A.11 of the SWPPP requirements of the General Permit. The storm events that preceded the July 1, 2009 SWPPP review were on April 11, 2009 (rainfall total of 0.08 inches); March 23, 2009 (rainfall total of 0.16 inches); and a multiple day rain event that occurred on February 16 through February 17, 2009 (rainfall total of 1.18 inches). Caltrans failed to implement corrective maintenance of the BMPs in accordance with the requirements of the NPDES Permits. The NPDES Permits require that corrective maintenance of the BMPs be performed as soon as possible after the conclusion of each storm.
21. On December 14, 2009, the Caltrans Resident Engineer managing Segment 3 of the Project was informed of the results of a SWPPP review conducted on December 14, 2009 by the Caltrans San Bernardino County Storm Water Coordinator. The SWPPP review was conducted following a multiple day rain event that began on December 11, 2009 and ended on December 13, 2009, producing a total of 1.65 inches of rain. Findings of the SWPPP review include:

- A) The SWPPP review identified several storm drain system inlets that failed to have any sediment control BMPs in place prior to the rain event. The discharge of storm water runoff from the construction site into unprotected storm drain system inlets are violations of Sections A.8 and A.11 of the SWPPP requirements of the Construction General Permit and Section 500.3.5 of the SWPPP for Segment 3 of the I-215 Widening Project. The Contractor and/or Caltrans staff failed to perform effective inspections of the construction sites prior to the storm event. In addition, Caltrans failed to comply with the requirements that sediment control BMPs shall be installed at all storm drain system inlets during the rainy season. The following storm drain inlets failed to have sediment control BMPs in place during the rainy season:
- 1) An unprotected storm drain inlet was identified along the north bound I-215 at the Orange Show Road on-ramp.
 - 2) An unprotected storm drain inlet was identified along the north bound I-215 just past Lytle Creek Channel.
 - 3) An unprotected storm drain inlet was identified along the south bound I-215, adjacent to the new Inland Center Drive on-ramp.
- B) The SWPPP review also identified the need to remove built up sediment accumulated behind sediment control BMPs installed at several storm drain system inlets. The following storm drain system inlets required maintenance to remove accumulated sediment:
- 1) North bound I-215, at the Mill Street on ramp;
 - 2) North bound I-215, just past Mill Street, prior to Lytle Creek Channel;
 - 3) South bound I-215, prior to Lytle Creek Channel; and
 - 4) South bound I-215, just past Lytle Creek Channel;
- C) In addition, the SWPPP review emphasized the requirement to implement temporary or permanent soil stabilization BMPs on all non-active disturbed soil areas.
22. On January 8, 2010, Caltrans notified the Regional Board of the discharge of sediment laden storm water from the construction area into a storm drain system inlet and into Lytle Creek during storm events that occurred on December 11, 2009 through December 13, 2009 and on December 22, 2009. The Notice of Discharge reported:
- A) Sediment discharged into an unprotected storm drain system inlet located near the Mill Street on ramp to the north bound I-215. Caltrans reported that the drainage inlet had been uncapped prior to the rain event that occurred on December 22, 2009. The drain inlet was being prepared for installation of the permanent drainage structure when the rain event occurred. The failure to install adequate sediment control BMPs around the storm drain system inlet prior to the forecast storm resulted in the discharge of sediment into the storm drain system

and to waters of the United States. This is a violation of Sections A.8 and A.11 of the SWPPP requirements of the Construction General Permit.

B) Caltrans reported that during the storm events on December 11, 2009 through December 13, 2009 and December 22, 2009, sediment discharged into Lytle Creek from drainage areas located parallel to the north bound and south bound lanes of I-215. Caltrans failed to implement an effective combination of erosion and sediment controls to minimize erosion and effectively control the discharge of sediment from the disturbed soil area. The discharge of sediment from the construction site impacted or threatened to impact the beneficial uses of waters of the United States. The following discharges are violations of the General Discharge Prohibitions A.6 of the Caltrans Permit and Discharge Prohibitions Section A.3 and Section A.6 of the SWPPP requirements of the Construction General Permit.

- 1) Caltrans reported that sediment laden storm water overflowed a single row of gravel bags placed along the perimeter of the disturbed soil and discharged into Lytle Creek from a drainage area located parallel to the north bound I-215. Caltrans reported that following the storm events, built-up sediment was removed and additional gravel bags were placed along the gravel bag berm.
- 2) Caltrans reported that sediment laden storm water discharged directly into Lytle Creek from the disturbed soil area located along the south bound I-215 south of Lytle Creek. Caltrans reported that no sediment control BMPs were in place along the perimeter of the disturbed soil area prior to the rain events. Caltrans reported that following the rain events, sediment control BMPs were placed along the perimeter of the disturbed soil area along the channel wall of Lytle Creek. Caltrans reported that the area was graded and ready for permanent erosion control BMPs prior to the discharge events.
- 3) Caltrans reported that the disturbed soil areas would be sprayed with temporary soil stabilization by January 22, 2010 and permanent A/C dikes would be constructed along the roadway by January 22, 2010. Caltrans indicated that the A/C dikes will direct flows from paved surfaces to drainage structures and away from the disturbed soil areas susceptible to erosion.

23. On January 20, 2010, Regional Board staff conducted an unannounced inspection of the I-215 construction sites. Regional Board staff performed the inspection during a forecasted rain event. As reported by San Bernardino County Flood Control District, the rain event began on January 17, 2010 and ended on January 22, 2010. Regional Board staff inspected several locations along the I-215 Widening Project and identified several violations of the Caltrans and Construction General Permits. Regional Board staff noted that Caltrans failed to design and/or implement an effective combination of erosion and

sediment control BMPs at several locations. Inadequate construction entrance and exit tracking control BMPs, inadequate perimeter sediment control BMPs, inadequate storm drain system inlet protection BMPs, and inadequate stockpile management BMPs were observed. Specific examples of some of the observations noted during the inspection include:

- A) Caltrans and/or its contractors failed to take appropriate steps to minimize erosion of disturbed slopes that receive concentrated flows from paved surfaces. Significant erosion was observed on the disturbed slopes located along the north bound and south bound I-215, north and south of Lytle Creek. Regional Board staff noted that the slopes were not protected with linear sediment control barrier BMPs. This is a violation of Caltrans Permit and Guidelines. Table 4-4 of the Guidelines specifies that all active disturbed soil areas with slope inclinations greater than 1:20 (V:H) are required to have temporary sediment control BMPs in place during the rainy season. Caltrans reported in the January 8, 2010 NOD that by January 22, 2010, permanent A/C dikes or temporary sediment controls BMPs would be placed along the edge of the roadway to direct concentrated flows from the paved surface towards storm drain inlets located away from the disturbed slopes. Neither the A/C dike nor temporary sediment control BMPs were installed along the edge of the roadway prior to the forecast rain event. Regional Board staff observed sediment laden storm water runoff discharging into the storm drain inlet in the drainage area located east of the Mill Street on ramp to the north bound I-215.
 - B) Regional Board staff also observed erosion of the disturbed slope located east of the north bound I-215, between Rialto Avenue and 2nd Street, parallel to the 2nd Street off ramp. Regional Board staff noted temporary sediment control BMPs (fiber rolls) were installed at the toe of the slope but the sediment controls were overwhelmed with eroded sediment. Regional Board staff noted that eroded sediment exceeded the BMP holding capacity, as sediment was overtopping the fiber rolls. Regional Board staff also noted that the storm drain system inlet protection BMP installed at an inlet located down gradient from the toe of the slope required corrective measures. The temporary sediment control BMP installed at the inlet allowed storm water runoff to flow past the BMP without reducing the flow velocity before the runoff entered the storm drain system inlet.
24. On January 21, 2010, Regional Board staff conducted another unannounced inspection of the project site to inspect additional project locations and to assess whether any corrective measures had been implemented at the locations evaluated during the previous inspection. Regional Board staff identified several locations that were in violation of the Caltrans and Construction General Permits. Examples of some of the observations noted during the inspection include:

- A) Temporary sediment control BMPs still had not been installed along the disturbed slopes located along the north bound and south bound I-215, north and south of Lytle Creek. The failure to install sediment control BMPs along these slopes are a violation of the Caltrans Permit and Guidelines. Regional Board staff observed sediment laden storm water runoff discharge into Lytle Creek from the drainage area. The discharge of sediment laden storm water runoff from the drainage area discolored the waters in Lytle Creek. This is a violation of the General Discharge Prohibitions A.6 of the Caltrans Permit.
- B) Regional Board staff inspected the construction area along the north bound I-215, between Rialto Avenue and 2nd Street, to assess if the sediment control BMPs in place had been maintained. Regional Board staff noted that the linear sediment control BMPs placed along the toe of the slope had accumulated more sediment than previously observed. Sediment laden storm water runoff was observed discharging from the construction area and draining into storm drain system inlets located down gradient from the disturbed slope. Regional Board staff noted that the storm drain system inlet protection BMPs installed at inlets located down gradient from the slope still required corrective measures. Storm water runoff was observed flowing around the storm drain inlet protection BMPs. The failure to maintain an effective combination of erosion and sediment control BMPs resulted in the discharge of sediment laden storm water runoff into the storm drain system.
25. On February 2, 2010, Regional Board staff conducted a follow-up inspection of the project site to assess whether any corrective measures had been implemented since the previous two inspections. Examples of some of the observations noted during the inspection include:
- A) Temporary sediment control BMPs still had not been installed along the disturbed slopes located along the north bound and south bound I-215, north and south of Lytle Creek. The permanent A/C dikes or temporary sediment control BMPs proposed to be constructed by Caltrans by January 22, 2010, also had not been placed along the edge of the roadway.
- B) Regional Board staff noted that some areas of the sediment control BMPs installed along the north bound I-215 between Rialto Avenue and 2nd Street had been maintained. Accumulated sediment was removed from behind the linear sediment control BMPs installed along the base of the slope, parallel to Rialto Avenue. However, the linear sediment control BMPs installed along the toe of the slope between Rialto Avenue and 2nd Street, parallel to the north bound I-215 had not been maintained. Eroded sediment from the disturbed slope still overtopped the linear sediment control BMPs. The failure to maintain the sediment control BMPs is a violation of Section A.11 of the SWPPP requirements of the General Permit and Section 4.5 of the Construction Site BMPs requirements of the Caltrans Permit.

- C) Regional Board staff noted that some of the storm drain inlet protection BMPs previously identified as inadequately installed or maintained had been reconfigured and/or maintained.

26. On February 3, 2010, the Caltrans Resident Engineer managing Segment 3 of the Project was informed of the results of a SWPPP review conducted on February 3, 2010 by the Caltrans San Bernardino County Storm Water Coordinator. The SWPPP review noted that additional work is required to bring the construction activities into minimum compliance with the Caltrans requirements, including spraying non active slopes with soil stabilization BMPs, implementing additional sediment control BMPs, and placing permanent and or temporary dikes at the top of the disturbed slopes. Specific examples of some of the findings of the SWPPP review include:

- A) Recommended the placement of sand bag barriers or permanent dike where storm water is running from paved surface areas to slopes along north bound and south bound I-215 near the Mill Street on and off ramps to the I-215.
- B) Recommended the application of temporary soil stabilization BMPs to the slope east of the Mill Street on ramp to the north bound I-215, near Lytle Creek.
- C) Recommended the application of temporary soil stabilization BMPs to the slope west of the Mill Street off ramp along the south bound I-215, from approximately Lytle Creek to Mill Street.
- D) Recommended the placement of temporary down slope drains along the slope located south of Lytle Creek along the south bound I-215, as "...water is running down the slope and causing erosion."
- E) Specified that eroded areas needed to be filled in and temporary soil stabilization BMPs needed to be reapplied.
- F) Recommended the application of temporary sediment controls on slopes with inclinations greater than 1:20 and longer than 10 feet in length.

27. On February 16, 2010, Caltrans notified the Regional Board that sediment laden storm water runoff from the construction area discharged into Lytle Creek and into storm drain system inlets that discharge into Lytle Creek during the storm event that occurred on January 18 through January 22, 2010. Caltrans reported that an unknown amount of water sheet flowed into the drainage inlets and over the gravel bag sediment control BMP. This is a violation of Section A.6 of the SWPPP requirements of the Construction General Permit. Caltrans and/or its contractors failed to implement an effective combination of erosion and sediment controls to minimize erosion and effectively control the discharge of sediment

from the disturbed areas. Caltrans noted that all in-place BMPs were functioning as intended and any necessary adjustments to the BMPs would be made prior to forecasted rain events.

28. On February 22, 2010, Regional Board staff held a meeting with Caltrans staff to discuss concerns regarding the implementation of construction site storm water BMPs along the I-215 Widening Project. Regional Board staff requested a copy of the SWPPPs prepared for the I-215 Widening Project and copies of the inspection reports prepared by the contractor(s) and Caltrans staff from December 2009 through the date of submittal.
29. On February 25, 2010, Regional Board staff received a copy of the SWPPPs for Segments 1, 2, 3, 5 and 11 of the I-215 Widening Project. Regional Board staff also received copies of the Notices of Discharge and inspection reports performed by the contractors and Caltrans during the period from December 2009 through February 25, 2010.
30. After review of the SWPPPs and inspection reports, the Regional Board issued Caltrans a Notice of Violation (NOV) dated May 13, 2010, for violations noted by Regional Board staff during the inspections conducted during the period of January 20 through February 2, 2010. The NOV requested Caltrans to conduct a review of construction management practices as they relate to compliance with the Caltrans Permit and provide a written report to the Regional Board by May 28, 2010.
31. On May 28, 2010, the Regional Board received an electronic copy of Caltrans' written response to the May 13, 2010 NOV. Caltrans reported in its letter dated May 27, 2010, that the erosion of the damaged slopes located from Mill Street to north of Lytle Creek were addressed by implementing additional temporary water pollution control measures during the week of February 15, 2010. Caltrans reported that gravel bag berms were placed along the top of the damaged slopes and the damaged slopes were covered with plastic sheeting.
32. Storm water pollution control measures must be implemented on a proactive manner during all seasons while construction is ongoing. Caltrans and/or its contractors failed to implement an effective combination of erosion and sediment controls and other appropriate BMPs at several locations during the I-215 Widening Project. Evidence that Caltrans and/or its contractors failed to implement an effective combination of erosion and sediment control BMPs was demonstrated by the reoccurring presence of sediment behind control devices, erosion in disturbed soil areas, and the repeated discharge of sediment from disturbed soil areas to storm drain system inlets, and into Lytle Creek and Warm Creek, tributaries to the Santa Ana River, a water of the United States.

33. Caltrans and/or its contractors also failed to implement an effective inspection and a regular maintenance program. In compliance with the requirements of SWPPPs and the NPDES Permits, site inspections were to be conducted by the contractors and/or Caltrans staff prior to forecast storm events, at 24-hour intervals during extended rain events, and after rain events that cause runoff from the construction site, as well as weekly inspections during the rainy season. Results of these inspections shall document inadequate BMPs, locations that require maintenance, list corrective actions required, including any changes to the SWPPP and implementation dates. Regional Board staff note that the contractor(s) and/or Caltrans staff regularly inspected the construction sites but the inspection reports often appeared to be inadequate, particularly for Segment 3 of the I-215 Widening Project. For example, for Segment 3 of the I-215 Widening Project the contractor(s) and/or Caltrans staff failed to identify and install appropriate pollution control BMPs at several storm drain system inlets prior to storm events that occurred during the rainy season that resulted in the discharge of sediment from the construction site into the storm drain system and to waters of the United States. In addition, the inspection reports prepared by the contractor(s) and Caltrans staff on behalf of the Resident Engineer for Segment 3 of the I-215 Widening Project failed to document the need to repair slopes damaged by erosion and failed to recommend the installation of permanent or temporary soil stabilization or erosion/sediment controls and barriers to prevent further erosion of the damaged slopes.
34. As described above, beginning in the 2008-2009 rainy season and continuing into the 2009-2010 rainy season, Caltrans reported several instances where sediment discharged from disturbed soil areas into the storm drain system and/or directly into Lytle Creek. Caltrans and/or its contractors failed to implement the minimum water pollution control measures specified in the Guidelines during this period. Disturbed slopes located from Mill Street to north of Lytle Creek were not protected with appropriate sediment control barriers and/or an effective combination of erosion and sediment control BMPs to prevent erosion of the disturbed soil areas. The repeated discharge of sediment, lack of proactive repairs to fill and stabilize slopes damaged with rill and gully erosion, failure to identify the need to install water pollution control measures to direct concentrated flows away from the damaged slopes towards storm drain system inlets, and effectively stabilize the disturbed slopes in a timely manner, resulted in threatened and/or direct discharge of pollutants to waters of the United States during storm events that occurred during the 2008-2009 and 2009-2010 rain seasons.
35. Based on information available to Regional Board staff, beginning as early as February 2008, Caltrans and/or its contractors failed to implement temporary sediment control BMPs at the storm drain inlet located along the north bound I-215 near the Orange Show on-ramp (as noted in Finding No. 19). The construction schedule included in the SWPPP for Segment 3 of the I-215

Widening Project identified clearing and grubbing activities in Stage 1a of the segment during the month of January 2008. SWPPP measures were to be installed immediately following the clearing and grubbing activities. After a review of WPCD-2a, dated December 4, 2007, Regional Board staff noted that the storm drain inlet is shown in WPCD but sediment control BMPs were not required for the storm drain inlet. Although, as depicted in WPCD-2a, other storm drain inlets located in the same general area as the inlet noted above were required to be protected with temporary sediment control BMPs. As noted in Finding No. 19, the December 14, 2009 Caltrans SWPPP review identified the failure to install sediment control BMPs at the inlet. Following the SWPPP review, SWPPP Amendment No. 5, dated December 15, 2009, required the installation of sediment control BMPs at the storm drain inlet. The failure to install sediment control BMPs at the storm drain inlet during the rainy season is a violation of Section A.8 of the SWPPP requirements of the Construction General Permit and Section 500.3.5 of the SWPPP developed for Segment 3 of the I-215 Widening Project. Caltrans and its contractors failed to comply with the requirements of the Construction General Permit and SWPPP during the period of February 2008 to December 14, 2009.

36. Based on information available to Regional Board staff, beginning as early as March 2008, Caltrans and/or its contractors failed to implement temporary sediment control BMPs at the storm drain inlet located along the south bound I-215 near the Inland Center Drive on-ramp (as noted in Finding No. 19). The construction schedule included in the SWPPP for Segment 3 of the I-215 Widening Project identified clearing and grubbing activities for Stage 2 of the segment during the month of February 2008. The SWPPP measures were to be installed immediately following the clearing and grubbing activities. The WPCD-25, dated December 4, 2007, identified storm drain inlet protection BMPs for several storm drain inlets located along the south bound I-215 adjacent to the Inland Center Drive on-ramp. As noted above, the December 14, 2009 Caltrans SWPPP review identified the failure to install sediment control BMPs at the inlets. The failure to install sediment control BMPs at the storm drain inlets during the rainy season is a violation of Section A.8 of the SWPPP requirements of the Construction General Permit and Section 500.3.5 of the SWPPP developed for Segment 3 of the I-215 Widening Project. Caltrans and its contractors failed to comply with the requirements of the Construction General Permit and SWPPP during the period of March 2008 to December 14, 2009.
37. Based on information available to Regional Board staff, beginning as early as April 2008, Caltrans and/or its contractors failed to implement temporary sediment control BMPs at the storm drain inlet located along the north bound I-215 north of Lytle Creek (as noted in Finding No. 19). The construction schedule included in the SWPPP for Segment 3 of the I-215 Widening Project identified clearing and grubbing activities for Stage 1b of the segment during the months of January through March 2008. The SWPPP measures were to be installed

immediately following the clearing and grubbing activities. The WPCD-A2-10 dated September 30, 2008 identified the installation of sediment control BMPs along the north bound I-215 and along the perimeter of the disturbed soil area adjacent to the northern channel wall of Lytle Creek. The December 14, 2009 Caltrans SWPPP review noted that the storm drain inlet was not protected with sediment control BMPs. The failure to install sediment control BMPs at the storm drain inlet during the rainy season is a violation of Section A.8 of the SWPPP requirements of the Construction General Permit and Section 500.3.5 of the SWPPP developed for Segment 3 of the I-215 Widening Project. Caltrans and its contractors failed to comply with the requirements of the Construction General Permit and SWPPP during the period of April 2008 to December 14, 2009.

38. Caltrans and/or its contractors failed to ensure the sediment control BMPs installed along the east slope of the I-215 between Rialto Avenue and 2nd Street were maintained in accordance with the requirements of the Caltrans and Construction General Permits. As noted above, during an inspection of the construction site on January 20, 2010 Regional Board staff observed the temporary linear sediment control BMPs installed along the toe of the slope at the perimeter of the construction area were buried with sediment. During a follow-up inspection on February 2, 2010, Regional Board staff noted that the linear sediment control BMPs were still buried with sediment. The Storm Water Quality Construction Site Inspections performed by SANBAG staff on February 4th, February 5th, February 10th, and February 12th, 2010, also noted that the sediment control BMPs along the toe of the slope were buried with sediment and the BMPs required maintenance. The February 5, 2010 SANBAG inspection noted that additional silt fence or perimeter controls were needed at the toe of the slope and at the nearby storm drain system inlet. On February 8th and February 10th, 2010, SANBAG inspection reports indicated that concentrated flow blew through an earthen berm and gravel bag berm along the toe of the slope and discharged sediment into the storm drain system inlet located nearby. As reported in the San Bernardino County Flood Control District's Flood Warning System database, rain events occurred in the city of San Bernardino on January 17th through January 22nd, January 26th, February 5th through February 6th, and on February 9th, 2010. In accordance with the Section A.11 of the SWPPP requirements of Construction General Permit, maintenance of BMPs shall be performed after the conclusion of each storm. Regional Board staff noted that it was not until February 18, 2010, as noted in SWPPP Amendment No. 8, that additional perimeter controls were installed along the toe of the slope. The SWPPP amendment noted that 133-meters of silt fence were installed along the toe of the slope between Rialto Avenue and 2nd Street. By failing to implement timely maintenance of the linear sediment control BMPs and/or effective erosion and sediment control BMPs along the slope, sediment discharged from the construction area to nearby storm drain system inlets. Caltrans and its contractors failed to ensure compliance with the requirements of the Construction

General Permit and SWPPP during the period of January 20, 2010 to February 18, 2010.

39. Based on San Bernardino County storm event records, the above violations resulted in a discharge of sediment-laden storm water on 108 days during 2008-09 to 2009-10 rain seasons. During the same period, there were a total of 1,240 days of non-discharge violations. These are detailed in Attachment A and in Paragraphs 20(A), and 32 to 36, above. Because of the difficulty involved in determining the exact drainage area for each discharge point, staff did not attempt to calculate the discharge volume. As such no penalty has been assessed based on the discharge volume.
40. The discharge of sediment laden storm water from the construction activities impacted or potentially impacted the beneficial uses of the waters in the Santa Ana River. Sediment laden storm water runoff from the construction activities discharged sediment into Lytle Creek, Warm Creek, and into the storm drain systems that conveyed storm water runoff to Lytle Creek and/or Warm Creek. Lytle Creek and Warm Creek are tributary to Reach 4 of the Santa Ana River, a water of the United States.
41. The Water Quality Control Plan for the Santa Ana River Basin (Basin Plan) designates beneficial uses for waterbodies within the Region. The designated beneficial uses of Reach 4 of the Santa Ana River include: (1) Groundwater recharge; (2) Water contact recreation¹; (3) Non-contact water recreation; (4) Warm freshwater habitat; and (5) Wildlife habitat.
42. The Basin Plan specifies that "Inland surface waters shall not contain suspended or settleable solids in amounts which cause a nuisance or adversely affect beneficial uses..." The discharge of sediment from the construction activities to surface waters may cause nuisance, is deleterious to benthic organisms, may cause anaerobic conditions, can clog fish gill and interfere with respiration in aquatic fauna. Suspended and settleable solids also screen out light, hindering photosynthesis and normal aquatic plant growth and development.
43. Caltrans and its contractors violated the Caltrans Permit by failing to implement adequate pollution control measures and discharging pollutants from the construction site and by causing or threatening to cause a condition of pollution or nuisance in waters of the United States. Pursuant to Water Code §13385(a)(2), civil liability may be administratively imposed for the preceding violations.
44. Pursuant to CWC §13385(c), the Regional Board may impose civil liability administratively for noncompliance with the provisions of the Federal Water

¹ Access prohibited in some portions by San Bernardino County Flood Control.

Pollution Control Act on a daily basis at a maximum of ten thousand dollars (\$10,000) for each day in which the violation occurs in accordance with CWC §13385(c)(1); and 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 discharge but not cleaned up exceeds 1,000 gallons in accordance with CWC §13385(c)(2); or both.

45. Pursuant to CWC §13385(c), the maximum liability for the violations cited above is \$13,480,000, based on 108 days of discharge violations at \$10,000 per day, and 1,240 non-discharge days of violations at \$10,000 per day.
46. CWC §13385(e) specifies factors that the Regional Board shall consider in establishing the amount of civil liability. The Water Quality Enforcement Policy (hereinafter "Policy") adopted by the State Water Resources Control Board on November 19, 2009, establishes a methodology for assessing administrative civil liability pursuant to this statute. Use of methodology addresses the factors in CWC §13385(e). The policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.
47. Attachment A presents the administrative civil liability derived from the use of the penalty methodology in the Policy. In summary, this amount is based on the following:
 - A) The Policy establishes an alternative approach to assess civil liability on a per day basis for violations that last more than thirty (30) days. The daily assessment can be less than the calculated daily assessment if one of the following conditions is applicable: 1) the violation is not causing daily detrimental impacts to the environment or the regulatory program; 2) the violation results in no economic benefit from the illegal conduct that can be measured on a daily basis; or, 3) the violation occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. Regional Board staff determined that non-discharge violations noted in this Complaint did not cause daily detrimental impacts to the environment or the regulatory program. Using the alternative approach to penalty calculations for multiple day violations, the civil liability on a per day basis for non-discharge violations that occurred for more than thirty consecutive days were reduced in accordance with the Policy from 1,240 days to 85 days (see page 18 of the Policy and Attachment A for details).
 - B) For the discharge violations, the Policy also requires a consideration of the potential for harm from the discharge and the deviation from requirements. Using a potential harm factor of 5 and "moderate" deviation from requirement, a

per day factor of 0.100 is obtained from Table 2 of the Policy (see Page 15 of the Policy). Using this factor, the total assessment for the discharge violations is:
 $108 \text{ days} \times \$10,000/\text{day} \times 0.100 = \$108,000.$

- C) For the non-discharge violations, using a potential harm of "moderate" and "minor" deviation from requirement, a per day factor of 0.25 is obtained from Table 3 of the Policy (see Page 16 of the Policy). Using this factor, the total assessment for the non-discharge violations for 85 days is: $85 \text{ days} \times \$10,000/\text{day} \times 0.25 = \$212,500.$
- D) The total for the discharge and the non-discharge violations is $\$108,000 + \$212,500 = \$320,500.$
- E) This amount is then adjusted based on Caltrans' and its contractors' culpability, cleanup effort and cooperation, and history of violations. Caltrans and/or its contractors did not implement several recommendations from its own storm water coordinator; as such a culpability of factor of 1.5 is appropriate in this situation. A factor of 1 each is assigned for cleanup effort and cooperation, and history of violations. Using these factors the total assessed liability is: $\$320,500 \times 1.5 \times 1 \times 1 = \$480,750.$
- F) CWC Section 13385(e) and the Policy also require consideration of economic benefit or savings, if any, resulting from the violations and other matters as justice may require. Regional Board staff has determined that Caltrans and/or its contractors failed to implement erosion and sediment control BMPs along drainage areas located near Lytle Creek that resulted in erosion of the disturbed soil areas and discharge of sediment into the storm drain system and to waters of the United States. In addition, Caltrans and/or its contractors failed to install storm drain system inlet protection BMPs at several locations that resulted in the discharge of sediment into the storm drain system and to waters of the United States. Based on the United States Environmental Protection Agency BEN Model, Caltrans and its contractors saved approximately \$47,600 in deferred costs associated with its failure to implement BMPs specified in its SWPPPs, and by failing to comply with the other provisions of the Caltrans Permit. The Policy requires that the proposed assessment be at least 10% higher than the economic benefit or savings received.
- G) The costs of investigation and enforcement incurred by the Regional Board Prosecution staff are considered as one of the "other factors as justice may require," and should be included in the liability assessed. Investigation costs have been estimated to be \$46,950 (313 hours at \$150 per hour = \$46,950). Staff costs are then added to the proposed liability amount for a total of \$527,700 ($\$480,750 + \$46,950 = \$527,700$).

November 9, 2010

H) Caltrans and MCM are jointly and severally liable for violations arising from Segments 3, 5 and 11. Caltrans, SANBAG and Skanska are jointly and severally liable for violations arising from Segments 1 and 2. The investigation and enforcement costs have been equally divided between the two project portions, Segments 3, 5 and 11 on the one hand, and Segments 1 and 2 on the other hand.

48. After consideration of the factors in accordance with the CWC section 13385(e) and the Policy, the Division Chief proposes that civil liability be imposed on Caltrans in the amount of five hundred twenty-seven thousand seven hundred dollars (**\$527,700**) for discharging pollutants to waters of the United States in violation of the Caltrans Permit.

49. Due to the division of labor in constructing the Segments, the liability of the Contractors is as follows:

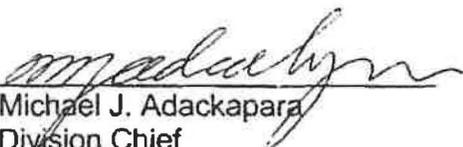
- A. MCM, Segments 3, 5 and 11: \$408,975.
- B. Skanska, Segments 1 and 2: \$118,725.
- C. SANBAG, Segments 1 and 2: \$118,725.
- D. Caltrans is jointly and severally liable for the \$527,700 sought in this Complaint.

WAIVER OF HEARING

Dischargers may waive their right to a hearing. If Dischargers choose to do so, please sign the attached Waiver Form and return it, together with a check for \$527,700 payable to the State Water Pollution Cleanup and Abatement Account, in the enclosed preprinted envelope. If Dischargers waive their right to a hearing and pay the assessed amount, the Regional Board may not hold a hearing regarding this Complaint.

If you have any questions, please contact Stephen D. Mayville at (951) 782-4992 or Kirk Larkin at (951) 320-2182.

11/09/10
Date


Michael J. Adackapara
Division Chief
Regional Board Prosecution Team

Discharger		Violations					
Caltrans, District 8 I-215 Widening Project		Failure to Protect Disturbed Slopes, Near Lytle Creek	Unprotected Storm Drain Inlet, Near Orange Show Rd.	Unprotected Storm Drain Inlet, Near Inland Center Dr.	Unprotected Storm Drain Inlet, Near Lytle Creek	Unprotected Storm Drain Inlet, Near Mill Street	Delayed BMP Maintenance, Between Rialto Ave & 2 nd St
Project Segment No.		3	3	3	3	3	1 & 2
Discharge Violations	Potential Harm Factor	5	5	5	5	5	5
	Days of Violation	32	27	21	21	1	6
	Statutory Maximum per Day	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000
	Per Day Adjustment Factor	0.100	0.100	0.100	0.100	0.100	0.100
	Per Day Assessment	\$32,000	\$27,000	\$21,000	\$21,000	\$1,000	\$6,000
	Discharge Volume, Gallons	-	-	-	-	-	-
	Statutory Maximum per Gallon	-	-	-	-	-	-
	Per Gallon Assessment	-	-	-	-	-	-
Non-Discharge Violations	Days of Violation	244	350	327	296	-	23
	Multiple Day Violations (Number of days reduced per Policy)	14	17	16	15	-	23
	Statutory Maximum per Day	\$10,000	\$10,000	\$10,000	\$10,000	-	\$10,000
	Per Day Adjustment Factor	0.25	0.25	0.25	0.25	-	0.25
	Per Day Assessment	\$35,000	\$42,500	\$40,000	\$37,500	-	\$57,500
Initial Amount of Liability		\$67,000	\$69,500	\$61,000	\$58,500	\$1,000	\$63,500
Conduct Adjustment Factors	Culpability	1.5	1.5	1.5	1.5	1.5	1.5
	Cleanup and Cooperation	1.0	1.0	1.0	1.0	1.0	1.0
	History of Violations	1.0	1.0	1.0	1.0	1.0	1.0
Initial Base Liability Amount		\$100,500	\$104,250	\$91,500	\$87,750	\$1,500	\$95,250
Total Base Liability Amount		\$480,750					
Staff Costs (Equally divided between the contractors)		\$46,950					
Economic Benefit		\$47,600					
Final Liability Amount		\$527,700					

EXHIBIT KK

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

In the matter of:)	
)	
Eastern Municipal Water District)	Order No. R9-2015-0048
)	
Sanitary Sewer Overflow From Temecula Valley;)	Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order
)	
District Manhole #77)	
<hr/>		

Section I: Introduction

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order ("Stipulated Order" or "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 and State Water Resources Control Board Office of Enforcement Prosecution Team (Prosecution Team), and Eastern Municipal Water District (District) (collectively known as the Parties) and 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. The District owns and operates two sanitary sewer collection systems ("Eastern Municipal Water District Collection System [CS]" and "Temecula Valley CS"), and is regulated by State Water Board Order Nos. 2006-0003-DWQ and 2008-0002-EXEC, *Statewide General Waste Discharge Requirements for Sanitary Sewer Systems*. The Temecula Valley collection system is also regulated by San Diego Water Board Order R9-2007-0005, *Waste Discharge Requirements for Sewage Collection Systems in the San Diego Region*, which prohibits any discharge of sewage upstream of the wastewater treatment plant.

2. On January 3, 2013, the District became aware of a sanitary sewer overflow (SSO) from a manhole on the west side of Winchester Road, just south of Jean Nichols Road in Murrieta, California.¹ The District arrived on-site and discovered the manhole seeping sewage out of the rim of the manhole at the approximate rate of 1-2 gallons per minute. During a period from September 29, 2012² through January 3, 2013, the District discharged raw sewage from a manhole adjacent to Winchester Road into a vegetated sidewalk median, into the gutter, and eventually into a storm drain inlet which discharges to French Valley Creek, a water of the United States.

3. The Prosecution Team alleges the District caused the SSO due to its failure to properly inventory, inspect, and remove an existing sewer bulkhead installed during pipeline construction approximately 20 years prior to the use of the sewer line section brought online in September 2012 when a new housing development was opened. The District removed one bulkhead but was unaware of the second bulkhead downgradient of the first. Complete blockage in the sewer main line caused incoming raw sewage from new homes upstream of the sewer bulkhead to accumulate inside the sewer pipeline assets and eventually resulted in the SSO from District Manhole #77, located in a landscaped median between Winchester Road and an adjacent pedestrian sidewalk. As a result of this SSO, the District upgraded its August 2012 "Pre-Partial Release" procedures for sewers to ensure that sewers are more thoroughly checked and inspected prior to placing newly constructed sewers in use.

4. The District conducted engineering studies (including a geotechnical field investigation/soils testing by an outside contractor and a water balance analysis) to assist with determination of the SSO volume estimate. The District's estimate for total gallons discharged is 259,300 gallons, with 3,829 gallons allegedly reaching surface waters (~1.5 percent) through storm floodway structures, which discharge into French Valley Creek. However, the Prosecution Team also conducted its own discharge volume calculation based on the manhole discharge flow rate and other planter inputs (precipitation, irrigation, etc.) assumed by the District and the infiltration rate determined appropriate by the Prosecution Team, and estimated the total discharge to French Valley Creek via the gutter and storm drain to be 132,663 gallons.

¹ The District states the SSO was first discovered by landscapers who indicated they noticed the spill on the morning of December 28, 2012.

² The District estimates the SSO began on September 29, 2012.

5. The Parties have engaged in settlement negotiations and agree to settle the matter without administrative or civil litigation by presenting this Stipulation to the San Diego Water Board for adoption as an Order pursuant to Government Code section 11415.60. To resolve by consent and without further administrative proceedings the alleged violation of Water Code Section 13385 as set forth herein and in Attachment A, the Parties have agreed to the imposition of ONE HUNDRED TEN THOUSAND SIX HUNDRED TWENTY FOUR DOLLARS AND TWENTY THREE CENTS (\$110,624.23) in administrative civil liability against the District. The District shall pay this amount to the State Water Resources Control Board Cleanup and Abatement Account (Cleanup and Abatement Account) no later than 30 days following the San Diego Water Board's adoption of this Order.

6. In the course of settlement discussions between the Parties, the Parties discussed adjustments to three specific factors in the State Water Board's Water Quality Enforcement Policy (Enforcement Policy) regarding the Discharger's history of violation, economic benefit of noncompliance, and discharge volume calculation. Pursuant to the Enforcement Policy, the Prosecution Team drafted a technical report to support a proposed administrative civil liability amount. After further discussion with the District, and in consideration of hearing and litigation risks, the Parties agreed to a history of violation factor of 1.2. In addition, the District provided more detailed information for the Prosecution Team to estimate the economic benefit of noncompliance. Finally, the Parties each presented their technical arguments and analysis with respect to the volume calculation. Though each Party believes its calculation is appropriate, in the interest of settling this matter and in consideration of hearing and litigation risks, the Parties agreed to establish an estimated volume amount of 68,246 gallons, which represents a compromised volume amount between each Party's position. These adjustments result in an agreed upon administrative civil liability amount of \$110,624.23 (including staff costs).

7. The Prosecution Team believes that the resolution of the alleged violation is fair, reasonable, and fulfills its enforcement objectives, that no further action is warranted concerning the alleged violation described above and in Attachment A, except as provided in this Stipulation, and that this Stipulation is in the best interest of the public.

Section III: Stipulations

The Parties stipulated to the following:

8. **Incorporation of Terms:** The Parties incorporate Paragraphs 1 through 7 by this reference as if set forth fully herein, stipulate to the entry of this Order as set forth below, and recommend that the San Diego Water Board issue this Order to effectuate the settlement.

9. **Administrative Civil Liability:** The District hereby agrees to pay the administrative civil liability totaling \$110,624.23 as set forth in Paragraph 5 of Section II herein. Within thirty (30) days of the effective date of this Order, the District agrees to remit, by check, ONE HUNDRED TEN THOUSAND SIX HUNDRED TWENTY FOUR DOLLARS AND TWENTY THREE CENTS (\$110,624.23), payable to the *State Water Pollution Cleanup and Abatement Account*, and shall indicate on the check the number of this Order. The District shall send the original signed check referencing Order number R9-2015-0048 to the Division of Administrative Services ATTN: Accounting, State Water Resources Control Board, 1001 I Street 18th Floor, Sacramento, California 95814 and shall send a copy to the Prosecution Team at the address listed below.

10. **Compliance with Applicable Laws:** The District understands that payment of administrative civil liability in accordance with the terms of this Stipulated Order and or compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that additional violations of the type alleged herein may subject it to further enforcement, including additional administrative civil liability.

11. **Party Contacts for Communications related to Stipulated Order:**

For the Prosecution Team:

Ms. Chiara Clemente
Enforcement Coordinator
Regional Water Quality Control Board, San Diego
2375 Northside Drive, Suite 100
San Diego, California 92108
Chiara.Clemente@waterboards.ca.gov

For the District:

Ms. Jayne Joy
Director of Environmental & Regulatory Compliance
Eastern Municipal Water District
PO Box 8300
Perris, California 92570
JoyJ@emwd.org

12. **Attorneys' Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

13. **Matters Addressed by Stipulation:** Upon the San Diego Water Board's adoption of this Stipulated Order, this Order represents a final and binding resolution and settlement of the violation alleged herein and in Attachment A, and all claims, violations or causes of action that could have been asserted against the District as of the effective date of this Stipulated Order based on the specific facts alleged in this Stipulated Order ("Covered Matters"). The provisions of this Paragraph are expressly conditioned on the payment of the administrative civil liability in accordance with this agreement.

14. **Public Notice:** The District understands that this Stipulated Order will be noticed for a 30-day public review and comment period prior to consideration by the San Diego Water Board. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the San Diego Water Board 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 District agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.

15. **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 Stipulated Order, will be adequate. In the event procedural objections are raised prior to the Stipulated 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 under the circumstances.

16. **No Waiver of Right to Enforce:** The failure of the Prosecution Team or San Diego Water Board to enforce any provision of this Stipulated 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 Team 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 Stipulated 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 Stipulation 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 under the circumstances.

18. **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.

19. **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.

20. **If Order Does Not Take Effect:** In the event that this Stipulated 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 the 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 Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on a Complaint for 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 District has been informed of the rights provided by California Water Code section 13323 subdivision (b), and hereby waives its right to a hearing before the San Diego Water Board prior to the adoption of the Stipulated Order.

22. **Waiver of Right to Petition:** The District hereby waives its right to petition the San Diego Water Board's adoption of the Stipulated 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.

23. **Covenant Not to Sue:** The District covenants not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, their officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any Covered Matter.

24. **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 District, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulated Order.

25. **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 the Order.

26. **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.

27. **Effective Date of Execution:** This Stipulated Order shall be effective and binding on the Parties upon the date the San Diego Water Board enters the Order.

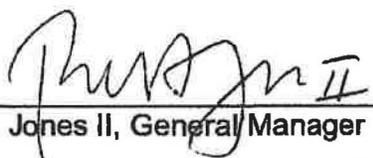
28. **Counterpart Signatures:** This Stipulated Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.

IT IS SO STIPULATED

California Regional Water Quality Control Board Prosecution Team
San Diego Region

By: 
James G. Smith, Assistant Executive Officer

Date: 25 April 2015

By: 
Paul D. Jones II, General Manager

Date: 4.20.15

Section IV: Findings of the San Diego Water Board

29. The San Diego Water Board incorporates Paragraphs 1 through 28 by this reference as if set forth fully herein.
30. The settlement of this matter is in the best interest of the People of the State. Therefore, to settle this matter, the District hereby agrees to comply with the terms and conditions of this Order.
31. The San Diego Water Board finds that the Recitals set forth herein in Section II are true.
32. This Stipulation and Order are severable; should any provision be found invalid the remainder shall remain in full force and effect.
33. In accepting this settlement, the San Diego Water Board has considered, where applicable, each of the factors prescribed in California Water Code sections 13327 and 13385. 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 herein and in Attachment A or otherwise provided to the San Diego Water Board. In addition to these factors, this settlement recovers the costs incurred by the Prosecution Team for this matter.
34. 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, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.
35. The San Diego Water Board is authorized to refer this matter directly to the Attorney General for enforcement if the District fails to perform any of its obligations under the Order.
36. Fulfillment of the District's obligations under the Order constitutes full and final satisfaction of any and all liability for each claim alleged herein in accordance with the terms of the Order.

Order No. R9-2015-0048

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.



DAVID W. GIBSON
Executive Officer

Date: 3 JUNE 2015

Attachment A: Enforcement Policy Methodology for administrative civil liability

ATTACHMENT A

EASTERN MUNICIPAL WATER DISTRICT

This document provides details to support recommendations for enforcement in response to an illegal Sanitary Sewer Overflow (SSO) discharge that occurred within the Eastern Municipal Water District's (District) sanitary sewer collection system located in Winchester, California and reflects information submitted by the District pursuant to an initial California Water Code (CWC) Section 13267 request and subsequent discussions between the District and the Prosecution Team.

1.0 Discharger Information

The District both owns and operates two sanitary sewer collection systems ("Eastern Municipal Water District Collection System [CS]" and "Temecula Valley CS"), and is regulated by Water Quality Order Nos. 2006-0003-DWQ and 2008-0002-EXEC (SSS WDR). The Temecula Valley collection system is also regulated by San Diego Water Board Order R9-2007-0005¹ which prohibits any discharge of sewage upstream of the wastewater treatment plant.

The District is divided into four sewer service areas (Hemet-San Jacinto, Moreno Valley, Temecula Valley, and Perris Valley), for collection, transmission, treatment, and disposal of wastewater. The District currently treats approximately 46 million gallons per day of wastewater at its four active regional water reclamation facilities.

2.0 Application of Water Board's Enforcement Policy²

On November 17, 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors in CWC section 13385(e), which requires the Regional Water Board to consider several factors when determining the amount of civil liability to impose, including "...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."

The following recommendations have been developed based on the procedures included in the Water Quality Enforcement Policy methodology:

SSO Violation #1

Illegal discharge from Temecula Valley CS reported on 1/3/2013

Alleged Cause of SSO: Failure of District to properly inventory, inspect, and remove an existing sewer bulkhead (hereafter, sewer plug) installed during pipeline construction ~20 years prior to use of sewer section brought online in September 2012.

¹ http://www.waterboards.ca.gov/sandiego/board_decisions/adopted_orders/2007/2007_0005.pdf and http://www.waterboards.ca.gov/sandiego/board_decisions/adopted_orders/2007/2007_0005.pdf

² Water Board's Adopted Enforcement Policy available at: http://www.swrcb.ca.gov/water_issues/programs/enforcement/policy.shtml

SSO Event Description: On January 3, 2013, the District became aware of a sanitary sewer overflow (SSO) from a manhole on the west side of Winchester Road, just south of Jean Nichols Road in Murrieta, California.³ The District arrived on-site and discovered the manhole seeping sewage out of the rim of the manhole at the approximate rate of 1-2 gallons per minute. During a period from September 29, 2012⁴ through January 3, 2013, the District discharged raw sewage from a manhole adjacent to Winchester Road into a vegetated sidewalk median, into the gutter, and eventually into a storm drain inlet which discharges to French Valley Creek, a water of the United States.

District alleges contributing factors to SSO include turnover of internal District sewer construction inspectors along with large geographic distances between the sewer plug and the new sewer lines brought online. District alleges that because of complete blockage in the sewer main line, incoming raw sewage from new homes upstream of sewer plug was unable to be conveyed out of the immediate area, accumulated inside these sewer pipeline assets, and eventually spilled from District Manhole (MH) #77

As a result of this SSO, the District upgraded its August 2012 "Pre-Partial Release" procedures for sewers to ensure that sewers are more thoroughly checked/inspected and any installed sewer plugs are discovered and removed prior to placing newly constructed sewers in use.

SSO VIOLATION #1 (STEP 1): POTENTIAL FOR HARM

FACTOR 1: HARM OR POTENTIAL HARM TO BENEFICIAL USES

- **SCORE = 3 [MODERATE THREAT]**

1. The existing beneficial uses for the receiving water (French Valley Creek) are: municipal and domestic supply, agricultural supply, industrial service supply, industrial process supply, non-contact water recreation, warm freshwater habitat, and wild habitat. The potential beneficial use is contact water recreation.⁵
2. Water quality monitoring by the District to assess this SSO did not begin until ~7-10 days following discovery of SSO, after the District completed its initial investigation.
3. Impacts to water quality are unknown. There were no health warning signs posted by the District.
4. There is potential public exposure to sewage from this overflow due to the spill location (adjacent to housing, a sidewalk, grass, and curb/gutter along major street) over extended period (total of 96 days of discharge).

FACTOR 2: PHYSICAL, CHEMICAL, BIOLOGICAL OR THERMAL CHARACTERISTICS

- **SCORE = 3 [ABOVE-MODERATE THREAT]**

Above-moderate risk or direct threat to potential receptors due high levels of suspended solids, pathogenic organisms, toxic pollutants, nutrients, oil, and grease, etc. that are found in sewage.

FACTOR 3: SUSCEPTIBILITY TO CLEANUP OR ABATEMENT

- **SCORE = 1 [<50% SUSCEPTIBLE TO CLEANUP OR ABATEMENT]**

Due to the low-flow nature of the SSO, the release went unnoticed for 96 days, during which time, no volume of the spill was recovered. Following discovery of the SSO, the District estimates approximately 100 gallons were recovered of the 259,300 gallons estimated to have been released.

FINAL SCORE = 7 [3 + 3 + 1]

³ The District states the SSO was first discovered by landscapers who indicated they noticed the spill on the morning of December 28, 2012.

⁴ The District estimates the SSO began on September 29, 2012.

⁵ http://www.waterboards.ca.gov/sandiego/water_issues/programs/basin_plan/docs/update082812/Chpt_2_2012.pdf

SSO VIOLATION #1 (STEP 2): ASSESSMENTS FOR DISCHARGE VIOLATIONS**VOLUME AND TOTAL NUMBER OF DAYS DETERMINATION****• 68,246 GALLONS**

The District conducted engineering studies (including a geotechnical field investigation/soils testing by an outside contractor and a water balance analysis) to assist with determination of the SSO volume estimate. The District's estimate for total gallons discharged is 259,300 gallons over 96 days, with 3,829 gallons allegedly reaching surface waters (~1.5%) through storm floodway structures, which discharge into French Valley Creek. However, the Prosecution Team also conducted its own discharge volume calculation based on the manhole discharge flow rate and other planter inputs (precipitation, irrigation, etc.) assumed by the District and the infiltration rate determined appropriate by the Prosecution Team, and estimated the total discharge to French Valley Creek via the gutter and storm drain to be 132,663 gallons.

Each Party presented its technical argument and analysis with respect to the volume calculation. Though each Party believes its calculation is appropriate, in the interest of settling this matter and in consideration of hearing and litigation risks, the Parties agreed to establishing an estimated volume amount of **68,246 gallons** which represents a compromised volume amount between each Party's respective position.

• DAYS OF VIOLATION

This violation occurred for a period of 84 days from October 12, 2012 (when the Prosecution Team estimates the spill reached receiving waters) to January 3, 2013 (the day the Discharger became aware of the SSO and responded). Pursuant to the Enforcement Policy, for violations that are assessed a civil liability on a per day basis, the initial liability should be assessed for each day up to thirty (30) days. For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. In this case, an alternate approach to the penalty calculation for multiday violations may be used because the violation occurred without the knowledge of the District, who therefore did not take action to mitigate or eliminate the violation until its discovery. The District became aware of the SSO on January 3, 2013 and the SSO was terminated on the same day. Therefore, the alternate approach for calculating multiday violations shall not be less than an amount calculated based on the initial Total Base Liability Amount for the first day of the violation, plus an assessment for each five day period of violation until the 30th day, plus an assessment for each thirty (30) days of violation. In this case, the days of violation are calculated as follows:

84 days of violation: Day 1, 5, 10, 15, 20, 25, 30, 60. Therefore, the penalty is calculated based on eight (8) days of violation.

DEVIATION FROM REQUIREMENT**• SCORE = MAJOR**

The deviation from requirements is scored as major because this SSO rendered two prohibitions set forth in Order No. 2006-0003-DWQ ineffective.

- District failed to comply with SSS WDRs, Prohibition C.1 (SSO was discharged to waters of U.S.).
- District failed to comply with SSS WDRs, Prohibition C.2 (SSO created a nuisance).

- Also, the District failed to comply with SSS WDRs, Provision D.6 (failed to prevent SSO by the exercise of reasonable control described in a certified SSMP for proper management, operation, and maintenance of the sanitary sewer system).

VOLUME ASSESSMENT

- SCORE = \$2.00 per gallon
 1. Pursuant to CWC section 13385(a), the District is subject to administrative civil liability for violating any waste discharge requirement. The Regional Water Board may impose administrative civil liability pursuant to Article 2.5 (commencing with section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following; (1) \$10,000 for each day in which the violation occurs; and (2) \$10 for each gallon of discharge that is not susceptible to cleanup or is not cleaned up in excess of 1,000 gallons.
 2. The Water Quality Enforcement Policy requires application of the per gallon factor to the maximum per gallon amounts allowed under statute for the violations involved, but allows for a \$2.00 per gallon maximum penalty for high volume discharges.

SSO VIOLATION #1 (STEP 4): ADJUSTMENT FACTORS**CULPABILITY****• SCORE = 1.2**

1. District failed to implement adequate control measures to comply with Provision D.13v(a) and D.13v(b) of the SSS WDRs by failing to properly inspect and test the new sewer system before placing in service, which was the root cause of the SSO.
2. Water quality monitoring by District to assess the nature and impact of the release did not occur until seven days following the initial notification and subsequent stoppage of release.

CLEANUP AND COOPERATION**• SCORE = 1.0 (neutral)**

The District has provided several technical reports detailing the SSO, field assessment data, and laboratory testing results, however the District's estimates for raw sewage released to the storm channel are not substantiated based on site-specific data it has collected and provided.

HISTORY OF VIOLATIONS**• SCORE = 1.2**

1. Previous to September 29, 2012, the estimated start date of the SSO, the District has reported 52 SSOs (from both collection systems) in the California Integrated Water Quality System (CIWQS) database:
 - a. Over 1,000,000 gallons spilled
 - b. Over 60,000 gallons reportedly reached surface waters
2. District performance metrics for spill recovery rates are very low (<10%), according to current CIWQS data available.

SSO VIOLATION #1 (STEP 5): DETERMINATION OF BASE LIABILITY

- Initial liability of $\$66,492.52 * 1.2 * 1.0 * 1.2 = \$95,749.23$

For All Violations**ABILITY TO PAY AND ABILITY TO CONTINUE IN BUSINESS (STEP 6):****• SCORE = 1.0 (neutral)**

The ability to pay is used as a consideration when assessing administrative civil liabilities. The ability to pay was calculated using the MUNIPAY financial calculator provided by the US EPA. The model takes into account the municipality's revenues, assets, liabilities, and local demographic information. Financial data used in MUNIPAY was extracted from the District's financial and budget information for 2013 available on its website. Demographic information is available from the 2000 and 2010 US census. Based on the analysis performed, the Prosecution Team determined that the District can afford to pay the final liability amount and the estimated continued recurring costs of compliance.

OTHER FACTORS AS JUSTICE MAY REQUIRE (STEP 7):**• STAFF COSTS = \$14,875**

Costs were calculated based on the following summary of work:

EASTERN MUNICIPAL WATER DISTRICT SSO CASE				
Staff Position	TASK	Estimated Hours	Hourly Rate	Cost (\$)
WRCE1	Review RB9 case files (NOV, Inspection report, discharger CIWQS data, etc)	20	\$125	2500
WRCE2	Review RB9 case files (NOV, Inspection report, discharger CIWQS data, etc)	10	\$125	1250
WRCE1	Development of Investigative NOV/13267 Order	15	\$125	1875
WRCE2	Development of Investigative NOV/13267 Order	5	\$125	625
Senior WRCE	Review/Approve Investigative NOV/13267 Order	5	\$125	625
WRCE1	Onsite technical meeting to follow-up on clarification of initial NOV/13267 response	15	\$125	1875
WRCE2	Onsite technical meeting to follow-up on clarification of initial NOV/13267 response	15	\$125	1875
WRCE1	Develop Draft Attachment A+penalty matrix	5	\$125	625
WRCE1	Present Draft Attachment A+penalty matrix (in settlement negotiations)	10	\$125	1250
WRCE2	Present Draft Attachment A+penalty matrix (in settlement negotiations)	10	\$125	1250
Senior WRCE	Discuss Draft Attachment A+penalty matrix (in settlement negotiations)	9	\$125	1125
TOTAL				14875

ECONOMIC BENEFIT (STEP 8):

- Pursuant to CWC section 13385(e), civil liability must be assessed at a minimum to recover the economic benefits, if any, derived from noncompliance with the order. The SSO in question was the result of inadequate training and written procedures related to activating new or existing sewer lines for use.

The Enforcement Policy states (p. 21) that the total liability shall be at least 10% higher than the economic benefit, "so that liabilities are not construed as the cost of doing business and the assessed liability provides meaningful deterrent to future violations."

The Prosecution Team's original economic benefit calculation estimated the District's economic benefit of noncompliance as \$103,343 based partly on an annual recurring training expense for a 4-hour refresher course on the District's Standard Operating Procedures (SOP) for 61 employees. The District provided additional information to the Prosecution Team resulting in a revised economic benefit calculation including 29 employees for a 2-hour training. Using this information, the revised economic benefit of noncompliance totaled \$33,199.

MAXIMUM AND MINIMUM LIABILITY (STEP 9):

- Minimum Liability Amount: \$36,518.90
Pursuant to the Enforcement Policy, the total proposed liability amount is at least 10% higher than the economic benefit. Therefore, the proposed minimum liability for economic benefit is calculated to be \$36,518.90.
- Maximum Liability Amount: \$1,512,469.
Maximum liability amount is determined based on the statutory maximums of \$10,000 per day and \$10 per gallon. Based on the originally alleged 84 days of violation and 67,246 gallons (68,246 – the first 1,000), the maximum liability amount is \$1,512,469.

FINAL LIABILITY AMOUNT (STEP 10):

Based on the above penalty factor analysis and consistent with the Enforcement Policy, the final liability amount proposed for the SSO violation is \$110,624.23.

Base Liability amount of \$95,749.23 + staff costs of \$14,875 = \$110,624.23

EXHIBIT LL

792 F.Supp. 339
United States District Court,
D. New Jersey.

STOECO DEVELOPMENT, LTD.; Stainton-Burrell Development, Ltd.; The Shore Memorial Hospital, and The Pennington School, Plaintiffs,

v.

The DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS OF THE
UNITED STATES of America, Defendant.

and

UNITED STATES of America, Plaintiff,

v.

STOECO HOMES, INC.; Stoeco Development, Ltd.;
Stainton-Burrell Development, Ltd.; The Shore
Hospital; and The Pennington School, Defendants.

Civ. No. 88-0054 (WGB).

|

April 14, 1992.

Developer and others moved for plenary hearing on issue of whether lands they were attempting to develop were "wetlands" within meaning of Clean Water Act. Army Corps of Engineers cross-moved for partial summary judgment on issue of developer's liability for violation of Clean Water Act. The District Court, Bassler, J., held that: (1) Corps had burden of proving existence of wetlands by preponderance of evidence, and (2) genuine issue of material fact concerning whether Corps' data underlying wetlands determination was gathered in reliable manner precluded summary judgment.

So ordered.

West Headnotes (5)

[1] **Environmental Law**

Presumptions, Inferences, and Burden of Proof

Environmental Law

Weight and Sufficiency

In an enforcement action brought under Clean Water Act, Army Corps of Engineers has burden of proving existence of wetlands by

preponderance of evidence. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

3 Cases that cite this headnote

[2] **Federal Civil Procedure**

Materiality and Genuineness of Fact Issue

For summary judgment purposes, disputed fact is "material" only if it would affect outcome of suit.

Cases that cite this headnote

[3] **Federal Civil Procedure**

Burden of Proof

Where party moving for summary judgment has made properly supported motion, it is incumbent upon nonmoving party to come forward with specific facts to show that there is genuine issue of material fact and to produce evidence to reasonably support jury verdict in its favor; once moving party has carried its burden, nonmoving party may not rest upon allegations or denials in its pleading. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

Cases that cite this headnote

[4] **Federal Civil Procedure**

Materiality and Genuineness of Fact Issue

For summary judgment purposes, "material fact" does not have to be element of movant's prima facie case; rather, it can be any fact that affect outcome of action under governing law. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[5] **Federal Civil Procedure**

Environmental Law, Cases Involving

Genuine issue of material fact as to whether data underlying Army Corps of Engineers' wetlands determination was gathered in reliable manner precluded summary judgment in favor of Corps; Corps has burden of proving existence of wetlands by preponderance of evidence, and thus issue as to whether Corps' data was gathered

in reliable manner was material. Fed.Rules
Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

Attorneys and Law Firms

*340 Michael Chertoff, U.S. Atty. by Irene Dowdy, Asst.
U.S. Atty., D. N.J., Trenton, N.J., for the Army Corps of
Engineers.

Levin & Hluchan by Richard M. Hluchan, Voorhees, N.J., for
Stoeco, et al.

OPINION

BASSLER, District Judge:

Plaintiffs Stoeco Development, Ltd., Stainton-Burrell
Development, Ltd., the Shore Memorial Hospital and the
Pennington School ("Stoeco") move for a plenary hearing
on the issue of whether the lands they are developing are
"wetlands" within the meaning of the Clean Water Act, 33
U.S.C. § 1251 *et seq.*, and 33 C.F.R. § 328.3(b). Defendant
Department of the Army, Corps of Engineers, ("Corps")
cross-moves for partial summary judgment on the issue of the
Stoeco's liability for violating 33 U.S.C. § 1251 *et seq.* For
the following reasons, the Corps' motion is denied; Stoeco's
motion is granted to the extent that the Corps must prove
the existence of wetlands at trial by a preponderance of the
evidence.

Factual History

The tract at issue is a 17 acre site in Ocean City, New Jersey,
which Stoeco was developing for residential use. In 1987,
the Corps made two determinations in regard to this tract.
First, the Corps found the tract to be "wetlands" within the
meaning of the Clean Water Act and the Code of Federal
Regulations. Second, the Corps determined that Stoeco had
placed fill on these wetlands without a permit, in violation
of 33 U.S.C. § 1344. Having made these determinations, the
Corps issued a "Cease and Desist" order to Stoeco on June
16, 1987, directing Stoeco to either remove the fill or apply
for an after-the-fact permit.

Admitting that it had placed fill on the site but denying that it
was wetlands, Stoeco filed an action to invalidate the "Cease
and Desist" order and to obtain a declaratory judgment that
the area in question was not wetlands. In response, the United
States filed an enforcement action seeking removal of the fill,
civil penalties and injunctive relief. These two actions were
subsequently consolidated into this lawsuit.

In the summer of 1988, Stoeco moved for partial summary
judgment on the limited issue of whether the Corps had
authority to issue the "Cease and Desist" order. In support
of this motion, Stoeco argued that because the administrative
record compiled by the Corps did not support the issuance
of the order, it was "arbitrary and capricious" within
the meaning of 5 U.S.C. § 706(2)(A) (the Administrative
Procedure Act).

The Corps cross-moved for summary judgment on three
issues: its authority to issue the order under 5 U.S.C. § 706;
its right to an order compelling Stoeco to remove the fill; and
Stoeco's liability for monetary damages.

In response to these motions, United States District Court
Judge Mitchell H. Cohen denied on November 2, 1988
Stoeco's motion for partial summary judgment and granted
partial summary judgment to the Corps solely on the ground
that the agency action at issue—the issuance of the "Cease
and Desist" order—was not "arbitrary and *341 capricious".
*Stoeco Development v. Department of the Army Corps of
Engineers*, 701 F.Supp. 1075, 1084 (D.N.J.1988).

In accordance with Judge Cohen's order enforcing the "Cease
and Desist" order, Stoeco applied for an after-the-fact fill
permit on May 7, 1990. The permit application was denied by
the Corps in January of 1991.

In November of 1991, Stoeco moved for a plenary hearing on
the issue of whether or not the tract was wetlands. In response,
the Corps asserted that Judge Cohen had already determined
that the tract was wetlands, and renewed its motion for partial
summary judgment.

Discussion

The motions before this court raise three basic issues:

(1) Did Judge Cohen rule that, in an enforcement action, the
Corps does not have to prove the existence of wetlands by a

preponderance of the evidence? Also, if Judge Cohen made such a ruling, is this court bound by it under the "law of the case" doctrine?

(2) Assuming that no such ruling was made, must the Corps, in an enforcement action, prove the existence of wetlands by a preponderance of the evidence? Alternatively, is the trial court bound by the Corps' determination that an area is wetlands unless that determination is found to be arbitrary and capricious?

(3) Assuming that, in an enforcement action, the Corps must prove the existence of wetlands by a preponderance of the evidence, is the Corps entitled to summary judgment on the basis of the affidavits submitted by the parties?

I. Judge Cohen's Order of November 2, 1988

The Corps asserts that Judge Cohen's earlier order disposes of Stoeco's motion. According to the Corps, Judge Cohen held that the Corps does not have to prove the existence of wetlands by a preponderance of the evidence. The Corps reads the order to mean that the Corps' wetlands determination in an enforcement action is only subject to judicial review under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A).

Stoeco, on the other hand, argues that Judge Cohen did not make such a ruling. Rather, it is argued that Judge Cohen merely held that the agency action at issue in the earlier motion—the Corps' decision to issue the "Cease and Desist" order—was to be judged by the arbitrary and capricious standard. Thus Stoeco contends that Judge Cohen never reached the issue of whether or not the Corp would have to prove the "existence of wetlands" at trial by a preponderance of the evidence.

After reviewing Judge Cohen's opinion, this court concludes that Stoeco's reading is the correct one. Judge Cohen's decision did not relieve the Corps of the burden of proving the existence of wetlands by a preponderance of the evidence. Nothing in the opinion indicates that Judge Cohen even considered this issue, let alone decided it. Stoeco moved for summary judgment solely on the ground that the agency action—the issuance of the "Cease and Desist" order—was arbitrary and capricious in light of the administrative record. While the Corps' cross motion did include demands for fines and an injunction, it is evident that Judge Cohen focused exclusively on a single question: whether the issuance of the "Cease and Desist" order was arbitrary and capricious. Having concluded that it was not, Judge Cohen merely

required Stoeco to comply with the Corps' order by applying, after the fact, for a § 404 permit. *Stoeco Development v. Department of the Army Corps of Engineers*, 701 F.Supp. 1075, 1080 (D.N.J.1988).

Since the key to resolving this dispute is not to be found in Judge Cohen's opinion, the court must consider the next issue.

II. The "Existence of Wetlands" Issue in an Enforcement Action

[1] Most of the seeming complexity in this case results from the parties' failure to frame this issue with precision. Boiling away all of the surplusage about "plenary hearings" and "standards of review," we are left with a very simple question: in an *342 enforcement action, does the Corps have to prove the existence of wetlands by a preponderance of the evidence?

The Corps' initial position is that it does not have such an obligation.¹ Instead, it asserts that its determination that an area is wetlands must be accepted by the court unless the determination is found to be arbitrary and capricious under 5 U.S.C. § 706(2)(A).

Stoeco acknowledges that the "arbitrary and capricious" standard is appropriate in a "citizens suit" brought under § 505(a)² of the Clean Water Act to challenge a wetlands determination by the Corps. But Stoeco argues that such a standard is not appropriate in an enforcement action where the Corps invokes the power of the court to impose fines and an injunction.

What is the appropriate standard of review in an enforcement action brought by the Corps is a question of first impression in the Third Circuit. There have been several enforcement actions in the Third Circuit in which the trial court, without objection from the Corps, took evidence and made a *de novo* factual finding on the existence of wetlands. See, *United States v. Ciampitti*, 583 F.Supp. 483 (D.N.J.1984), *aff'd* 772 F.2d 893 (3rd Cir.1985), *cert. denied*, 475 U.S. 1014, 106 S.Ct. 1192, 89 L.Ed.2d 307 (1986); *United States v. Malibu Beach, Inc.*, 711 F.Supp. 1301 (D.N.J.1989). This case is unique, however, in that the Corps resists any requirement to prove the existence of wetlands by a preponderance of the evidence in a plenary hearing.

As in all cases that involve a statutory regime, we begin our analysis with an examination of the relevant statutory

provisions and regulations. The federal Clean Water Act ("CWA") prohibits the discharge of fill materials into the "waters of the United States" unless authorized by a Corps permit issued pursuant to 33 U.S.C. § 1344. "Wetlands adjacent to navigable waters" and their tributaries are included within the definition of "waters of the United States." 33 C.F.R. § 328.3(a)(3). See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S.Ct. 455, 462, 88 L.Ed.2d 419 (1985) (upholding the inclusion of "wetlands adjacent to navigable waters" as within the scope of the Corps' regulatory authority). To be wetlands, an area must: (1) be durationally inundated or saturated; (2) be supportive of vegetation dependent on or adapted to saturated soils; and (3), contain saturated soils. 33 C.F.R. § 328.3(b) (1987)³.

Taken together, the CWA and the accompanying regulations provide a definition of wetlands and require a permit in order to fill them. They do not, however, answer the question of who, in an enforcement action, is to determine that an area meets the definition of wetlands. For an answer to this question this court is forced to look elsewhere.

The Corps urges that the answer is to be found in the Administrative Procedure Act, 5 U.S.C. § 706, arguing that this provision relieves the Corps of any obligation to prove the existence of wetlands in an enforcement action by a preponderance of the evidence. According to the Corps, the trial court must accept its administrative determination that the area is wetlands unless it finds the Corps' determination to be arbitrary and capricious. For several reasons, this court finds this interpretation of § 706 to be erroneous.

*343 In the only federal case to squarely address this issue, *Leslie Salt Company v. United States*, 660 F.Supp. 183 (N.D.Cal.1987), the Corps' reading of § 706 was expressly rejected.⁴ In a case remarkably similar to this one, *Leslie* held that the Corps must carry the burden of persuasion on the "existence of wetlands" issue in an enforcement action. In reaching this conclusion, *Leslie* reasoned that there was a difference between the standard of review which governed a "citizens suit" challenging a Corps' wetlands designation and the burden of proof in an enforcement action. *Id.*, 660 F.Supp. at 186.

This court finds the reasoning in *Leslie* compelling. In a "citizens suit" brought under § 505 of the CWA, a third party challenges the agency's action and essentially asks the Court to "second-guess" agency decisions and findings. In such a situation, the arbitrary and capricious standard

is entirely appropriate. The court has neither the training nor the inclination to serve as an oversight body for every agency decision. See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 906 (5th Cir.1983); *Golden Gate Audubon Society v. Army Corps of Engineers*, 700 F.Supp. 1549 (N.D.Cal.1988).

An enforcement action, however, is an entirely different matter. In an enforcement action, the Corps' decisions are not being questioned by a group of citizens. Rather, it is the Corps itself that is taking the initiative. In an enforcement action, the Corps seeks to invoke the power of the court in order to impose penalties and injunctive relief, including the removal of intrusive construction. In such a case, to apply an "arbitrary and capricious" standard to the Corps' assertion that certain lands are wetlands would turn the normal burden of proof at trial on its head.

The facts of this case dramatically illustrate the consequences that would result if this Court were to reject the reasoning of *Leslie*. Part of the relief sought by the Corps is the destruction of five completed homes with a total value of approximately \$450,000. Three of these homes have been sold to third parties and would have to be re-purchased if the Corps prevails. The Corps also seeks the destruction of sixteen partially completed homes, with construction costs totaling more than \$400,000. When one adds in the costs of site preparation, engineering costs, property taxes and legal fees, Stoeco's losses in this case could easily exceed \$2,000,000. To hold that the Corps may subject a property owner to such staggering losses without having to prove the existence of wetlands by a preponderance of the evidence seems contrary to basic principles of fairness.

This court's conclusion is bolstered by the impressive list of cases in which, in an enforcement action, the trial court took evidence and decided the "existence of wetlands" issue *de novo* without objection from the Corps. *Ciampitti, supra*; *United States v. Rivera Torres*, 656 F.Supp. 251 (D.P.R.1987), *aff'd*, 826 F.2d 151 (1st Cir.1987); *United States v. Larkins*, 657 F.Supp. 76 (W.D.Ky.1987), *aff'd*, 852 F.2d 189 (6th Cir.1988), *cert. denied*, 489 U.S. 1016, 109 S.Ct. 1131, 103 L.Ed.2d 193 (1989); *Leslie*, 700 F.Supp. 476 (N.D.Cal.1988), *rev'd on other grounds*, 896 F.2d 354 (9th Cir.1990), *cert. denied*, 498 U.S. 1126, 111 S.Ct. 1089, 112 L.Ed.2d 1194 (1991). See also *United States v. Riverside Bay View Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). This observation is not meant to imply that there is some sort of estoppel operating in this case. If the Corps

has been given the right to prevail at trial without proving the existence of wetlands by a preponderance of the evidence, its failure to assert that right in previous cases does not destroy that right. It seems inconceivable, however, that so many appellate courts could review so many trial transcripts without someone arguing that a *de novo* determination of the wetlands issue by the trial court was improper.

*344 For all of these reasons, this court finds that 5 U.S.C. § 706 does not, in an enforcement action, relieve the Corps of the obligation to prove the existence of wetlands by a preponderance of the evidence.

III. Propriety of Granting Summary Judgment

Summary judgment is appropriate here only if all the probative materials in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁵ Fed.R.Civ.P. 56(c). See *Hersh v. Allen Products Co.*, 789 F.2d 230, 232 (3rd Cir.1986); *Lang v. New York Life Ins. Co.*, 721 F.2d 118, 119 (3rd Cir.1983).

In determining whether any genuine issues of material fact remain, the court must resolve all reasonable doubts in favor of the non-moving party. *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 n. 2 (3rd Cir.1983), *cert. denied*, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984); *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3rd Cir.1972).

[2] That does not mean, however, that fanciful or irrelevant factual disputes will stave off summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The disputed fact must be "material." A disputed fact is "material" only if it would affect the outcome of the suit. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

[3] Further, where the moving party has made a properly supported motion for summary judgment, as the Corps has done in this case, it is incumbent upon the non-moving party to come forward with specific facts to show that there is a genuine issue of material fact. *Id.*, 477 U.S. at 248, 106 S.Ct. at 2510. Thus, once the moving party has carried its burden of establishing the absence of genuine issues of material fact, the non-moving party may not rest upon allegations or denials

in its pleading. Fed.R.Civ.P. 56(c). It must produce sufficient evidence to reasonably support a jury verdict in its favor. *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1355.

In this case, the Corps alleges that Stoeco violated the federal Clean Water Act by illegally filling in wetlands and seeks summary judgment as to Stoeco's liability. In order to establish liability at trial, the Corps would have to prove three elements by preponderance of the evidence: (1) that the area contained wetlands; (2) that it was filled by Stoeco; and (3) that there was no "fill permit". The second and third elements have been conceded by Stoeco. The existence of the first element, however, is contested.

The Corps contends that its experts have conclusively established that the tract contains wetlands. For this proposition, it relies primarily on the administrative record and the affidavit of Corps Biologist Michael Claffey, which conclude that all three of the wetlands characteristics mentioned previously existed on the tract in 1987. The Corps then points out that none of Stoeco's affidavits offers any affirmative evidence that the tract does not contain these wetlands elements. Rather, the Stoeco affidavits merely challenge Claffey's methods of gathering data as unsound.

From this, the Corps concludes that it is entitled to summary judgment. According to the Corps, whether or not Claffey's methods were sound is immaterial to the resolution of this dispute. The Corps maintains that in the face of Claffey's uncontradicted conclusion that the tract contains wetlands elements, Stoeco must produce evidence that affirmatively shows the non-existence of wetlands.

Stoeco denies any such obligation. It argues that since the Corps has the burden of proving the existence of wetlands at trial, Stoeco does not have to introduce *345 evidence that the tract is not wetlands in order to survive a motion for summary judgment. Rather, Stoeco argues that its evidence has indeed demonstrated a genuine material issue of fact: the soundness of the Corps' data collection methods and the accuracy of the government reports.

After examining the relevant submissions in some detail, this court is compelled to agree with Stoeco on this point and deny summary judgment. The flaw in the government's summary judgment argument is its assumption that the only possible "genuine issue of material fact" remaining is "the existence of wetlands." Once the government has made this assumption, it is only a short leap to its conclusion that because the

government has introduced evidence of the existence of wetlands, Stoeco must respond in kind and raise evidence of the non-existence of wetlands.

[4] [5] Such an argument fails to comprehend the meaning of "material fact" as that term is used in Fed.R.Civ.P. 56(c). A "material fact" does not have to be one of the elements of the movant's *prima facie* case. Rather, it can be any fact that might affect the outcome of the action under governing law. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510; *Metro Transp. Co. v. North Star Reinsurance Co.*, 912 F.2d 672 (3rd Cir.1990); *Beck v. Somerset Technologies Inc.*, 882 F.2d 993 (5th Cir.1989). Since the Corps has the burden of proving the existence of wetlands by a preponderance of the evidence,

whether the Corps' data was gathered in a reliable manner is obviously "material." If the fact-finder concludes that the Corps' methodology was flawed, the Corps may be unable to meet its burden of proving that the lands in question are "wetlands."

Because the Court finds that Stoeco's affidavits demonstrate a genuine issue as to whether the Corps' data was gathered in a reliable manner, and because it finds this issue to be material, the Corps' motion for partial summary judgment is denied.⁶

All Citations

792 F.Supp. 339, 22 Env'tl. L. Rep. 21,528

Footnotes

- 1 The Corps later amended this position somewhat. At oral argument, the Corps conceded that the Court should make the factual determination on the "existence of wetlands" issue, but argued however, that the Court should make such a determination solely on the basis of the administrative record.
- 2 § 505(a) of the CWA provides for "citizen suits" challenging violations of the Act or challenging an administrative failure to perform a non-discretionary duty.
- 3 Wetlands include "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b) (1987).
- 4 See also *Leslie Salt Company v. United States*, 700 F.Supp. 476, *rev'd on other grounds*, 896 F.2d 354 (9th Cir.1990), *cert. denied*, 498 U.S. 1126, 111 S.Ct. 1089, 112 L.Ed.2d 1194 (1991). The reversal was not predicated on the fact that the trial court took evidence and rendered a factual finding on the existence of wetlands.
- 5 For cases granting summary judgment in enforcement actions see *Leslie*, 660 F.Supp. at 185 n. 4.
- 6 The Corps also argues that the six most recent affidavits submitted by Stoeco must be excluded from the court's consideration because they were submitted after the record was "closed". The court finds such a contention to be without merit. The Corps has not offered any evidence that anyone "closed" the record in this matter and thus the six most recent affidavits were considered.

660 F.Supp. 183
United States District Court,
N.D. California.

LESLIE SALT CO., a Delaware corporation, Plaintiff,

v.

The UNITED STATES of America;
John O. Marsh, et al., Defendants.

UNITED STATES of America, Plaintiff,

v.

LESLIE SALT, CO., a Delaware corporation,
Cargill Inc., a Delaware corporation, Defendants.

Nos. C-85-8615-CAL, C-86-4187-CAL.

April 24, 1987.

Landowner brought action challenging jurisdiction of Corps of Engineers, and Government moved for bifurcation and stay. The District Court, Legge, J., held that decision on jurisdiction was to be made by district court in plenary trial, not by Corps of Engineers, though court could remand all or certain portions of case to Corps if, after trial, it determined that Corps had jurisdiction.

Motion denied.

West Headnotes (1)

[1] **Environmental Law**

Water, wetlands, and waterfront conservation

Environmental Law

Remand to administrative agency

When landowner brings action to challenge jurisdiction of Corps of Engineers, or Corps brings enforcement action which raises issue of jurisdiction over lands and landowner joins that issue, decision on jurisdiction is to be made by district court in plenary trial and not by Corps; if, after trial, court determines that Corps does have jurisdiction, then it may remand all or certain portions of case to Corps for other relevant determinations within Corps' jurisdiction. Federal Water Pollution Control Act

Amendments of 1972 (Clean Water Act), § 101 et seq., 33 U.S.C.A. § 1251 et seq.; 33 U.S.C.A. § 401 et seq.

8 Cases that cite this headnote

Attorneys and Law Firms

*184 Edgar B. Washburn, John P. Yeager, Washburn & Kemp, San Francisco, Cal., for plaintiff in No. C-85-8615-CAL.

Francis B. Boone, Asst. U.S. Atty., San Francisco, Cal., for defendants in No. C-85-8615-CAL.

E. Clement Shute, Jr., Shute, Mihaly & Weinberger, San Francisco, Cal., for Save San Francisco Bay Ass'n and the Nat. Audubon Soc.—defendants in intervention.

Edgar B. Washburn, David M. Ivester, Ronald E. Altman, Washburn & Kemp, San Francisco, Cal., for defendants in No. C-86-4187-CAL.

ORDER

LEGGÉ, District Judge.

The United States¹ has moved for a bifurcation and stay. In the motion the United States seeks: (1) to defer the present schedule for discovery, pretrial, and trial; (2) to have one issue—the central issue in these cases—determined initially by the Corps of Engineers; (3) to order the Corps to file its determination by a certain date; (4) to schedule this court's review of that determination, with briefing by the parties; and (5) to stay all other proceedings in the meantime. The central issue in both cases is whether the properties of Leslie² are wetlands within the meaning of section 404 of the Clean Water Act; 33 U.S.C. § 1344. Leslie opposes the motion and seeks to proceed to a plenary trial before this court on that central issue.

The motion has been briefed, argued and submitted. The court has considered the motion and supporting papers, the opposition and supporting papers, the extensive briefs of the parties, the arguments of counsel, the record, and the applicable authorities. The court is of the opinion that the motion should be denied for the reasons set forth below.

I.

In October 1985, the Corps asserted initial jurisdiction over Leslie's lands, as being wetlands within the meaning of the Act, and determined that Leslie was doing certain work on those wetlands without the permits required by the Act. The Corps issued a cease and desist order. Leslie then brought action No. C 85-8615 to contest the Corps' jurisdiction over its lands.

The United States moved to dismiss action No. C-85-8615, and this court denied the motion. The court determined that the cease and desist order was action by the Corps sufficient to show that the Corps had exercised initial jurisdiction over the lands, and that Leslie could then bring action No. C-85-8615 to contest the Corps' jurisdiction. The United States subsequently brought action No. C-86-4187, in which the Corps again asserts jurisdiction over the lands and seeks injunctive and declaratory relief and the imposition of civil penalties for alleged violations of the Clean Water Act and the River and Harbor Act (33 U.S.C. § 401, *et seq.*).

II.

This motion involves more than the procedural considerations usually involved in requests for bifurcation or stay. Instead, *185 resolution of this motion will determine the scope and legal standard for the proceedings in this court and for the decision of the central issue. If this court grants the motion, it is necessarily deciding that the Corps has the right to determine initially the issue of whether the lands are wetlands, and hence the Corps' own jurisdiction over Leslie's lands. And this court, then acting under the Administrative Procedure Act, 5 U.S.C. § 706, could only review the Corps' decision and its administrative record. The court could upset that decision only if it found that the Corps' decision was arbitrary, capricious, an abuse of discretion, or contrary to law. Obviously, that review by this court would be much less than a full trial on the merits.

Leslie contends that, having brought this action to contest the Corps' jurisdiction, and then having been sued by the United States to enforce that jurisdiction, it is entitled to a plenary trial. That is, Leslie argues that the issue of the Corps' jurisdiction should be determined by this court on the

evidence in a plenary trial, rather than by simply reviewing a decision by the Corps.

It should be noted that the Corps has no procedures, either by statute or by regulation, for a full hearing before it. Rather, the Corps conducts its own investigations and makes its determination without a formal hearing. The Corps does request information from the landowner, but the rights of the landowner are informal only. The constitutionality of this procedure has been upheld, *see Buttrey v. United States*, 690 F.2d 1170 (5th Cir.1982), *cert. denied*, 461 U.S. 927, 103 S.Ct. 2087, 77 L.Ed.2d 298 (1983). But there is obviously a considerable difference to the landowner whether the determination of jurisdiction is made by the Corps, followed by limited Administrative Procedure Act review, or is made by a district court.

III.

Neither the primary statute involved here (the Clean Water Act), nor the secondary statute (the River and Harbor Act), nor the Administrative Procedure Act provide an answer to the question of whether the Corps or this court should initially determine the Corps' jurisdiction when there is a challenge to that jurisdiction by the landowner.³ The court is therefore left to the reported decisions for guidance. And unfortunately the reported decisions do not offer a clear-cut answer. Indeed, language and reasoning can be cited from most of the relevant cases for either position.

IV.

The court concludes from the applicable case authorities that when a landowner brings an action to challenge the jurisdiction of the Corps, or the Corps brings an enforcement action which raises the issue of jurisdiction over the lands and the landowner joins that issue, the decision on jurisdiction is to be made by the district court in a plenary trial and not by the Corps. If after trial the court determines that the Corps does have jurisdiction, then it may remand all or certain portions of the case to the Corps for other relevant determinations within the Corps' jurisdiction.

The court believes that these conclusions are supported by *United States v. Riverside Bay View Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) (trial court determined property was wetland; appellate court

accepted factual determination of trial court, but found property not a wetland under new definition; Supreme Court reversed, holding property was a wetland); *Swanson v. United States*, 600 F.Supp. 802 (D.Idaho 1985) (held Corps made jurisdictional determination when sent "stop work" letter; no administrative remedies to exhaust; court determined jurisdictional issue on stipulated facts), *aff'd*, 789 F.2d 1368 (9th Cir.1986).⁴

*186 The court has reviewed the numerous cases cited by the United States, but believes that they are not applicable to this case. Those cases were ones in which: (1) the landowners participated in the administrative hearings or procedures before the Corps; *e.g.*, *Bailey v. United States*, 647 F.Supp. 44 (D.Idaho 1986); (2) the parties sought a permit from the Corps and did not contest its jurisdiction; *e.g.*, *Friends of the Earth v. Ilintz*, 800 F.2d 822 (9th Cir.1986); and *Buttrey v. United States*, *supra*; (3) the suit was brought by third parties, *e.g.*, *Friends of the Earth*, *supra*, and *Avoyelles Sportsmen's*

League v. Marsh, 715 F.2d 897 (5th Cir.1983); (4) the Corps had in fact taken no action; *e.g.* *Avoyelles*, *supra*; or (5) the Corps had asserted jurisdiction over some of the land and the issue was the extent of its jurisdiction, *e.g.* *Avoyelles*.

V.

IT IS THEREFORE ORDERED that:

The United States' motion for bifurcation and stay is denied. The jurisdictional issue of whether Leslie's lands are wetlands within the meaning of the Act will be determined by the court in a plenary trial.

All Citations

660 F.Supp. 183, 26 ERC 1150, 17 Env'tl. L. Rep. 21,006

Footnotes

- 1 The term the "United States" includes all defendants in action C-85-8615, and plaintiff in action C-86-4187.
- 2 The term "Leslie" shall include plaintiff Leslie Salt Company and defendant Leslie Salt Company and Cargill, Inc., defendants in action No. C-86-4187.
- 3 Nor does the legislative history of those statutes.
- 4 See also, *U.S. v. Byrd* 609 F.2d 1204 (7th Cir.1979) (affirming trial court's grant of summary judgment; trial court made independent determination of jurisdictional issue); *U.S. v. Sexton Cove Estates*, 526 F.2d 1293 (5th Cir.1976) (under Rivers & Harbors Act; reversed, in part and on the merits, trial court's plenary determination of jurisdiction over five landlocked canals); *Weiszmann v. District Engineers, U.S. Army Corp*, 526 F.2d 1302 (5th Cir.1976) (same outcome as in *Sexton Cove* in action brought by landowner); *U.S. v. St. Bernard Parish*, 589 F.Supp. 617 (E.D.La.1984) (plenary trial determining jurisdictional issue); *U.S. v. Lambert* 589 F.Supp. 366 (M.D.Fla.1984) (plenary trial determining property was a wetland; proof by preponderance of evidence was measure of government's burden of persuasion); *U.S. v. Ciampitti*, 583 F.Supp. 483 (D.N.J.1984) (in action for preliminary injunction, court made own determination that property was a wetland); *U.S. v. City of Fort Pierre*, 580 F.Supp. 1036 (D.S.D.1983) (plenary trial determining property was a wetland) *rev'd*, 747 F.2d 464 (9th Cir.1984) (holding property not a wetland); *Parkview Corp. v. Department of Army Corp of Engineers*, 469 F.Supp. 217 (E.D.Wis.1979) (on motion for summary judgment court determined no genuine issue of material fact on whether land was a wetland).

660 F.Supp. 183
United States District Court,
N.D. California.

LESLIE SALT CO., a Delaware corporation, Plaintiff,
v.

The UNITED STATES of America;
John O. Marsh, et al., Defendants.

UNITED STATES of America, Plaintiff,
v.

LESLIE SALT, CO., a Delaware corporation,
Cargill Inc., a Delaware corporation, Defendants.

Nos. C-85-8615-CAL, C-86-4187-CAL.

April 24, 1987.

Landowner brought action challenging jurisdiction of Corps of Engineers, and Government moved for bifurcation and stay. The District Court, Legge, J., held that decision on jurisdiction was to be made by district court in plenary trial, not by Corps of Engineers, though court could remand all or certain portions of case to Corps if, after trial, it determined that Corps had jurisdiction.

Motion denied.

West Headnotes (1)

[1] **Environmental Law**

Water, wetlands, and waterfront conservation

Environmental Law

Remand to administrative agency

When landowner brings action to challenge jurisdiction of Corps of Engineers, or Corps brings enforcement action which raises issue of jurisdiction over lands and landowner joins that issue, decision on jurisdiction is to be made by district court in plenary trial and not by Corps; if, after trial, court determines that Corps does have jurisdiction, then it may remand all or certain portions of case to Corps for other relevant determinations within Corps' jurisdiction. Federal Water Pollution Control Act

Amendments of 1972 (Clean Water Act), § 101 et seq., 33 U.S.C.A. § 1251 et seq.; 33 U.S.C.A. § 401 et seq.

8 Cases that cite this headnote

Attorneys and Law Firms

*184 Edgar B. Washburn, John P. Yeager, Washburn & Kemp, San Francisco, Cal., for plaintiff in No. C-85-8615-CAL.

Francis B. Boone, Asst. U.S. Atty., San Francisco, Cal., for defendants in No. C-85-8615-CAL.

E. Clement Shute, Jr., Shute, Mihaly & Weinberger, San Francisco, Cal., for Save San Francisco Bay Ass'n and the Nat. Audubon Soc.—defendants in intervention.

Edgar B. Washburn, David M. Ivester, Ronald E. Altman, Washburn & Kemp, San Francisco, Cal., for defendants in No. C-86-4187-CAL.

ORDER

LEGGE, District Judge.

The United States¹ has moved for a bifurcation and stay. In the motion the United States seeks: (1) to defer the present schedule for discovery, pretrial, and trial; (2) to have one issue—the central issue in these cases—determined initially by the Corps of Engineers; (3) to order the Corps to file its determination by a certain date; (4) to schedule this court's review of that determination, with briefing by the parties; and (5) to stay all other proceedings in the meantime. The central issue in both cases is whether the properties of Leslie² are wetlands within the meaning of section 404 of the Clean Water Act; 33 U.S.C. § 1344. Leslie opposes the motion and seeks to proceed to a plenary trial before this court on that central issue.

The motion has been briefed, argued and submitted. The court has considered the motion and supporting papers, the opposition and supporting papers, the extensive briefs of the parties, the arguments of counsel, the record, and the applicable authorities. The court is of the opinion that the motion should be denied for the reasons set forth below.

I.

In October 1985, the Corps asserted initial jurisdiction over Leslie's lands, as being wetlands within the meaning of the Act, and determined that Leslie was doing certain work on those wetlands without the permits required by the Act. The Corps issued a cease and desist order. Leslie then brought action No. C 85 -8615 to contest the Corps' jurisdiction over its lands.

The United States moved to dismiss action No. C-85-8615, and this court denied the motion. The court determined that the cease and desist order was action by the Corps sufficient to show that the Corps had exercised initial jurisdiction over the lands, and that Leslie could then bring action No. C-85-8615 to contest the Corps' jurisdiction. The United States subsequently brought action No. C 86-4187, in which the Corps again asserts jurisdiction over the lands and seeks injunctive and declaratory relief and the imposition of civil penalties for alleged violations of the Clean Water Act and the River and Harbor Act (33 U.S.C. § 401, *et seq.*).

II.

This motion involves more than the procedural considerations usually involved in requests for bifurcation or stay. Instead, *185 resolution of this motion will determine the scope and legal standard for the proceedings in this court and for the decision of the central issue. If this court grants the motion, it is necessarily deciding that the Corps has the right to determine initially the issue of whether the lands are wetlands, and hence the Corps' own jurisdiction over Leslie's lands. And this court, then acting under the Administrative Procedure Act, 5 U.S.C. § 706, could only review the Corps' decision and its administrative record. The court could upset that decision only if it found that the Corps' decision was arbitrary, capricious, an abuse of discretion, or contrary to law. Obviously, that review by this court would be much less than a full trial on the merits.

Leslie contends that, having brought this action to contest the Corps' jurisdiction, and then having been sued by the United States to enforce that jurisdiction, it is entitled to a plenary trial. That is, Leslie argues that the issue of the Corps' jurisdiction should be determined by this court on the

evidence in a plenary trial, rather than by simply reviewing a decision by the Corps.

It should be noted that the Corps has no procedures, either by statute or by regulation, for a full hearing before it. Rather, the Corps conducts its own investigations and makes its determination without a formal hearing. The Corps does request information from the landowner, but the rights of the landowner are informal only. The constitutionality of this procedure has been upheld, *see Buttrey v. United States*, 690 F.2d 1170 (5th Cir.1982), *cert. denied*, 461 U.S. 927, 103 S.Ct. 2087, 77 L.Ed.2d 298 (1983). But there is obviously a considerable difference to the landowner whether the determination of jurisdiction is made by the Corps, followed by limited Administrative Procedure Act review, or is made by a district court.

III.

Neither the primary statute involved here (the Clean Water Act), nor the secondary statute (the River and Harbor Act), nor the Administrative Procedure Act provide an answer to the question of whether the Corps or this court should initially determine the Corps' jurisdiction when there is a challenge to that jurisdiction by the landowner.³ The court is therefore left to the reported decisions for guidance. And unfortunately the reported decisions do not offer a clear-cut answer. Indeed, language and reasoning can be cited from most of the relevant cases for either position.

IV.

The court concludes from the applicable case authorities that when a landowner brings an action to challenge the jurisdiction of the Corps, or the Corps brings an enforcement action which raises the issue of jurisdiction over the lands and the landowner joins that issue, the decision on jurisdiction is to be made by the district court in a plenary trial and not by the Corps. If after trial the court determines that the Corps does have jurisdiction, then it may remand all or certain portions of the case to the Corps for other relevant determinations within the Corps' jurisdiction.

The court believes that these conclusions are supported by *United States v. Riverside Bay View Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) (trial court determined property was wetland; appellate court

accepted factual determination of trial court, but found property not a wetland under new definition; Supreme Court reversed, holding property was a wetland); *Swanson v. United States*, 600 F.Supp. 802 (D.Idaho 1985) (held Corps made jurisdictional determination when sent "stop work" letter; no administrative remedies to exhaust; court determined jurisdictional issue on stipulated facts), *aff'd*, 789 F.2d 1368 (9th Cir.1986).⁴

*186 The court has reviewed the numerous cases cited by the United States, but believes that they are not applicable to this case. Those cases were ones in which: (1) the landowners participated in the administrative hearings or procedures before the Corps; *e.g.*, *Bailey v. United States*, 647 F.Supp. 44 (D.Idaho 1986); (2) the parties sought a permit from the Corps and did not contest its jurisdiction; *e.g.*, *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir.1986); and *Buttrey v. United States*, *supra*; (3) the suit was brought by third parties, *e.g.*, *Friends of the Earth*, *supra*, and *Avoyelles Sportsmen's*

League v. Marsh, 715 F.2d 897 (5th Cir.1983); (4) the Corps had in fact taken no action; *e.g.* *Avoyelles*, *supra*; or (5) the Corps had asserted jurisdiction over some of the land and the issue was the extent of its jurisdiction, *e.g.* *Avoyelles*.

V.

IT IS THEREFORE ORDERED that:

The United States' motion for bifurcation and stay is denied. The jurisdictional issue of whether Leslie's lands are wetlands within the meaning of the Act will be determined by the court in a plenary trial.

All Citations

660 F.Supp. 183, 26 ERC 1150, 17 Env'tl. L. Rep. 21,006

Footnotes

- 1 The term the "United States" includes all defendants in action C-85-8615, and plaintiff in action C-86-4187.
- 2 The term "Leslie" shall include plaintiff Leslie Salt Company and defendant Leslie Salt Company and Cargill, Inc., defendants in action No. C-86-4187.
- 3 Nor does the legislative history of those statutes.
- 4 *See also*, *U.S. v. Byrd* 609 F.2d 1204 (7th Cir.1979) (affirming trial court's grant of summary judgment; trial court made independent determination of jurisdictional issue); *U.S. v. Sexton Cove Estates*, 526 F.2d 1293 (5th Cir.1976) (under Rivers & Harbors Act; reversed, in part and on the merits, trial court's plenary determination of jurisdiction over five landlocked canals); *Weiszmann v. District Engineers, U.S. Army Corp*, 526 F.2d 1302 (5th Cir.1976) (same outcome as in *Sexton Cove* in action brought by landowner); *U.S. v. St. Bernard Parish*, 589 F.Supp. 617 (E.D.La.1984) (plenary trial determining jurisdictional issue); *U.S. v. Lambert* 589 F.Supp. 366 (M.D.Fla.1984) (plenary trial determining property was a wetland; proof by preponderance of evidence was measure of government's burden of persuasion); *U.S. v. Ciampitti*, 583 F.Supp. 483 (D.N.J.1984) (in action for preliminary injunction, court made own determination that property was a wetland); *U.S. v. City of Fort Pierre*, 580 F.Supp. 1036 (D.S.D.1983) (plenary trial determining property was a wetland) *rev'd*, 747 F.2d 464 (9th Cir.1984) (holding property not a wetland); *Parkview Corp. v. Department of Army Corp of Engineers*, 469 F.Supp. 217 (E.D.Wis.1979) (on motion for summary judgment court determined no genuine issue of material fact on whether land was a wetland).

136 S.Ct. 1807
Supreme Court of the United States

UNITED STATES ARMY CORPS
OF ENGINEERS, petitioner
v.
HAWKES CO., INC., et al.

No. 15–290.
|
Argued March 30, 2016.
|
Decided May 31, 2016.

Synopsis

Background: Peat mining company and affiliated property owners brought action against Army Corps of Engineers, seeking judicial review of a revised jurisdictional determination that property on which company sought to mine peat contained “waters of the United States” subject to **Clean Water Act's** (CWA) permitting requirements. The United States District Court for the District of Minnesota, Ann D. Montgomery, J., 963 F.Supp.2d 868, entered an order granting Corps' motion to dismiss, and company appealed. The United States Court of Appeals for the Eighth Circuit, Loken, Circuit Judge, 782 F.3d 994, reversed. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] determination marked consummation of Corps' decisionmaking process;

[2] determination gave rise to direct and appreciable legal consequences;

[3] discharging fill without a permit was not an adequate alternative to judicial review under Administrative Procedure Act (APA); and

[4] applying for a discharge permit and then seeking review in event of an unfavorable decision was not an adequate alternative.

Affirmed.

Justice Kennedy filed a concurring opinion, in which Justices Thomas and Alito joined.

Justice Kagan filed a concurring opinion.

Justice Ginsburg filed an opinion concurring in part and concurring in judgment.

West Headnotes (8)

[1] Administrative Law and Procedure

Finality;ripeness

Two conditions generally must be satisfied for agency action to be final under the Administrative Procedure Act (APA): first, the action must mark the consummation of the agency's decisionmaking process, that is, it must not be of a merely tentative or interlocutory nature, and second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. 5 U.S.C.A. § 704.

3 Cases that cite this headnote

[2] Environmental Law

Finality

Army Corps of Engineers' revised jurisdictional determination that property on which company sought to mine peat contained “waters of the United States” subject to **Clean Water Act's** (CWA) permitting requirements marked consummation of Corps' decisionmaking process, as required to constitute final agency action under Administrative Procedure Act (APA); determination was issued after extensive factfinding regarding physical and hydrological characteristics of property, Corps ruled definitively that property contained jurisdictional waters by issuing an approved jurisdictional determination, and revision of Corps' approved determination based on new information did not make its otherwise definitive decision non-final.

5 U.S.C.A. § 704; Federal Water Pollution Control Act, § 301(a), 33 U.S.C.A. § 1311(a); 33 C.F.R. § 331.2.

Cases that cite this headnote

[3] **Administrative Law and Procedure**

Finality;ripeness

The possibility that an agency may revise its decision based on new information is a common characteristic of agency action and does not make an otherwise definitive decision non-final under the Administrative Procedure Act (APA). 5 U.S.C.A. § 704.

1 Cases that cite this headnote

[4] **Environmental Law**

Finality

Army Corps of Engineers' revised jurisdictional determination that property on which company sought to mine peat contained "waters of the United States" subject to **Clean Water Act's** (CWA) permitting requirements gave rise to direct and appreciable legal consequences, as required to constitute final agency action under Administrative Procedure Act (APA); determination denied company a five-year safe harbor from proceedings by Corps and Environmental Protection Agency (EPA) under CWA that a negative jurisdictional determination would have provided. 5 U.S.C.A. § 704; Federal Water Pollution Control Act, § 301(a), 33 U.S.C.A. § 1311(a); 33 C.F.R. § 331.2.

1 Cases that cite this headnote

[5] **Environmental Law**

Water pollution

Discharging fill material without a permit under **Clean Water Act** (CWA) while risking an enforcement action during which peat mining company could argue that no permit was required was not an adequate alternative to judicial review of Army Corps of Engineers' revised jurisdictional determination that

property on which company sought to mine peat contained "waters of the United States" subject to CWA's permitting requirements; discharging material under mistaken belief that property did not contain jurisdictional waters would expose company to civil penalties of up to \$37,500 for each day that it violated CWA, in addition to potential criminal liability. 5 U.S.C.A. § 704; Federal Water Pollution Control Act, §§ 301(a), 309(c), 33 U.S.C.A. §§ 1311(a), 1319(c); 33 C.F.R. § 331.2.

Cases that cite this headnote

[6] **Administrative Law and Procedure**

Finality;ripeness

Parties need not await enforcement proceedings before challenging final agency action under the Administrative Procedure Act (APA) where such proceedings carry the risk of serious criminal and civil penalties. 5 U.S.C.A. § 704.

Cases that cite this headnote

[7] **Environmental Law**

Water pollution

Applying for a discharge permit under **Clean Water Act** (CWA) and then seeking judicial review in event of an unfavorable decision was not an adequate alternative to judicial review of Army Corps of Engineers' revised jurisdictional determination that property on which company sought to mine peat contained "waters of the United States" subject to CWA's permitting requirements; Corps demanded that company undertake, among other things, a hydrogeologic assessment of rich fen system, including mineral/nutrient composition and pH of groundwater, and estimated cost of undertaking required analyses was more than \$100,000. 5 U.S.C.A. § 704; Federal Water Pollution Control Act, § 301(a), 33 U.S.C.A. § 1311(a); 33 C.F.R. § 331.2.

Cases that cite this headnote

[8] **Administrative Law and Procedure**

→ Judicial Review of Administrative Decisions

The Administrative Procedure Act (APA) presumes reviewability for all final agency action. 5 U.S.C.A. § 704.

1 Cases that cite this headnote

1809 Syllabus

The **Clean Water Act** regulates “the discharge of any pollutant” into “the waters of the United States.” 33 U.S.C. §§ 1311(a), 1362(7), (12). When property contains such waters, landowners who discharge pollutants without a permit from the Army Corps of Engineers risk substantial criminal and civil penalties, §§ 1319(c), (d), while those who do apply for a permit face a process that is often arduous, expensive, and long. It can be difficult to determine in the first place, however, whether “waters of the United States” are present. During the time period relevant to this case, for example, the Corps defined that term to include all wetlands, the “use, degradation or destruction of which could affect interstate or foreign commerce.” 33 CFR § 328.3(a)(3). Because of that difficulty, the Corps allows property owners to obtain a standalone “jurisdictional determination” (JD) specifying whether a particular property contains “waters of the United States.” § 331.2. A JD may be either “preliminary,” advising a property owner that such waters “may” be present, or “approved,” definitively “stating the presence or absence” of such waters. *Ibid.* An “approved” JD is considered an administratively appealable “final agency action,” §§ 320.1(a)(6), 331.2, and is binding for five years on both the Corps and the Environmental Protection Agency, 33 CFR pt. 331, App. C; EPA, Memorandum of Agreement: Exemptions Under Section 404(F) of the **Clean Water Act** § VI-A.

Respondents, three companies engaged in mining peat, sought a permit from the Corps to discharge material onto wetlands located on property that respondents own and hope to mine. In connection with the permitting process,

respondents obtained an approved JD from the *1810 Corps stating that the property contained “waters of the United States” because its wetlands had a “significant nexus” to the Red River of the North, located some 120 miles away. After exhausting administrative remedies, respondents sought review of the approved JD in Federal District Court under the Administrative Procedure Act (APA), but the District Court dismissed for want of jurisdiction, holding that the revised JD was not a “final agency action for which there is no other adequate remedy in a court,” 5 U.S.C. § 704. The Eighth Circuit reversed.

Held : The Corps' approved JD is a final agency action judicially reviewable under the APA. Pp. 1813 – 1816.

(a) In general, two conditions must be satisfied for an agency action to be “final” under the APA: “First, the action must mark the consummation of the agency's decisionmaking process,” and “second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177–178, 117 S.Ct. 1154, 137 L.Ed.2d 281. Pp. 1813 – 1815.

(1) An approved JD satisfies *Bennett* 's first condition. It clearly “mark [s] the consummation” of the Corps' decisionmaking on the question whether a particular property does or does not contain “waters of the United States.” It is issued after extensive factfinding by the Corps regarding the physical and hydrological characteristics of the property, see U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook 47–60, and typically remains valid for a period of five years, see 33 CFR pt. 331, App. C. The Corps itself describes approved JDs as “final agency action.” *Id.* § 320.1(a)(6). Pp. 1813 – 1814.

(2) The definitive nature of approved JDs also gives rise to “direct and appreciable legal consequences,” thereby satisfying *Bennett* 's second condition as well. 520 U.S., at 178, 117 S.Ct. 1154. A “negative” JD—*i.e.*, an approved JD stating that property does not contain jurisdictional waters—creates a five-year safe harbor from civil enforcement proceedings brought by the Government and limits the potential liability a property owner faces for violating the **Clean Water Act**. See 33 U.S.C. §§ 1319, 1365(a). Each of those effects is a legal consequence. It follows that an “affirmative” JD, like the one issued here, also has legal consequences: It deprives property

owners of the five-year safe harbor that “negative” JDs afford. This conclusion tracks the “pragmatic” approach the Court has long taken to finality. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681. Pp. 1814–1815.

(b) A “final” agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court. The Corps contends that respondents have two such alternatives: They may proceed without a permit and argue in a Government enforcement action that a permit was not required, or they may complete the permit process and then seek judicial review, which, the Corps suggests, is what Congress envisioned. Neither alternative is adequate. Parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of “serious criminal and civil penalties.” *Abbott*, 387 U.S., at 153, 87 S.Ct. 1507. And the permitting process is not only costly and lengthy, but also irrelevant to the finality of the approved JD and its suitability for judicial review. Furthermore, because the **Clean Water Act** makes no reference to standalone jurisdictional determinations, there is little basis for inferring anything from it concerning their reviewability. *1811 Given “the APA’s presumption of reviewability for all final agency action,” *Sackett v. EPA*, 566 U.S. —, —, 132 S.Ct. 1367, 1373, 182 L.Ed.2d 367 “[t]he mere fact” that permitting decisions are reviewable is insufficient to imply “exclusion as to other[.]” agency actions, such as approved JDs, *Abbott*, 387 U.S., at 141, 87 S.Ct. 1507. Pp. 1815–1816.

782 F.3d 994, affirmed.

ROBERTS, C.J., delivered the opinion of the Court, in which KENNEDY, THOMAS, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a concurring opinion, in which THOMAS and ALITO, JJ., joined. KAGAN, J., filed a concurring opinion. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment.

Attorneys and Law Firms

David R. Cooper, Chief Counsel, United States Army, Corps of Engineers, Washington, DC, Donald B. Verrilli, Jr., Solicitor General, John C. Cruden, Assistant Attorney General, Malcolm L. Stewart, Deputy Solicitor

General, Ginger D. Anders, Assistant to the Solicitor General, Aaron P. Avila, Jennifer Scheller Neumann, Robert J. Lundman, Attorneys, Department of Justice, Washington, DC, for petitioner.

Nancy Quattlebaum Burke, Gregory R. Mertz, of counsel, Gray Plant Mooty, Minneapolis, MN, M. Reed Hopper, Pacific Legal Foundation, Sacramento, CA, Mark Miller, Pacific Legal Foundation, Palm Beach Gardens, FL, for respondents.

Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

The **Clean Water Act** regulates the discharge of pollutants into “the waters of the United States.” 33 U.S.C. §§ 1311(a), 1362(7), (12). Because it can be difficult to determine whether a particular parcel of property contains such waters, the U.S. Army Corps of Engineers will issue to property owners an “approved jurisdictional determination” stating the agency’s definitive view on that matter. See 33 CFR § 331.2 and pt. 331, App. C (2015). The question presented is whether that determination is final agency action judicially reviewable under the Administrative Procedure Act, 5 U.S.C. § 704.

I

A

The **Clean Water Act** prohibits “the discharge of any pollutant” without a permit into “navigable waters,” which it defines, in turn, as “the waters of the United States.” 33 U.S.C. §§ 1311(a), 1362(7), (12). During the time period relevant to this case, the U.S. Army Corps of Engineers defined the waters of the United States to include land areas occasionally or regularly saturated with water—such as “mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [and] playa lakes”—the “use, degradation or destruction of which could affect interstate or foreign commerce.” 33 CFR § 328.3(a)(3) (2012). The Corps has applied that definition to assert jurisdiction over “270–to–300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States.”

*1812 *Rapanos v. United States*, 547 U.S. 715, 722, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (plurality opinion).¹

It is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does. The **Clean Water Act** imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit from the Corps. See 33 U.S.C. §§ 1311(a), 1319(c), (d), 1344(a). The costs of obtaining such a permit are significant. For a specialized “individual” permit of the sort at issue in this case, for example, one study found that the average applicant “spends 788 days and \$271,596 in completing the process,” without “counting costs of mitigation or design changes.” *Rapanos*, 547 U.S., at 721, 126 S.Ct. 2208. Even more readily available “general” permits took applicants, on average, 313 days and \$28,915 to complete. *Ibid.* See generally 33 CFR § 323.2(h) (limiting “general” permits to activities that “cause only minimal individual and cumulative environmental impacts”).

The Corps specifies whether particular property contains “waters of the United States” by issuing “jurisdictional determinations” (JDs) on a case-by-case basis. § 331.2. JDs come in two varieties: “preliminary” and “approved.” *Ibid.* While preliminary JDs merely advise a property owner “that there *may* be waters of the United States on a parcel,” approved JDs definitively “stat[e] the presence or absence” of such waters. *Ibid.* (emphasis added). Unlike preliminary JDs, approved JDs can be administratively appealed and are defined by regulation to “constitute a Corps final agency action.” §§ 320.1(a)(6), 331.2. They are binding for five years on both the Corps and the Environmental Protection Agency, which share authority to enforce the **Clean Water Act**. See 33 U.S.C. §§ 1319, 1344(s); 33 CFR pt. 331, App. C; EPA, Memorandum of Agreement: Exemptions Under Section 404(F) of the **Clean Water Act** § VI-A (1989) (Memorandum of Agreement).

B

Respondents are three companies engaged in mining peat in Marshall County, Minnesota. Peat is an organic material that forms in waterlogged grounds, such as wetlands and bogs. See Xuehui & Jinming, *Peat and Peatlands*, in 2 Coal, Oil Shale, Natural Bitumen, Heavy

Oil and Peat 267–272 (G. Jinsheng ed. 2009) (Peat and Peatlands). It is widely used for soil improvement and burned as fuel. *Id.*, at 277. It can also be used to provide structural support and moisture for smooth, stable greens that leave golfers with no one to blame but themselves for errant putts. See Monteith & Welton, *Use of Peat and Other Organic Materials on Golf Courses*, 13 Bulletin of the United States Golf Association Green Section 90, 95–100 (1933). At the same time, peat mining can have significant environmental and ecological impacts, see *Peat and Peatlands* 280–281, and therefore is regulated by both federal and state environmental protection agencies, see, e.g., Minn.Stat. § 103G.231 (2014).

Respondents own a 530-acre tract near their existing mining operations. The tract includes wetlands, which respondents believe contain sufficient high quality peat, suitable for use in golf greens, to extend *1813 their mining operations for 10 to 15 years. App. 8, 14–15, 31.

In December 2010, respondents applied to the Corps for a Section 404 permit for the property. *Id.*, at 15. A Section 404 permit authorizes “the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a). Over the course of several communications with respondents, Corps officials signaled that the permitting process would be very expensive and take years to complete. The Corps also advised respondents that, if they wished to pursue their application, they would have to submit numerous assessments of various features of the property, which respondents estimate would cost more than \$100,000. App. 16–17, 31–35.

In February 2012, in connection with the permitting process, the Corps issued an approved JD stating that the property contained “water of the United States” because its wetlands had a “significant nexus” to the Red River of the North, located some 120 miles away. *Id.*, at 13, 18, 20. Respondents appealed the JD to the Corps’ Mississippi Valley Division Commander, who remanded for further factfinding. On remand, the Corps reaffirmed its original conclusion and issued a revised JD to that effect. *Id.*, at 18–20; App. to Pet. for Cert. 44a–45a.

Respondents then sought judicial review of the revised JD under the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.* The District Court dismissed for want of subject matter jurisdiction, holding that the revised JD

was not “final agency action for which there is no other adequate remedy in a court,” as required by the APA prior to judicial review, 5 U.S.C. § 704. 963 F.Supp.2d 868, 872, 878 (Minn.2013). The Court of Appeals for the Eighth Circuit reversed, 782 F.3d 994, 1002 (2015), and we granted certiorari, 577 U.S. —, 136 S.Ct. 615, 193 L.Ed.2d 495 (2015).

II

The Corps contends that the revised JD is not “final agency action” and that, even if it were, there are adequate alternatives for challenging it in court. We disagree at both turns.

A

[1] In *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997), we distilled from our precedents two conditions that generally must be satisfied for agency action to be “final” under the APA. “First, the action must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Id.*, at 177–178, 117 S.Ct. 1154 (internal quotation marks and citation omitted).²

[2] The Corps does not dispute that an approved JD satisfies the first *Bennett* condition. Unlike preliminary JDs—which are “advisory in nature” and simply indicate that “there may be waters of the United States” on a parcel of property, 33 CFR § 331.2—an approved JD clearly “mark[s] the consummation” of the Corps’ decisionmaking process on that question, *Bennett*, 520 U.S., at 178, 117 S.Ct. 1154 (internal quotation marks omitted). It is issued after extensive factfinding by the Corps regarding the physical and hydrological characteristics of the property, see *1814 U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook 47–60 (2007), and is typically not revisited if the permitting process moves forward. Indeed, the Corps itself describes approved JDs as “final agency action,” see 33 CFR § 320.1(a)(6), and specifies that an approved JD “will remain valid for a period of five years,” Corps, Regulatory Guidance Letter No. 05–02, § 1(a), p.

1 (June 14, 2005) (2005 Guidance Letter); see also 33 CFR pt. 331, App. C.

[3] The Corps may revise an approved JD within the five-year period based on “new information.” 2005 Guidance Letter § 1(a), at 1. That possibility, however, is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal. See *Sackett v. EPA*, 566 U.S. —, —, 132 S.Ct. 1367, 1372, 182 L.Ed.2d 367 (2012); see also *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). By issuing respondents an approved JD, the Corps for all practical purposes “has ruled definitively” that respondents’ property contains jurisdictional waters. *Sackett*, 566 U.S., at —, 132 S.Ct., at 1374–1375 (GINSBURG, J., concurring).

[4] The definitive nature of approved JDs also gives rise to “direct and appreciable legal consequences,” thereby satisfying the second prong of *Bennett*, 520 U.S., at 178, 117 S.Ct. 1154. Consider the effect of an approved JD stating that a party’s property does *not* contain jurisdictional waters—a “negative” JD, in Corps parlance. As noted, such a JD will generally bind the Corps for five years. See 33 CFR pt. 331, App. C; 2005 Guidance Letter § 1. Under a longstanding memorandum of agreement between the Corps and EPA, it will also be “binding on the Government and represent the Government’s position in any subsequent Federal action or litigation concerning that final determination.” Memorandum of Agreement §§ IV–C–2, VI–A. A negative JD thus binds the two agencies authorized to bring civil enforcement proceedings under the **Clean Water Act**, see 33 U.S.C. § 1319, creating a five-year safe harbor from such proceedings for a property owner. Additionally, although the property owner may still face a citizen suit under the Act, such a suit—unlike actions brought by the Government—cannot impose civil liability for wholly past violations. See §§ 1319(d), 1365(a); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 58–59, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). In other words, a negative JD both narrows the field of potential plaintiffs and limits the potential liability a landowner faces for discharging pollutants without a permit. Each of those effects is a “legal consequence[]” satisfying the second *Bennett* prong. 520 U.S., at 178, 117 S.Ct. 1154; see also *Sackett*, 566 U.S., at —, 132 S.Ct., at 1371.

It follows that affirmative JDs have legal consequences as well: They represent the denial of the safe harbor that negative JDs afford. See 5 U.S.C. § 551(13) (defining “agency action” to include an agency “rule, order, license, sanction, relief, or the equivalent,” or the “denial thereof”). Because “legal consequences ... flow” from approved JDs, they constitute final agency action. *Bennett*, 520 U.S., at 178, 117 S.Ct. 1154 (internal quotation marks omitted).³

*1815 This conclusion tracks the “pragmatic” approach we have long taken to finality. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). For example, in *Frozen Food Express v. United States*, 351 U.S. 40, 76 S.Ct. 569, 100 L.Ed. 910 (1956), we considered the finality of an order specifying which commodities the Interstate Commerce Commission believed were exempt by statute from regulation, and which it believed were not. Although the order “had no authority except to give notice of how the Commission interpreted” the relevant statute, and “would have effect only if and when a particular action was brought against a particular carrier,” *Abbott*, 387 U.S., at 150, 87 S.Ct. 1507 we held that the order was nonetheless immediately reviewable, *Frozen Food*, 351 U.S., at 44–45, 76 S.Ct. 569. The order, we explained, “warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties.” *Id.*, at 44, 76 S.Ct. 569. So too here, while no administrative or criminal proceeding can be brought for failure to conform to the approved JD itself, that final agency determination not only deprives respondents of a five-year safe harbor from liability under the Act, but warns that if they discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties.

B

Even if final, an agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court. 5 U.S.C. § 704. The Corps contends that respondents have two such alternatives: either discharge fill material without a permit, risking an EPA enforcement action during which they can argue that no permit was required, or apply for a permit and seek judicial review if dissatisfied with the results. Brief for Petitioner 45–51.

[5] [6] Neither alternative is adequate. As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of “serious criminal and civil penalties.” *Abbott*, 387 U.S., at 153, 87 S.Ct. 1507. If respondents discharged fill material without a permit, in the mistaken belief that their property did not contain jurisdictional waters, they would expose themselves to civil penalties of up to \$37,500 for each day they violated the Act, to say nothing of potential criminal liability. See 33 U.S.C. §§ 1319(c), (d); *Sackett*, 566 U.S., at —, n. 1, 132 S.Ct., at 1370, n. 1 (citing 74 Fed.Reg. 626, 627 (2009)). Respondents need not assume such risks while waiting for EPA to “drop the hammer” in order to have their day in court. *Sackett*, 566 U.S., at —, 132 S.Ct., at 1372.

[7] Nor is it an adequate alternative to APA review for a landowner to apply for a permit and then seek judicial review in the event of an unfavorable decision. As Corps officials indicated in their discussions with respondents, the permitting process can be arduous, expensive, and long. See *Rapanos*, 547 U.S., at 721, 126 S.Ct. 2208 (plurality opinion). On top of the standard permit application that respondents were required to submit, see 33 CFR § 325.1(d) (detailing contents of permit application), the Corps demanded that *1816 they undertake, among other things, a “hydrogeologic assessment of the rich fen system including the mineral/nutrient composition and pH of the groundwater; groundwater flow spatially and vertically; discharge and recharge areas”; a “functional/resource assessment of the site including a vegetation survey and identification of native fen plant communities across the site”; an “inventory of similar wetlands in the general area (watershed), including some analysis of their quality”; and an “inventory of rich fen plant communities that are within sites of High and Outstanding Biodiversity Significance in the area.” App. 33–34. Respondents estimate that undertaking these analyses alone would cost more than \$100,000. *Id.*, at 17. And whatever pertinence all this might have to the issuance of a permit, none of it will alter the finality of the approved JD, or affect its suitability for judicial review. The permitting process adds nothing to the JD.

[8] The Corps nevertheless argues that Congress made the “evident []” decision in the **Clean Water Act** that a

coverage determination would be made “as part of the permitting process, and that the property owner would obtain any necessary judicial review of that determination at the conclusion of that process.” Brief for Petitioner 46. But as the Corps acknowledges, the **Clean Water Act** makes no reference to standalone jurisdictional determinations, *ibid.*, so there is little basis for inferring anything from it concerning the reviewability of such distinct final agency action. And given “the APA’s presumption of reviewability for all final agency action,” *Sackett*, 566 U.S., at —, 132 S.Ct., at 1373, “[t]he mere fact” that permitting decisions are “reviewable should not suffice to support an implication of exclusion as to other[]” agency actions, such as approved JDs, *Abbott*, 387 U.S., at 141, 87 S.Ct. 1507 (internal quotation marks omitted); see also *Sackett*, 566 U.S., at —, 132 S.Ct., at 1373 (“[I]f the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA’s presumption of reviewability ..., it would not be much of a presumption at all”).

Finally, the Corps emphasizes that seeking review in an enforcement action or at the end of the permitting process would be the only available avenues for obtaining review “[i]f the Corps had never adopted its practice of issuing standalone jurisdictional determinations upon request.” Reply Brief 3; see also *id.*, at 4, 23. True enough. But such a “count your blessings” argument is not an adequate rejoinder to the assertion of a right to judicial review under the APA.

The judgment of the Court of Appeals for the Eighth Circuit is affirmed.

It is so ordered.

Justice KENNEDY, with whom Justice THOMAS and Justice ALITO join, concurring.

My join extends to the Court’s opinion in full. The following observation seems appropriate not to qualify what the Court says but to point out that, based on the Government’s representations in this case, the reach and systemic consequences of the **Clean Water Act** remain a cause for concern. As Justice ALITO has noted in an earlier case, the Act’s reach is “notoriously unclear” and the consequences to landowners even for inadvertent violations can be crushing. See *Sackett v. EPA*, 566 U.S.

—, —, 132 S.Ct. 1367, 1374–1375, 182 L.Ed.2d 367 (2012) (concurring opinion).

An approved Jurisdictional Determination (JD) gives a landowner at least some measure of predictability, so long as the *1817 agency’s declaration can be relied upon. Yet, the Government has represented in this litigation that a JD has no legally binding effect on the Environmental Protection Agency’s (EPA) enforcement decisions. It has stated that the memorandum of agreement between the EPA and the Army Corps of Engineers, which today’s opinion relies on, does not have binding effect and can be revoked or amended at the Agency’s unfettered discretion. Reply Brief 12; Tr. of Oral Arg. 16. If that were correct, the Act’s ominous reach would again be unchecked by the limited relief the Court allows today. Even if, in an ordinary case, an agency’s internal agreement with another agency cannot establish that its action is final, the Court is right to construe a JD as binding in light of the fact that in many instances it will have a significant bearing on whether the **Clean Water Act** comports with due process.

The Act, especially without the JD procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.

Justice KAGAN, concurring.

I join the Court’s opinion in full. I write separately to note that for me, unlike for Justice GINSBURG, see *post*, at 1817 (opinion concurring in part and concurring in judgment), the memorandum of agreement between the Army Corps of Engineers and the Environmental Protection Agency is central to the disposition of this case. For an agency action to be final, “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). As the Court states, the memorandum of agreement establishes that jurisdictional determinations (JDs) are “binding on the Government and represent the Government’s position in any subsequent Federal action or litigation concerning that final determination.” Memorandum of Agreement §§ IV–C–2, VI–A; *ante*, at 1814 (majority opinion). A negative JD thus prevents the Corps and EPA—the two agencies with authority to enforce the **Clean Water Act**—from bringing a civil

action against a property owner for the JD's entire 5-year lifetime. *Ante*, at 1814 – 1815, and n. 3. The creation of that safe harbor, which binds the agencies in any subsequent litigation, is a “direct and appreciable legal consequence[]” satisfying the second prong of *Bennett*, 520 U.S., at 178, 117 S.Ct. 1154.

Justice GINSBURG, concurring in part and concurring in the judgment.

I join the Court's opinion, save for its reliance upon the Memorandum of Agreement between the Army Corps of Engineers and the Environmental Protection Agency. *Ante*, at 1814 – 1815, and n. 3 (construing the memorandum to establish that Corps jurisdictional determinations (JDs) are binding on the Federal Government in litigation for five years). The Court received scant briefing about this memorandum, and the United States does not share the Court's reading

of it. See Reply Brief 12, n. 3 (memorandum “does not address mine-run Corps jurisdictional determinations of the sort at issue here”); Tr. of Oral Arg. 7 (same); *id.*, at 9 (reading of the memorandum to establish that JDs have binding effect in litigation does not “reflec[t] current government policy”). But the JD at issue is “definitive,” not “informal” or “tentative,” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), and has “an immediate and practical impact,” *1818 *Frozen Food Express v. United States*, 351 U.S. 40, 44, 76 S.Ct. 569, 100 L.Ed. 910 (1956). See also *ante*, at 1814 – 1815. * Accordingly, I agree with the Court that the JD is final.

All Citations

136 S.Ct. 1807, 16 Cal. Daily Op. Serv. 5586

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 In 2015, the Corps adopted a new rule modifying the definition of the scope of waters covered by the **Clean Water Act** in light of scientific research and decisions of this Court interpreting the Act. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed.Reg. 37054, 37055–37056. That rule is currently stayed nationwide, pending resolution of claims that the rule is arbitrary, capricious, and contrary to law. See *In re EPA*, 803 F.3d 804, 807–809 (C.A.6 2015).
- 2 Because we determine that a JD satisfies both prongs of *Bennett*, we need not consider respondents' argument that an agency action that satisfies only the first may also constitute final agency action. See Brief for Respondents 19–20.
- 3 The Corps asserts that the Memorandum of Agreement addresses only “special case” JDs, rather than “mine-run” ones “of the sort at issue here.” Reply Brief 12, n. 3. But the memorandum plainly makes binding “[a]ll final determinations,” whether in “[s]pecial” or “[n]on-special” cases. Memorandum of Agreement §§ IV–C, VI–A; see also Corps, Memorandum of Understanding Geographical Jurisdiction of the Section 404 Program, 45 Fed.Reg. 45019, n. 1 (1980) (“[U]nder this [memorandum], except in special cases previously agreed to, the [Corps] is authorized to make a final determination ... and such determination shall be binding.”).
- * *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997), contrary to Justice KAGAN's suggestion, *ante*, at 1817, (concurring opinion) does not displace or alter the approach to finality established by *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149–151, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), and *Frozen Food Express v. United States*, 351 U.S. 40, 44, 76 S.Ct. 569, 100 L.Ed. 910 (1956). *Bennett* dealt with finality quickly, and did not cite those pathmarking decisions.

KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Rhea Lana, Inc. v. U.S. Department of Labor, D.D.C., November 21, 2014

132 S.Ct. 1367

Supreme Court of the United States

Chantell SACKETT, et vir, Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.

No. 10-1062.

Argued Jan. 9, 2012.

Decided March 21, 2012.

Synopsis

Background: Landowners, who received compliance order from United States Environmental Protection Agency (EPA) alleging their parcel was subject to **Clean Water Act (CWA)** and that they violated CWA by filling about one half acre of their property with dirt and rock in preparation for building house, brought action against EPA seeking injunctive and declaratory relief. The United States District Court for the District of Idaho, Edward J. Lodge, J., 2008 WL 3286801, dismissed matter. Landowners appealed. The United States Court of Appeals for the Ninth Circuit, Gould, Circuit Judge, 622 F.3d 1139, affirmed. Certiorari was granted in part.

Holdings: The Supreme Court, Justice Scalia, held that:

[1] EPA's compliance order was "final agency action" for which there was no adequate remedy other than Administrative Procedure Act (APA) review, and

[2] CWA did not preclude that review.

Reversed and remanded.

Justice Ginsburg filed concurring opinion.

Justice Alito filed concurring opinion.

West Headnotes (4)

[1] Environmental Law

Finality

Environmental Protection Agency compliance order stating that Idaho residential lot contained navigable waters and that landowners' construction project violated CWA was "final agency action" for which there was no adequate remedy other than Administrative Procedure Act (APA) review. 5 U.S.C.A. §§ 551(13), 701(b)(2), 704; Federal Water Pollution Control Act, §§ 301, 309(a)(3), (d), 404(a), 33 U.S.C.A. §§ 1311, 1319(a)(3), (d), 1344(a).

44 Cases that cite this headnote

[2] Administrative Law and Procedure

Judicial Review of Administrative Decisions

In determining whether and to what extent a particular statute precludes judicial review, court does not look only to its express language, and Administrative Procedure Act (APA) presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from statutory scheme as whole. 5 U.S.C.A. §§ 701(a)(1), 702.

17 Cases that cite this headnote

[3] Environmental Law

Water pollution

Clean Water Act (CWA) did not preclude judicial review under Administrative Procedure Act (APA) of Environmental Protection Agency (EPA) compliance order stating that Idaho residential lot contained navigable waters and that landowners' construction project violated CWA. 5 U.S.C.A. §§ 701(a)(1), 704; Federal Water Pollution Control Act, § 309(a)(3), (g)(8), 33 U.S.C.A. § 1319(a)(3), (g)(8).

31 Cases that cite this headnote

[4] Administrative Law and Procedure

← Judicial Review of Administrative Decisions

Where statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, inference that it is not reviewable at the instance of other parties, who are not subject to the administrative process, is strong.

10 Cases that cite this headnote

1368 Syllabus

The **Clean Water Act** prohibits “the discharge of any pollutant by any person,” 33 U.S.C. § 1311, without a permit, into “navigable waters,” § 1344. Upon determining that a violation has occurred, the Environmental Protection Agency (EPA) may either issue a compliance order or initiate a civil enforcement action. § 1319(a)(3). The resulting civil penalty may not “exceed [\$37,500] per day for each violation.” § 1319(d). The Government contends that the amount doubles to \$75,000 when the EPA prevails against a person who has been issued a compliance order but has failed to comply.

The Sacketts, petitioners here, received a compliance order from the EPA, which stated that their residential lot contained navigable waters and that their construction project violated the Act. The Sacketts sought declarative and injunctive relief in the Federal District Court, contending that the compliance order was “arbitrary [and] capricious” under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and that it deprived them of due process in violation of the Fifth Amendment. The District Court dismissed the claims for want of subject-matter jurisdiction. The Ninth Circuit affirmed, concluding that the **Clean Water Act** precluded pre-enforcement judicial review of compliance orders and that such preclusion did not violate due process.

Held: The Sacketts may bring a civil action under the APA to challenge the issuance of the EPA’s order. Pp. 1371 – 1374.

(a) The APA provides for judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. The compliance order here has all the hallmarks of APA finality. Through it, the EPA “determined” “rights or obligations,” *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281, requiring the Sacketts to restore their property according to an agency-approved plan and to give the EPA access. Also, “legal consequences ... flow” from the order, *ibid.*, which, according to the Government’s litigating position, exposes the Sacketts to double penalties in future enforcement proceedings. The order also severely limits their ability to obtain a permit for their fill from the Army Corps of Engineers, see ***1369** 33 U.S.C. § 1344; 33 CFR § 326.3(e)(1)(iv). Further, the order’s issuance marks the “consummation” of the agency’s decisionmaking process, *Bennett, supra*, at 178, 117 S.Ct. 1154, for the EPA’s findings in the compliance order were not subject to further agency review. The Sacketts also had “no other adequate remedy in a court,” 5 U.S.C. § 704. A civil action brought by the EPA under 33 U.S.C. § 1319 ordinarily provides judicial review in such cases, but the Sacketts cannot initiate that process. And each day they wait, they accrue additional potential liability. Applying to the Corps of Engineers for a permit and then filing suit under the APA if that permit is denied also does not provide an adequate remedy for the EPA’s action. Pp. 1371 – 1372.

(b) The **Clean Water Act** is not a statute that “preclude[s] judicial review” under the APA, 5 U.S.C. § 701(a)(1). The APA creates a “presumption favoring judicial review of administrative action.” *Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 104 S.Ct. 2450, 81 L.Ed.2d 270. While this presumption “may be overcome by inferences of intent drawn from the statutory scheme as a whole,” *ibid.*, the Government’s arguments do not support an inference that the **Clean Water Act’s** statutory scheme precludes APA review. Pp. 1372 – 1374.

622 F.3d 1139, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. GINSBURG, J., and ALITO, J., filed concurring opinions.

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Opinion

Justice SCALIA delivered the opinion of the Court.

We consider whether Michael and Chantell Sackett may bring a civil action under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, to challenge the issuance by the Environmental Protection Agency (EPA) of an administrative compliance order under § 309 of the **Clean Water Act**, 33 U.S.C. § 1319. The order asserts that the Sacketts' property is subject to the Act, and that they have violated its provisions by placing fill material on the property; and on this basis it directs them immediately to restore the property pursuant to an EPA work plan.

I

The **Clean Water Act** prohibits, among other things, “the discharge of any pollutant by any person,” § 1311, without a permit, into the “navigable waters,” § 1344—which the Act defines as “the waters *1370 of the United States,” § 1362(7). If the EPA determines that any person is in violation of this restriction, the Act directs the agency either to issue a compliance order or to initiate a civil enforcement action. § 1319(a)(3). When the EPA prevails in a civil action, the Act provides for “a civil penalty not to exceed [\$37,500] per day for each violation.”¹ § 1319(d). And according to the Government, when the EPA prevails against any person who has been issued a compliance

order but has failed to comply, that amount is increased to \$75,000—up to \$37,500 for the statutory violation and up to an additional \$37,500 for violating the compliance order.

The particulars of this case flow from a dispute about the scope of “the navigable waters” subject to this enforcement regime. Today we consider only whether the dispute may be brought to court by challenging the compliance order—we do not resolve the dispute on the merits. The reader will be curious, however, to know what all the fuss is about. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), we upheld a regulation that construed “the navigable waters” to include “freshwater wetlands,” *id.*, at 124, 106 S.Ct. 455, themselves not actually navigable, that were adjacent to navigable-in-fact waters. Later, in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), we held that an abandoned sand and gravel pit, which “seasonally ponded” but which was not adjacent to open water, *id.*, at 164, 121 S.Ct. 675, was not part of the navigable waters. Then most recently, in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006), we considered whether a wetland not adjacent to navigable-in-fact waters fell within the scope of the Act. Our answer was no, but no one rationale commanded a majority of the Court. In his separate opinion, THE CHIEF JUSTICE expressed the concern that interested parties would lack guidance “on precisely how to read Congress' limits on the reach of the **Clean Water Act**” and would be left “to feel their way on a case-by-case basis.” *Id.*, at 758, 126 S.Ct. 2208 (concurring opinion).

The Sacketts are interested parties feeling their way. They own a ²/₃-acre residential lot in Bonner County, Idaho. Their property lies just north of Priest Lake, but is separated from the lake by several lots containing permanent structures. In preparation for constructing a house, the Sacketts filled in part of their lot with dirt and rock. Some months later, they received from the EPA a compliance order. The order contained a number of “Findings and Conclusions,” including the following:

“1.4 [The Sacketts' property] contains wetlands within the meaning of 33 C.F.R. § 328.4(8)(b); the wetlands meet the criteria for jurisdictional wetlands in the 1987 ‘Federal Manual for Identifying and Delineating Jurisdictional Wetlands.’

"1.5 The Site's wetlands are adjacent to Priest Lake within the meaning of 33 C.F.R. § 328.4(8)(c). Priest Lake is a 'navigable water' within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7), and 'waters of the United *1371 States' within the meaning of 40 C.F.R. § 232.2.

"1.6 In April and May, 2007, at times more fully known to [the Sacketts, they] and/or persons acting on their behalf discharged fill material into wetlands at the Site. [They] filled approximately one half acre.

"1.9 By causing such fill material to enter waters of the United States, [the Sacketts] have engaged, and are continuing to engage, in the 'discharge of pollutants' from a point source within the meaning of sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

"1.11 [The Sacketts'] discharge of pollutants into waters of the United States at the Site without [a] permit constitutes a violation of section 301 of the Act, 33 U.S.C. § 1311." App. 19–20.

On the basis of these findings and conclusions, the order directs the Sacketts, among other things, "immediately [to] undertake activities to restore the Site in accordance with [an EPA-created] Restoration Work Plan" and to "provide and/or obtain access to the Site ... [and] access to all records and documentation related to the conditions at the Site ... to EPA employees and/or their designated representatives." *Id.*, at 21–22, ¶¶ 2.1, 2.7.

The Sacketts, who do not believe that their property is subject to the Act, asked the EPA for a hearing, but that request was denied. They then brought this action in the United States District Court for the District of Idaho, seeking declaratory and injunctive relief. Their complaint contended that the EPA's issuance of the compliance order was "arbitrary [and] capricious" under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and that it deprived them of "life, liberty, or property, without due process of law," in violation of the Fifth Amendment. The District Court dismissed the claims for want of subject-matter jurisdiction, and the United States Court of Appeals for the Ninth Circuit affirmed, 622 F.3d 1139 (2010). It concluded that the Act "preclude[s] pre-

enforcement judicial review of compliance orders," *id.*, at 1144, and that such preclusion does not violate the Fifth Amendment's due process guarantee, *id.*, at 1147. We granted certiorari. 564 U.S. —, 131 S.Ct. 3092, 180 L.Ed.2d 911 (2011).

II

[1] The Sacketts brought suit under Chapter 7 of the APA, which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. We consider first whether the compliance order is final agency action. There is no doubt it is agency action, which the APA defines as including even a "failure to act." §§ 551(13), 701(b)(2). But is it *final*? It has all of the hallmarks of APA finality that our opinions establish. Through the order, the EPA " 'determined' " " 'rights or obligations.' " *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S.Ct. 203, 27 L.Ed.2d 203 (1970)). By reason of the order, the Sacketts have the legal obligation to "restore" their property according to an agency-approved Restoration Work Plan, and must give the EPA access to their property and to "records and documentation related to the conditions at the Site." App. 22, ¶ 2.7. Also, " 'legal consequences ... flow' " from issuance of the order. *Bennett, supra*, at 178, 117 S.Ct. 1154 (quoting *1372 *Marine Terminal, supra*, at 71, 91 S.Ct. 203). For one, according to the Government's current litigating position, the order exposes the Sacketts to double penalties in a future enforcement proceeding.² It also severely limits the Sacketts' ability to obtain a permit for their fill from the Army Corps of Engineers, see 33 U.S.C. § 1344. The Corps' regulations provide that, once the EPA has issued a compliance order with respect to certain property, the Corps will not process a permit application for that property unless doing so "is clearly appropriate." 33 CFR § 326.3(e)(1)(iv) (2011).³

The issuance of the compliance order also marks the " 'consummation' " of the agency's decisionmaking process. *Bennett, supra*, at 178, 117 S.Ct. 1154 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 92 L.Ed. 568 (1948)). As the Sacketts learned when they unsuccessfully sought a hearing, the "Findings and Conclusions" that the

compliance order contained were not subject to further agency review. The Government resists this conclusion, pointing to a portion of the order that invited the Sacketts to “engage in informal discussion of the terms and requirements” of the order with the EPA and to inform the agency of “any allegations [t]herein which [they] believe[d] to be inaccurate.” App. 22–23, ¶ 2.11. But that confers no entitlement to further agency review. The mere possibility that an agency might reconsider in light of “informal discussion” and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.

The APA’s judicial review provision also requires that the person seeking APA review of final agency action have “no other adequate remedy in a court,” 5 U.S.C. § 704. In **Clean Water Act** enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA under 33 U.S.C. § 1319. But the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government’s telling, an additional \$75,000 in potential liability. The other possible route to judicial review—applying to the Corps of Engineers for a permit and then filing suit under the APA if a permit is denied—will not serve either. The remedy for denial of action that might be sought from one agency does not ordinarily provide an “adequate remedy” for action already taken by another agency. The Government, to its credit, does not seriously contend that other available remedies alone foreclose review under § 704. Instead, the Government relies on § 701(a)(1) of the APA, which excludes APA review “to the extent that [other] statutes preclude judicial review.” The **Clean Water Act**, it says, is such a statute.

III

[2] Nothing in the **Clean Water Act** expressly precludes judicial review under the APA or otherwise. But in determining “[w]hether and to what extent a particular statute precludes judicial review,” we do not look “only [to] its express language.” *1373 *Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). The APA, we have said, creates a “presumption favoring judicial review of administrative action,” but as with most presumptions, this one “may be overcome by inferences of intent drawn from the statutory scheme as a whole.” *Id.*, at 349, 104 S.Ct. 2450.

The Government offers several reasons why the statutory scheme of the **Clean Water Act** precludes review.

[3] The Government first points to 33 U.S.C. § 1319(a)(3), which provides that, when the EPA “finds that any person is in violation” of certain portions of the Act, the agency “shall issue an order requiring such person to comply with [the Act], or ... shall bring a civil action [to enforce the Act].” The Government argues that, because Congress gave the EPA the choice between a judicial proceeding and an administrative action, it would undermine the Act to allow judicial review of the latter. But that argument rests on the question-begging premise that the relevant difference between a compliance order and an enforcement proceeding is that only the latter is subject to judicial review. There are eminently sound reasons other than insulation from judicial review why compliance orders are useful. The Government itself suggests that they “provid[e] a means of notifying recipients of potential violations and quickly resolving the issues through voluntary compliance.” Brief for Respondents 39. It is entirely consistent with this function to allow judicial review when the recipient does not choose “voluntary compliance.” The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice.

The Government also notes that compliance orders are not self-executing, but must be enforced by the agency in a plenary judicial action. It suggests that Congress therefore viewed a compliance order “as a step in the deliberative process[,] ... rather than as a coercive sanction that itself must be subject to judicial review.” *Id.*, at 38. But the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction. And it is hard for the Government to defend its claim that the issuance of the compliance order was just “a step in the deliberative process” when the agency rejected the Sacketts’ attempt to obtain a hearing and when the *next* step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action). As the text (and indeed the very name) of the compliance order makes clear, the EPA’s “deliberation” over whether the Sacketts are in violation of the Act is at an end; the agency may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject.

The Government further urges us to consider that Congress expressly provided for prompt judicial review, on the administrative record, when the EPA assesses administrative penalties after a hearing, see § 1319(g)(8), but did not expressly provide for review of compliance orders. But if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all.

[4] The cases on which the Government relies simply are not analogous. In *Block v. Community Nutrition Institute*, *supra*, we held that the Agricultural Marketing Agreement Act of 1937, which expressly allowed milk handlers to obtain judicial review of milk market orders, precluded review of milk market orders in *1374 suits brought by milk consumers. 467 U.S., at 345–348, 104 S.Ct. 2450. Where a statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, the inference that it is not reviewable at the instance of other parties, who are not *subject* to the administrative process, is strong. In *United States v. Erika, Inc.*, 456 U.S. 201, 102 S.Ct. 1650, 72 L.Ed.2d 12 (1982), we held that the Medicare statute, which expressly provided for judicial review of awards under Part A, precluded review of awards under Part B. *Id.*, at 206–208, 102 S.Ct. 1650. The strong parallel between the award provisions in Part A and Part B of the Medicare statute does not exist between the issuance of a compliance order and the assessment of administrative penalties under the **Clean Water Act**. And in *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988), we held that the Civil Service Reform Act, which expressly excluded certain “nonpreference” employees from the statute's review scheme, precluded review at the instance of those employees in a separate Claims Court action. *Id.*, at 448–449, 108 S.Ct. 668. Here, there is no suggestion that Congress has sought to exclude compliance-order recipients from the Act's review scheme; quite to the contrary, the Government's case is premised on the notion that the Act's primary review mechanisms are open to the Sacketts.

Finally, the Government notes that Congress passed the **Clean Water Act** in large part to respond to the inefficiency of then-existing remedies for water pollution. Compliance orders, as noted above, can obtain quick remediation through voluntary compliance. The Government warns

that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the **Clean Water Act** was uniquely designed to enable the strong-arming of regulated parties into “voluntary compliance” without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.

* * *

We conclude that the compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and that the **Clean Water Act** does not preclude that review. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice GINSBURG, concurring.

Faced with an EPA administrative compliance order threatening tens of thousands of dollars in civil penalties per day, the Sacketts sued “to contest the jurisdictional bases for the order.” Brief for Petitioners 9. “As a logical prerequisite to the issuance of the challenged compliance order,” the Sacketts contend, “EPA had to determine that it has regulatory authority over [our] property.” *Id.*, at 54–55. The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question. Whether the Sacketts could challenge not only the EPA's authority to regulate their land under the **Clean Water Act**, but also, at this pre-enforcement stage, the terms and conditions of the compliance order, is *1375 a question today's opinion does not reach out to resolve. Not raised by the Sacketts here, the question remains open for another day and case. On that understanding, I join the Court's opinion.

Justice ALITO, concurring.

The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.

The reach of the **Clean Water Act** is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to \$75,000 per day (\$37,500 for violating the Act and another \$37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable.

The Court's decision provides a modest measure of relief. At least, property owners like petitioners will have the right to challenge the EPA's jurisdictional determination under the Administrative Procedure Act. But the combination of the uncertain reach of the **Clean Water Act** and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.

Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the **Clean Water Act**. When Congress passed the **Clean Water Act** in 1972, it provided that the Act covers “the waters of the United States.” 33 U.S.C. § 1362(7). But Congress did not define what it meant by “the waters of the United States”; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate. Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority. We rejected that boundless view, see *Rapanos v. United States*, 547 U.S. 715, 732–739, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (plurality opinion); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 167–174, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), but the precise reach of the Act remains unclear. For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase. Instead, the agency has relied on informal guidance. But far from providing clarity and predictability, the agency's latest informal guidance advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff. See Brief for Competitive Enterprise Institute as *Amicus Curiae* 7–13.

Allowing aggrieved property owners to sue under the Administrative Procedure ***1376** Act is better than nothing, but only clarification of the reach of the **Clean Water Act** can rectify the underlying problem.

All Citations

132 S.Ct. 1367, 182 L.Ed.2d 367, 73 ERC 2121, 80 USLW 4240, 12 Cal. Daily Op. Serv. 3314, 2012 Daily Journal D.A.R. 3737, 23 Fla. L. Weekly Fed. S 195

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The original statute set a penalty cap of \$25,000 per violation per day. The Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, note following 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, § 3720E, 110 Stat. 1321–373, note following 28 U.S.C. § 2461, p. 1315 (Amendment), authorizes the EPA to adjust that maximum penalty for inflation. On the basis of that authority, the agency has raised the cap to \$37,500. See 74 Fed.Reg. 626, 627 (2009).

Sackett v. E.P.A., 132 S.Ct. 1367 (2012)

73 ER2 2121, 182 L.Ed.2d 367, 80 USLW 4240, 12 Cal. Daily Op. Serv. 3314...

- 2 We do not decide today that the Government's position is correct, but assume the consequences of the order to be what the Government asserts.
- 3 The regulation provides this consequence for "enforcement litigation that has been initiated by other Federal ... regulatory agencies." 33 CFR § 326.3(e)(1)(iv) (2011). The Government acknowledges, however, that EPA's issuance of a compliance order is considered by the Corps to fall within the provision. Brief for Respondents 31. Here again, we take the Government at its word without affirming that it represents a proper interpretation of the regulation.

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Distinguished by Deerfield Plantation Phase II-B Property Owners Ass'n, Inc. v. U.S. Army Corps of Engineers, D.S.C., July 12, 2011

633 F.3d 278
United States Court of Appeals,
Fourth Circuit.

PRECON DEVELOPMENT CORPORATION,
INCORPORATED, Plaintiff–Appellant,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, Defendant–Appellee.
Chesapeake Bay Foundation; National
Wildlife Federation; Natural Resources
Defense Council, Amici Supporting Appellee.

No. 09–2239.

|
Argued: Oct. 28, 2010.

|
Decided: Jan. 25, 2011.

Synopsis

Background: Developer of proposed residential site containing wetlands filed suit against Army Corps of Engineers (Corps), requesting court to enter declaratory judgment holding that site wetlands were not subject to federal jurisdiction under Clean Water Act (CWA), and in alternative, to set aside Corps' permit denial and direct Corps to issue permit to allow proposed activities. The United States District Court for the Eastern District of Virginia, Rebecca Beach Smith, J., 658 F.Supp.2d 752, granted summary judgment for defendant. Plaintiff appealed.

Holdings: The Court of Appeals, Duncan, Circuit Judge, held that:

[1] abutting and other adjacent wetlands could be aggregated;

[2] Corps acted reasonably in aggregating two man-made ditches into single “tributary”;

[3] finding that non-contiguous wetlands adjacent to two man-made ditches stretching over three miles downstream were “similarly situated” was entitled to deference; and

[4] Corps did not establish existence of **significant nexus** between adjacent wetlands and navigable river that was approximately seven miles away.

Reversed and remanded.

West Headnotes (13)

[1] Administrative Law and Procedure

☞ Scope

A district court's findings on an administrative record are reviewed de novo. 5 U.S.C.A. § 706(2)(A).

1 Cases that cite this headnote

[2] Administrative Law and Procedure

☞ Environment and health

Environmental Law

☞ Water pollution

Interpretation of phrase, “significant nexus,” by Army Corps of Engineers, to determine whether it had jurisdiction under Clean Water Act (CWA) over development of proposed residential site containing wetlands, was not entitled to *Chevron* deference, since Corps had not adopted interpretation of “navigable waters” that incorporated that concept through notice-and-comment rulemaking, but, instead, had interpreted that phrase only in non-binding guidance document. Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7).

1 Cases that cite this headnote

[3] Environmental Law

☞ Scope of review

De novo review applies to compliance with the test for a “significant nexus” between wetlands and navigable waters, as utilized to determine whether the Army Corps of Engineers has jurisdiction under the Clean Water Act (CWA) over the development of a proposed residential site containing wetlands, as a question of law, as any question of statutory interpretation;

however, recognizing the Corps' expertise in administering the CWA, deference is given to its interpretation and application of the test where appropriate. Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7).

5 Cases that cite this headnote

[4] **Environmental Law**

Wetlands

Abutting and other adjacent wetlands could be aggregated by Army Corps of Engineers in its significant nexus determination under Clean Water Act (CWA) to determine whether it had jurisdiction over development of proposed residential site containing wetlands, and thus larger tract of wetlands could be considered "similarly situated" to smaller tract of wetlands that had been proposed for development; although berm had separated smaller tract from man-made drainage ditch, it did not disconnect those wetlands from surrounding ones because it neither inhibited wildlife movement nor wetland functions and berm moderated and mitigated flood flows by allowing floodwaters to be retained longer within wetlands prior to being discharged downstream. Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7); 33 C.F.R. § 328.3(c).

Cases that cite this headnote

[5] **Administrative Law and Procedure**

Deference to agency in general

Under *Skidmore*, an agency's interpretation merits deference to the extent that the interpretation has the power to persuade.

2 Cases that cite this headnote

[6] **Environmental Law**

Wetlands

Army Corps of Engineers acted reasonably in aggregating two man-made ditches into single "tributary," in its **significant nexus** determination under Clean Water Act (CWA) to determine whether Corps had jurisdiction over development of proposed residential

site containing wetlands, where those ditches historically had been part of same naturally defined wetland drainage feature. 5 U.S.C.A. § 706(2)(A); Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7); 33 C.F.R. § 328.3(c).

1 Cases that cite this headnote

[7] **Environmental Law**

Wetlands

Court of Appeals could defer to finding that non-contiguous wetlands adjacent to two man-made ditches stretching over three miles downstream were "similarly situated," in significant nexus determination under Clean Water Act (CWA) to determine whether Army Corps of Engineers had jurisdiction over development of proposed residential site containing wetlands, on statement that subject smaller tract "continue[d] to function as part of the entire" larger tract, since consideration of what could be evaluated together was open for considerable interpretation and requiring some ecological expertise to administer and property developer had not suggested any appropriate limiting principle. 5 U.S.C.A. § 706(2)(A); Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7); 33 C.F.R. § 328.3(c).

Cases that cite this headnote

[8] **Environmental Law**

Wetlands

Administrative record reflecting measures of water storage capacity and resultant potential flow rates of man-made ditches, without any indication of how often that capacity was reached or how much flow typically was in those ditches, did not adequately establish existence of significant nexus between adjacent wetlands and navigable river that was approximately seven miles away, as required under Clean Water Act (CWA) to determine whether Army Corps of Engineers had jurisdiction over development of proposed residential site containing wetlands; furthermore, information on significance of flow on river's condition, such as on flooding or levels of nitrogen or sedimentation, was required.

Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7).

Cases that cite this headnote

[9] **Environmental Law**

↔ Wetlands

Factual determination by Army Corps of Engineers, that man-made ditch flowed at least seasonally, was not arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law, and thus was sufficient to support conclusion that it was **tributary** that should be considered in jurisdictional analysis under Clean Water Act (CWA) of whether **significant nexus** existed between adjacent wetlands and navigable river, where ditch seasonally had flowed from February to April and water had been observed standing in ditch even during drought. Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7); 5 U.S.C.A. § 706(2)(A).

1 Cases that cite this headnote

[10] **Environmental Law**

↔ Wetlands

The significant nexus test between wetlands and navigable waters, as utilized to determine whether the Army Corps of Engineers has jurisdiction under the Clean Water Act (CWA) over the development of a proposed residential site containing wetlands, does not require laboratory tests or any particular quantitative measurements in order to establish significance. Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7).

7 Cases that cite this headnote

[11] **Environmental Law**

↔ Wetlands

The test for a “**significant nexus**” between wetlands and navigable waters, as utilized to determine whether the Army Corps of Engineers has jurisdiction under the Clean Water Act (CWA) over the development of a proposed residential site containing wetlands, emphasizes the comparative relationship between the

wetlands at issue, their adjacent **tributary**, and traditional navigable waters. Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7).

11 Cases that cite this headnote

[12] **Environmental Law**

↔ Water, wetlands, and waterfront conservation

Question of whether the findings of the Army Corps of Engineers were adequate to support the ultimate conclusion that a **significant nexus** exists was a legal determination, not a factual determination subject to review under the Administrative Procedure Act (APA), since it essentially was a matter of statutory construction because a “**significant nexus**” was a statutory requirement for bringing wetlands adjacent to non-navigable **tributaries** within the definition of “navigable waters” under the Clean Water Act (CWA). Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7); 5 U.S.C.A. § 706(2)(A).

3 Cases that cite this headnote

[13] **Environmental Law**

↔ Wetlands

When determining whether the Army Corps of Engineers has jurisdiction under the Clean Water Act (CWA) over the development of a proposed residential site involving wetlands running alongside a ditch miles from any navigable water, the Army Corps of Engineers should pay particular attention to documenting why such wetlands significantly, rather than insubstantially, affect the integrity of navigable waters; such documentation need not take the form of any particular measurements, but should include some comparative information that allows us to meaningfully review the significance of the wetlands' impacts on downstream water quality. Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7).

Cases that cite this headnote

Attorneys and Law Firms

***280 ARGUED:** Mark R. Baumgartner, Pender & Coward, PC, Virginia Beach, Virginia, for Appellant. Mary Gabrielle Sprague, United States Department of ***281** Justice, Washington, D.C., for Appellee. **ON BRIEF:** Douglas E. Kahle, Pender & Coward, PC, Virginia Beach, Virginia, for Appellant. Ignacia S. Moreno, Assistant Attorney General, Katherine W. Hazard, Austin D. Saylor, Kent E. Hanson, Environmental & Natural Resources Division, Appellate Section, United States Department of Justice, Washington, D.C., for Appellee. Deborah M. Murray, Southern Environmental Law Center, Charlottesville, Virginia; James G. Murphy, Ramya Sivasubramanian, Alex Phipps, National Wildlife Federation, Montpelier, Vermont; Jon Devine, Rebecca Hammer, Natural Resources Defense Council, Washington, D.C.; Jon A. Mueller, Chesapeake Bay Foundation, Annapolis, Maryland, for Amici Supporting Appellee.

Before SHEDD and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Reversed and remanded by published opinion. Judge DUNCAN wrote the opinion, in which Judge SHEDD and Senior Judge HAMILTON joined.

OPINION

DUNCAN, Circuit Judge:

This appeal arises out of a determination made by the Army Corps of Engineers (the “Corps”) that it has jurisdiction, under the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, over 4.8 acres of wetlands located on Precon Development Corporation’s (“Precon” ’s) property, approximately seven miles from the nearest navigable water. The Corps subsequently denied Precon’s application for a CWA permit to impact the wetlands through development. Precon appealed these determinations to the United States District Court for the Eastern District of Virginia under the Administrative Procedure Act (“APA”), 5 U.S.C. § 702, and the parties cross-moved for summary judgment. The district court granted summary judgment to the Corps on September 4, 2009, upholding both its jurisdictional determination and its permit denial. On appeal, Precon challenges only the Corps’ jurisdictional determination. Because we find the Corps’ administrative record inadequate to support its

conclusion that it had jurisdiction over Precon’s wetlands, we vacate the district court’s grant of summary judgment and remand to the district court with instructions to remand to the Corps for reconsideration of its jurisdiction over the wetlands in question.

I.

A.

Precon is the developer of a 658-acre Planned Unit Development known as Edinburgh (the “Edinburgh PUD”), located in Chesapeake, Virginia. The city of Chesapeake is in southeastern Virginia, a region historically comprised of forested wetlands. Many of these wetlands ultimately drain into the Northwest River, which flows south through the region, passing within five to ten miles of the Edinburgh PUD.

The Edinburgh PUD is a mixed-use development that contains both residences and retail establishments. Its construction began in 2001. Precon acquired the Edinburgh PUD from RGM Corporation (“RGM”), the initial developer, in 2003. Since 2003, Precon has pursued the development of several residential areas within the Edinburgh PUD. Between 2004 and 2006, the Corps granted Precon permits to fill 77 acres of wetlands in order to proceed with these developments, based in part on an understanding that this was the totality of the development planned for the Edinburgh PUD.

***282** In 2006, Precon announced a plan to develop ten additional residential lots in the Edinburgh PUD. The original plan for developing these lots required filling 10.7 acres of wetlands. However, after discussions with the Corps in which the Corps expressed its displeasure that Precon was separately pursuing additional residential development, Precon limited its proposed design so that it would only impact 4.8 acres of wetlands (the “Site Wetlands”). Precon further suggested that it did not believe the Corps had jurisdiction over these 4.8 acres. The Corps disagreed.

A detailed explanation of the geography of the Site Wetlands is critical to understanding the parties’ dispute. The Site Wetlands are in the southwest quadrant of the Edinburgh PUD and sit adjacent to a man-made drainage ditch approximately 2,500 feet long (the “2,500-foot Ditch”).¹ The Site Wetlands do not, however, abut the 2,500-foot Ditch, because when

the 2,500-foot Ditch was excavated through the surrounding wetlands in 1977, “[m]aterial excavated ... was side-cast on the east bank and therefore creates a berm between the [Site Wetlands] and the ditch.”² J.A. 264.

The 2,500-foot Ditch, which flows seasonally—i.e., from late winter to early spring—joins a larger, perennial drainage ditch, the Saint Brides Ditch, approximately 900 feet downstream of the Site Wetlands. The Saint Brides Ditch runs along the western boundary of the PUD for approximately 3,000 feet before continuing to meet a second perennial tributary about two and one-half to three miles south of the Edinburgh PUD. These merged tributaries flow into the Northwest River approximately three to four miles downstream.

The 4.8-acre Site Wetlands comprise only a small portion of the total wetland acreage within the Edinburgh PUD. There are, in total, 166 acres of wetlands in the PUD that are part of the Northwest River watershed.³ The remainder of the 166 acres are concentrated along the western edge of the PUD and surround the 2,500-foot Ditch and the Saint Brides Ditch.

B.

In 2007, Precon applied to the Corps for a jurisdictional determination as to whether the Site Wetlands were covered by the CWA, such that a permit would be needed before they could be impacted by development. Precon further requested a permit to fill the Site Wetlands if the Corps determined that a permit was required under the CWA.

On May 31, 2007, the Corps determined that it had jurisdiction over the Site Wetlands, on the ground that the wetlands sat adjacent to a ditch which qualified as “waters of the United States.” J.A. 202. It subsequently denied Precon's request for a CWA permit. Precon administratively appealed *283 both determinations. Around this same time, the Corps and the Environmental Protection Agency (“EPA”) jointly issued new guidance (the “Rapanos Guidance,” issued June 5, 2007) on CWA jurisdiction following the Supreme Court's jurisdiction-limiting decision in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006). In light of the Rapanos Guidance, a Corps appeals officer remanded the Corps' jurisdictional determination to the Corps' Norfolk District for reconsideration.

i.

The Rapanos Guidance instructs Corps and EPA personnel on how to make jurisdictional determinations that comply with the new rules for CWA jurisdiction announced by the Supreme Court in *Rapanos*.⁴ The Guidance explains that post *Rapanos*, wetlands, such as the Site Wetlands, which are “adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature),” are no longer automatically subject to the Corps' jurisdiction. J.A. 484. Pursuant to the Supreme Court's decision, the Rapanos Guidance instructs the Corps to evaluate such wetlands, along with “similarly situated” wetlands in the area, in order to determine whether they have a “significant nexus” with traditional navigable waters. *Id.*; see also *Rapanos*, 547 U.S. at 780, 126 S.Ct. 2208.

The first step in evaluating whether a significant nexus exists, according to the Rapanos Guidance, is to determine the region to be evaluated for significance. To do so, the relevant tributary must first be identified. A “tributary” for these purposes is defined as “the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream).” J.A. 486. The pertinent section of the relevant tributary is known as the “relevant reach.” *Id.* at 261. The Corps must next identify all wetlands adjacent to the relevant reach. Together, the relevant reach and its adjacent wetlands constitute the area to be evaluated for a significant nexus with a traditional navigable water.

The Rapanos Guidance explains that such evaluation should focus on the flow and functions of the relevant reach and adjacent wetlands. It instructs the Corps to specifically consider “volume, duration, and frequency” of flow in the relevant reach, as well as hydrologic information, physical characteristics, and functions performed by the relevant reach and its wetlands. *Id.* at 487. The Guidance then instructs the Corps, “after assessing the flow characteristics and functions,” to evaluate whether these factors “are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water.” J.A. 487. It emphasizes that “[a]s the distance from the **tributary** to the navigable water increases, it will become increasingly important to document whether the **tributary** and its adjacent wetlands have a **significant**

nexus rather than a speculative or insubstantial *284 nexus with a traditional navigable water.” *Id.*

ii.

Upon remand and application of this new guidance, the Corps upheld its finding of jurisdiction over the Site Wetlands. Because the Site Wetlands do not abut—but only sit adjacent to—the 2,500-foot Ditch, the Corps did not treat them as automatically subject to jurisdiction, but instead, as instructed by the Rapanos Guidance, attempted to explain its rationale for upholding jurisdiction through a “Significant Nexus Determination.”

First, the Corps' Significant Nexus Determination identified the relevant reach as the 2,500-foot Ditch and the Saint Brides Ditch, collectively. The Corps considered these ditches collectively because the Saint Brides Ditch and the 2,500-foot Ditch are, historically, part of the same naturally defined wetland drainage feature—a feature that was manipulated into discrete ditches in the late 1970s. Further, the Corps labeled both the Saint Brides Ditch, which undisputedly has perennial flow, and the 2,500-foot Ditch as “relatively permanent waters.” The Corps defines “relatively permanent waters” as tributaries that “typically flow[] year-round or ha[ve] continuous flow at least ‘seasonally’ (e.g., typically 3 months).” *Id.* at 242. The Corps found the 2,500-foot ditch to be a relatively permanent water because photographs supported the conclusion that the tributary flowed from February through April. Together, these two ditches were labeled as “a man-altered, first-order tributary to the Northwest River.” *Id.* at 259.

The Corps then determined that the relevant reach of this tributary extended to the point, downstream 3.11 miles, where the Saint Brides Ditch joined the Pleasant Grove Swamp. In making this determination, the Corps ignored “[m]ultiple man-made or manipulated drainage ditches” that carried minor flow to the Saint Brides Ditch at various points downstream of the Edinburgh PUD, and instead selected the point where the Saint Brides Ditch converged with another historically natural drainage. *Id.*

The Corps next took up the task of identifying “similarly situated wetlands.” It first identified all 166 acres of wetlands located within the Edinburgh PUD and the Northwest River watershed as similarly situated. Although the 4.8-acre Site Wetlands are separated from the remaining approximately

161 acres of wetlands by a road that is unfinished (filled but not paved), the Corps focused on this larger area because “the 4.8 acres of wetlands function as one with the remainder of the 166 acres of on site wetlands in the Saint Brides Ditch drainage area.” *Id.* at 265. A berm separates these 166 acres of wetlands from the Saint Brides Ditch, but it has several breaks along its eastern edge.

The Corps then identified 282 more acres of “similarly situated wetlands” adjacent to the relevant reach but not on Precon's property. In determining that these 448 acres of wetlands should be evaluated in the aggregate, the Corps explained that the 4.8 acres of Site Wetlands and 166 acres of PUD wetlands are part of a “physical, chemical and biological connection of wetlands and streams” that exists, and “has always existed,” in the area. *Id.* at 267.

Again in accordance with the Rapanos Guidance, the Corps' Significant Nexus Determination analyzed the functions and flow of the Saint Brides Ditch and the 2,500-foot Ditch. With respect to the Saint Brides Ditch, the Corps noted that the channel has a dynamic storage capacity of approximately 1.2 million cubic feet of water, a channel slope of 0.04 percent, and *285 water velocities of approximately 1.3 feet per second—all of which means that it takes a volume of water approximately four hours to move through the relevant reach. Based on these observations, the Corps found that the ditch “greatly moderates the effect of flood flows” on the Northwest River due to its large storage capacity and slow release. *Id.* at 263. Additionally, it concluded that this low water velocity and extended residence time allowed suspended sediments to settle out of the water. It estimated that approximately 10,540 cubic yards of sediment is stored in the relevant portion of the Saint Brides Ditch rather than downstream in the Northwest River. It explained that this filtered sediment likely includes some quantity of dissolved pollutants that are thus removed from the Northwest River, improving the drinking water and fishing quality of the river.

With respect to the 2,500-foot Ditch, the Corps found that its 93,750 cubic feet of water storage capacity and substantial accumulation of woody debris allowed it to slow water velocities to 1.13 feet per second, providing “significant flood flow benefits to downstream traditionally navigable waters.” *J.A.* 265. Its large woody debris also allowed it to trap at least 2,083 cubic yards of sediment and organic material that would otherwise flow downstream. Decomposed organic matter from these tributaries, the Corps explained, provides

a “substantial food source” to fish species in the Northwest River. *Id.* at 266.

The Corps' Significant Nexus Determination further explained that numerous other ditches, similar to the 2,500-foot Ditch, drain into the Saint Brides Ditch along the relevant reach, each serving similar functions. The Corps concluded that these ditches cumulatively provide significant benefits to the river below, including “retaining a significant amount of flood water/flows, removing large volumes of sediments and pollutants from the system, as well as delivering important food resources to fish and other species living and spawning in the Northwest River.” *Id.* at 267.

The Significant Nexus Determination then analyzed the 448 acres of similarly situated wetlands. Most of these wetlands are mineral flats, which contain unique hydric soils that have large amounts of organics at the surface, allowing them to retain more water than most wetlands. Although berms “have severed the direct surface water connection” among these wetlands in many places, the Corps found that “the berm has a negligible effect on the overall ecological functions that ... all of the adjacent wetlands in the [significant nexus] determination provide to downstream [traditional navigable waters].” *Id.* at 271. The Corps found the berms to be neither a barrier to wildlife functions nor an inhibitor of wetland functions, and in fact explained that they provide the benefit of “allow[ing] floodwaters to be retained longer within the wetlands prior to being discharged downstream thus moderating and mitigating flood flows.” *Id.* The Corps also found that subsurface flows exist in the Edinburgh PUD wetlands, explaining that they slowly release groundwater into the Saint Brides Ditch.

The Corps then elaborated on the wetlands' role in flood mitigation. The 166 acres of on-site wetlands are capable of storing up to one and one-half feet of water per acre, and receive approximately 1,222,943 gallons of precipitation a year. Blackened leaves observed on-site evidence the wetlands' prolonged water storage capabilities. The Corps further explained that expert testimony from a trial between the Corps and the previous developer, RGM,⁵ supported the conclusion that *286 the wetlands “slow release of water maintains base flows to the Northwest River and also moderates downstream flooding during extreme precipitation events.” *Id.* at 272. Moreover, one expert testified that “loss of wetlands on the Edinburgh PUD would result in a major change to the timing and routing of water from the site,” and that increased water velocities downstream “would cause

erosion of sediments, increasing sedimentation and pollution of downstream waters including the Northwest River.” *Id.*

The Corps further observed that such mineral flat wetlands rapidly cycle nutrients, sequester carbon, and help denitrify water, reducing eutrophication.⁶ The 448 acres of similarly situated wetlands were found to remove an estimated 448 to 9,403 pounds of nitrogen per acre from the water each year, and also remove an unquantified amount of pollutants and particles. Moreover, the 4.8-acre Site Wetlands and similarly situated wetlands serve as habitat for numerous species, including State endangered species, at least some of which can cross the unfinished road separating the Site Wetlands from remaining wetlands. These species use the area as “a corridor for movement between the Northwest River and points to the north and west.” *Id.* at 276.

On the basis of this evidence, the Corps' Significant Nexus Determination concluded that the **tributaries** and their adjacent wetlands have “a **significant nexus** that has more than a speculative or insubstantial effect on the Northwest River,” and that loss of these wetlands “would have a substantial negative impact on water quality and biological communities of the river's ecosystem.” *Id.* at 277–78. Accordingly, the Corps reaffirmed its previous conclusion that it had jurisdiction over the Site Wetlands, such that Precon would be required to obtain a CWA permit before filling them.

C.

Precon sought judicial review of this determination, along with the Corps' denial of its permit application, in the United States District Court for the Eastern District of Virginia. The parties filed cross-motions for summary judgment, which were referred to a magistrate judge for a Report and Recommendation (“R & R”). The district court adopted this R & R in full on September 4, 2009, granting the Corps' motion for summary judgment and denying Precon's motion for summary judgment.

The district court found that the Corps had permissibly defined the scope of its review area as including 448 acres of similarly situated wetlands, and that the Corps' determination that these wetlands had a significant nexus to the Northwest *287 River was supported by substantial factual findings. The district court also upheld the Corps' denial of a CWA permit. This appeal followed.

II.

On appeal, Precon challenges the district court's finding that the Corps properly asserted jurisdiction over the Site Wetlands under the CWA.⁷ Precon argues that there are two major flaws in the Corps' jurisdictional determination. First, it contends that the Corps' decision to aggregate 448 acres of surrounding wetlands in determining jurisdiction was impermissible. Second, it argues that even if all 448 acres were appropriately included in the Corps' jurisdictional determination, the Corps did not provide sufficient evidence that the connection between these wetlands and the Northwest River amounted to a significant nexus.

Before reaching Precon's two substantive arguments, we provide an overview of the Supreme Court's jurisprudence addressing the parameters of CWA jurisdiction. We then turn to each of Precon's contentions.

A.

Congress passed the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. To that end, the CWA prohibits the discharge of pollutants into navigable waters. *See id.* §§ 1311(a), 1362(12)(A). The CWA defines navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Although the Corps initially construed this definition to cover only waters navigable in fact, "in 1975 the Corps issued interim final regulations redefining 'the waters of the United States' to include not only actually navigable waters but also tributaries of such waters" and " 'freshwater wetlands' that were adjacent to other covered waters." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123–24, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985).

In *Riverside Bayview Homes*, the Supreme Court upheld the Corps' determination that it had jurisdiction over wetlands adjacent to navigable waters. *Id.* at 139, 106 S.Ct. 455. Even though the plain language of the statute did not compel this conclusion, the Court explained that by including a broad definition of "navigable waters" in the CWA, Congress "evidently intended to ... exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding

of that term." *Id.* at 133, 106 S.Ct. 455. It further reasoned that the Corps' decision to include wetlands within its jurisdiction was a reasonable one, given wetlands' critical importance to the health of adjacent waters. *Id.* at 133–34, 106 S.Ct. 455.

The Supreme Court again interpreted the CWA term "navigable waters" in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) ("*SWANCC*"). In *SWANCC*, it considered whether "isolated ponds, some only seasonal, wholly located within two Illinois counties, f[e]ll under [the CWA's] definition of 'navigable waters' because they serve[d] as habitat for migratory birds." *Id.* at 171–72, 121 S.Ct. 675. The Court held that these waters were simply too far removed from any navigable waters *288 to be included within that term. *Id.* To distinguish these isolated ponds from the wetlands it considered in *Riverside Bayview Homes*, the Court explained: "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id.* at 167, 121 S.Ct. 675.

Five years later, in *Rapanos*, the Supreme Court revisited the issue of the Corps' jurisdiction over adjacent wetlands. 547 U.S. at 715, 126 S.Ct. 2208. Although recognizing the continuing validity of *Riverside Bayview Homes*, a majority of the Court found troubling the Corps' assertion of jurisdiction over wetlands adjacent to tributaries far away from, and unimportant to, any traditional navigable water.⁸ *See id.* at 726, 730–33, 106 S.Ct. 455 (plurality opinion); *id.* at 776, 779–80, 106 S.Ct. 455 (Kennedy, J., concurring in the judgment). Accordingly, a fractured Court proposed two different ways to limit the reach of its earlier ruling so as not to allow jurisdiction over wetlands lying alongside "remote and insubstantial" ditches and drains. *Id.* at 778, 106 S.Ct. 455 (Kennedy, J., concurring in the judgment). The *Rapanos* plurality suggested that wetlands should only fall within CWA jurisdiction when they: (1) are adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters"; and (2) have "a continuous surface connection with that water." *Id.* at 742, 126 S.Ct. 2208 (plurality opinion). Justice Kennedy, concurring, found this test too limiting. Instead, he borrowed language from *SWANCC* to establish an alternative new test for jurisdiction over adjacent wetlands. *Id.* at 779–80, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment). Under his formulation, when the Corps "seeks to regulate wetlands based on adjacency to nonnavigable tributaries," it must establish that a "significant nexus" exists "between the

wetlands in question and navigable waters in the traditional sense.” *Id.* at 779, 782, 126 S.Ct. 2208. The dissent, which drew four votes, found both of these tests too stringent. It thus suggested that in the future, jurisdiction should be established if either the plurality's or Justice Kennedy's test is met. *Id.* at 810, 126 S.Ct. 2208 (Stevens, J., dissenting).

The parties here agree that Justice Kennedy's “significant nexus” test governs and provides the formula for determining whether the Corps has jurisdiction over the Site Wetlands. We therefore do not address the issue of whether the plurality's “continuous surface connection” test provides an alternate ground upon which CWA jurisdiction can be established.⁹

Given that the significant nexus test undisputedly controls, it bears further elaboration. Justice Kennedy derived this test from a recognition that while Congress *289 clearly intended to allow CWA jurisdiction over “at least some waters that are not navigable in the traditional sense,” *id.* at 767, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment), some meaning had to be given to the term “navigable” as used in the statute, *id.* at 778–79, 126 S.Ct. 2208. To discern this meaning, he returned to *Riverside Bayview Homes*, where the Court upheld jurisdiction over some wetlands by explaining that “wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment...” *Id.* at 779, 126 S.Ct. 2208 (quoting *Riverside Bayview Homes*, 474 U.S. at 135, 106 S.Ct. 455).

Drawing upon this purposive rationale for including certain wetlands within the term “navigable waters,” Justice Kennedy explained that “the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.” *Id.* Wetlands possessing this significant nexus are those that “perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage.” *Id.* Accordingly, Justice Kennedy set forth the following standards for evaluating the existence of a significant nexus:

[W]etlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological

integrity of other covered waters more readily understood as “navigable.” When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.”

Id. at 780, 126 S.Ct. 2208.

Justice Kennedy further explained that, in accordance with *Riverside Bayview Homes*, wetlands adjacent to navigable-in-fact waters necessarily satisfy this significant nexus test. *Id.* However, for wetlands adjacent to non-navigable **tributaries**, such as the Site Wetlands we consider here, the Corps must now “establish a **significant nexus** on a case-by-case basis.” *Id.* at 782, 126 S.Ct. 2208. As possible indicia of the significance of such wetlands, Justice Kennedy noted that the Corps might consider documenting “the significance of the tributaries to which the wetlands are connected,” a “measure of the significance of [the hydrological connection] for downstream water quality,” and/or “the quantity and regularity of flow in the adjacent tributaries.” *Id.* at 784, 786, 126 S.Ct. 2208.

B.

[1] With this framework established, we turn to Precon's substantive challenges. We review the district court's decision to grant summary judgment de novo, *S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752, 755 (4th Cir.2010), including its findings on an administrative record, *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 189 (4th Cir.2009).

[2] [3] Precon's arguments require a careful examination of the Corps' application of the language Justice Kennedy has engrafted into the statutory requirements of the CWA. See *Rapanos*, 547 U.S. at 779, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment). We therefore treat compliance with Justice Kennedy's “significant nexus” test as a question of law, as we do any question of statutory interpretation, *290 and review for compliance de novo. See, e.g., *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 242–43 (4th Cir.2009); cf. *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 439 (4th Cir.2003) (“When reviewing a particular agency action ... [t]he court is first required to decide whether the [agency] acted within the

scope of [its] authority.” (internal quotations omitted and alterations in original)). However, recognizing the Corps' expertise in administering the CWA, we give deference to its interpretation and application of Justice Kennedy's test where appropriate.¹⁰ See *United States v. Mead Corp.*, 533 U.S. 218, 234, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (“[A]n agency's interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency....”) (quoting *Skidmore v. Swift*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

i.

[4] Precon first challenges the Corps' decision to label 448 acres of surrounding wetlands as “similarly situated” wetlands for purposes of its significant nexus determination. On this point, recognizing the deference due the Corps' factual findings and interpretation of the phrase “similarly situated,” we uphold the Corps' finding that 448 acres of wetlands were “similarly situated” to the Site Wetlands.

Justice Kennedy's significant nexus test clearly allows some aggregation of wetlands in determining whether a significant nexus exists. He explained that the significant nexus inquiry should focus on whether “wetlands, either alone or *in combination with similarly situated lands in the region*, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ ” *Rapanos*, 547 U.S. at 780, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment) (emphasis added). However, his concurrence provided no further explanation of what “similarly situated,” or, for that matter, “region,” should be taken to mean in this context.

To flesh out this concept, the Corps' Rapanos Guidance interprets “similarly situated” to mean “all wetlands adjacent to the same tributary.” J.A. 486. A tributary, in turn, is defined as “the entire reach of the stream that is of the same order (i.e. from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream).” *Id.*

Applying these definitions to the instant case, the Corps identified the relevant tributary as the 2,500-foot Ditch and the Saint Brides Ditch, collectively, down to the *291 point where the Saint Brides Ditch converged with the Pleasant Grove Swamp. The Corps explained that it considered

these ditches together because they were historically part of the same naturally defined wetland drainage feature before human-made ditches altered the area. The Corps then identified the 166 acres of wetlands located on the Edinburgh PUD and an additional 282 acres of wetlands outside of Precon's property as wetlands sitting “adjacent” to this “relevant reach.” It noted that all 448 acres were part of a “physical, chemical and biological connection of wetlands and streams” that existed, “and had always existed,” in the area. *Id.* at 267.

[5] Precon acknowledges that the Rapanos Guidance's interpretation of “similarly situated lands in the region” is entitled to *Skidmore* deference. Under *Skidmore*, an agency's interpretation merits deference “to the extent that the interpretation has the power to persuade.” *U.S. Dep't of Labor v. N.C. Growers Ass'n*, 377 F.3d 345, 353–54 (4th Cir.2004) (citing *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161). Precon argues, however, that the Corps' determination that the 448 acres were “similarly situated” is unpersuasive because (1) adjacent and abutting wetlands cannot reasonably be considered to be “similarly situated,” and (2) the Corps failed to follow its own guidance here.¹¹

According to Precon, the primary flaw in the Corps' interpretation of “similarly situated” is its equal treatment of abutting and other adjacent wetlands. Specifically, Precon argues that the plurality and Justice Kennedy in *Rapanos* “expressly recognize[d] that there is a significant difference in the relationship between abutting and non-abutting wetlands and their nearest ditches.” Appellant's Br. at 46.

Although the *Rapanos* plurality clearly found the abutting/adjacent distinction meaningful, see 547 U.S. at 740–42, 126 S.Ct. 2208, we find no evidence that Justice Kennedy, in permitting “similarly situated lands” to be included within the significant nexus analysis, intended to differentiate between abutting and other adjacent wetlands. To the contrary, his concurrence explicitly approved of the Corps' regulatory definition of “adjacent,” which includes both those wetlands that directly abut waters of the United States and those separated from other waters “by man-made dikes or barriers, natural river berms, beach dunes and the like.” 33 C.F.R. § 328.3(c). As Justice Kennedy explained, abutting wetlands are not necessarily any more important than other adjacent wetlands because “filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways.” *Rapanos*,

547 U.S. at 775, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment). He thus concluded that “it may be the absence of an interchange of waters ... that makes protection of the wetlands critical to the statutory scheme.” *Id.*

Here, the Corps adopted this precise rationale in aggregating abutting and other adjacent wetlands. It explained that the berm separating the 4.8-acre Site Wetlands from the 2,500-foot Ditch did not *292 disconnect these wetlands from surrounding ones, because it neither inhibited wildlife movement nor wetland functions. It also explained that the berm in fact provided the additional benefit of “allow[ing] floodwaters to be retained longer within the wetlands prior to being discharged downstream thus moderating and mitigating flood flows.” J.A. 271. Given this reasonable explanation for its actions, we see no error in the Corps' decision to aggregate both abutting and adjacent wetlands in its significant nexus determination.

[6] As for Precon's second argument, we acknowledge that it is difficult to determine whether the Corps precisely adhered to the Rapanos Guidance in identifying “similarly situated” wetlands. Specifically, it is not clear that the Guidance contemplates that multiple tributaries might appropriately be included within the “relevant reach.” Although at oral argument the Corps took the position that its determination to aggregate these two ditches was merely an application of its Rapanos Guidance to the unique geography of the area, we are not convinced that the Guidance is so flexible on this point.

However, we conclude that we do not need to determine whether or not the Corps methodically adhered to its nonbinding guidance document in identifying the “similarly situated” wetlands here. *Cf.* J.A. 481 n.16 (footnote in the Rapanos Guidance explaining that the guidance “does not impose legally binding requirements ... and may not apply to a particular situation depending on the circumstances”). Even if the Corps deviated from its guidance, it provided reasoned grounds for doing so.

The Corps explained that it decided to aggregate the wetlands surrounding both the 2,500-foot Ditch and the Saint Brides Ditch because the two ditches were, historically, part of the same naturally defined wetland drainage feature—a feature that was manipulated into discrete ditches in the late 1970s. We accept this finding as true, having no reason to believe it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also Aracoma*, 556 F.3d at 192 (explaining that we should

be at our “most deferential” when reviewing findings of fact based on special expertise). And based on this finding, we are persuaded that the Corps acted reasonably in aggregating these two man-made ditches into a single “tributary.” There is both logical and practical appeal to treating man-made ditches that would naturally be part of the same drainage feature together. Otherwise, a property owner could avoid CWA jurisdiction simply by digging a few well-placed drainage ditches on either side of the wetlands he wished to fill.

[7] We find more questionable the Corps' decision, after determining that it would treat these two ditches together, to include adjacent wetlands stretching over three miles downstream as “similarly situated.” However, we recognize that Justice Kennedy's instruction—that “similarly situated lands in the region” can be evaluated together—is a broad one, open for considerable interpretation and requiring some ecological expertise to administer. On the basis of this recognition, and with no appropriate limiting principle suggested by Precon as to which wetlands could properly have been considered “similarly situated” here, we uphold the Corps' finding that all 448 acres of non-contiguous wetlands adjacent to the 2,500-foot Ditch and the Saint Brides Ditch down to Pleasant Grove Swamp were “similarly situated.” However, the Corps' record on this point gives us a bare minimum of persuasive reasoning to which we might defer. It *293 only notes, somewhat conclusorily, that the Site Wetlands “continue to function as part of the entire” 448 acres. J.A. 271. We urge the Corps to consider ways to assemble more concrete evidence of similarity before again aggregating such a broad swath of wetlands.

For the foregoing reasons, we reject Precon's argument that the Corps impermissibly identified 448 acres of wetlands as “similarly situated lands in the region,” and uphold the Corps' findings on this point.

ii.

[8] [9] We now turn to Precon's argument that the Corps did not adequately establish the existence of a significant nexus between the Site Wetlands—along with similarly situated wetlands—and the Northwest River. The Corps' factual findings on this point are not in dispute;¹² rather, Precon challenges whether the Corps' administrative record, if accepted as accurate, suffices to meet Justice Kennedy's significant nexus test. Upon close examination of the record, we find that it contains insufficient information to allow us

to assess the Corps' conclusion that these wetlands have a significant nexus with the Northwest River, a body of water situated miles away.

Precon's primary argument is that the Corps' record lacks any "measures" of the effects that these wetlands have on the Northwest River. And, it reasons, without such "measures," the wetlands' significance for the river's health cannot be established. The Corps responds that Justice Kennedy's significant nexus test does not require empirical or quantitative evidence of "significance," and that the evidence it provided more than sufficed to establish a significant nexus.

We have not yet had occasion to consider the evidentiary requirements of Justice Kennedy's significant nexus test. The Sixth Circuit has most directly addressed the issue. In *United States v. Cundiff*, 555 F.3d 200 (6th Cir.2009), it held that Justice Kennedy's significant nexus test does not require "laboratory analysis" of soil samples, water samples, or ... other tests." *Id.* at 211. Instead, the Sixth Circuit found that the district court had not clearly erred by finding that a significant nexus was demonstrated through qualitative, rather than quantitative, physical evidence. This evidence included expert testimony that dredging and filling of the wetlands at issue "undermined the wetlands' ability to store water which, in turn, ... affected the frequency and extent of flooding, and increased the flood peaks in the Green River," and caused visible acid mine runoff previously stored in the wetlands to flow more directly to the Green River. *Id.* at 210–11.

*294 [10] We agree that the significant nexus test does not require laboratory tests or any particular quantitative measurements in order to establish significance. As Justice Kennedy explained, the significant nexus test is a flexible ecological inquiry into the relationship between the wetlands at issue and traditional navigable waters. *See Rapanos*, 547 U.S. at 779–80, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment). However, in announcing this test, he clearly intended for some evidence of both a nexus and its significance to be presented. Otherwise, it would be impossible to engage meaningfully in an examination of whether a wetland had "significant" effects or merely "speculative or insubstantial" effects on navigable waters. *Id.* at 780, 126 S.Ct. 2208. Justice Kennedy's opinion further provides specific examples of the types of evidence that might support a determination of significance. For instance, an adequate record might include documentation of "the significance of the tributaries to which the wetlands

are connected," a "measure of the significance of [the hydrological connection] for downstream water quality," and/or "indication of the quantity and regularity of flow in the adjacent tributaries." *Id.* at 784, 786, 126 S.Ct. 2208.

The question is thus whether the Corps' record contained enough physical evidence—quantitative or qualitative—to allow us to uphold its determination that a significant nexus existed here. Relying on the final example described above, the Corps asserted at oral argument that its documentation of the flow of the adjacent **tributaries** sufficed, even standing alone, to establish that a **significant nexus** existed here. According to this theory, a measurement of these **tributaries'** flow adequately demonstrated that this area "help[ed] to slow flows/retain floodwaters, releasing them slowly so that downstream waters do not receive as much flow volume and velocity, all working to diminish downstream flooding and erosion," which led to the conclusion that a **significant nexus** existed. J.A. 265.

We cannot accept this conclusion for two reasons. First, as Precon points out, the Corps' administrative record does not appear to contain *any* measurements of actual *flow*. Nor was counsel able to point to such measurements at oral argument. Instead, the record reflects measures of the water storage *capacity* and the resultant *potential* flow rates of the Saint Brides Ditch and the 2,500-foot Ditch, without any indication of how often this capacity is reached or how much flow is typically in the ditches.¹³

[11] Second, even if the record *had* sufficiently documented flow, we do not believe that recitation of the flow of an adjacent **tributary** alone, absent any additional information regarding its significance, would necessarily suffice to establish a **significant nexus**. The **significant nexus** inquiry emphasizes the comparative relationship between the wetlands at issue, their adjacent **tributary**, and traditional navigable waters. *Cf. Rapanos*, 547 U.S. at 780, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment) (drawing a critical distinction between wetlands with "significant" effects versus only "insubstantial" effects on navigable waters). We can therefore imagine, for example, that wetlands *295 next to a tributary with minimal flow might be significant to a river one quarter mile away, whereas wetlands next to a tributary with much greater flow might have only insubstantial effects on a river located twenty miles away. Accordingly, in this case of wetlands approximately seven miles from any navigable water, we cannot say that

recitation of the adjacent tributary's flow, standing alone, would necessarily have sufficed.

We acknowledge that the Corps' **Significant Nexus** Determination did contain other physical observations about the wetlands and adjacent **tributaries**.¹⁴ However, there is no documentation in the record that would allow us to review its assertion that the functions that these wetlands perform are "significant" for the Northwest River. In particular, although we know that the wetlands and their adjacent tributaries trap sediment and nitrogen and perform flood control functions, we do not even know if the Northwest River suffers from high levels of nitrogen or sedimentation, or if it is ever prone to flooding. This lack of evidence places the facts here in stark contrast to those in *Cundiff*, upon which the Corps relies. There, the Sixth Circuit noted that the district court credited expert testimony about the wetlands "*in relation to*" the navigable river. 555 F.3d at 210–11 (emphasis added). According to that testimony, the challenged actions had undermined the wetlands' ability to store water, which, in turn, had increased the flood peaks in the Green River. *Id.* Additional testimony established that acid mine runoff that had previously been stored in the wetlands flowed more directly into the river, causing "direct and significant impacts to navigation ... and to aquatic food webs" in the river. *Id.* at 211. There is no such testimony here.

Accordingly, we must conclude that this record does not support the Corps' determination that the nexus that exists between the 448 acres of similarly situated wetlands and the Northwest River is "significant." Particularly given the facts of this case, involving wetlands adjacent to two man-made ditches, flowing at varying and largely unknown rates toward a river five to ten miles away, we cannot accept, without any information on the river's condition, the Corps' conclusion that the nexus here is significant. Justice Kennedy created the significant nexus test specifically because he was disturbed by the assertion of jurisdiction over wetlands situated along a ditch "many miles from any navigable-in-fact water," carrying "only insubstantial flow toward it." *Rapanos*, 547 U.S. at 786, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment).

In support of our request for further information on these wetlands' significance, we observe that the geography of the wetlands at issue places them squarely in that category of wetlands over which jurisdiction is no longer assured. *Carabell*, one of the consolidated cases in *Rapanos*, involved wetlands similar to, but less remote than, the Site Wetlands.

In *Carabell*, the Corps had asserted jurisdiction *296 over 15.9 acres of forested wetlands, lying along a ditch—but separated from the ditch by a man-made berm—which eventually drained into Lake St. Claire approximately one mile downstream. *Id.* at 764, 126 S.Ct. 2208. Both the plurality and Justice Kennedy agreed that more evidence was needed about these wetlands' characteristics before jurisdiction could be established. *Id.* at 757, 126 S.Ct. 2208 (plurality opinion); *id.* at 786–87, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment). Given that the Site Wetlands are considerably more removed from traditional navigable waters than the wetlands at issue in *Carabell*, it follows that it would be even more important for the Corps to fully document the significance of their effects on navigable water. Indeed, even the Corps' own Rapanos Guidance cautions that "[a]s the distance from the **tributary** to the navigable water increases, it will become increasingly important to document whether the **tributary** and its adjacent wetlands have a **significant nexus** rather than a speculative or insubstantial nexus with a traditional navigable water." J.A. 487.

Recent Ninth and Sixth Circuit cases provide good examples of the types of evidence—either quantitative or qualitative—that could suffice to establish "significance." In *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir.2007), the Ninth Circuit held the significant nexus test satisfied in part because the district court found increased chloride levels in the relevant navigable water, from 5.9 parts per million to 18 parts per million, due to chlorine seepage from the wetlands in question into the navigable river. *Id.* at 1001. Alternatively, *Cundiff* provides an example of the type of qualitative evidence that can establish a significant nexus. As noted earlier, the Sixth Circuit's opinion in *Cundiff* rested on evidence that the wetlands' acid mine drainage storage capabilities and flood storage capabilities had "direct and significant" impacts on navigation in the Green River, via sediment accumulation, and that the diversion of water from the wetlands had "increased the flood peaks" in the Green River. 555 F.3d at 210–11. Thus, in contrast to the present case, both *River Watch* and *Cundiff* included some evidence not only of the functions of the relevant wetlands and their adjacent tributaries, but of the condition of the relevant navigable waters.

[12] The Corps argues that we must afford deference to its significant nexus finding. We agree that its factual findings are entitled to deference under the APA, and should be reversed only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)

(A); *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376–77, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). The Corps' factual findings, however, are not in dispute. The question is instead whether the Corps' findings were adequate to support the ultimate conclusion that a significant nexus exists. This legal determination is essentially now a matter of statutory construction, as Justice Kennedy established that a “**significant nexus**” is a statutory requirement for bringing wetlands adjacent to non-navigable **tributaries** within the CWA's definition of “navigable waters.” *See Rapanos*, 547 U.S. at 779–80, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment). As we mentioned at the outset, on this question of statutory interpretation, absent the promulgation of new regulations, the Corps' conclusions are entitled at most to *Skidmore* deference. *See Mead*, 533 U.S. at 234–35, 121 S.Ct. 2164; *cf. Rivenburgh*, 317 F.3d at 439. Because the Corps' current administrative record contains no evidence of significance for us to review, we cannot find its conclusion *297 that significance existed here persuasive. *Cf. Shipbuilders Council of Am. v. U.S. Coast Guard*, 578 F.3d 234, 245 (4th Cir.2009) (“Some indicia of reliability and reasonableness must exist in order for us to defer to the agency's interpretation.”).

[13] For these reasons, we reverse the district court's holding that the Corps' administrative record adequately demonstrated that a significant nexus existed here, and remand to the Corps for reconsideration of its significant nexus determination. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52, 57, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (remanding for further agency consideration when

the agency's view of the facts was accepted but the Court “appreciate[d] the limitations of th[e] record in supporting the agency's decision”); *Cook v. Heckler*, 783 F.2d 1168, 1174 (4th Cir.1986) (remanding for further consideration where it was “impossible to conclude that there [was] substantial evidence to support the Secretary's determination”). In doing so, we do not intend to place an unreasonable burden on the Corps. We ask only that in cases like this one, involving wetlands running alongside a ditch miles from any navigable water, the Corps pay particular attention to documenting why such wetlands significantly, rather than insubstantially, affect the integrity of navigable waters. Such documentation need not take the form of any particular measurements, but should include some comparative information that allows us to meaningfully review the significance of the wetlands' impacts on downstream water quality.

III.

For the foregoing reasons, the district court's grant of summary judgment is reversed and we remand to the district court with instructions to remand to the Corps for further consideration in light of this opinion.

REVERSED AND REMANDED

All Citations

633 F.3d 278, 72 ERC 1616

Footnotes

- 1 Adjacent, per the Corps' relevant regulations, means “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’ ” 33 C.F.R. § 328.3(c).
- 2 A “berm,” as used in this context, is “[a] raised bank or path,” or “[a] mound or bank of earth, used especially as a barrier....” *American Heritage Dictionary* 171 (4th ed.2006).
- 3 The Edinburgh PUD is situated on a drainage divide, meaning that only a portion of the property drains towards the Northwest River. Additional acres of wetlands on the Edinburgh PUD, which drain towards the Intracoastal Waterway, are not relevant for purposes of this opinion.
- 4 The version of the Rapanos Guidance utilized by the Corps, and thus the one described here, is the version dated June 5, 2007, and included within the Joint Appendix. The Guidance has since been updated, and the current version of the Guidance is available on the Corps' website. *See* U.S. Env't Prot. Agency & U.S. Army Corps of Eng'rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), available at http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/cwa_juris_2dec08.pdf.
- 5 In 2001, the Corps brought a civil enforcement action against RGM for filling wetlands without a CWA permit. In *United States v. RGM Corp.*, 222 F.Supp.2d 780 (E.D.Va.2002), the court found that the Corps had no jurisdiction over the wetlands on the Edinburgh PUD. However, after Precon acquired the Edinburgh PUD, Precon and the Corps settled

pending appeal and the district court vacated its earlier judgment. See No. 01–cv–719, 2005 U.S. Dist. LEXIS 1992 (E.D.Va. Jan. 18, 2005). The particulars of this suit and settlement have no bearing on the instant litigation.

6 Eutrophication is:

a process by which [a water body's] nutrient content increases dramatically due to nitrogen- and phosphorus-rich soil that is washed into [it]. These nutrients encourage the growth of algae, which renders the formerly clear blue water green and increasingly opaque. Moreover, the algae depletes oxygen in the water, jeopardizing the survival of fish and other animal life.

Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1070 (9th Cir.2003).

7 Precon does not challenge the Corps' permit denial, which will accordingly not be discussed further.

8 In *Rapanos*, the Court specifically considered the validity of the Corps' regulation defining "waters of the United States," 33 C.F.R. § 328.3(a). Section 328.3(a) broadly defines this term to encompass all wetlands "adjacent to waters," including "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce" and tributaries of such waters. 33 C.F.R. § 328.3(a). A majority of the justices in *Rapanos* found this regulation to be overly broad inasmuch as it allowed, as a matter of course, jurisdiction over wetlands adjacent to nonnavigable tributaries. See 547 U.S. at 739, 126 S.Ct. 2208 (plurality opinion); *id.* at 781–82, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment).

9 We note that in any event, the applicability of the continuous surface connection test is more questionable on these facts, given the presence of a continuous berm separating the 4.8–acre Site Wetlands from the 2,500–foot Ditch.

10 We do not, however, review the Corps' interpretation of the phrase "significant nexus" under the greater deference accorded to some agency interpretations under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), because—although it could—the Corps has not adopted an interpretation of "navigable waters" that incorporates this concept through notice-and-comment rulemaking, but instead has interpreted the term only in a non-binding guidance document. See *United States v. Mead Corp.*, 533 U.S. 218, 234, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Rapanos*, 547 U.S. at 782, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment) (explaining that "[a]bsent more specific regulations ... the Corps must establish a significant nexus on a case-by-case basis"); *id.* at 758, 126 S.Ct. 2208 (Roberts, J., concurring) (noting that the Corps has broad leeway to interpret the CWA, but that in order to receive *Chevron* deference, it must engage in rulemaking that interprets "the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the [CWA]").

11 Precon also argues that the Corps impermissibly aggregated bottom-land hardwood wetlands and forested mineral flat wetlands. But as the Corps notes in response, the bottomland hardwood wetlands only comprised three of the 448 acres. Accordingly, there is no indication that inclusion of these acres, even if improper, had any material impact on the outcome of the Corps' significant nexus analysis.

12 There is one factual dispute between the parties. Precon argues that the Corps improperly characterized the 2,500–foot Ditch as a "relatively permanent water," given that the ditch was "substantially dry" in January 2008, which it asserts was the wettest time of year. Appellant's Reply Br. at 17. However, the Corps' determination that the ditch was a reasonably permanent water, which it defines as a tributary that "has continuous flow at least 'seasonally' (e.g. typically three months)," J.A. 242, rested on its conclusion that it seasonally flowed from February to April. The Corps' Significant Nexus Determination also observed that January 2008 was a period of drought, and that even at this time standing water was observed in the ditch. *Id.* at 264. Accordingly, we accept the Corps' factual determination that the 2,500–foot Ditch flowed at least seasonally, finding it not to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *cf. Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (applying § 706(2)(A) to "a factual dispute the resolution of which implicates substantial agency expertise").

13 In fact, the record suggests that the two ditches are not generally at capacity, such that a measurement of capacity could double as a measure of flow. At the *United States v. RGM Corp.* trial, a neighbor testified that the Saint Brides Ditch perennially has water in it, but that at times—especially during drought conditions—portions of it have only two to three inches of water and that it is often not possible to discern which way it is flowing. J.A. 415–16.

14 Specifically, the Corps' record documents the Saint Brides Ditch's dynamic storage capacity, channel slope, water velocities, and sediment storage capabilities; the 2,500–foot Ditch's storage capacity, water velocity, and estimated sediment and organic material trapping capabilities; and the 448 acres of similarly situated wetlands' foot/acre water storage capacity, annual amount of precipitation received, and estimated amount of nitrogen stored. These findings support a conclusion that certain amounts of water, sediment, and pollutants migrate, or are prevented from migrating,

from these wetlands to the Northwest River, and thus establish that a "nexus" is present here. But they do not speak to the *significance* of this nexus.

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(Publication page references are not available for this document.)**H****Motions, Pleadings and Filings**

United States District Court,
N.D. California.
ENVIRONMENTAL PROTECTION
INFORMATION CENTER, a non-profit
corporation,
Plaintiff,

v.

PACIFIC LUMBER COMPANY, a Delaware
corporation; Scotia Pacific Company LLC, a
Delaware corporation; Environmental Protection
Agency; and Christine Todd
Whitman, Defendants.
No. C 01-2821 MHP.

Jan. 8, 2007.

Background: Non-profit environmental organization brought citizen-suit action under Clean Water Act (CWA) against two lumber companies, Environmental Protection Agency (EPA), and EPA administrator, seeking declaratory and injunctive relief, civil penalties, and restitution for alleged discharge of pollutants into creek, and challenging EPA regulation defining certain silvicultural activities as nonpoint sources for CWA purposes. Parties brought motions for partial summary judgment.

Holdings: The District Court, Patel, J., held that:
(1) member of organization had individual, particularized injury distinct from organization's institutional interests;
(2) member's interests did not merge with those of organization through organization's compensation of member for his work;
(3) other member, who lived several hundred miles away from watershed, nevertheless had individual, particularized injury distinct from organization's

institutional interests;

(4) another member's observations of muddy, turbid water during his many drives over creek in his car did not result in personal and particularized injury;

(5) interests that organization sought to protect were germane to its organizational purpose;

(6) remedy, if granted, would have inured to benefit of those members of organization actually injured;

(7) organization demonstrated that hydrologic connection existed between navigable water and streams in question; and

(8) separate cause of action for discharges did not exist under provision of CWA that set out requirements for National Pollutant Discharge Elimination System (NPDES) permits and afforded cause of action for noncompliance with permit.

Motions denied.

[1] Environmental Law 196

149Ek196 Most Cited Cases

Under the Clean Water Act (CWA), the National Pollutant Discharge Elimination System (NPDES) requires permits only for point source emissions. Federal Water Pollution Control Act §§ 101(a), 303(a), 402(a), 33 U.S.C.A. §§ 1251(a), 1311(a), 1342(a).

[2] Federal Civil Procedure 103.2

170Ak103.2 Most Cited Cases

An Article III court cannot entertain the claims of a litigant unless that party has demonstrated the threshold jurisdictional issue of whether it has constitutional and prudential standing to sue. U.S.C.A. Const. Art. 3, § 2.

[3] Federal Civil Procedure 103.2

170Ak103.2 Most Cited Cases

[3] Federal Civil Procedure 103.3

170Ak103.3 Most Cited Cases

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(Publication page references are not available for this document.)

To satisfy Article III's standing requirements, a plaintiff must show that: (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 2.

[4] Associations ⚡20(1)

41k20(1) Most Cited Cases

An organization may have standing to sue in its own right to vindicate whatever rights and immunities the association itself may enjoy, and in doing so, may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties; in order to establish organizational standing, plaintiffs must meet the same standing test that applies to individuals.

[5] Associations ⚡20(1)

41k20(1) Most Cited Cases

In those cases where an organization is suing on its own behalf, to establish standing, it must establish concrete and demonstrable injury to the organization's activities, with a consequent drain on the organization's resources, constituting more than simply a setback to the organization's abstract social interests; the organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action.

[6] Associations ⚡20(1)

41k20(1) Most Cited Cases

Even if an organization has not suffered injury to itself, it may have standing to assert the rights of its members if: (1) its members would have standing to sue on their own; (2) the interests it seeks to protect are germane to its purpose; and (3) its claim and requested relief do not require participation by individual members.

[7] Associations ⚡20(1)

41k20(1) Most Cited Cases

[7] Federal Courts ⚡12.1

170Bk12.1 Most Cited Cases

Even in the absence of injury to itself, an association may have standing solely as the representative of its members, but the possibility of such representational standing does not eliminate or attenuate the requirement of an Article III case or controversy. U.S.C.A. Const. Art. 3, § 2.

[8] Environmental Law ⚡656

149Ek656 Most Cited Cases

Member of non-profit environmental organization had individual, particularized injury distinct from organization's institutional interests to bring suit in his own right, as required for organization to have representational standing to bring citizen-suit action under Clean Water Act (CWA) against two lumber companies for alleged violations of National Pollution Discharge Elimination System (NPDES) permit conditions, where member personally observed sediment in watershed which organization attributed to companies, member's recreational and conservation interests were harmed by sediment deposited without NPDES permit, and member's injuries would have been redressed if companies were enjoined from discharging storm water without NPDES permit. Federal Water Pollution Control Act § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[9] Associations ⚡20(1)

41k20(1) Most Cited Cases

For representational standing purposes, an organizational plaintiff needs to show that one of its members has standing in his or her own right.

[10] Environmental Law ⚡656

149Ek656 Most Cited Cases

Member of non-profit environmental organization, who had been compensated for his work at particular watershed as independent contractor for organization, nevertheless had individual, particularized injury distinct from organization's institutional interests to bring suit in his own right, as required for organization to have representational standing to bring citizen-suit action under Clean Water Act (CWA) against two lumber companies for alleged violations of National Pollution Discharge Elimination System (NPDES) permit conditions at that watershed, where member's alleged injuries did not arise from his position as

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independent contractor and member could establish standing as member. Federal Water Pollution Control Act, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[11] Associations ↪20(1)

41k20(1) Most Cited Cases

For the purpose of representational standing, there is no barrier to an employee establishing a particularized injury based on his employment with an

organization of which he is also a member, even if that person's injuries arose from his work as an independent contractor.

[12] Environmental Law ↪651

149Ek651 Most Cited Cases

A plaintiff alleging violations of the Clean Water Act (CWA) can establish injury-in-fact by showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable, that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction, if the area in question remains or becomes environmentally degraded. Federal Water Pollution Control Act, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[13] Environmental Law ↪656

149Ek656 Most Cited Cases

Member of non-profit environmental organization, who lived several hundred miles away from watershed, nevertheless had individual, particularized injury distinct from organization's institutional interests to bring suit in his own right, as required for organization to have representational standing to bring citizen-suit action under Clean Water Act (CWA) against two lumber companies for alleged violations of National Pollution Discharge Elimination System (NPDES) permit conditions at that watershed, where member visited watershed over dozen times before suit commenced as well as several times during tenure of suit, and he expressed his intent to visit watershed in future. Federal Water Pollution Control Act, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[14] Environmental Law ↪656**149Ek656 Most Cited Cases**

Member of non-profit environmental organization did not suffer personal and particularized injury by alleged harm he suffered by his observations of muddy, turbid water during his many drives over creek in his car, for purpose of representational standing inquiry in citizen-suit action under Clean Water Act (CWA) against two lumber companies for alleged violations of National Pollution Discharge Elimination System (NPDES) permit conditions at that watershed; such indirect contact with area was insufficient to establish standing. Federal Water Pollution Control Act Amendments, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[15] Environmental Law ↪652

149Ek652 Most Cited Cases

Interests that non-profit environmental organization sought to protect were germane to its organizational purpose, for purpose of representational standing inquiry in citizen-suit action under Clean Water Act (CWA) against two lumber companies for alleged violations of National Pollution Discharge Elimination System (NPDES) permit conditions at particular watershed, where organization's goals were to promote "clean water and healthy watersheds through public education and outreach, grassroots citizen advocacy and strategic litigation." Federal Water Pollution Control Act, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[16] Associations ↪20(1)

41k20(1) Most Cited Cases

To claim representational standing, the litigation involved must not require the participation of individual members.

[17] Associations ↪20(1)

41k20(1) Most Cited Cases

When an organization seeks prospective, equitable relief, it can reasonably be supposed, for the purpose of representational standing, that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

[18] Environmental Law ↪652

149Ek652 Most Cited Cases

Remedy, if granted, would have inured to benefit of

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those members of organization actually injured, as required for organization to have representational standing in citizen-suit action under Clean Water Act (CWA) against two lumber companies for alleged violations of National Pollution Discharge Elimination System (NPDES) permit conditions at particular watershed, where organization sought declaratory and injunctive relief as well as civil penalties and restitutions and consideration of individual circumstances of any aggrieved member was not required by claims and relief sought. Federal Water Pollution Control Act, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

[19] Environmental Law ↪196
149Ek196 Most Cited Cases

[19] Environmental Law ↪206
149Ek206 Most Cited Cases

Sampling of runoff did not have to be conducted before it reached discharge location to prove that sediment, as pollutant, was added at discharge location, under Clean Water Act (CWA) provision which defined discharge of any pollutant as "any addition of any pollutant to navigable waters from any point source." Federal Water Pollution Control Act, §§ 303(a), 502(12), 33 U.S.C.A. §§ 1311(a), 1362(12).

[20] Environmental Law ↪230
149Ek230 Most Cited Cases

Expert eyewitness observations, as well as photographic and video documentation and measurement of turbidity levels, was sufficient to prove discharge of sediment, as pollutant under Clean Water Act (CWA). Federal Water Pollution Control Act, § 303(a), 502(12), 33 U.S.C.A. §§ 1311(a), 1362(12).

[21] Federal Civil Procedure ↪2498.3
170Ak2498.3 Most Cited Cases

Genuine issue of material fact existed as to issue of discharge at particular locations, precluding summary judgment on claim that lumber companies discharged sediment on particular dates from specific point sources in particular watershed without securing National Pollutant Discharge Elimination System (NPDES) permit. Federal

Water Pollution Control Act, §§ 303(a), 502(12), 33 U.S.C.A. §§ 1311(a), 1362(12); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[22] Environmental Law ↪175
149Ek175 Most Cited Cases

Unpaved logging roads, as sources of sediment that was discharged via inboard ditches to stream crossing culverts, ditch relief culverts, and cross drain culverts, and rolling dips, could be point source under Clean Water Act (CWA), although those road features were best management practice (BMPs) in compliance with California Forest Practice Rules which had been designed to disperse storm water on hillside in order to promote natural filtration and lessen runoff; points of failure can be point sources when device or system designed to channel or diffuse runoff failed and instead channels runoff into navigable water. Federal Water Pollution Control Act, §§ 303(a), 502(12, 14), 33 U.S.C.A. §§ 1311(a), 1362(12, 14).

[23] Federal Civil Procedure ↪2498.3
170Ak2498.3 Most Cited Cases

Genuine issue of material fact existed as to whether ditches and culverts at issue were point sources, precluding summary on claim under Clean Water Act (CWA) alleging discharge of sediment, as pollutant, into navigable water without securing National Pollutant Discharge Elimination System (NPDES) permit. Federal Water Pollution Control Act, §§ 303(a), 502(12, 14), 33 U.S.C.A. §§ 1311(a), 1362(12, 14); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[24] Environmental Law ↪175
149Ek175 Most Cited Cases

Under the Clean Water Act, the issue of whether a ditch, culvert, or other best management practices (BMP) may constitute a point source is a highly fact-based inquiry. Federal Water Pollution Control Act, §§ 303(a), 502(12, 14), 33 U.S.C.A. §§ 1311(a), 1362(12, 14).

[25] Federal Civil Procedure ↪2498.3
170Ak2498.3 Most Cited Cases

Genuine issue of material fact existed as to whether streams in dispute had significant nexus to water

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quality of navigable water, precluding summary judgment on claim under Clean Water Act (CWA) alleging discharge of sediment, as pollutant, into navigable water without securing National Pollutant Discharge Elimination System (NPDES) permit. Federal Water Pollution Control Act, § 502(7), 33 U.S.C.A. § 1362(7); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

[26] Courts ↪90(2)

106k90(2) Most Cited Cases

by

When a fragmented Supreme Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.

[27] Environmental Law ↪173

149Ek173 Most Cited Cases

Under the significant nexus test of the Clean Water Act (CWA), the party seeking to invoke the court's jurisdiction must present evidence of a hydrologic connection. Federal Water Pollution Control Act, 502(7), 33 U.S.C.A. § 1362(7).

[28] Environmental Law ↪206

149Ek206 Most Cited Cases

Non-profit environmental organization demonstrated that hydrologic connection existed between navigable water and streams in question, as required on claim under Clean Water Act (CWA) alleging discharge of sediment, as pollutant, into navigable water without securing National Pollutant Discharge Elimination System (NPDES) permit, on evidence that lumber companies' geographic information system (GIS) maps demonstrated hydrological connection between each of streams in dispute and navigable water. Federal Water Pollution Control Act, § 502(7), 33 U.S.C.A. § 1362(7).

[29] Environmental Law ↪206

149Ek206 Most Cited Cases

Alleged discharges of sediment, as pollutant, that occurred on property that was not owned or controlled by lumber companies were not violations

of Clean Water Act (CWA) by lumber companies, since lumber companies could not have obtained National Pollutant Discharge Elimination System (NPDES) permit for discharges on that land. Federal Water Pollution Control Act, §§ 303(a), 502(12, 14), 33 U.S.C.A. §§ 1311(a), 1362 (12, 14).

[30] Environmental Law ↪226

149Ek226 Most Cited Cases

Separate cause of action for discharges did not exist under provision of Clean Water Act (CWA) that set out requirements for National Pollutant Discharge Elimination System (NPDES) permits and afforded cause of action for noncompliance with permit; provision did not confer any independent cause of action other than for noncompliance. Federal Water Pollution Control Act, § 402(p), 33 U.S.C.A. § 1342(p).

[31] Environmental Law ↪196

149Ek196 Most Cited Cases

[31] Environmental Law ↪206

149Ek206 Most Cited Cases

In the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with Environmental Protection Agency (EPA) regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an National Pollutant Discharge Elimination System (NPDES) permit in the first instance. Federal Water Pollution Control Act, § 402(p), 33 U.S.C.A. § 1342(p).

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Moring LLP, Washington, DC, for Defendants.

MEMORANDUM & ORDER
Re: Parties' Cross-Motions for Summary Judgment

PATEL, District Judge.

On July 24, 2001 plaintiff Environmental Protection Information Center ("EPIC"), a non-profit environmental organization, brought a citizen-suit action under section 505(a) of the Clean Water Act ("CWA"), 33 U.S.C. section 1365(a), against Pacific Lumber Company and Scotia Pacific Company (collectively "PALCO"), the Environmental Protection Agency ("EPA"), and Christine Todd Whitman as EPA Administrator. [FN1]

Now before the court are PALCO's motion for summary judgment on the issue of EPIC's standing and EPIC's motion for partial summary judgment regarding its first and second claims for relief. [FN2] The court has considered the parties' arguments fully, and for the reasons set forth below, the court rules as follows.

BACKGROUND

I. Background Facts

In each of its prior decisions the court has set forth the underlying facts of this action in significant detail, and it is not necessary to restate that background here in order to resolve the motions currently before the court. The court, rather, need only reframe the core dispute.

At the heart of this litigation is Bear Creek, a brook situated several miles upstream of Scotia, California. A tributary of the Eel River, Bear Creek creates a watershed that covers 5500 acres of land throughout Humboldt County, California. Pacific Lumber Company and its wholly-owned subsidiary, defendant Scotia Pacific Lumber Company, own some ninety-five percent of the land in the Bear Creek watershed, much of which PALCO uses for logging. [FN3]

According to EPIC, substantial logging activity (primarily PALCO's) in the watershed area has spurred a dramatic increase in the amount of sediment deposited in Bear Creek. Before significant logging began, EPIC claims, Bear Creek's sediment deposit peaked at approximately 8,000 tons per year; after logging practices commenced, sediment deposit climbed to 27,000 tons per year. This sediment increase, EPIC alleges, has a specific source: PALCO's timber harvesting and construction of unpaved roads. According to EPIC, PALCO's logging activity increases sediment through the following process. First, EPIC notes, timber harvesting removes vegetation from the ground surface, making soil more susceptible to erosion and landslides. Construction of unpaved roads then exposes more soil, which, in turn, further destabilizes slopes. The effect of timber harvesting and road construction, EPIC contends, is to expose far more destabilized soil than is environmentally sustainable. When it rains, EPIC explains, the rain water carries the exposed silts and sediments--as well as other pollutants, such as pesticides and diesel fuel--into culverts, ditches, erosion gullies, and other alleged channels. From these various channels, silts, sediments and pollutants flow directly into Bear Creek. The consequences of PALCO's drainage system, EPIC notes, are predictable and environmentally adverse; PALCO's present and future timber harvest plans, EPIC adds, promise only to make the situation worse.

EPIC believes PALCO's present drainage system violates various provisions of the Clean Water Act, including (but not necessarily limited to) the National Pollutant Discharge Elimination System ("NPDES"). See 33 U.S.C. §§ 1251(a), 1311(a), 1342(a); see also *Environmental Def. Ctr., Inc. v. United States Envtl. Prot. Agency* ("EPA"), 344 F.3d 832 (9th Cir.2003), cert. denied, 541 U.S. 1085, 124 S.Ct. 2811, 159 L.Ed.2d 246 (2004); *Association to Protect Hammersley v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir.2002) (noting that, in 1972, "Congress passed the Clean Water Act amendments, 33 U.S.C. §§ 1251-1387, to respond to environmental degradation of the nation's waters."); *Natural Resources Def. Council* ("NRDC") v. EPA, 822 F.2d 104, 109

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(D.C.Cir.1987) (citing 33 U.S.C. § 1311(a)). In substantial part, EPIC alleges that PALCO has used a variety of "point sources," *see* 33 U.S.C. § 1362(14), to discharge pollutants without first securing necessary NPDES permits. Absent such permits, EPIC claims, PALCO's system conflicts with defendants' CWA obligations.

II. Statutory and Regulatory Background

With the goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," Congress enacted the CWA in 1972. 33 U.S.C. § 1251(a) (originally codified as the Federal Water Pollution Control Act, 62 Stat. 1155); *see Association to Protect Hammersley*, 299 F.3d at 1016; *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir.2002) (observing that prior federal water pollution regulation "had proven ineffective"), *cert. denied*, 539 U.S. 926, 123 S.Ct. 2573, 156 L.Ed.2d 602 (2003). Built on a "fundamental premise" that the unauthorized "discharge of any pollutant by any person shall be unlawful," *NRDC v. EPA*, 822 F.2d at 109 (citing 33 U.S.C. § 1311(a)), the CWA "establishes a comprehensive statutory system for controlling water pollution." *Association to Protect Hammersley*, 299 F.3d at 1009 (citation and internal quotation marks omitted). This broad statutory scheme includes, *inter alia*, a National Pollutant Discharge Elimination System (NPDES) for regulation of pollutant discharges into the waters of the United States. *See* 33 U.S.C. §§ 1311(a), 1342(a). Under the NPDES, permits may be issued by EPA or by states that have been authorized by EPA to act as NPDES permitting authorities. *See* 33 U.S.C. § 1342(a)-(b); *see also Environmental Def. Ctr., Inc.*, 344 F.3d at 841 (holding that pollution dischargers must comply with "technology-based pollution limitations (generally according to the 'best available technology economically achievable,' or 'BAT' standard)."); *NRDC v. EPA*, 822 F.2d at 110 (noting that, when necessary, water quality-based standards may supplement technology standards). California has been so authorized. [FN4]

Not all pollutants or pollution sources fall within the purview of the NPDES. Under the CWA,

"discharge of pollutant" is defined as "any addition of any pollutant to navigable waters from any *point source*." 33 U.S.C. § 1362(12)(A) (emphasis added). The focus of both the CWA and NPDES, then, turns largely on pollutant discharges from "point sources," a term the Act defines as:

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

Id. at § 1362(14); *see also id.* at § 1362(6) (defining "pollutant" broadly to include substances ranging from rock and sand to industrial and municipal industrial wastes).

[1] The CWA distinguishes point sources from nonpoint sources. The NPDES recognizes--and functions on the basis of--this distinction, requiring permits only for point source emissions. *See, e.g., League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir.2002) ("Point source pollution is distinguished from 'nonpoint source pollution,' which is regulated in a different way and does not require [the NPDES] type of permit."). Unlike point sources, nonpoint sources [FN5] are regulated indirectly: the CWA directs EPA to disseminate information regarding nonpoint pollution sources, *see* 33 U.S.C. § 1314(f), but it is often through state management programs that nonpoint sources are monitored and controlled. *See Oregon Natural Desert Ass'n v. Dombek*, 172 F.3d 1092, 1096-97 (9th Cir.1998), *cert. denied*, 528 U.S. 964, 120 S.Ct. 397, 145 L.Ed.2d 310 (1999). [FN6]

III. Procedural History

In an effort to compel PALCO to comply with the putative terms of the CWA, EPIC brought a citizen-suit action under section 505(a) of the CWA, 33 U.S.C. section 1365(a), against PALCO, the EPA, and then-EPA Administrator Christine Todd Whitman. EPIC's first two claims allege,

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generally stated, that PALCO's drainage system employs a number of unpermitted point sources to discharge pollutants; EPIC later added a third claim, alleging that the adoption of a particular EPA regulation--40 C.F.R. section 122.27-- constituted an *ultra vires* act. A number of potentially dispositive motions followed.

On June 6, 2003 the court denied EPA's motion to dismiss and denied PALCO's motion to dismiss in part, concluding that EPIC could pursue a claim under the Administrative Procedures Act ("APA") in this court and that EPIC's claim was not time-barred. On October 14, 2003 the court denied EPIC's motion for summary adjudication on its third claim for relief, granting EPA's and PALCO's cross-motions for summary adjudication and construing 40 C.F.R. section 122.27 to be consistent with the governing provisions of the CWA. On January 23, 2004 the court denied PALCO's motion to dismiss EPIC's remaining claims (that is, its first and second claims for relief) under Federal Rule of Civil Procedure 12(b)(6) and held that PALCO's point sources--to the extent they exist--must comply with the terms of the NPDES and the CWA. On April 19, 2004 the court denied PALCO's motion to certify three of the court's decisions for interlocutory review under 28 U.S.C. section 1292(b). On July 12, 2005 PALCO filed a Notice of Intent ("NOI") to comply with the terms of the General Permit to Discharge Storm Water Associated With Industrial Activity (WQ Order No. 97-03-DWQ) ("Industrial General Permit" or "IGP") for PALCO's logging operations in the Bear Creek Watershed and Storm Water Pollution Prevention Plan ("SWPPP") which outlines practices and procedures PALCO will implement to reduce or prevent industrial pollutants in storm water discharges. On April 28, 2006 the court denied defendants' motion for summary judgment with respect to EPIC's first and second claims for relief, rejecting PALCO's argument that the claims were rendered moot by procuring IGP. The court also denied EPIC's cross-motion for partial summary judgment on the issue of defendants' liability. The court further ordered additional briefing on the issue of what EPIC must prove to establish defendant's liability under the CWA.

PALCO now urges the court to hold that EPIC does not have standing to bring this suit on its own behalf or on behalf of its members. EPIC, in turn, asks the court to hold PALCO liable for violations of the CWA.

LEGAL STANDARD

I. Summary Judgment

Summary judgment is proper when the pleadings, discovery, and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Material facts are those which may affect the outcome of the proceedings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The party moving for summary judgment bears the burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). On an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Mere allegations or denials do not defeat a moving party's allegations. *Id.*; see also *Gasaway v. Northwestern Mut. Life Ins. Co.*, 26 F.3d 957, 960 (9th Cir.1994). The court may not make credibility determinations, *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505, and inferences drawn from the facts must be viewed in the light most favorable to the party opposing the motion. *Masson v. New Yorker Magazine*, 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991).

II. Standing

(Publication page references are not available for this document.)

[2] An Article III court cannot entertain the claims of a litigant unless that party has demonstrated the threshold jurisdictional issue of whether it has constitutional and prudential standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The doctrine of standing encompasses both constitutional and statutory considerations. *Id.* Article III, section 2 of the United States Constitution extends the judicial power of the federal courts only to cases or controversies. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

[3] The party invoking federal jurisdiction bears the burden of establishing three requirements in order to meet the "irreducible constitutional minimum of standing." *Defenders of Wildlife*, 504 U.S. at 560, 112 S.Ct. 2130. To satisfy Article III's requirements a plaintiff must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Defenders of Wildlife*, 504 U.S. at 560-61, 112 S.Ct. 2130). In addition, where Congress is the source of the alleged legal violation, the Supreme Court has recognized a prudential component to standing requiring that the plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision invoked. *Bennett v. Spear*, 520 U.S. 154, 163, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

[4][5] An organization may have standing to sue "in its own right ... to vindicate whatever rights and immunities the association itself may enjoy," and in doing so, "may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties." *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In order to establish organizational standing, plaintiffs must "meet the

same standing test that applies to individuals." *Spann v. Colonial Vill. Inc.*, 899 F.2d 24, 27 (D.C.Cir.1990), *cert. denied*, 498 U.S. 980, 111 S.Ct. 508, 112 L.Ed.2d 521 (1990) (internal quotations and citations omitted). "In those cases where an organization is suing on its own behalf, it must establish concrete and demonstrable injury to the organization's activities--with a consequent drain on the organization's resources--constituting more than simply a setback to the organization's abstract social interests. Indeed, the organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action." *Common Cause v. Federal Election Comm'n*, 108 F.3d 413, 417 (D.C.Cir.1997) (internal quotations omitted). *See also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982).

[6][7] Moreover, even if the organization has not suffered injury to itself, it may have standing to assert the rights of its members if (1) its members would have standing to sue on their own; (2) the interests it seeks to protect are germane to its purpose; and (3) its claim and requested relief do not require participation by individual members. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). *See also Warth*, 422 U.S. at 511, 95 S.Ct. 2197 ("Even in the absence of injury to itself, an association may have standing solely as the representative of its members."); *Sierra Club v. Morton*, 405 U.S. 727, 734-41, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (association must allege that its members are suffering immediate or threatened injury of the sort that would be a justiciable case had members brought suit individually). "The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy." *Warth*, 422 U.S. at 511, 95 S.Ct. 2197

DISCUSSION

I. PALCO's Motion for Summary Judgment

[8] A plaintiff must establish that it has

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constitutional and prudential standing to sue. *Defenders of Wildlife*, 504 U.S. at 560, 112 S.Ct. 2130. In order to meet Article III's case or controversy requirement, an organizational plaintiff can either assert standing on its own behalf or standing on behalf of its members. *See Warth*, 422 U.S. at 511, 95 S.Ct. 2197. In its motion for summary judgment, PALCO argues that EPIC has neither organizational nor representational standing in the present action. First, PALCO asserts that EPIC cannot demonstrate an injury-in-fact on its own behalf because its services have not been diminished and because an informational injury is insufficient to overcome the injury-in-fact requirement. EPIC need not demonstrate organization standing. Even if the organization has not suffered injury to itself, it may have standing to assert the rights of its members. *Hunt*, 432 U.S. at 343, 97 S.Ct. 2434. *See also Warth*, 422 U.S. at 511, 95 S.Ct. 2197. Because EPIC need only demonstrate that it has standing on behalf of its members and has done so adequately, the court will not address PALCO's organizational standing arguments.

[9] EPIC can successfully allege representational standing "if its members would have standing to sue on their own behalf, the interests at issue are 'germane' to [EPIC's] mission, and neither the substantive claim nor the remedy sought necessitates the participation of any individual member of [EPIC]." *Ocean Advocates v. United States Army Corps of Eng'rs*, 361 F.3d 1108, 1121 (9th Cir.2004) (citing *Laidlaw*, 528 U.S. at 167, 120 S.Ct. 693). In its motion for summary judgment, PALCO asserts only that EPIC has failed to show that any of its members would have standing on their own behalf. PALCO does not challenge EPIC's standing based on the other standing requirements-- that the interests are germane to EPIC's mission and that the individual participation of EPIC members is not required. Because the party invoking federal jurisdiction bears the burden of establishing all of the requirements of standing, *Defenders of Wildlife*, 504 U.S. at 560, 112 S.Ct. 2130, the court will examine whether EPIC has established each of the requirements in order to overcome summary

judgment. For representational standing purposes, an organizational plaintiff needs to show that one of its members has standing in his or her own right. *See Warth*, 422 U.S. at 511, 95 S.Ct. 2197. Therefore, the court need only address the standing of a single EPIC member who meets the constitutional requirements.

In order to satisfy the standing requirement of Article III, an individual plaintiff must show that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 180-81, 120 S.Ct. 693; *Morton*, 405 U.S. at 734-41, 92 S.Ct. 1361. Here, PALCO asserts that Richard Gienger and Paul Mason have not satisfied the injury-in-fact requirement. The court disagrees for the reasons discussed below.

A. Standing of EPIC Individual Members

1. Richard Gienger

[10][11] PALCO asserts that Mr. Gienger has not established an individual, particularized injury distinct from EPIC's institutional interests. As an independent contractor for EPIC, defendants argue that Mr. Gienger's interests have merged with those of the organization. Therefore, defendants maintain that EPIC cannot assert representational standing based on Mr. Gienger's standing. Assuming *arguendo* that Mr. Gienger was paid for all of his activities in Bear Creek, defendants have provided no case law to support the proposition that such an employee would not have standing in his own right to assert claims based on injuries suffered *qua* employee. Indeed, *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097 (9th Cir.2004), a case cited by PALCO in its motion, would suggest otherwise. That case held that housing testers, some of whom may be compensated for their work, had standing to bring suits for violations of the Fair Housing Amendments Act. *Id.* at 1105. Other cases, several of which EPIC cites in its opposition, suggest no

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such merger doctrine for employees exists. See, e.g., *NRDC v. Southwest Marine, Inc.*, 945 F.Supp. 1330, 1334 (S.D.Cal.1996), *aff'd* 236 F.3d 985 (9th Cir.2000). Additionally, PALCO has provided no evidence to show that all of Mr. Gienger's alleged injuries for standing purposes arise from his position as an independent contractor. See Def's Opp'n, at 13:27-14:24. PALCO has established only that Mr. Gienger was reimbursed for costs incurred when visiting Bear Creek, although it is far from certain that EPIC distributed funds for this purpose. Gienger Supp. Dec. ¶ 17. Regardless of whether Mr. Gienger's injuries arose from his work as an independent contractor, there is no barrier to an employee establishing a particularized injury based on his employment with an organization of which he is also a member. Furthermore, Mr. Gienger can also establish standing as a member. The fact that the two positions, "employee" and "member," may overlap in their experiences does not mean that the totality of his experiences cannot be considered.

[12] As the court has noted, Mr. Gienger must show injury-in-fact, causation, and redressability to establish standing. A plaintiff alleging violations of the CWA can establish injury-in-fact by showing "a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable--that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction--if the area in question remains or becomes environmentally degraded." *Ecological Rights Found. (ECF) v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir.2000). Mr. Gienger has sufficiently established that he has visited the specific area in question, the Bear Creek watershed, frequently for the purposes of both recreation, Gienger Tr. at 78:1-6, and his conservation interests, e.g., Gienger Tr. at 75:23-25; 76:1-2. Cf. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) (denying standing because members of environmental organization had only visited "the vicinity" of the land involved in dispute). He has personally observed the sediment in Bear Creek which EPIC attributes to PALCO. Gienger Dec.¶¶ 12 & 16. Mr. Gienger's recreational and conservation interests are harmed

by the sediment deposited. *Id.* He has thus demonstrated a "tangible, continuing connection" to the particular location affected sufficient to establish injury-in-fact for standing purposes. *ECF*, 230 F.3d at 1148. According to Mr. Gienger's testimony, his various interests are harmed by PALCO's failure to secure a permit NPDES permit. Gienger Supp. Dec. ¶ 9. He has therefore satisfied the causation requirement for standing. Finally, Mr. Gienger states that his injuries will be redressed if this court enjoins PALCO from discharging stormwater without a NPDES permit. The court concludes that Mr. Gienger has satisfied the Article III standing requirements, and, therefore, EPIC may properly base its representational standing claim on Mr. Gienger.

2. Paul Mason

[13] While the standing of a single member is sufficient to establish an organization's standing, the court will examine the standing of a second EPIC member, Paul Mason, [FN7] for prudential reasons. PALCO has not offered any direct challenges to Mr. Mason's standing beyond the argument that Mr. Mason cannot demonstrate a concrete and particularized injury-in-fact because he resides in Sacramento, several hundred miles away from Bear Creek. "Factors of residential contiguity and frequency of use may certainly be relevant to that determination, but are not to be evaluated in a one-size-fits-all, mechanistic manner." *ECF*, 230 F.3d at 1149; see also *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 159-60 (4th Cir.2000) (en banc) (same). Should Mr. Mason visit the Bear Creek area only once a year, he would not be "precluded from litigating to protect the environmental quality of [that area] simply because he cannot visit more often." *ECF*, 230 F.3d at 1150. Mason has satisfied the requirements for injury-in-fact illuminated in *ECF*: repeated use as well as credible allegations of future use. *Id.* at 1149. He has visited Bear Creek over a dozen times before this suit commenced as well as several times during the epic tenure of this suit. See Mason Tr. 90:13- 20(visits prior to 2001); 87:22-25-88:1-3 (visit in September 2005). Moreover, he has expressed his intent to visit Bear

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Creek in the future. Mason Supp. Dec. ¶ 4. He has sufficiently demonstrated that he has aesthetic, recreational, and conservational interests in Bear Creek and that these interests are harmed by PALCO's alleged activities. Like Mr. Gienger, Mr. Mason has established that redress of these injuries is appropriate through this court. Accordingly, the court concludes that Mr. Mason has individual standing to bring this suit.

3. Craig Bell

PALCO asserts that Craig Bell does not have standing in this case because he was not a member of EPIC at the time this suit was initiated. To support this contention, PALCO relies upon *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 360 (5th Cir.1996). In that case, the Fifth Circuit merely recited the fact that the district court had found that several of the standing witnesses had not been members of the plaintiff organization at the inception of the suit. EPIC presents no case law to support its contention that representational standing may be based on a member who joined the organization after the suit has been filed. At most, EPIC would have standing to sue based on Bell's injuries from 2003, when he joined EPIC. Because the court has determined that two of EPIC's other members properly have standing in this case, it is not necessary to decide whether EPIC may invoke standing based on Bell's individual standing.

4. Bill Eastwood

[14] PALCO advances three arguments against Bill Eastwood's assertions of standing. First, PALCO alleges that Mr. Eastwood has not suffered a particularized and concrete injury. Second, it contends that his fishing interests in the watershed are too generalized to satisfy the personal and particularized injury-in-fact requirement. Finally, PALCO argues that the geographic distance between his conservational activities with salmon in Eel Creek and Bear Creek cannot survive the traceability requirement for standing.

Mr. Eastwood has not visited Bear Creek but has

repeatedly observed it when driving over the creek in his car. This indirect contact with the area is insufficient to establish standing under the Supreme Court's reasoning in *Laidlaw*. In that case, the individual members of an organizational plaintiff alleged that they were deterred from visiting an area because of alleged environmental violations. *See Laidlaw*, 528 U.S. at 181-82, 120 S.Ct. 693 (member averred that he would like to visit the river as he had done as a teenager but would not do so because of his concerns about pollution in the river, which he observed during his occasional drives over the river); *see also ECF*, 230 F.3d at 1150 (assertions of deterrence to exercise recreational interests were sufficient to establish injury-in-fact). In this case, Mr. Eastwood alleges no such deterrence from exercising his other interests in Bear Creek. He merely observes the Creek during his many drives over it and claims to be harmed by his observations of muddy, turbid water. Eastwood Tr. at 92:15-18. Therefore, Mr. Eastwood has not sufficiently established that he has suffered a personal and particularized injury.

B. Germaneness

[15] Having established that two of its members have individual standing, EPIC must also show that the interests it seeks to protect are germane to its organizational purpose. EPIC's organizational goals are to promote "clean water and healthy watersheds through public education and outreach, grassroots citizen advocacy and strategic litigation." Mason Dec. ¶ 4. The interests in this case involve the protection of the Bear Creek and the Eel Creek watershed and are germane to EPIC's stated purpose. *See Ocean Advocates*, 361 F.3d at 1121.

C. Need for Individual Member Participation

[16][17][18] The final requirement for representational standing is prudential. To claim representational standing, the litigation involved must not require the participation of individual members. This requirement depends in large part on the nature of the relief being sought. When an organization seeks prospective, equitable relief, "it can reasonably be supposed that the remedy, if

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granted, will inure to the benefit of those members of the association actually injured." *Warth*, 422 U.S. at 515, 95 S.Ct. 2197. In its complaint, EPIC seeks declaratory and injunctive relief as well as civil penalties and restitutions. FAC ¶¶ 65-69. If granted, any of these forms of relief will inure to the benefit of the organization and its members. Nor is there any need for individualized proof because neither the "claims nor the relief sought require[] the District Court to consider the individual circumstances of any aggrieved [] member." *International Union, United Auto. Workers v. Brock*, 477 U.S. 274, 287, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986). EPIC's claims are based on the injuries to Bear Creek and the surrounding watershed and, as such, do not require individualized proof. The parties have not raised the issue of whether EPIC has satisfied the zone of interests requirement, and it does not seem to be in issue. Therefore, the court concludes that EPIC has standing in its capacity as a representative of its members.

In sum, EPIC has demonstrated that it has representational standing to bring this suit on behalf of its members. Accordingly, the court DENIES PALCO'S motion for summary judgment on standing.

II. EPIC's Motion for Summary Judgment

EPIC asks this court to grant summary judgment on its first and second claims for relief. EPIC contends that it has shown that PALCO has violated both section 301(a) of the CWA, codified at 33 U.S.C. § 1311(a) and section 402(p) of the CWA, codified at 33 U.S.C. § 1342(p) and is therefore entitled to summary judgment.

To support its claims, EPIC's experts recorded evidence of alleged discharges at seventeen different sites ("Locations No. 1-17") in the Bear Creek watershed. Based primarily on that evidence, EPIC alleges that PALCO is liable for (1) 13 violations of section 301(a) by discharging sediment on certain dates from specific point sources in the Bear Creek watershed without securing a NPDES permit; (2) 5,957 violations of section 402(p) for failing to apply for and obtain

coverage under California's general permit for discharges of storm water associated with industrial activity from March 8, 2004 to July 12, 2005 at each of 17 discharge points; and (3) 2,633 violations of section 402(p) for discharges of stormwater associated with industrial activity without a NPDES permit for the period May 25, 1996 to March 8, 2004. PALCO argues that EPIC has failed to make a prima facie case for violations of the CWA.

A. Section 301(a)

To meet its burden under section 301(a), [FN8] EPIC contends that it must show that PALCO (1) discharged (2) a pollutant (3) from a point source (4) to navigable waters (5) without an NPDES permit. PALCO does not dispute this enumeration of EPIC's burden. Def's Add. Br. at 3 n. 2. This understanding comports with the elements set out by the Ninth Circuit. *See Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir.1993). The parties disagree, however, on the evidence required to prove each element. The court will address in turn each element and assess the evidence proffered by EPIC to satisfy each element.

1. Discharge

Section 501(12) of the CWA defines "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The Ninth Circuit has addressed the definition of this term in *Mokelumne River*, 13 F.3d at 308. The court held that surface runoff collected and channeled in diversion ditches, channels, and gullies, *inter alia*, satisfied the definition of discharge. *Id.* at 307, 308. In doing so, the court distinguished its holding from two cases involving dams, which did "not add pollutants from the outside world." *Id.* at 308 (discussing *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir.1988) and *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C.Cir.1982)) (emphasis in original).

[19] PALCO contends that to prove the addition of

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a pollutant, EPIC must conduct sampling of the runoff before it reached the discharge locations to prove that the sediment was added at the that discharge location. PALCO argues that without a point of comparison EPIC cannot prove that pollutant was added or discharged. PALCO even suggests that water may prove to be cleaner when it left the various discharge points than when it entered. Def's Opp. at 19 n. 12. This precise argument was advanced and rejected in *Mokelumne River*, 13 F.3d at 309.

The Ninth Circuit has indicated that there is no such requirement. In *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir.1990), the court upheld EPA's interpretation of "addition" to include both redepositing material from the streambed into the stream as well as depositing material from outside the stream into it; cf. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir.2001) (direct application of herbicide into irrigation canals constituted a discharge under the CWA). Similarly, the court concluded that there was no material dispute of fact raised by the defendants' contention that there was no net increase in acidity of runoff from a facility. *Mokelumne River*, 13 F.3d at 309. PALCO's attempts to distinguish *Mokelumne River* are unpersuasive. The CWA "categorically prohibits any discharge of a pollutant from a point source without a permit." *Id.* at 309. EPIC need not conduct sampling above the road prism in order to demonstrate a discharge.

[20][21] EPIC offers evidence collected at twelve different discharge points on thirteen separate occasions to establish violations of section 301(a). Pl's Mot. at 41. To prove each discharge, EPIC offers eyewitness observations at each of the sites as well as photographic and video documentation of some of the discharges. See, e.g., *id.* at 23 (describing documentation at Location No. 4). EPIC also measured the turbidity levels at many of the alleged points of discharge. See, e.g., Lozeau Decl., Ex. J ("Proposed Testimony of Dr. Andrew Collison Regarding Sediment Sources and Delivery to the Waters of Bear Creek," by Andrew Collison, Ph.D.) ("Collison Report") at B-1 (discussing turbidity levels and subsequent lab analysis of

sediment concentration found at site No. 1). In response, PALCO argues that EPIC's evidence of additions of pollutant is faulty at several of the locations. PALCO contends that the measurement techniques employed by EPIC's experts were unreliable at Locations No. 6 and No. 11 and may have artificially introduced sediment into the samples. Def's Opp. at 31, 35. Similarly, it argues that the conditions at Locations No. 7 and 8 indicate that water flowed through natural materials before EPIC took the samples, which would render the measurements of sediment unreliable. *Id.* at 32. Finally, PALCO contends that since no measures of sediment were taken at Location No. 5, EPIC cannot establish the addition of sediment at that location. *Id.* at 30. In light of the eyewitness accounts of discharges at each location, PALCO's contentions raise issues as to the weight of the evidence, which the court cannot decide on summary judgment. However, PALCO's arguments do indicate that there is a genuine issue of disputed fact on the issue of discharge at Locations Nos. 5, 6, 7, 8 and 11. EPIC has sufficiently established the element of discharge with respect to the other locations.

2. Pollutant

The CWA expressly includes sediment in its definition of pollutant. 33 U.S.C. § 1362(6). EPIC presents evidence of the presence of sediment at each of the thirteen alleged discharges in the form of expert witness observation, turbidity measurements, and video and photographic documentation. It is difficult to disentangle the evidence necessary to prove discharge from that needed to establish the presence of the pollutant. Where PALCO has raised questions of fact about discharges for Locations No. 5, 6, 7, 8, and 11, it has created issues of fact for this element as well. For the other locations, the evidence presented is sufficient to establish that a pollutant was present in the discharges at those sites.

3. From a Point Source

[22] The parties disagree about whether this element is in fact one element or two. In its

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opposition, PALCO urges the court to interpret "from a point source" as two distinct elements: "from" and "point source." Def's Opp. at 14. Notably, PALCO did not make this distinction in its additional briefing on the elements of proof required to demonstrate liability under the CWA. PALCO argues that the "from" element mandates a direct connection between the point source and the navigable water. *Id.* It further argues that EPIC must provide evidence to demonstrate that the alleged point sources connected to a navigable water during EPIC's observations of the thirteen alleged discharges. The court finds that the issue of connectivity between a point source and a navigable water is better addressed as part of the element "to navigable waters" and will discuss it there.

Establishing that PALCO operates point sources has been the crux of this dispute from the outset. In its April 28, 2006 order, the court advised EPIC to put forth actual proof that PALCO made discharges from a discrete point source or sources into Bear Creek. At that time, the court noted that EPIC had provided no specific statements or evidence that PALCO operates point sources such as culverts, ditches or conduits from which storm water or pollutants are discharged into Bear Creek.

The CWA provides a definition of point source in 33 U.S.C. § 1362(14):

The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

EPIC argues that unpaved logging roads are sources of sediment and that the sediment is discharged via inboard ditches to stream crossing culverts, ditch relief culverts and cross drain culverts, and rolling dips. PALCO argues that these road features are Best Management Practice ("BMPs") in compliance with the California Forest Practice Rules and cannot be point sources.

According to PALCO, the BMPs are designed to disperse storm water on the hillside in order to promote natural filtration. Under this argument, a device designed to lessen runoff could never be a point source. Thus, the court is faced with two issues. First, whether as a matter of law these BMPs can be point sources. Second, as a matter of fact, whether EPIC has proven that these are point sources.

Courts have interpreted the term point source broadly to include, *inter alia*, a gold leachate system capable of overflowing, *United States v. Earth Scis., Inc.*, 599 F.2d 368 (10th Cir.1979); a cattle feedlot capable of discharging pollutants during an extreme storm event, *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055 (5th Cir.1991); and leachate that flowed into a pond and through a culvert to a marsh, *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir.1991). These interpretations of point source suggests that the term includes ditches and culverts like the ones EPIC alleges to be point sources. The Eleventh Circuit has held that stormwater collected and channeled by pipes and culverts can be point sources. *See Driscoll v. Adams*, 181 F.3d 1285 (11th Cir.1999) (reversing grant of summary judgment for defendants and concluding that discharge was a point source on the basis that "it is undisputed that Adams collected stormwater by pipes and other means, and that the stormwater was discharged into the stream"). The strongest support for this point finds its source in the plurality opinion written by Justice Scalia in *Rapanos v. United States*, --- U.S. ---, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) where he contrasts the term "navigable waters" with "point source." In doing so, the opinion describes point source as "watercourses through which intermittent waters typically flow" such as ditches. *Id.* at 2223. *But see* 126 S.Ct. at 2243 (Kennedy, J., concurring) (contending that intermittent flows may be characterized as navigable waters).

In determining the evidentiary showing required to establish a point source, courts considering similar facts have concluded that runoff channeled through ditches is a point source. The Fifth Circuit has adopted the position that "surface runoff collected

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or channeled by the operator constitutes a point source discharge." *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44 (5th Cir.1980). In determining that liquid manure spreading operations are a point source, the court concluded that a swale, which is a ditch on a contour, coupled with the pipe leading into the ditch that leads into the stream was a point source. *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir.1994). Additionally, defendants need not construct the conveyances "so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." *Id.* at 45. The Tenth Circuit "had no problem finding a point source" in the use of sumps and ditches to drain a mining operation. *Earth Sciences*, 599 F.2d at 374. That court found a point source where liquid overflows a wall or flows through a fissure in a sump. *Id.* ("[T]he escape of liquid from the confined system is from a point source."). While PALCO contends that remedial measures, such as the BMPs in this case, can never be point sources, the *Earth Sciences* opinion suggests otherwise. *Id.* When a device or system designed to channel or diffuse runoff fails and instead channels runoff into a navigable water, the points of failure such as the sump fissures in *Earth Sciences* can be point sources. Similarly, in *Mokelumne River*, the Ninth Circuit found that efforts by the California Water Regional Quality Control Board to eliminate runoff from acid mine drainage were discharging pollutants under the terms of the CWA. 13 F.3d at 310 (Fernandez, J., concurring). [FN9] As a matter of law, BMPs may be point sources.

[23] The second inquiry concerns whether EPIC has made an evidentiary showing sufficient to demonstrate that the ditches and culverts at each of the twelve locations are point sources. It has not. The Ninth Circuit has not directly addressed the type of evidence required to prove that sedimentary discharges from ditches and culverts are point sources. In *Pronsolino v. Nastri*, 291 F.3d 1123, 1126, (9th Cir.2002), the court gave sediment runoff from timber harvesting as an example of a nonpoint source, but this example was merely dicta. In the same case, the court described erosion related to road surfaces as nonpoint source, but this was

merely a recitation from the district court's opinion which relied on the parties' classifications of pollution as nonpoint source. See *Pronsolino v. Marcus*, 91 F.Supp.2d 1337, 1340 (N.D.Cal.2000) (Alsup, J.) (citing to Joint Statement of Undisputed Facts). The Ninth Circuit made that determination after reviewing a full record and a jury's findings of fact. In *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir.1984), the court concluded only that the EPA did not exceed its authority in regulating as a point source "discharge water [] released from a sluice box" because it was "a confined channel" within the definition of point source. However, that case involved the review of a determination of the EPA not a factual finding that a certain discharge is a point source.

[24] The sum of authority indicates that whether a ditch, culvert, or other BMP may constitute a point source is a highly fact-based inquiry. EPIC must demonstrate that these BMPs are discrete conveyances that channel runoff. PALCO raises a disputed issue of fact as to whether any of the ditches in question channel or instead diffuse water. In particular, PALCO questions EPIC's observations as to how the storm water entered the tributaries. See Def's Opp'n at 26 (raising questions about Location No. 1). If, as PALCO contends, the water enters in diffuse form, then the ditches and culverts have not channeled the water and these ditches are not point sources. On the other hand, if EPIC demonstrates that the ditches channel the water into the tributaries, the ditches are likely point sources. EPIC has not sufficiently demonstrated for each of these locations that the water was channeled, and therefore it has not proven that the twelve locations are point sources.

4. To Navigable Waters

[25] As an initial matter, the parties agree that Bear Creek is a navigable water pursuant to 33 U.S.C. section 1362(7). JSUF, Fact No. 12 (March 1, 2006). The parties disagree as to two matters: first, the correct legal standard for navigable waters; second, what evidence is required and whether EPIC's evidentiary proffer is sufficient to show that the streams in question are navigable waters. A

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third, related issue concerns whether EPIC must show that the point source directly delivered the sediment by demonstrating that the runoff reaches Bear Creek by surface flow and that the runoff contains a pollutant when it enters Bear Creek.

823 [26] First, EPIC argues that the Class II and Class III streams into which it observed discharges from each of the twelve alleged point sources are navigable waters. The Supreme Court recently refined the test for navigable waters. *Rapanos*, 126 S.Ct. at 2221; *id.* at 2251 (Kennedy, J., concurring). That case was decided 4-4-1, with Justice Scalia writing an opinion for the plurality, Justice Kennedy writing a separate opinion and concurring in the judgment, and Justice Stevens writing for the dissenters. [FN10] Although there is some argument that the plurality and concurring opinions provide two alternative standards for CWA jurisdiction, [FN11] the Ninth Circuit's interpretation of *Rapanos* is binding on this court. In *Northern Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1023 (9th Cir.2006), the Ninth Circuit concluded that the significant nexus test set out in Justice Kennedy's concurrence is controlling. Therefore, EPIC must demonstrate that the streams in dispute have a significant nexus to Bear Creek.

[27][28] Under the significant nexus test, the party seeking to invoke the court's jurisdiction must present evidence of a hydrologic connection. *Rapanos*, 126 S.Ct. at 2250-51 (Kennedy, J., concurring). That connection may suffice in some but not all cases to show "some measure of the significance of that connection for downstream water quality" *Id.* at 2251. EPIC has offered evidence in PALCO's GIS maps, which it claims is the best information available, to demonstrate a hydrological connection between each of the streams in dispute and Bear Creek. Collison Report at 3. PALCO argues that the maps, without firsthand observations of the connections between the streams and Bear Creek, are insufficient to establish a substantial nexus. PALCO also contends that the even if the maps were sufficient, they are unreliable. The court finds that EPIC's reliance on the map is sufficient to establish some sort of a hydrological connection, even for those Class II and

Class III streams which are intermittent waterflows. PALCO has offered only assertions as to the maps' unreliability but has not offered facts to demonstrate that the maps indicated a connection between any of the streams in question and Bear Creek which did not in fact exist. At the summary judgment stage, the non-moving party must set forth "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). PALCO has not put forth specific facts to rebut EPIC's showing and create a genuine factual dispute as to the hydrologic connection between the streams and Bear Creek.

824 A hydrologic connection without more will not comport with the *Rapanos* standard in this case. Because the evidence indicates that certain of the Class II and all of the Class III streams are intermittent or ephemeral watercourses, *see* Collison Report at 3, EPIC must demonstrate that these streams have some sort of significance for the water quality of Bear Creek. None of the evidence offered by EPIC--field observations, the GIS map, or expert testimony--address this part of the substantial nexus standard. In *Northern Cal. River Watch v. City of Healdsburg*, No. 01-04686, 2004 WL 201502 (N.D.Cal. Jan. 23, 2004) (Alsup, J.), *aff'd*, 457 F.3d 1023 (9th Cir.2006), a decision rendered before *Rapanos* but affirmed by the Ninth Circuit in light of *Rapanos*, the court considered both evidence of surface connections between a pond and a navigable water as well as ecological connections. *Id.* at *30 (relying upon similar connections in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985)). Ecological evidence is not a *sine qua non* for establishing a substantial nexus; however, EPIC has provided no evidence that the streams "significantly affect the chemical, physical, and biological integrity of other covered waters." *Rapanos*, 126 S.Ct. at 2248 (Kennedy, J., concurring). The court finds that EPIC has not established that the streams are navigable waters.

Finally, PALCO argues that EPIC must provide proof to "demonstrate the flow of pollutant along" the stream and into Bear Creek. *Rapanos*, 126 S.Ct. at 2228. *See also Concerned Area Residents for*

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Env't v. Southview Farm, 34 F.3d 114, 118-19 (2d Cir.1994). However, this requirement, if it exists, comes from Justice Scalia's plurality opinion in *Rapanos*, which has not been adopted by the Ninth Circuit. Therefore, the court concludes that this additional showing is not necessary under the substantial nexus test.

In sum, EPIC has sufficiently shown that a hydrologic connection exists between Bear Creek and the streams in question. However, EPIC has not shown that those streams are significant to the water quality of Bear Creek. EPIC must make this showing to establish a substantial nexus and meet the definition of navigable waters under the CWA.

5. Without a Permit

The final element of a prima facie showing for violations of section 301 is that the defendant discharged without an NPDES permit. PALCO admits that it did not have an NPDES permit at the time of the discharges documented by EPIC. JSUF at 25 (March 1, 2006). PALCO filed a NOI on July 12, 2005; the alleged discharges observed by EPIC occurred on various dates in March 2004 and March 2005. See Pl's Mot., at 43 (presenting a table of the thirteen discharges observed with dates of observation).

[29] However, PALCO argues that some of the alleged discharges, including Location No. 9, occurred on property that is not PALCO's land. [FN12] Def's Opp'n, at 33. EPIC must prove that PALCO could have obtained a permit for discharges on land that PALCO does not own or control. EPIC has not met its burden with respect to this element to the extent that any of the locations belong to landowners other than PALCO. As to locations owned or controlled by PALCO, EPIC has made a sufficient showing on this element.

In sum, however, for the reasons stated above as to all of the required factors, EPIC has not made out a prima facie case under section 301.

B. Section 402(p)

[30] EPIC alleges two different bases for violations of section 402(p). First, it argues that PALCO violated section 402(p) by failing to obtain a permit for discharges of storm water associated with industrial activities from March 8, 2004 to July 12, 2005 at each of seventeen discharge points. Second, it contends that PALCO violated section 402(p) for failure to obtain a permit for similar discharges during the period May 25, 1996 to March 8, 2004. For the first set of claims, EPIC asserts an individual violation for each of seventeen alleged discharges for each day between the time EPIC observed the discharge until PALCO obtained a permit, a total of 5,957 claimed violations. For the second set of claims, EPIC argues an individual violation for each day PALCO was without a permit. It counts backwards from, March 8, 2004; the day that EPIC first observed an alleged discharge on any of PALCO's locations, to May 25, 1996, the day the statute of limitations began to run on this action. Pl's Mot. at 7. This calculation produces a total of 2,633 violations, according to EPIC.

The parties disagree as to the requirements for section 402(p) liability in two respects. [FN13] First, EPIC contends that it need only prove discharge of storm water, without a pollutant, to establish PALCO's liability under section 402. Second, PALCO contends that failure to apply for a permit is not an element under section 402. Finally, the court considers whether EPIC can state a claim under section 402(p) for discharging without a permit.

First, the parties dispute whether section 402 liability may be imposed for the discharge of stormwater only or whether discharge of a pollutant is required. EPIC contends that section 402(p) regulates the discharge of stormwater associated with industrial activity, a term it construes loosely, and as such it may demonstrate a violation of section 402 by showing discharges of stormwater without the presence of pollutants. The court need not decide this issue because the evidence EPIC presents to establish violations of section 402(p) at the seventeen locations includes some evidence of sediment, a pollutant. At most of the locations,

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EPIC's experts measure sediment levels and turbidity. Even when EPIC's experts did not do so, they documented their observations of "muddy water" at Locations 15 and 17, which the court takes as an allegation of the presence of sediment. Def's Opp. at 39, 40-41. At Location 16, Mr. Bond observed "silts and sands" discharged onto the hillside. Lozeau Dec., Ex. Q-8. Because EPIC has not provided evidence of discharge of stormwater without the presence of a pollutant, the court need not decide whether the presence of pollutants is required for section 402 liability.

[31] PALCO argues that EPIC cannot maintain a cause of action for failure to apply for a permit under section 402(p). EPIC, in turn, contends that the elements of section 402 liability include failure to apply for an NPDES permit. However, EPIC provides no statutory or case law support for this element in its supplemental briefing nor in its moving papers other than the fact that section 402(p)(4) (A) sets out that "[a]pplications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]." 33 U.S.C. § 1342(p)(4)(A). The statutory text does not employ the language of duty, rather it proscribes a timeline for the filing of applications where appropriate. The Second Circuit addressed a similar argument in *Waterkeeper Alliance, Inc. v. United States EPA*, 399 F.3d 486, 505 (2d Cir.2005). That case involved a challenge to an EPA rule requiring all Concentrated Animal Feeding Operations (CAFOs) to apply for an NPDES permit regardless of whether they had in fact discharged any pollutants under the CWA. The court in strong language disavowed this interpretation as inconsistent with the text and purpose of the CWA. *Id.* at 506. "[I]n the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance." *Id.* at 505. The court declines to adopt such a duty as an element of section 402 liability.

In order to establish a violation of section 402, EPIC would need to establish that PALCO had failed to comply with the terms of an NPDES permit. Section 402 sets out the permitting requirements for NPDES permits. Section 402(h) affords a cause of action for noncompliance with a permit. *See Laidlaw*, 528 U.S. at 174, 120 S.Ct. 693. As noted above, it confers no independent cause of action other than that for noncompliance. The court has found no cases in which a plaintiff has maintained a separate cause of action under section 402 for discharges. Liability under the CWA for discharges is appropriately brought under section 301.

Therefore, the court concludes that plaintiff has failed to establish PALCO's liability under section 402.

CONCLUSION

For the foregoing reasons, the court hereby DENIES defendants' motion for summary judgment with respect to standing and DENIES plaintiff's motion for partial summary judgment on the issue of defendants' liability.

IT IS SO ORDERED.

FN1. Pursuant to Federal Rule of Civil Procedure 25(d)(1), Michael Leavitt, new Administrator of EPA, automatically replaces his predecessor in this suit. *See Fed.R.Civ.P. 25(d)(1)*.

FN2. Pursuant to the parties' stipulation, PALCO's motion for summary judgment as to EPIC's claims alleging violations of the California Unfair Competition Law is stayed pending a final decision by the California Supreme Court on its review of cases concerning the question of whether the terms of Proposition 64 apply to cases pending at the time Proposition 64 became law.

FN3. Both Pacific Lumber and Scotia Pacific Lumber Company are Delaware

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corporations; both maintain principal places of business in Scotia, California.

FN4. The EPA delegated its permit-issuing authority to California on May 14, 1973. See 39 Fed.Reg. 26,061 (July 16, 1974). California administers its portion of the NPDES program through the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"), Cal. Water Code § 13000 *et seq.*, which, in turn, created a group of Regional Water Quality Control Boards charged with the responsibility of issuing Waste Discharge Requirements ("WDRs"). By every relevant measure, WDRs are equivalent to CWA permits, and in every relevant sense for this action, the Porter-Cologne Act imports its definitions from the CWA, including those for "pollutants," "discharge," and "point source." See Cal. Water Code § 13373.

FN5. As the Ninth Circuit has noted, "nonpoint source pollution is not statutorily defined." *League of Wilderness Defenders*, 309 F.3d at 1184. As the Ninth Circuit has also noted, "nonpoint source pollution ... is widely understood to be the type of pollution that arises from many dispersed activities over large areas ... not traceable to any single discrete source." *Id.* The paradigmatic example of nonpoint source pollution, the Ninth Circuit adds, is automobile residue--whether rubber, metal, oil, or gas--left on the roadways. *Id.*

FN6. The CWA's distinct approach to regulation of "nonpoint sources" should not be seen as an indication that "nonpoint sources" constitute an insignificant source of pollution. In fact, quite the opposite is true. As the Ninth Circuit recently observed, nonpoint source pollution from automobile use itself outstrips point source pollution from chemical spills, factories, and sewage plants; indeed, nonpoint source pollution from automobile use is the largest source of water pollution in the

United States. See *League of Wilderness Defenders*, 309 F.3d at 1184 (citation omitted).

FN7. There appears to be some dispute between the parties as to whether Mr. Mason was presented as a standing witness in his own right. In its moving papers, PALCO acknowledges that Mr. Mason was offered as a standing witness. Def's Mot., at 4. For the purposes of asserting representational standing, EPIC initially identified four of its members who claim to have been adversely affected by PALCO's activities: Cynthia Elkins, Craig Bell, William Eastwood, and Paul Gienger. See Diveley Decl., Exh. A, at 6. EPIC subsequently substituted Mr. Mason for Ms. Elkins as a standing witness. See Diveley Decl., Exh. B. PALCO deposed Mr. Mason concerning his alleged injuries. See Mason Tr. at 90:13-20. Therefore, it is clear that EPIC can assert standing on the basis of Mr. Mason's own standing.

FN8. Section 301(a) of the CWA is codified at 33 U.S.C. § 1311 and reads in its entirety as follows:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

FN9. In that case, the issue of whether certain devices were point sources was not in dispute. Defendants conceded that the spillway and valve of the dam and reservoir in the dispute were point sources. And the majority "appear[ed] to agree" with that assertion. *Id.* at 310 (Fernandez, J., concurring). Judge Fernandez noted in his concurrence that the devices deemed point sources were in fact the product of remedial efforts aimed at cleaning up acid

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mine drainage. *Id.*

FN10. Justice Breyer also filed a separate dissent. *Id.* at 2266.

FN11. The EPA urges the court not to follow the Kennedy opinion based on the test set out in *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977): "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." In its motion to clarify the court's opinion in *Healdsburg*, the United States urged the Ninth Circuit to interpret *Rapanos* to provide two alternative standards for CWA jurisdiction. Motion of the United States as Amicus Curiae to clarify the court's opinion, *Northern Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir.2006) (No. 04-15442). Stipulation of the Parties, Exh. A.

FN12. While PALCO's papers and the related expert report submitted are not clear, the court assumes that PALCO does not own or otherwise control the land on which certain observations of alleged discharges occurred. *See* Def's Opp'n, at 33; Lozeau Dec., Ex. AA, Charles Rep. Ex. D at 1.

FN13. Section 402(p) of the CWA reads in its entirety:

(p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. Paragraph (1) shall not

apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. (3) Permit requirements.

(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 301 [33 U.S.C. § 1311]

(B) Municipal discharge. Permits for discharges from municipal storm sewers--

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements.

(A) Industrial and large municipal discharges. Not later than 2 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for

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stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 4 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges. Not later than 4 years after the date of the enactment of this subsection [enacted Feb. 4, 1987], the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after such date of enactment [enacted Feb. 4, 1987]. Not later than 6 years after such date of enactment [enacted Feb. 4, 1987], the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies. The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection; (B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the

Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

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