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

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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

**KB HOME'S SUPPLEMENTAL
BRIEFING**

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1 **I. INTRODUCTION**

2 In response to documents submitted by the Regional Board’s Prosecution Team to support
3 its Administrative Civil Liability Complaint No. R9-2016-0092 (“ACL”), by KB Home (“KB”) in
4 opposition, and by the Prosecution Team in rebuttal, the Regional Board’s Advisory Team has
5 requested supplemental briefing on the following issue:

6 How can the plain language of Water Code Section 13385(a)(5) be reconciled with
7 other provisions of Chapter 5.5, including sections 13370, 13372, 13376, 13377,
8 and 13385(a)(1) and (2), which recognize that Chapter 5.5’s provisions are
9 inapplicable to dredge and fill permitting activities unless the State of California has
obtained approval to issue dredged or fill material permits implementing the Clean
Water Act section 404 permit program within the State?

10 The Advisory Team’s question reflects the fact that KB challenged the Regional Board’s ability to
11 seek penalties under Water Code Section 13385(c) for KB’s alleged violation of Section
12 13385(a)(1) and (a)(5).¹ The basis for KB’s challenge was that the State has not been granted the
13 authority to implement the federal Clean Water Act (“CWA”) Section 404 permit program.

14 In response, the Prosecution Team dropped its Section 13385(a)(1) claim specifically
15 because the State has not been authorized to implement CWA Section 404. But, the Prosecution
16 Team also argued that the State’s lack of an approved CWA Section 404 program “has no bearing”
17 on the Regional Board’s “enforcement authority under Section 301.” Based on that unsupported
18 assertion, the Prosecution Team still claims that KB violated Section 13385(a)(5) by failing to
19 obtain a “dredge or fill” permit under CWA Section 404. The Prosecution Team’s Rebuttal Brief
20 (“PTRB”) did not address the language of Chapter 5.5, but argued only that CWA “Section 1370”
21 allows the State to enforce CWA Section 301. As shown below, that argument is without merit.

22 Even with this additional opportunity to address the Chapter 5.5 issues raised by KB, the
23 Prosecution Team will not fare any better. That is because there is a short answer to the Advisory
24 Team’s question: the provisions of Chapter 5.5 do not need to be “reconciled” at all. There is no
25 conflict between the reference to CWA Section 301 in Section 13385(a)(5) and the fact that
26 Chapter 5.5 only authorizes the Regional Board to implement the CWA programs for which the
27 State has a program approved by the United States Environmental Protection Agency (“EPA”).

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

1 The first sentence of Chapter 5.5 shows that the Legislature crafted the chapter knowing
2 that there are two, distinct CWA programs to regulate the “discharge of pollutants and dredged or
3 fill material to the navigable waters of the United States.” (Section 13370.) This distinction
4 between the “discharge of pollutants” and the discharge of “dredged or fill material” is referred to
5 repeatedly in Chapter 5.5. That language reflects the fact that the CWA Section 402 National
6 Pollutant Discharge Elimination System (“NPDES”) permit program applies to the discharge of
7 “pollutants” and the CWA Section 404 permit programs applies to the discharge of “dredged or fill
8 material” to jurisdictional waters of the United States (“WUS”). (33 U.S.C. §§ 1342(a), 1344(a).)²

9 The Legislature also made clear that it enacted Chapter 5.5 “to authorize the state to
10 implement” the CWA (Section 13370(c), emphasis added), and structured the chapter so it could
11 apply when and if the State received authorization from EPA to implement one or both of the
12 CWA permit programs. Because EPA has granted the State authority to implement the NPDES
13 program, Chapter 5.5 applies to the implementation and enforcement of that program, including
14 claims for the violation of CWA Section 301 under Section 13385(a)(5). But, because EPA has not
15 authorized the State to implement the CWA Section 404 permit program, the State does not have
16 the same enforcement authority under Chapter 5.5.

17 The argument that the State’s lack of authority to implement CWA Section 404 “has no
18 bearing” on the State’s ability to enforce the 404 program is illogical. Under that misreading of
19 Chapter 5.5, the State could (1) claim that a person violated CWA Section 301 by failing to obtain
20 a Section 404 permit even if the Army Corps of Engineers found that a Section 404 permit was not
21 needed, or (2) enforce the NPDES permit program even if the State did not have an approved
22 program. Those results would violate the intent of Chapter 5.5 and conflict with federal law.
23 Consequently, the Advisory Team should find that the allegation that KB violated CWA Section
24 301 by failing to obtain a CWA Section 404 permit is invalid under state and federal law because
25 the State has not been authorized to implement the CWA Section 404 program.

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27 ² Because Chapter 5.5 applies only to the implementation of the CWA and the CWA regulates only
28 discharges to WUS, KB’s analysis of the Advisory Team’s question assumes, for the sake of argument, that
the ephemeral drainage at issue is a WUS. That assumption does not change KB’s position that evidence has
not been presented showing that the ephemeral drainage even is a WUS.

1 **II. LEGAL ANALYSIS**

2 **A. The Prosecution Team’s Rationale for Dismissing Its Section 13376 Claim Also**
3 **Applies to the CWA Section 301 Claim**

4 In dismissing the allegation in the ACL that KB violated Section 13385(a) by failing to file
5 a report of the discharge under Section 13376, the Prosecution Team conceded that the allegation
6 must be dismissed because the State has not been delegated the authority to implement the CWA
7 Section 404 program. (PTRB at 3: 19-22.) While the Prosecution Team characterized the
8 allegation as being “imprecise” (*id.*), that was not the case. Rather, the allegation was based on an
9 obvious misreading of the specific language of Section 13372(b), which clearly stated that a report
10 need not be filed under Section 13376 until the State had an approved CWA Section 404 program.

11 The fact that the State is not authorized to implement the CWA Section 404 permit program
12 is fatal not only to the Prosecution Team’s Section 13376 claim, but to its remaining claim that KB
13 violated CWA Section 301. That is because Chapter 5.5, in its entirety applies, “only to discharges
14 for which the state has an approved permit program.” (Section 13372(b).)

15 The Prosecution Team also showed its misunderstanding of the intent of Chapter 5.5 (to
16 implement the CWA) and Chapter 5.5’s relation to the other non-Chapter 5.5 provisions of the
17 Water Code which do not implement the CWA. In trying to explain the “imprecise” nature of its
18 Section 13376 claim, the Prosecution Team actually contended that the ACL simply should have
19 alleged that KB violated Section 13260, “which is analogous provision for discharging to any
20 water of the State without first submitting a report of waste discharge.” (*Id.* at 3: 22-24, emphasis
21 added.)

22 But, that argument is non-sensical as well because it simply ignores the language in Section
23 13372 stating that a report need not be filed. It also refers to “waters of State” even though Chapter
24 5.5 only applies to WUS. The argument also conflicts with the Prosecution Team’s contention that
25 KB should be assessed penalties under Chapter 5.5 for violating the CWA. Failing to file a report
26 of waste discharge under Section 13260 is not a violation of CWA Section 404, and Section 13260
27 is not even one of the sections listed in Section 13385 for which penalties can be assessed under
28 Chapter 5.5.

1 What the Prosecution Team repeatedly shows it misunderstands is that Chapter 5.5 was
2 enacted to authorize the State to implement the CWA, not to establish an enforcement process and
3 penalties that would be applicable to all sections of the Water Code. As discussed below, Chapter
4 5.5 was added to the existing regulatory system established by the Porter-Cologne Act to address
5 the passage of the federal CWA and to authorize the State to receive approval to implement the
6 various CWA programs. Chapter 5.5 only applies to activities regulated by the CWA and not to
7 the non-Chapter 5.5 provisions of the Water Code such as Section 13260.

8 **B. The Prosecution Team’s Reliance on CWA Section 1370 Misreads the Intent of**
9 **That Provision**

10 In addition to claiming that the State’s lack of authority to implement the CWA Section 404
11 program “has no bearing” on its ability to enforce CWA Section 301, the Prosecution Team’s
12 Rebuttal Brief insisted that the argument that the State “has no enforcement jurisdiction over a
13 water of the U.S. located within the state” is “an absurd and fundamentally flawed interpretation of
14 the authorities that govern the matter.” (PTRB at 3: 11-14.) But, other than the generalized
15 pronouncement that such an argument was “absurd,” the only “authority” that the Prosecution
16 Team cited for support was CWA Section 510 (33 U.S.C § 1370). (*Id.* at 10.) In a single sentence,
17 the Prosecution Team maintained that CWA Section 510 supports its argument that the CWA does
18 not preclude the State “from enforcing any limitation respecting discharges of pollutants.” (*Id.* at
19 9-10.)

20 The first problem with the Prosecution Team’s argument is that it specifically
21 acknowledges that CWA Section 510 protects a state’s right to adopt standards “respecting
22 discharges of pollutants.” But the term “discharges of pollutants” is used in the CWA Section 402
23 NPDES program not in the CWA Section 404 program, which applies to the “discharge of dredged
24 or fill material.” (Compare 33 U.S.C. § 1342 and § 1344.) That distinction between “pollutants”
25 and “dredged or fill material” is found repeatedly in Chapter 5.5, and confirms that CWA Section
26 510 applies to the NPDES permit program.

27 In fact, a number of courts have interpreted Section 510 as simply providing states with the
28 ability to “set more restrictive standards, limitations, and requirements than those imposed” under

1 the CWA. (See, e.g., *Environmental Protection Agency v. California ex rel. State Water Resources*
2 *Control Bd.* (1976) 426 U.S. 200, 218; *City of Burbank v. State Water Resources Control Board*
3 (2005) 35 Cal.4th 613, 627.) EPA rules confirm that Section 510 affords states the opportunity to
4 “develop water quality standards more stringent than required by this regulation.” (40 C.F.R.
5 § 131.4.) KB is not arguing that the State cannot establish more-stringent water quality standards
6 under its CWA Section 402 NPDES program as that issue is irrelevant to the Prosecution Team’s
7 claims under the ACL.

8 In addition, only a strained reading of CWA Section 510 would conclude that the provision
9 authorizes the State to enforce the CWA Section 404 permit program even though the State has not
10 been granted such authorization by EPA. Such an interpretation of the effect of CWA Section 510
11 would impermissibly interpret out of existence the entire CWA Section 404 delegation program.
12 That would violate the canon of statutory construction that effect should be given, if possible, to
13 “every clause and word of a statute.” (*United States v. Menasche* (1955) 348 U.S. 528, 538–539.)

14 Another problem with the Prosecution’s Team’s attempt to stretch the language of CWA
15 Section 510 to fit its enforcement purposes is that the provision does not even apply to the
16 enforcement process at all. In *Natural Resources Defense Council, Inc. v. U.S.E.P.A.* (D.C. Cir.
17 1988) 859 F.2d 156, NRDC argued that Section 510 prohibited EPA from approving a state’s
18 NPDES program because the penalty provisions in the program were less stringent than those
19 prescribed in the CWA for federal enforcement. (*Id.* at 179.) NRDC based its argument on
20 language in CWA Section 510 that prohibits a state from establishing less-stringent effluent or
21 other limitations or standards than those established under the CWA. (*Id.*)

22 The reason that the court rejected NRDC’s argument is relevant here. The court held that
23 CWA Section 510 did not preclude EPA’s approval of the state program at issue because CWA
24 Section 510 “refers, not to enforcement powers, but only to effluent limitations and similar
25 standards.” (*Id.*) The fact that CWA Section 510 does not apply to enforcement powers at all also
26 eliminates the Prosecution Team’s argument that CWA Section 510 somehow authorizes the State
27 to enforce the CWA Section 404 permit program even without EPA approval to do so. The fact
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1 that the *NRDC* court’s decision came in a case concerning an approved state CWA program makes
2 it even clearer that CWA Section 510 does not have the effect claimed by the Prosecution Team.

3 CWA Section 510 reserves the right of states to establish more-stringent water quality
4 standards than those required to obtain authorization to implement an approved permit program
5 under the CWA. The Prosecution Team has provided no legal support for its assertion that CWA
6 Section 510 also authorizes a state, without delegated federal authority, to determine if a person has
7 violated federal law by failing to obtain a CWA Section 404 permit. The Prosecution Team’s
8 argument must be rejected.

9 **C. Chapter 5.5 Only Applies When the State Has an Approved Permit Program**

10 History is clear that, in response to the passage of the CWA in 1972, the Legislature “added
11 Chapter 5.5 to the Porter-Cologne Act, for the purpose of adopting the necessary federal
12 requirements to ensure it would obtain EPA approval to issue NPDES permits.” (*City of Burbank*,
13 *supra*, 35 Cal.4th at 631.) In interpreting the language of Chapter 5.5 and its relationship to the
14 other, non-Chapter 5.5 provisions of the Water Code governing water quality, courts have reviewed
15 the language of Chapter 5.5 “to determine the Legislature’s intent when it enacted the statute” and
16 to analyze the provisions of the Water Code and Chapter 5.5 “in the context of the statutory scheme
17 of which they are a part.” (*Id.* at 625.)

18 The language of Chapter 5.5 expresses the Legislature’s intent in enacting Chapter 5.5 “to
19 avoid direct regulation by the federal government of persons already subject to regulation under
20 state law” and “to authorize the state to implement the provisions” of the CWA and any applicable
21 “federal regulations and guidelines.” (Section 13370(c), emphasis added.) The Legislature directed
22 that Chapter 5.5 be construed “to ensure consistency with the requirements for state programs
23 implementing” the CWA (Section 13372(a), emphasis added) and that Chapter 5.5 apply “only to
24 actions required under the Federal Water Pollution Control Act and acts amendatory thereof or
25 supplementary thereto.” (*Id.*) To ensure consistency with the federal program, Chapter 5.5 defines
26 critical terms such as “navigable waters,” “pollutants” and “discharge” as having the same meaning
27 under state law as they do under the CWA. (*Id.* § 13373.) All these references in Chapter 5.5 to
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1 “implementing” the CWA are evidence that the provisions of Chapter 5.5 were not to apply until
2 the State received approval to implement either or both of the CWA permit programs.

3 The first sentence of Chapter 5.5 acknowledges that the CWA established a program to
4 regulate the “discharge of pollutants” (NPDES) and a separate program to regulate the discharge of
5 “dredged or fill material.” (Section 13370.) The Legislature repeated that critical distinction
6 between “pollutants” and dredged or fill materials” in numerous sections of Chapter 5.5, such as
7 the following:

- 8 • Section 13374 - equates waste discharge requirements (“WDRs”) with a CWA NPDES
9 permit;
- 10 • Section 13376 - distinguishes between a person who “discharges pollutants or proposes to
11 discharge pollutants” and a person who “discharges dredged or fill material or proposes to
12 discharge dredged or fill material;”
- 13 • Section 13377 - authorizes Water Boards “as required or authorized” by the CWA to “issue
14 waste discharge requirements and dredged or fill material permits;”
- 15 • Sections 13378 - establishes procedures for the issuance of WDRs and of “dredged or fill
16 material” permits;
- 17 • Section 13380 - requires five-year reviews for WDRs and for “dredged or fill material”
18 permits;
- 19 • Section 13381- provides for the modification or termination of WDRs or of “dredged or fill
20 material” permits;
- 21 • Section 13384 - requires public notice of applications for WDRs or for “dredged or fill
22 material” permits; and
- 23 • Sections 13385(a)(2) and 13387(a)(2) – refer to WDRs and to “dredged or fill material”
24 permits.

25 By crafting Chapter 5.5 to distinguish between CWA NPDES permit program (WDRs) and
26 the CWA Section 404 “dredged or fill material” permit program, the Legislature provided authority
27 for the State to be delegated the authority to implement either of the programs or both. The
28 language and the structure of Chapter 5.5 make clear that its provisions were not intended to apply

1 to the CWA NPDES program until EPA approved the State's NPDES program or to the CWA
2 Section 404 permit program until EPA approved the State's Section 404 program. That is the only
3 way that Chapter 5.5 can be read to effectuate its intent to "authorize the state to implement" the
4 CWA. (Section 13370(c), emphasis added.) That is the only way that Chapter 5.5 can be read "to
5 ensure consistency with the requirements for state programs implementing" the CWA. (Section
6 13372(a), emphasis added.) And, that is the only way that the language in Section 13372 stating
7 that the provisions of Chapter 5.5 "apply only to actions required under" the CWA can be
8 interpreted in any sensible manner.

9 Courts have recognized that the provisions of Chapter 5.5 must be interpreted in light of the
10 statutory requirements of the CWA that Chapter 5.5 was enacted to implement, and in relation to
11 the non-Chapter 5.5 provisions of the Water Code. For example, in *City of Burbank*, the California
12 Supreme Court held that a non-Chapter 5.5 provision, Section 13263, which directs the State to
13 consider economic factors when issuing WDRs, could not be used to justify establishing discharge
14 limits in an NPDES permit that were less-stringent than those required by the CWA. (*Burbank*,
15 *supra*, 35 Cal.4th at 625-26.) The court found that the using non-Chapter 5.5 economic factors to
16 establish less-stringent effluent standards violated the requirement of Section 13777 in Chapter 5.5
17 that discharge limits be consistent with federal CWA standards. (*Id.* at 626.) The court held that
18 Chapter 5.5 controlled the issue because the Regional Board was implementing the CWA under its
19 approved NPDES program. That is in stark contrast to the situation here where the Regional Board
20 has no authority to implement the CWA Section 404 program.

21 On the flip side, in *Lake Madrone Water District v. State Water Resources Control Board*
22 (1989) 209 Cal.App.3d 163, 173, the water district argued that it was not subject to a cleanup and
23 abatement order issued under a non-Chapter 5.5 provision, Section 13304, because it had not
24 "discharged" as that term is defined in Chapter 5.5. But, the court rejected that argument finding
25 that the "federal act's definition of 'discharge' does not control the meaning of the term in Section
26 13304." (*Id.* at 171.) The court held that Chapter 5.5 did not apply in the case because the State
27 was enforcing state law and not implementing the CWA. That decision also confirmed that Chapter
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1 5.5 only applies when a Regional Board is implementing the CWA. Here, the Regional Board can
2 only implement and enforce CWA Section 404 when and if the State has an approved program.

3 The Prosecution Team's notion that the Regional Board can implement and enforce the
4 CWA Section 404 program without federal approval also makes no sense in light of EPA's
5 continued involvement with the State's approved NPDES program. EPA oversees the State's
6 implementation of the NPDES program to ensure that the program complies with the requirements
7 of the CWA. So, when the State's effluent limits for toxic pollutants under the NPDES program
8 were rejected by EPA, the State was left "without any comprehensive regulatory compliance with
9 section 303(2)(c)(B)" of the CWA, and EPA was forced to establish those standards.

10 (*Waterkeepers Northern California v. State Water Resources Control Board* (2002) 102
11 Cal.App.4th 1454-55.) Here, the Prosecution Team is arguing that the Regional Board not only
12 can enforce the CWA Section 404 program without federal oversight, but can enforce it without
13 having a federally approved program. That argument is untenable.

14 These cases and the clear and repeated language of Chapter 5.5 makes the Prosecution
15 Team's boast that the State's lack of an approved CWA Section 404 program "has no bearing" on
16 its enforcement authority under CWA Section 301 ring especially hollow. To be internally
17 consistent with state law, Chapter 5.5 must be read as giving the State the authority to enforce the
18 federal "dredged or fill material" permit program only if the State receives authorization to do so.
19 Until the State has an approved program, the Regional Board cannot claim that a dredged or fill
20 activity violates CWA Section 301 in order to seek penalties under Chapter 5.5.

21 **D. The Prosecution Team's Interpretation of Its Authority Under Chapter 5.5**
22 **Violates Federal Law**

23 In the *City of Burbank* case, the Supreme Court also held that the Regional Board's attempt
24 to use economic factors under state law to establish less-stringent effluent standards violated the
25 CWA and did not "comport with the principles of federal supremacy." (*Burbank, supra*, 35 Cal.4th
26 at 625-26.) That was in recognition of the fact that state law cannot "contradict or limit the scope
27 of the CWA" under the Supremacy Clause of the United States Constitution. (*Northern Plains*
28

1 *Resource Council v. Fidelity Exploration and Development Company*, 325 F.3d 1155, 1165 (9th
2 Cir. 2003) (state law could not exempt a discharge from CWA regulation.)

3 The Prosecution Team maintains, however, that the mere reference to CWA Section 301 in
4 Section 13385(a)(5) authorizes any Regional Board to determine (1) if a water is a WUS (to
5 determine if Chapter 5.5 applies at all), (2) whether a person that discharges dredged or fill material
6 to a WUS has obtained the proper permit, and (3) if not, whether an enforcement action is
7 appropriate. The Prosecution Team argues that a Regional Board can make those determinations
8 under federal law even though the State does not have an approved CWA Section 404 program.

9 But, that argument does not “comport” with the language and structure of the CWA
10 because it improperly reads the entire CWA Section 404 delegation process out of the statute. That
11 attempt to circumvent the CWA by citing a reference to CWA Section 301 in Chapter 5.5 directly
12 conflicts with the CWA and violates of the Supremacy Clause.

13 Under the Prosecution Team’s interpretation, even the threshold question of whether a
14 watercourse is a WUS subject to the CWA and Chapter 5.5 apparently can be made by the
15 Regional Board. But, whether a watercourse is a WUS is a question of federal law made by the
16 Army Corps or EPA. (*See, e.g.*, 33 C.F.R. § 325.9.)

17 In addition an approved jurisdictional determination that a watercourse is a WUS is a
18 “final agency action” subject to judicial review under federal law. (*Army Corps v. Hawkes Co., Inc.*
19 (2016) __ U.S. __, 136 S.Ct. 1807, 1813.) The claim that a watercourse is a WUS also can be
20 challenged in federal court when a compliance order is issued by EPA or the Army Corps for
21 alleged violations of CWA Section 404. (*Sackett v. EPA* (2012) __ U.S. __, 132 S.Ct. 1367, 1374.)
22 Both of these cases provide procedural protections under federal law that the Prosecution Team
23 attempts to eliminate by impermissibly stepping into the shoes of the federal government and
24 enforcing the CWA. That violates the undisputed supremacy of those federal agencies to
25 implement and enforce the CWA.

26 **III. CONCLUSION**

27 The Prosecution Team remains intent on seeking penalties under Section 13385 because the
28 amounts that can be sought under that provision are higher than under the non-Chapter 5.5

1 provisions of the Water Code. The problem is that penalties are not available under Chapter 5.5 for
2 KB's alleged violation of CWA Section 301 because the State is not authorized to implement the
3 CWA Section 404 permit program or determine if its provisions have been violated.

4 There is no question that the Regional Board can seek penalties under Section 13385 for
5 violations of CWA Section 301 based on an illegal discharge under the NPDES program. But, that
6 is because the State is authorized to implement and enforce the federal NPDES program. The
7 Regional Board's authority to implement the NPDES program explains why CWA Section 301 is
8 referenced in Section 13385, and confirms why there is no conflict between the reference to CWA
9 Section 301 and the rest of Chapter 5.5 that needs to be reconciled. Any other interpretation of
10 Section 13385 would circumvent the language and the structure of Chapter 5.5 and the provisions
11 of the CWA's program-delegation process. Based on the discussion of this issue in KB's opening
12 submission and above, the Advisory Team should find that the Prosecution Team cannot maintain
13 its remaining claim under Section 13385(a)(5).

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15 DATED: September 2, 2016

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