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8 **BEFORE THE SAN DIEGO**
9 **REGIONAL WATER QUALITY CONTROL BOARD**

11 In the Matter of:

12 COMPLAINT FOR ADMINISTRATIVE CIVIL
13 LIABILITY AGAINST KB HOME, SETTLER'S
14 POINT PROJECT, LAKESIDE, CALIFORNIA

14 ACLC NO. R9-2016-0092

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) **PROSECUTION TEAM**
) **SUPPLEMENTAL BRIEF**
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15 The Prosecution Team submits this brief in response to the request by the Advisory Team
16 for supplemental briefing on the following issue:

17 How can the plain language of Water Code Section 13385(a)(5) be reconciled
18 with other provisions of Chapter 5.5, including sections 13370, 13372, 13376,
19 13377, and 13385(a)(1), which recognize that Chapter 5.5's provisions are
20 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?

21 **RESPONSE**

22 **I. The San Diego Water Board's enforcement authority for unauthorized discharges of**
23 **dredged or fill material is not conditioned on the State of California having an**
24 **approved Clean Water Act section 404 permit program. Section 13385(a)(5) is not**
inconsistent with the other provisions of Chapter 5.5 related to delegated Clean
Water Act section 404 permit implementation.

25 Chapter 5.5 of the Porter Cologne Water Quality Control Act was added to the Water Code
26 in 1972 to provide the State Water Resources Control Board (State Water Board) with adequate
27 statutory authority to implement the federal Clean Water Act National Permit Discharge
28 Elimination System (NPDES) permit program. (Stats. 1972, ch. 1256.) In 1978, Chapter 5.5 was

1 amended to authorize a state program to permit discharges of dredged or fill material. (Stats.
2 1978, ch. 746.) Nothing in the 1978 amendments or subsequent changes to Chapter 5.5 should
3 be construed as preventing the state from protecting its precious water resources against
4 unpermitted discharges, regardless of whether it has obtained approval to issue dredged or fill
5 material permits implementing the Clean Water Act section 404 permit program. A careful reading
6 of the provisions in Chapter 5.5, particularly sections 13372 and 13376, supports this conclusion.

7 Water Code section 13370 establishes the intent of the legislature to avoid direct
8 regulation by the federal government by authorizing the state to implement provisions of the
9 federal Clean Water Act. (Wat. Code, §13370.) Water Code section 13372 establishes that
10 Chapter 5.5 shall be construed to ensure consistency with the implementation of the Clean Water
11 Act. (Wat. Code, §13372(a).) Water Code section 13376 requires a person discharging or
12 proposing to discharge dredge and fill material to waters of the United States to file a report of
13 waste discharge with the State. (Wat. Code, § 13376.) Water Code section 13377 requires the
14 State Water Board or regional boards to, as required or authorized by the Clean Water Act, issue
15 dredge and fill material permits. (Wat. Code, §13377.) Read together, these Water Code
16 provisions establish the framework for state authority to assume the federal permitting program
17 under Clean Water Act sections 402 and 404. Nothing in the express language of any of these
18 provisions operates to prevent the San Diego Regional Water Board from imposing administrative
19 civil liability under Water Code section 13385 for the unpermitted discharge of dredged or fill
20 material.

21 Subdivision (b) of Water Code section 13372 limits the authority of the state to issue
22 section 404 permits and to require reports of waste discharge until the state actually takes over
23 the program. It states, in part, that “[t]he provisions of Section 13376 *requiring the filing of a report*
24 *for the discharge of dredged or fill material and the provisions of this chapter relating to the*
25 *issuance of dredged or fill material permits* by the state board or a regional board shall be
26 applicable only to discharges for which the state has an approved permit program, in accordance
27 with the provisions of the Federal Water Pollution Control Act, as amended, for the discharge of
28 dredged or fill material.” (Wat. Code, § 13372(b), emphasis added.) This provision only seeks to

1 eliminate the confusion and inconsistency that would arise from a scenario in which the Army
2 Corps of Engineers (ACOE) and the state concurrently issued 404 permits. It does not bar the
3 implementation of all other provisions in Chapter 5.5 related to dredge or fill activities, including
4 the imposition of liability under section 13385 for unpermitted discharges. This interpretation is
5 supported by the plain language in section 13376, which plainly states “that “[t]he discharge of [...]
6 dredged or fill material [...] *except as authorized by [...] dredged or fill material permits, is*
7 *prohibited.*” (Wat. Code, § 13376, emphasis added.)

8 The provisions of Chapter 5.5 referenced by the Advisory Team in this matter concern the
9 *implementation* of a state 404 *permitting* program, not the enforcement against a person who fails
10 to comply with any and all permitting requirements. The limitation included in Water Code section
11 13372(b), by its plain text, only applies to “the provisions of Section 13376 requiring the filing of a
12 report” and “the provisions of this chapter relating to the issuance of dredged or fill material
13 permits.” Section 13372 is silent on the section 13376 provision that prohibits the unauthorized
14 discharge of dredged and fill material, and is silent on the other provisions in Chapter 5.5 which
15 relate to the unauthorized discharge of dredged and fill material, including section 13385(a)(5). If
16 the legislature had intended to limit the Water Board’s authority to enforce the prohibitions
17 contained in Water Code section 13376 or Clean Water Act 301 regarding unpermitted dredged
18 and fill discharges, the limiting language in Water Code section 13372 would not be related only to
19 permitting.¹ Instead, the section would read something to the effect of: “The provisions in 13376
20 and in this chapter relating to the discharge of dredged and fill material shall be applicable only to
21 discharges for which the state has an approved permit program . . .”

22 A brief look at the legislative history of Water Code section 13372 further supports this
23

24 ¹ Had the legislature intended to limit the State’s authority to enforce unauthorized dredged and fill discharges until the
25 time that the State has an approved permit program, the Legislature would have also done so explicitly in Water Code
26 section 13376, which establishes that the prohibition against discharges only applies if a state or federal permit is
27 required under the Clean Water Act. (Wat. Code, §13376.) Had the legislature left out the words “or federal permit,”
28 the sentence would state that the statute’s prohibition against discharges only applies if a state permit is required, e.g. if
the state has an approved 404 permitting program. However, the Legislature included the words “or federal permit,”
which means that the Water Code 13376 prohibition applies regardless of whether it is the State or the federal
government administering 404 permitting.

1 reading. In 2003, Water Code section 13372 was amended to the version in place today. (Stats.
2 2003, ch. 683, § 5.) Prior to the 2003 amendments, Water Code section 13372 stated that: “The
3 provisions of this chapter relating to the discharge of dredged and fill material shall be applicable
4 only to discharges for which the state has an approved permit program, in accordance with the
5 provisions of the Federal Water Pollution Control Act, as amended, for the discharge of dredged
6 and fill material.” (Stats. 1987, ch. 1189, § 3, emphasis added.) In 2003, the language was
7 changed to the current version, which reads: “The provisions of Section 13376 requiring the filing
8 of a report for the discharge of dredged or fill material and the provisions of this chapter relating to
9 the issuance of dredged or fill material permits by the state board or a regional board . . .” (Wat.
10 Code, §13372.) The 2003 amendment to section 13372 emphasizes that only those provisions of
11 Chapter 5.5 related to the issuance of permits were conditioned on having an approved program.

12 Water Code section 13372 does not establish that the provisions of section 13376
13 prohibiting the discharge of dredge or fill material without dredge or fill material permit is
14 inapplicable until the state has an approved permit program. Nor does section 13372 conflict with
15 section 13385(a)(1) or (a)(5) which allow for the imposition of administrative civil liability for the
16 discharge of dredged and fill material without appropriate permit.

17 As currently drafted, the Compliant in this matter provides sufficient notice of the bases for
18 liability to KB Home’s unpermitted discharge. Specifically, the Complaint, on page 3, provides:

19 **ALLEGED VIOLATIONS**

20 Section 301 of the Clean Water Act (33 U.S.C. § 1311) and Water Code Section
21 13376 prohibit the discharge of pollutants to surface water except in compliance
22 with a permit for dredged and fill material.

23 Even though the Prosecution Team’s Rebuttal Brief indicated that the reference to a
24 violation of 13376 in the Complaint was “imprecise,” it was only imprecise with respect to an
25 alleged violation of the failure to file a report of waste discharge. The Complaint’s reference to a
26 violation of section 13376 is on point for the allegation that KB Home discharged dredged or fill
27 material without having an appropriate dredge or fill material permit under federal Clean Water Act
28 section 404.

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II. If the San Diego Water Board finds section 13385(a)(5) and section 13385(a)(1) insufficient to impose administrative civil liability for violations of section 404 of the Clean Water Act or Water Code section 13376, it should allow the Prosecution Team an opportunity to amend the Complaint to alternately allege a violation of Clean Water Act section 401 for which the Regional Water Board has similar authority to impose liability under section 13385(a)(5).

Section 401 of the Clean Water Act requires that “[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in a discharge” to obtain state certification. (33 U.S.C. § 1341(a)(1).) Water Code section 13385(a)(5) grants authority to the San Diego Water Board to impose civil liability for violations of 401 requirements. (Wat. Code, § 13385(a)(5).) If the San Diego Water Board finds that it has no authority to impose civil liability pursuant to Water Code section 13385(a)(1) for violation of the prohibition in 13376, or pursuant to Water Code section 13385(a)(5) for violations of Clean Water Act section 404, then the Prosecution Team respectfully motions for leave to amend the Complaint to include allegations that the Discharger violated Clean Water Act section 401.

September 2, 2016


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