
San Diego Regional Water Quality Control Board

April 22, 2016

Certified Mail – Return Receipt Requested
Article Number: 7010 1060 0000 4953 0921

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

In reply refer to: CW-826199:cmeans

Notice of Hearing and Issuance of Complaint No. R9-2016-0092 for Administrative Civil Liability Against KB Home for Violations of Clean Water Act Section 301 and California Water Code Section 13376

Mr. Mertz:

Enclosed find Complaint No. R9-2016-0092 (Complaint) for Administrative Civil Liability against KB Home (Discharger) for **\$875,166** for violations of California Water Code section 13376 and federal Clean Water Act section 301. The alleged violations are described in the Complaint and the attached Technical Analysis to the Complaint. Pursuant to Water Code section 13323, the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) shall hold a hearing on the Complaint no later than ninety (90) days after it is issued.

Waiver of Hearing

You may elect to waive your right to a hearing before the San Diego Water Board. Waiver of the hearing constitutes admission of the violations alleged in the Complaint and the acceptance of the assessment of civil liability as set forth in the Complaint. For the San Diego Water Board to accept the waiver of your right to a public hearing, you must sign, as the Legally Responsible Person for KB Home, the enclosed waiver form with Option 1 selected, and submit it to the San Diego Water Board by 5:00 p.m. on **May 2, 2016**.


Public Hearing

Alternatively, if you elect to proceed to a public hearing, a hearing is tentatively scheduled to be held at the San Diego Water Board meeting on **June 22, 2016**. The meeting is scheduled to convene at the San Diego Water Board, 2375 Northside Drive, Suite 100, San Diego, California at 9:00 a.m. At that time, the San Diego Water Board will accept testimony, public comment, and decide whether to affirm, reject, or modify the proposed liability, or whether to refer the matter for judicial civil action.

Enclosed is the recommended hearing procedure for the San Diego Water Board to follow in conducting the hearing. Please note that comments on the proposed procedure are due by **May 2, 2016**, to the San Diego Water Board's advisory attorney, Catherine Hagan, at the address indicated in the hearing procedure.

Please submit all written documents as Portable Document Format (PDF) files to sandiego@waterboards.ca.gov. In the subject line of any response, please include the reference number **CW-826199:cmeans**. For questions or comments, please contact Christopher Means by telephone at (619) 521-3365, or by email at Christopher.Means@waterboards.ca.gov.

Respectfully,



JAMES G. SMITH
Assistant Executive Officer

JGS:cmc:cjm

Enclosures:

1. ACL Complaint No. R9-2016-0092 with attached Technical Analysis and Appendices
2. ACL Complaint Fact Sheet
3. Proposed Hearing Procedure
4. Waiver of Public Hearing Form

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Mr. Ron Mertz
KB Home
ACL Complaint No. R9-2016-0092

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April 22, 2016

CIWQS:

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

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

In the matter of:

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

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

**Noncompliance with
California Water Code § 13376,**

and

Clean Water Act § 301

PIN: SM-453268

April 22, 2016

KB HOME IS HEREBY GIVEN NOTICE THAT:

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

Background

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

6. On December 5, 2014 the Discharger began grading activities that included the offsite street knuckle portion of the project. The grading activity resulted in the unauthorized discharge of fill and other construction material into waters of the U.S./State. The discharge of fill continued until final curb, gutter and paving for the street knuckle were completed on May 14, 2015. This constitutes an active discharge period of 161 days.
7. On March 10, 2015 Pulte Home Corporation submitted a Clean Water Act (CWA) Section 401 Water Quality Certification application package for the Brightwater Ranch project to the San Diego Water Board, to build a 66-unit, single-family residential subdivision, with four Homeowner Association maintained lots, and 41.8 acres of open space. The application package included a preliminary jurisdictional delineation indicating the presence of waters of U.S./State in the street knuckle footprint.
8. The preliminary jurisdictional delineation was conducted by Helix Environmental Planning Inc. on November 7, 2014 and concluded that the site had 0.05 acre (685 linear feet) of waters of the U.S. and State (ephemeral dry wash) under the jurisdiction of the U.S. Army Corps of Engineers (USACE), San Diego Water Board, and California Department of Fish & Wildlife (CDFW). The preliminary delineation identified an additional 0.12 acre (3,710 linear feet) of non-federal waters of the State onsite. The 76.23 acre site contains five unnamed ephemeral drainages that are tributary to Los Coches Creek (Hydrologic sub area 907.14).
9. In April 2015, during an initial San Diego Water Board review of the Pulte Home Corporation certification application, Google Earth aerial imagery revealed that grading had been conducted offsite of the Settler's Point project boundary, and had impacted jurisdictional waters on the Brightwater Ranch Project.
10. On July 1, 2015 staff from the USACE, San Diego Water Board, KB Home, Helix Environmental Planning, and County of San Diego met onsite to inspect the impacts and to verify the jurisdictional delineation. Results of the inspection confirmed that KB Home had not obtained any authorizations or permits from State (401 certification, Waste Discharge Requirements and Streambed Alteration Agreement) and Federal (404 permit) regulatory agencies prior to discharging fill into the ephemeral streams on the Brightwater property.
11. On July 7, 2015 KB Home's environmental consultant reported to the San Diego Water Board that the grading operations associated with construction of the offsite street knuckle impacted approximately 0.018 acre (278 linear feet) of jurisdictional waters of the U.S. and State.
12. On August 18, 2015 the discharger reported that an estimated 350 cubic yards of fill were used for construction of the off-site street knuckle. That equates to the discharge of 70,691 gallons of fill to waters of the U.S. and State.

13. The Water Quality Control Plan for the San Diego Basin (Basin Plan) designates the following beneficial uses for surface waters in Los Coches Creek and its tributaries:

Industrial Service Supply (IND)
Contact Water Recreation (REC-1)
Non-contact Water Recreation (REC-2)
Warm Freshwater Habitat (WARM)
Wildlife Habitat (WILD)
14. On August 13, 2015 the San Diego Water Board issued Notice of Violation No. R9-2015-0154 to the Discharger for the unauthorized discharge of fill to waters of the U.S./State.

ALLEGED VIOLATIONS

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

MAXIMUM LIABILITY

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

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

(2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

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

MINIMUM LIABILITY

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

PROPOSED LIABILITY ASSESSMENT

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

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



JAMES G. SMITH
Assistant Executive Officer

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

Attachment: Technical Analysis and Appendices

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

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

**TECHNICAL ANALYSIS
for
Administrative Civil Liability
Contained in Complaint No. R9-2016-0092**

To

KB Home

For

Noncompliance with

Clean Water Act Section 301

And

California Water Code Section 13376

Prepared by

**Christopher Means
Environmental Scientist
Compliance Assurance Unit**

April 22, 2016

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A. INTRODUCTION

This technical analysis provides a summary of factual and analytical evidence that supports the findings in Administrative Civil Liability Complaint No. R9-2016-0092 (Complaint) and the recommended assessment of civil liability in the amount of **eight hundred seventy five thousand one hundred sixty-six dollars** (\$875,166) against KB Home (Discharger) for violations of Section 301 of the Clean Water Act (CWA) and California Water Code (CWC) Section 13376 from its unauthorized discharge of fill to unnamed ephemeral tributaries to Los Coches Creek in Lakeside California, San Diego County.

The proposed Brightwater Ranch development project (APN # 397-180-13) is located within the unincorporated community of Lakeside in San Diego County. The 76.23 acre site is located northwest of Business Route 8/East Main Street, and southwest of Los Coches Road (Latitude: 32.832479 ° N, Longitude: - 116.914554° W, Center Reading). The Brightwater Ranch property is currently owned by Pulte Home Corporation.

Directly adjacent to and northeast of the Brightwater Ranch project site is the 27.23 acre KB Home "Settler's Point" residential housing project (see Figure 1). In May of 2014, KB Home began negotiations to purchase the Settler's Point property with the previous owner, Dan Floit. The project was marketed as having all the necessary environmental approvals and a construction grading permit issued by the County of San Diego. As part of this purchase process the Discharger hired Helix Environmental Planning Inc. (Helix) to conduct a due diligence assessment which was provided to KB Home on May 9, 2014. The assessment was based on a single site reconnaissance by Helix staff on May 5, 2014 and a review of project files and regional planning documents provided by KB Home. On September 2, 2014 the Discharger finalized the purchase of the property. Active grading on the Settler's Point project began in December 2014. Homes were completed, and at the end of November 2015, families began to occupy homes that were purchased.

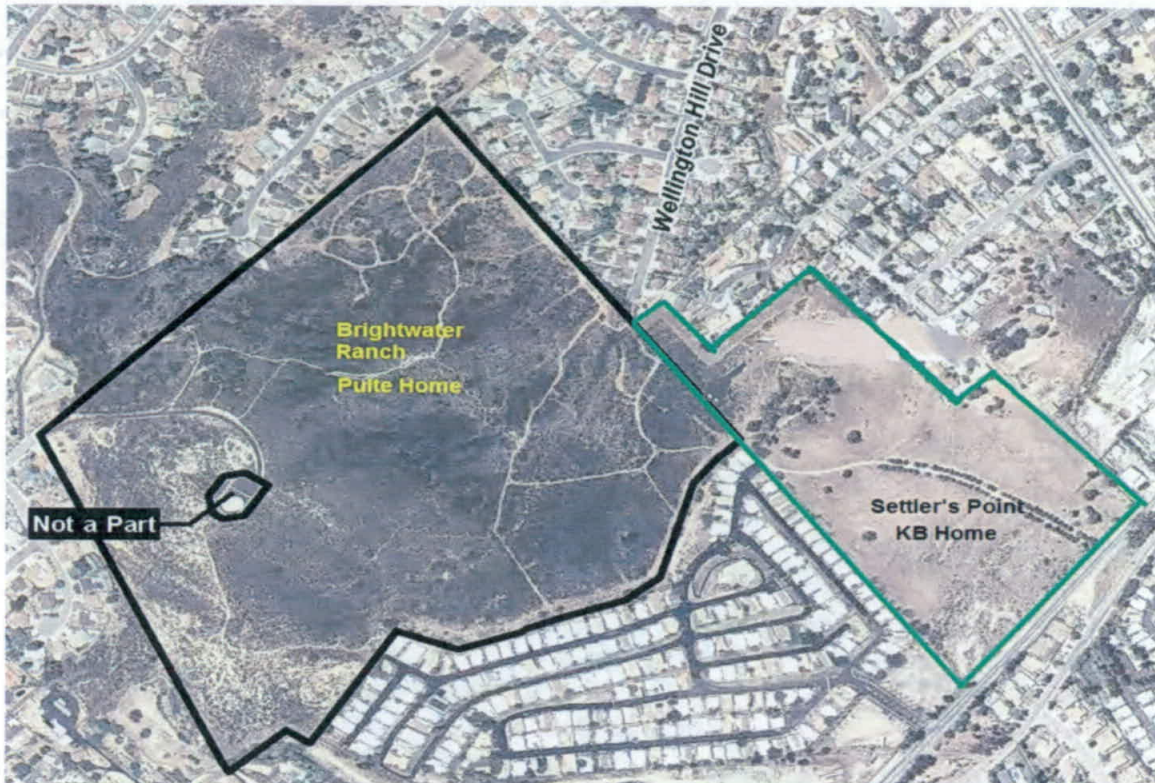


Figure 1. Brightwater Ranch and Settlers Point projects, Lakeside CA (Modified version of March 10, 2015 Pulte Home 401 water quality certification application Figure 2, project vicinity map)

On March 10, 2015 Pulte Home Corporation submitted a 401 water quality certification (Certification) application package for the adjacent Brightwater Ranch project to the San Diego Water Board. The project proposes a 66-unit single-family residential subdivision with four Homeowner Association-maintained lots, and 41.8 acres of open space. The application package included a preliminary jurisdictional delineation, identifying the presence of waters of U.S. and State.

The preliminary jurisdictional delineation was conducted by a separate Helix staff person, not affiliated with the Settler's Point project, on November 7, 2014, and concluded that the site contained 0.05 acre (685 linear feet) of waters of the U.S. and State (ephemeral streambed) under the jurisdiction of the United States Army Corps of Engineers (USACE), San Diego Water Board, and California Department of Fish & Wildlife (CDFW). The preliminary delineation identified an additional 0.12 acre (3,710 linear feet) of non-federal waters of the State onsite. The site contains five unnamed ephemeral drainages that are tributary to Los Cochis Creek (Hydrologic sub area 907.14). (see Figure 2)

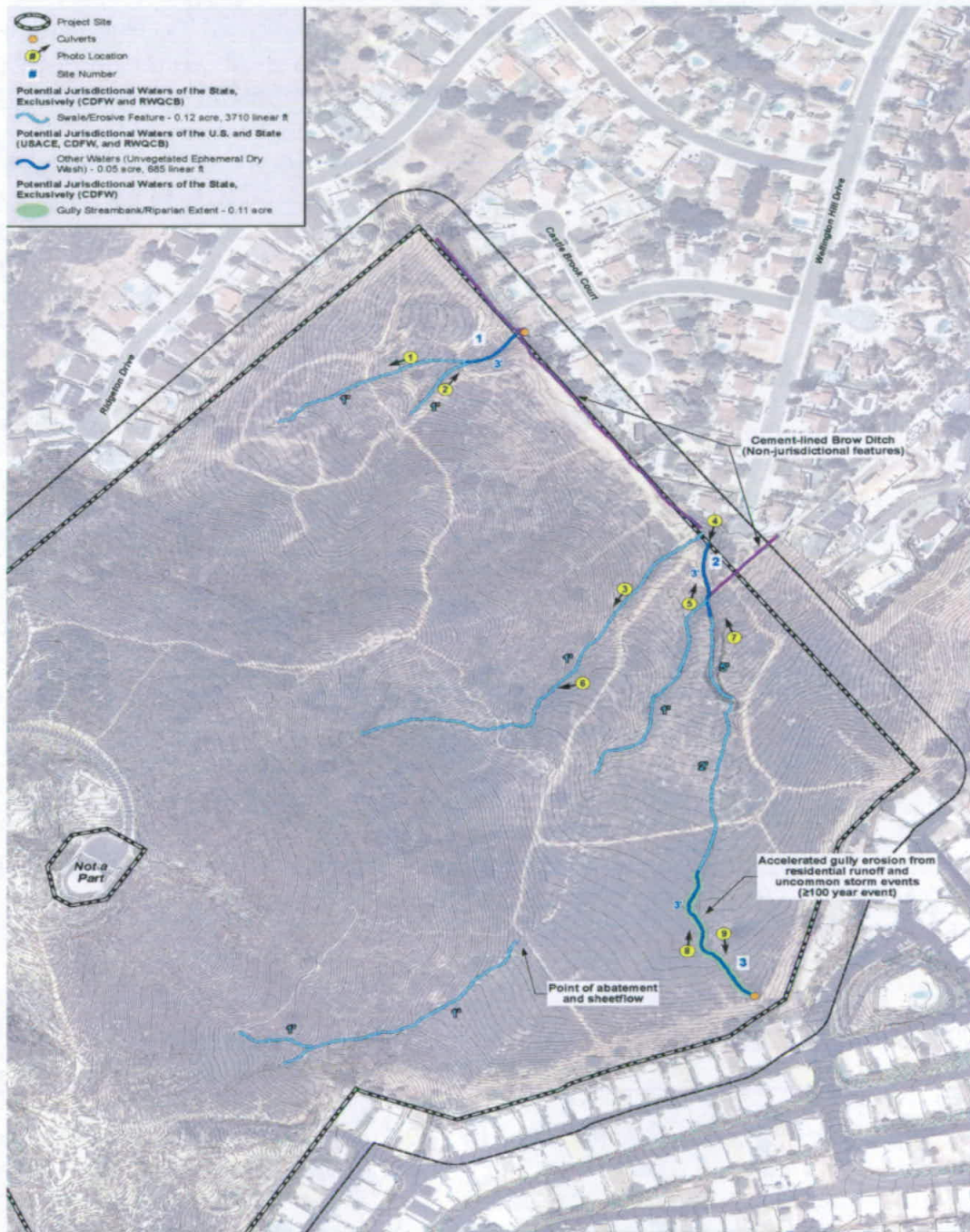


Figure 2. Map of Preliminary jurisdictional delineation for Brightwater Ranch. Taken from Pulte Homes March 10, 2015 401 Cert. application package Figure 8.

In April 2015, during an initial San Diego Water Board review of the Pulte Home Corporation Brightwater Certification application, Google Earth aerial imagery revealed that grading had been conducted within the Brightwater project boundary, and had impacted jurisdictional waters on-site. A review of the Stormwater Multi-Application, Reporting and Tracking System (SMARTS) database of construction stormwater enrollees indicated that KB Home had filed a Notice of Intent to conduct construction activities in that area. On July 1, 2015 staff from the USACE, San Diego Water Board, KB Home, Helix, and County of San Diego met onsite to inspect the impacts and to verify the jurisdictional delineation.

The findings of the inspection, and subsequent communications with KB Home, Pulte Homes, and the County of San Diego determined that, for a period of 161 days, starting on December 5, 2014 and ending on May 14, 2015, KB Home conducted grading operations for the Settler's Point project which included off-site grading and filling of jurisdictional waters on the adjacent Brightwater Ranch property.

The offsite grading activities included the construction of a temporary road "knuckle" connecting the Settler's Point project with the existing Wellington Drive to provide secondary access, in accordance with the site's fire protection plan. The road knuckle had been added to the project plans at the request of the County of San Diego sometime in August 2008. The knuckle was deemed "temporary" because both the Settler's Point and Brightwater Ranch projects were working through the approval process independently and it was unknown which project would receive approval to break ground and build the road knuckle first. Based on the Brightwater Ranch Certification submittal, it was proposed that after both projects were constructed, the road knuckle would be converted to a four-way intersection.

On July 7, 2015 the Discharger's environmental consultant reported that the unauthorized discharge of fill into jurisdictional waters of the U.S. and State, associated with the offsite knuckle portion of the Settler's Point project impacted approximately 0.018 acre (278 linear feet) of waters of the U.S. and State (see Figure 3). The jurisdictional determination that the impacts associated with the knuckle were comprised entirely of waters of the US and State was confirmed by the ACOE.

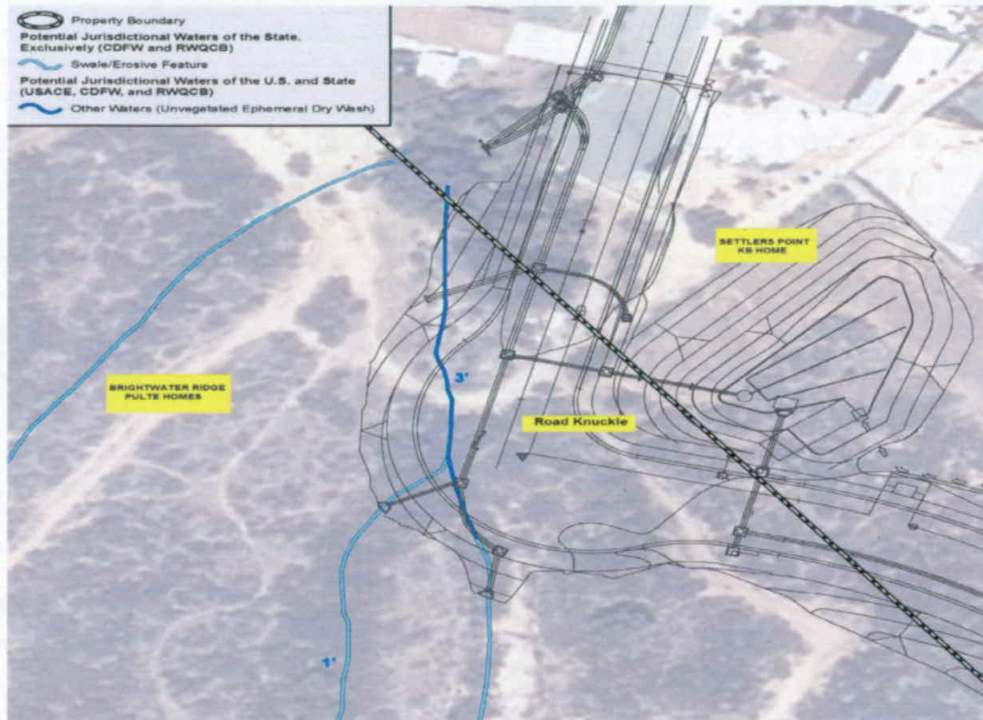


Figure 3. Unauthorized Impacts to Waters of the US/State. Diagram provided by Helix Environmental on behalf of KB Home, July 2015.

On August 13, 2015 the San Diego Water Board issued KB Home and Pulte Homes Notice of Violation (NOV) No. R9-2015-0120 for the unauthorized discharge of fill to ephemeral waters of the U.S. and State associated with the construction of the offsite knuckle portion of the Settler's Point project.

On July 10, 2015, at the request of Prosecution Team staff, Helix staff provided a timeline of events for the Discharger's involvement in procuring the Settler's Point property. Helix summarized the activity and concluded that "KB Home exercised due diligence in their efforts to confirm the project was in complete compliance with all local, state and federal regulations, as evidenced by the issuance of the grading for the project."

Subsequently, during the course of investigation, KB Home provided the Prosecution team with a May 9, 2014 due diligence report prepared by Helix. The purpose of the report was to perform a due diligence assessment of the property to confirm that no significant changes or biological issues had occurred to constrain the project. The assessment consisted of a single day site reconnaissance and a review of project files and regional planning documents provided by KB Home.

KB Home had one final opportunity to identify the presence of jurisdictional streams within the off-site project footprint when their consultant performed the on-site reconnaissance on May 5, 2014. Their consultant walked the entire perimeter of the site, but did not include an examination of the off-site knuckle component. Had the consultant looked slightly beyond the Settler's Point property boundary it would have been obvious that the off-site portion to be graded contained an ephemeral stream bed in a twenty-foot deep canyon (see Figure 4).



Figure 4. Ephemeral stream in highly eroded canyon, looking west from constructed off-site road knuckle. Photo by Lisa Honma, SDRWQCB, July 1, 2015.

The due diligence assessment concluded, in part, that:

“No potentially jurisdictional areas were observed within the project area. No signs of recent surface flow, no definable bed and bank or ordinary high-water mark, and no presence of wetland or riparian vegetation sufficient to constitute habitat were observed. Based on our assessment, there were no areas that could be considered jurisdictional under either U.S. Army Corps of Engineers (USACE) or California Department of Fish and Wildlife (CDFW) regulations.”

Subsequent to the issuance of the NOV, KB Home and the San Diego Water Board Prosecution team (Parties) held meetings on August 19, 2015 and October 26, 2015 to discuss the alleged violations, and entered into settlement discussions. The settlement discussions lasted until early November 2015, but the parties were unable to reach an agreement.

Summary

Beginning in December 2015, the Discharger initiated grading to construct the Settler's Point housing project. The Discharger's activity resulted in the filling of ephemeral streams tributary to Los Coches Creek and permanently removed the beneficial uses associated with those streams. The Discharger should have applied for the proper permits and authorizations from resource agencies prior to impacting the streams, including a CWA section 401 water quality certification from the San Diego Water Board, a CWA section 404 permit from the USACE and a Fish and Game Code section 1602 Streambed Alteration Agreement from CDFW. The Discharger failed to apply for and obtain any authorizations for the impacts to the ephemeral streams. By not applying for the CWA section 401 water quality certification, the San Diego Water Board was denied the opportunity to require avoidance and minimization measures. This includes evaluating alternatives where the impacts to ephemeral streams tributary to Los Coches Creek could be completely avoided.

The Prosecution Team asserts that the Discharger's due diligence review was wholly inadequate. The addition of the off-site road knuckle portion had been incorporated into the plans years before. Engineering plans for the project had incorporated the knuckle into drainage studies, and had taken into account the flows that would be generated from the unnamed streams as it designed the storm water infrastructure for the project. However, biological resource updates provided in the years after the inclusion of the off-site knuckle failed to find it necessary to do any additional field work to investigate whether the offsite portion of the project would result in impacts to off-site jurisdictional features. Attachment A of this technical analysis provides a detailed chronology of the history of the Settler's Point project and the missteps all along the way that led to the violations alleged.

Had the Discharger done any one of the following steps during its due diligence review, it could have identified jurisdictional impacts that warranted application for 401 Certification.

1. Reviewed the engineering drainage plans and Stormwater Pollution Prevention Plan (SWPPP) prepared for the project by their consultants, and prior owners.
2. Identified the proper project boundaries when conducting its field visits.
3. Looked at topographical maps or satellite images of the project footprint.
4. Established effective communication on the project between the engineering and biological sections of the planning teams.

The unauthorized impacts to waters of the US and State were due to a lack of due diligence on the part of KB Home and its consultant, as a result of their reliance on the inadequate biological analysis of the project, failure to properly validate the information, and lack of communication between the engineering and biological consultants associated with the project.

B. BENEFICIAL USES OF AFFECTED WATERS

The Water Quality Control Plan for the San Diego Basin (Basin Plan) designates beneficial uses for all surface and ground waters in the San Diego Region. These beneficial uses "form the cornerstone of water quality protection under the Basin Plan" (Basin Plan, Chapter 2). Beneficial uses are defined in the Basin Plan as "the uses of the water necessary for the survival or well-being of man, plants and wildlife."

The un-named ephemeral streams impacted by the discharge of fill in conjunction with the construction of the road knuckle are tributary to Los Coches Creek. The Basin Plan has designated the following beneficial uses for Los Coches Creek:

- Industrial Service Supply (IND)
- Contact Water Recreation (REC1)
- Non-contact Water Recreation (REC2)
- Warm Freshwater Habitat (WARM)
- Wildlife Habitat (WILD)

C. ALLEGED VIOLATIONS

Failure to Obtain a CWA section 401 Water Quality Certification for Impacts to Waters of the US and State in violation of Clean Water Act section 301 and CWC section 13376

The discharge of dredge and fill material into waters of the United States without a permit under CWA section 404 and without obtaining state water quality certification pursuant to CWA section 401 constitutes a violation of CWA section 301.

These violations subject the Discharger to administrative civil liability pursuant to Water Code section 13385.

D. DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY

Pursuant to CWC section 13385, any person who violates waste discharge requirements issued pursuant to Chapter 5.5 of the CWC (i.e., NPDES Permits) shall be liable civilly.

Pursuant to CWC section 13385(c), the maximum civil liability that the San Diego Water Board may impose for a violation of an NPDES permit is ten thousand dollars (\$10,000) for each day the violation occurs and/or ten dollars (\$10) per gallon discharged but not cleaned up that exceeds 1,000 gallons.

CWC section 13385(e) requires the San Diego Water Board to consider specific factors in establishing discretionary liability amounts. These factors include:

“...the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.”

The State Water Board's Water Quality Enforcement Policy (Enforcement Policy), provides a penalty calculation methodology for Water Boards¹ to use in administrative civil liability cases. The penalty calculation methodology enables the Water Boards to fairly and consistently implement liability provisions of the Water Code for maximum enforcement impact to address, correct, and deter water quality violations. The penalty calculation methodology provides a consistent approach and analysis of factors to determine liability based on the applicable Water Code section.

The Enforcement Policy requires the Water Boards to determine an initial liability factor based on the Potential for Harm and the extent of Deviation from Requirements when there is a discharge violation. The Potential for Harm score is calculated by determining the actual or threatened impact to beneficial uses caused by the violation using a three-factor scoring system to quantify: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) the discharge's susceptibility to cleanup or abatement. These factors are used to determine a per day factor using the matrix set forth in the Enforcement Policy that is multiplied by the maximum per day amount allowed under the Water Code. An initial liability amount on a per gallon basis is determined using the Potential for Harm score and the extent of Deviation of Requirement of the violation.

The initial liability amount is then increased or decreased based on the following adjustment factors: culpability, cleanup and cooperation, and history of violations.

¹ "Water Boards" refers to the State Water Resources Control Board and the Regional Water Quality Control Boards.

Step 1 – Potential for Harm for Discharge Violations

Factor 1: Harm or Potential for Harm to Beneficial Uses

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 (negligible) and 5 (major) is assigned in accordance with the statutory factors of the nature, circumstances, extent and gravity of the violation.

The Prosecution Team has assigned a score of **5 (Major)** out of 5 to Factor 1 of the penalty calculation.

The Enforcement Policy defines **Major** potential for harm to beneficial uses as:

High threat to beneficial uses (i.e., significant impacts to aquatic life or human health, long term restrictions on beneficial uses (e.g., more than five days), high potential for chronic effects to human or ecological health)

The Prosecution Team assigned a **5 (Major)** because the unauthorized discharge of fill into waters of the United States has permanently eliminated, or at least significantly impacted, the beneficial uses assigned to the unnamed ephemeral streams in the footprint of the road knuckle. The undergrounding, armoring, and culverting of the impacted streams will result in an unmitigated loss of flood attenuation, groundwater recharge, pollutant assimilation, and biological productivity and diversity in the habitat lost.²

Furthermore, the failure of the Discharger to submit a CWA section 401 water quality certification application denied resource agencies the opportunity to evaluate the project in its entirety, and regulate the discharge by the avoidance, minimization, and subsequent mitigation of the remaining impacts to the streams. Thus, as the impacts are permanent, the actual harm to beneficial uses can be scored as nothing less than Major, as defined by the Enforcement Policy.

Factor 2: Physical, Chemical, Biological or Thermal Characteristics of the Discharge

This factor evaluates the physical, chemical, biological, and/or thermal nature of the discharge. A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material to potential receptors.

² Meyer, J. L., L. A. Kaplan, J. D. Newbold, D. L. Strayer, C. J. Woltemade, J. B. Zedler, R. Beilfuss, Q. Carpenter, R. Semlitsch, M.C. Watzin, and P. H. Zedler (2003): Where rivers are born: The scientific imperative for defending small streams and wetlands. *Sierra Club and American Rivers*.

The Prosecution Team assigns a score of **2** out of 4 (moderate) to Factor 2 of the penalty calculation. The Enforcement Policy defines **moderate** as:

Discharged material poses a moderate risk or threat to potential receptors (i.e, the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection).

The discharge of sediment, rip rap, pavement, storm water infra-structure and concrete to receiving waters poses a **moderate** level of concern regarding receptor protection because:

- a. The physical characteristics of the discharge of sediment, rip-rap, and concrete essentially eliminate the presence of many, if not all, potential receptors in the fill area.
- b. Sediment, rip-rap, and concrete, together in the form of hydromodification, diminish the physical quality of in-stream waterways by altering or obstructing flows, modifying sediment transport, and affecting existing riparian functions near the site and within the watershed.

Factor 3: Susceptibility to Cleanup and Abatement

Pursuant to the Enforcement Policy a score of 0 is assigned for this factor if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned to this factor if less than 50 percent of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the Discharger.

The road knuckle was identified as temporary, acknowledging that the impacted area will be subject to modification with the construction of the Brightwater project. Moreover, the Board has the discretion to issue a Cleanup and Abatement Order directing the Discharger to cleanup and abate the unauthorized fill. Therefore, more than 50 percent of the discharge is susceptible to cleanup or abatement. Accordingly, a score of **0 (zero)** is assigned to the penalty calculation for Factor 3.

Final Score – “Potential for Harm”

Based on the above determinations, the Potential for Harm final score for these discharge violations is **7 (seven)**.

Step 2 – Assessments for Discharge Violations

CWC section 13385 states that a Regional Water Board may impose civil liability on a daily basis, a per gallon basis, or both.

a. Extent of Deviation from Requirement

Where there is a discharge, the initial liability is determined on a per gallon basis using the same Potential Harm score from Step 1 and the Extent of Deviation from Requirement of the violation. The "Deviation from the Requirement" reflects the extent to which the violation deviates from the specific requirement. In this case, the requirement (CWA section 401 and 404) was to obtain the appropriate dredge and fill permit and associated state water quality certification prior to the initiation of the grading activities associated with the construction of the off-site road knuckle.

The Prosecution Team has assigned a Deviation from Requirement score of "**major**" because the requirement to obtain the appropriate authorizations prior to discharge of fill into waters of the U.S./State was rendered ineffective by the Discharger's actions.

The Enforcement Policy defines **major** for discharge violations as:

The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

b. Gallons Discharged

On August 18, 2015 the Discharger provided an estimate of the volume of fill placed into waters of the U.S. and State associated with construction of the off-site road knuckle. It estimated that 350 cubic yards of fill was discharged to fill the drainages and construct the road knuckle. For penalty calculation purposes, the total amount of unauthorized fill was converted to gallons and estimated to be 70,691 gallons.

CWC section 13385(c)(2) states:

"Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons."

In determining the per gallon liability in this case, the total gallons is calculated to be: 70,691 gallons – 1,000 gallons = **69,691** gallons.

c. Per Gallon and Per Day Assessment

Per Gallon Assessment for Discharge Violations

Using a "Potential for Harm" factor of **7** and "Deviation from Requirement" factor of "**Major**," the "Per Gallon Factor" for the unauthorized discharge of fill into waters of the U.S. is **0.310** in Table 1 of the Enforcement Policy. Pursuant to CWC section 13385 the maximum civil liability for these violations is ten dollars (\$10.00) per gallon discharged (minus the first 1,000 gallons discharged).

Calculating the Per Gallon Assessment is achieved by multiplying:

$$\begin{aligned} &(\text{Gallons}) \times (\text{Per Gallon Factor}) \times (\text{Statutory Maximum Liability}) = \\ &(69,691) \times (0.310) \times (\$10.00) = \mathbf{\$216,042} \end{aligned}$$

Per Day Assessments for Discharge Violations

When there is a discharge, the initial liability is assessed on a per day basis using the same Potential Harm score from Step 1 and the Extent of Deviation from Requirements used in the per gallon analysis.

The Potential for Harm score is **7** and the Extent Deviation from Requirements is considered to be **Major**. Therefore the "per day" factor is **0.31** (as determined by Table 2 in the Enforcement Policy).

Although the days of violation resulting from the unauthorized discharge of fill are ongoing to the present, the Prosecution Team has limited its calculation of the discharge days to the period of time beginning with the initiation of grading activities to the conclusion of construction of the off-site road knuckle; a period totaling 161 days.

Calculating the Per Day Assessment is achieved by multiplying:

$$\begin{aligned} &(\text{Days of Discharge}) \times (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability}) = \\ &(161)(0.310) \times (\$10,000/\text{day}) = \mathbf{\$499,100} \end{aligned}$$

Step 3 – Per Day Assessments for Non-Discharge Violations

Step 3 does not apply to discharge violations.

Initial Amount of the ACL

The Total Combined Initial Liability is derived from the addition of the Per Gallon and Per Day initial liability amounts calculated in Step 2:

$$\begin{aligned} &(\text{Per Gallon Liability}) + (\text{Per Day Liability}) \\ &(\$216,042) + (\$499,100) = \mathbf{\$715,142} \end{aligned}$$

Step 4 – Adjustment Factors

There are three additional factors to be considered for modifications of the amount of initial liability: the violator's culpability, efforts to clean up and cooperate with regulatory authority, and the violator's compliance history.

Culpability

Higher liabilities should result from the lack of due diligence or negligent actions as opposed to violations beyond the control of the Discharger. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Prosecution Team has assigned a culpability multiplier of **1.2** out of a range from 0.5 to 1.5 for these violations because:

- a. KB Home ranks in the top five of the largest home builders in the nation. As such, it is, or should be, intimately aware of the regulatory requirements associated with developing projects within the State of California and in particular the County of San Diego, where it currently has multiple projects.
- b. The addition of the off-site road knuckle was not a last minute add-on to the proposed Settler's Point project. It had been a part of the project since 2009. A June 2009 drainage study had been completed analyzing the storm water infrastructure needs in association with the building of the off-site road knuckle, and noted a natural creek in the vicinity of the off-site portion of the project.
- c. Additionally, the Storm Water Pollution Prevention Plan developed by KB Home in 2014 for the Settler's Point project contained an exhibit that labeled the area of the off-site road knuckle as a "natural watercourse." The engineering side of the project development was in possession of the knowledge of the natural streams within the off-site knuckle area, and failed to communicate this information with the environmental consultants who were analyzing potential impacts resulting from the project.
- d. In May 2014, KB Home's environmental consultants conducted an assessment prior to purchase of the property, which included a file review and site visit to verify the conditions on the ground. This was another opportunity to determine that the off-site road knuckle construction would impact waters of the U.S. The consultant failed to inspect the off-site portion of the project. Had the consultant inspected the whole of the project it would have been obvious that jurisdictional waters were present in the off-site road knuckle area.

- e. The same environmental firm hired by the Discharger was also involved in the 401 certification application for the adjacent Pulte Homes Brightwater Ridge residential project that contained the off-site road knuckle. Different staff were responsible for each project. Unfortunately, there was no coordination between consultants on the resources present in the shared off-site knuckle area.

The Discharger's reliance on past flawed environmental studies and CEQA documents, and the lack of an appropriate level of due diligence while reviewing the property prior to its purchase increase the Discharger's level of culpability for the violations. A reasonably prudent person would have identified impacts to Waters of the US/State and would have sought permits accordingly. For this reason, the Prosecution Team has assigned a culpability factor of 1.2 in this case.

Cleanup and Cooperation

The Prosecution Team assigned a neutral cleanup and cooperation multiplier of **1.0** from a range of .75 to 1.5 for this violation. Although the Discharger was cooperative in providing requested information to characterize the violations and in discussing a path forward, no voluntary cleanup efforts have been undertaken.

History of Violation

The Prosecution Team assigned a neutral multiplier of **1.0** because the Discharger does not have a history of violations.

Step 5 – Determination of Total Base Liability Amount

The Total Base Liability amount for the violation is determined by multiplying the combined Per Gallon/Per Day Initial Amount computed in Step 3 with the adjustment factors as follows:

$$\begin{aligned} & \text{(Initial Liability Amount) x (Culpability) x (Cooperation) x (History of Violation) =} \\ & \quad (\$715,142) \times (1.2) \times (1.0) \times (1.0) = \mathbf{\$858,170} \end{aligned}$$

Step 6 – Ability to Pay and Ability to Continue In Business

The Discharger's ability to pay and continue in business must be considered when assessing administrative civil liabilities. As noted above, the Discharger is one of the leading homebuilders in the nation, and in its financial statements showed a gross operating profit of 492.66 million dollars, and a total net income of 86.64 million dollars for the year ending November 2015.³ The proposed

³ KB Home Financial Statement found at <http://investor.kbhome.com/financials-Statements.cfm>

penalty represents 1% of the Discharger's net income in 2015. The Discharger can pay the liability and remain in business.

Step 7 – Other Factors as Justice May Require

The cost of investigation and enforcement are “other factors as justice may require” and may be considered by the San Diego Water Board as an increase to the Total Base Liability Amount as a manner that serves as sufficient general and specific deterrent against future violations. The Prosecution Team recommends increasing the Total Base Liability Amount by \$16,996 in consideration of investigation and enforcement costs incurred in prosecuting this matter. Increasing the Total Base Liability Amount in this manner serves to create a more appropriate deterrent against future violations.

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

Step 8 – Economic Benefit

Pursuant to Water Code section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

The Prosecution Team has determined that the Discharger achieved an economic benefit from failing to retain a permitting consultant to process the necessary permits and authorizations required to impact jurisdictional waters associated with the off-site road knuckle construction, the failure to pay 401 Certification application fees, and the failure to mitigate and offset the permanent losses to waters of the US/State.

Based on the USEPA BEN model (see Attachment B), the Discharger avoided the cost of retaining a permitting consultant in the amount of **sixteen thousand eight hundred and eighty nine dollars (\$16,889)** during the violation period. The avoided 401 water quality certification application fees amount to **three thousand two hundred and twenty-one dollars (\$3,221)**.

In addition, the Discharger achieved an economic benefit by failing to properly mitigate the permanent impacts to the ephemeral streams associated with the construction of the off-site road knuckle. The economic benefit for this avoided cost is **eighteen thousand four hundred and ninety-one dollars (\$18,491)**.

The total economic benefit for this violation is **thirty eight thousand six hundred and one dollars (\$38,601)**.

This economic benefit calculation does not include calculations of the economic benefit the Discharger may have gained from not having to modify its project to avoid or minimize impacts as a result of the Certification evaluation process.

Step 9 – Maximum and Minimum Liability Amounts

Pursuant to CWC section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day and (b) ten dollars (\$10) for every gallon discharged, over one thousand gallons discharged, that was not cleaned up. CWC section 13385(d) requires that when pursuing civil liability under CWC section 13385, "At a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitutes the violation." If no economic benefit was derived from the violation, there is no minimum liability requirement.

The Prosecution Team is proposing the assessment of civil liability for the discharge of fill to waters of the US/State on a per day basis and a per gallon basis. Over a period of 161 days, 70,691 gallons of fill, including sediment, rip rap, asphalt and cement was discharged to waters of the US/State. Therefore, the maximum civil liability that could be assessed for this violation is **two million three hundred and six thousand nine hundred and ten dollars (\$2,306,910)**.

CWC section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent higher than the Economic Benefit Amount. Therefore, the minimum liability amount is calculated to be **forty-one thousand three hundred eighty-three dollars (\$41,383)**.

Step 10 – Proposed Civil Liability

Based on the penalty calculation methodology within Section VI of the Enforcement Policy, the total proposed liability amount for the violations addressed in Complaint No. R9-2016-0092 is for discharging sediment to waters of the US/State in violation of Section 301 of the Clean water Act and Section 13376 of the California Water Code is **eight hundred seventy five thousand one hundred and sixty six dollars (\$875,166)**.

E. DOCUMENTS RELIED UPON

Date	Title	Author	ECM Doc Handle
2003	Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands	Meyer et al.	2272547
02/2006	Biological Technical Report For Settler's Point Subdivision and Rezone	Robin Church	2270037
07/31/2008	Settlers Point Updated Project Description	REC Consultants	2270127
06/05/2009	Centex Homes Permission to grade letter	Centex Homes	2270249
06/2009	Drainage Study For Settlers Point	REC Consultants	2270566
02/10/2012	CEQA Initial Study for Settlers Point Project	County of San Diego	2270271
02/10/2012	CEQA Mitigated Negative Declaration for Settlers Point Project	County of San Diego	2270278
03/19/2013	Settlers Point Project No. PDS2013-STP-13-002 Updated Project Description	REC Consultants	2270078
05/09/2014	KB Home Due Diligence Assessment for Settlers Point Project	Helix Environmental Planning	2270438
08/18/2014	Stormwater Pollution Prevention Plan for Settlers Point	Waterlogged	2270509
03/10/2015	Pulte Home Request for Clean Water Act Section 401 Water Quality Certification, Application Package	Helix Environmental Planning	2270305
07/01/2015	San Diego Water Board Site inspection Report Brightwater Ranch/Settlers point	Lisa Honma	2270444
07/07/2015	Diagram of Impacted waters of the US/State, Brightwater Ridge Property	Helix Environmental Planning	2270538
07/10/2015	KB Home Timeline of Events	Helix Environmental Planning	2270516
07/14/2015	Pulte Home email to Eric Becker re discharge of fill on Brightwater Ridge Property	Pulte home	2271728
07/21/2015	Inspection photos, Road Knuckle	Christopher Means	2271636
08/13/2015	NOV R9-2015-0120 & Transmittal letter	Christopher Means	2270478, 2270482
08/18/2015	Estimation of Fill email	Procopio	2271595

APPENDICES

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

Appendix A

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

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

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

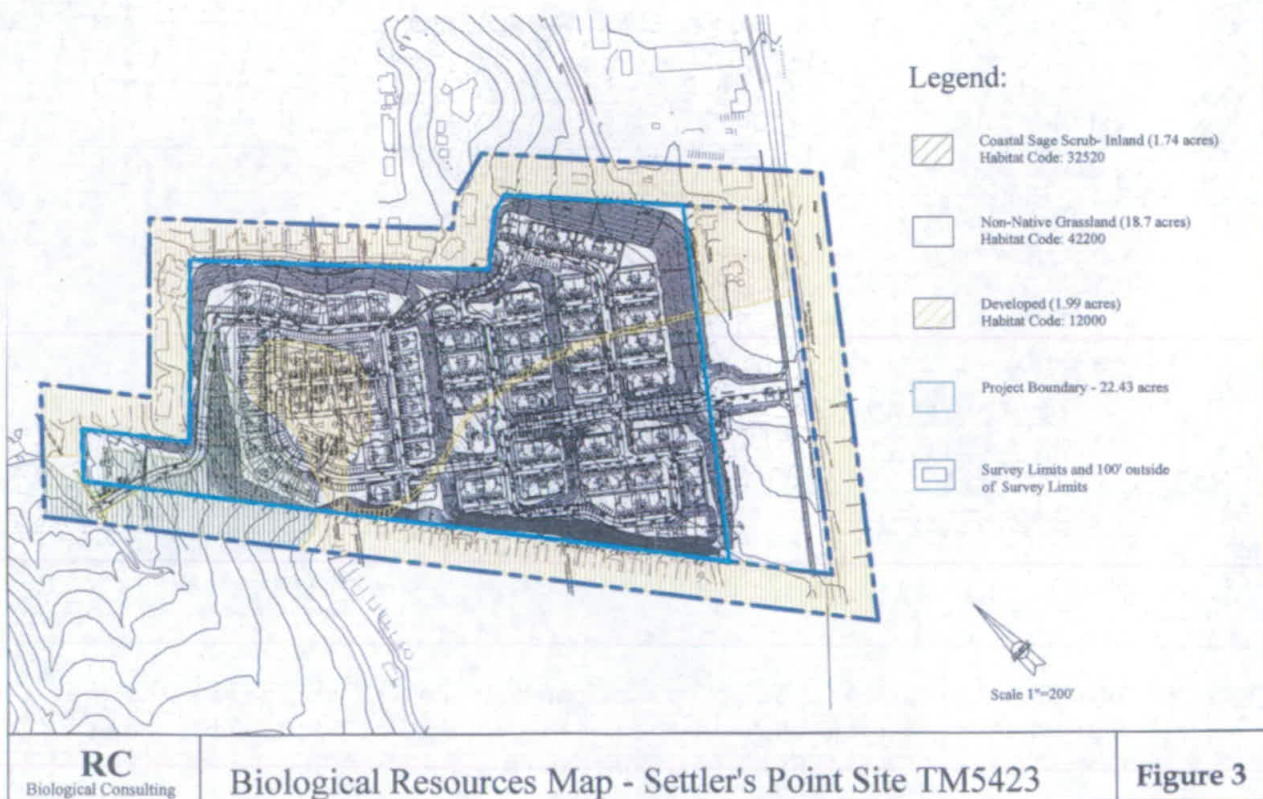


Figure 1. 2006 Biological Resources map prepared by Robin Church. Biological Technical Report for Settler's Point Subdivision and Rezone (RC Biological Consulting).

Appendix A

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

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

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

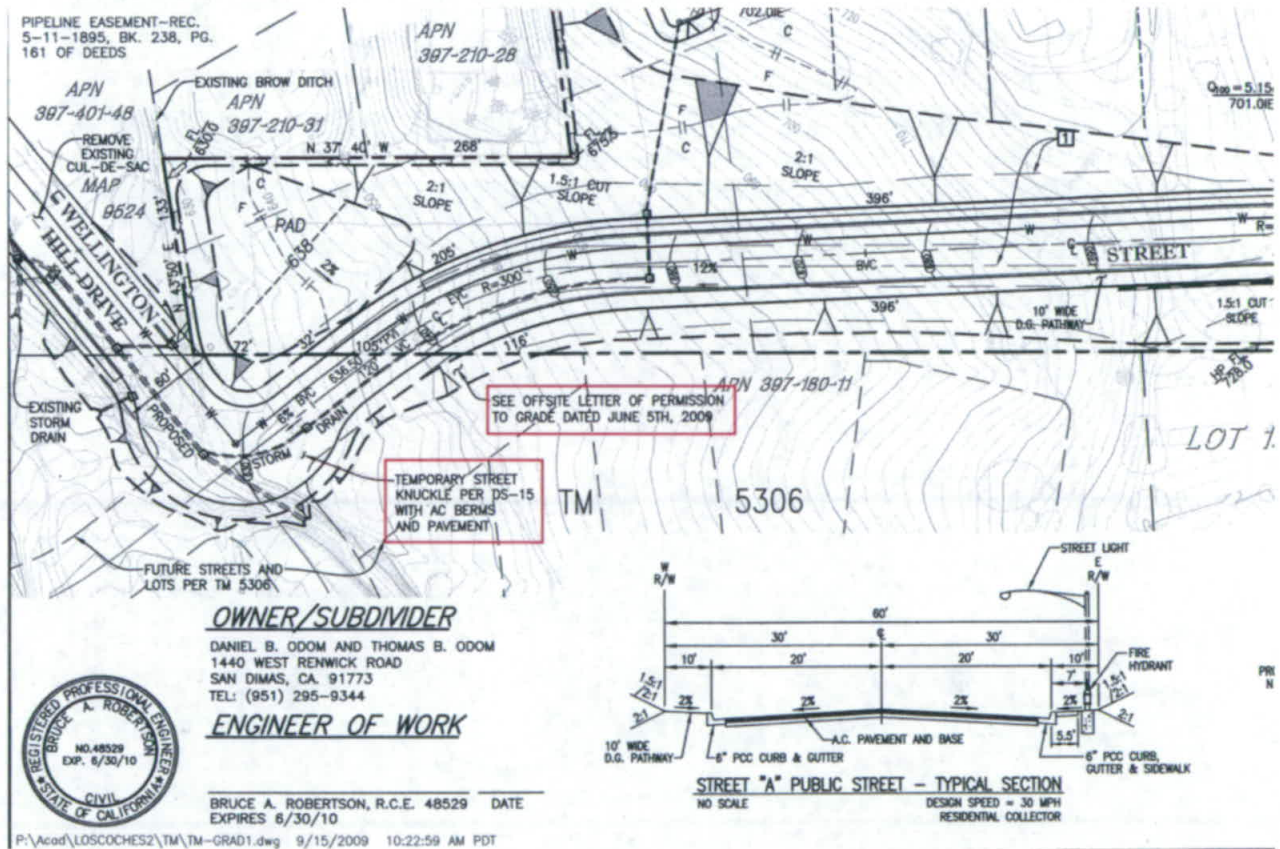


Figure 2. 2010 Engineering plans showing the anticipated off-site road knuckle as part of the Settler's Point project (Preliminary Grading Plan for Settler's Point County of San Diego Tract No. TM 5423 RPL3, REC Consultants, June 20, 2010).

Appendix A

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

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

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

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

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

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

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

Appendix A

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

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



Figure 3. September 2010 Google Earth Aerial photograph

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

Appendix A

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

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

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

May 9, 2014: Helix Environmental provides KB Home with a Due Diligence Assessment for the Settler's Point project. The assessment was based on a site reconnaissance on May 5, 2014 by a Helix biologist, a review of project files provided by KB Home, and regional planning documents¹. The focus of this assessment was "to confirm that no significant changes or biological issues have occurred since project approvals and there are no constraints to development."

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

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

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

Appendix A

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

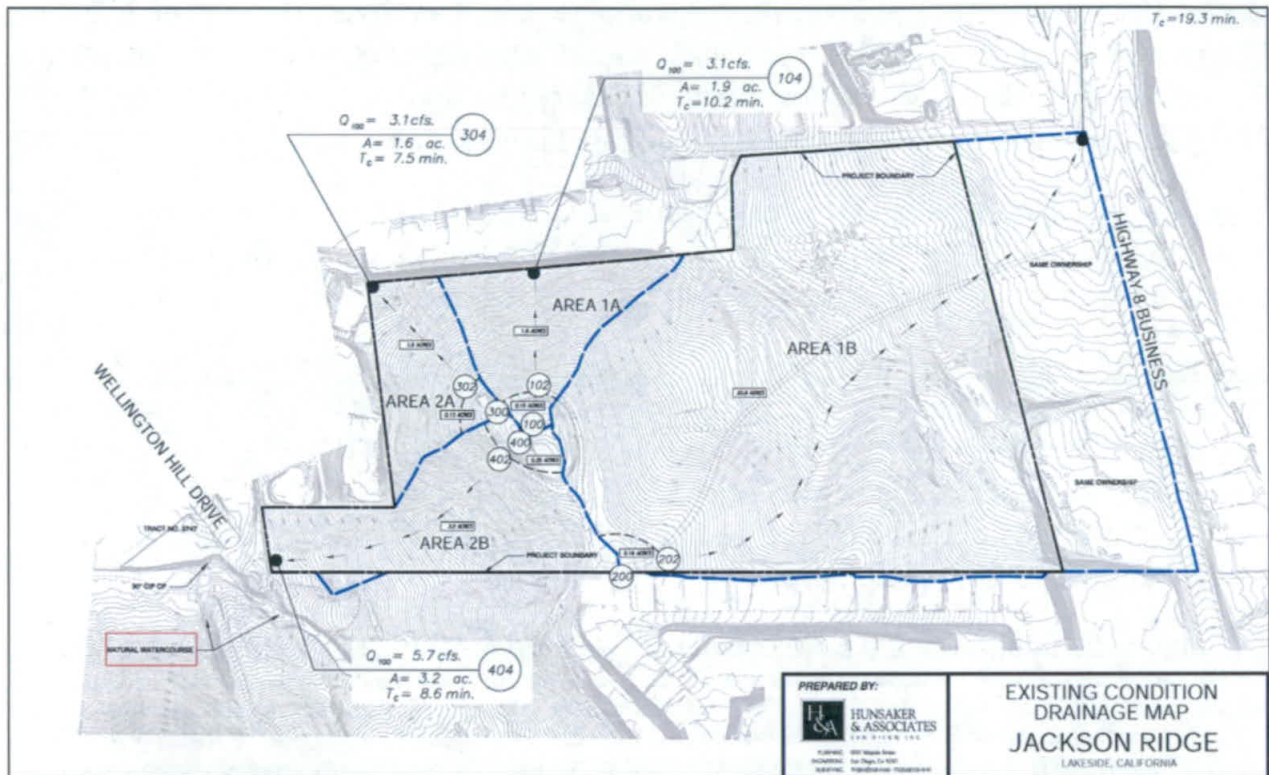


Figure 4. Drainage map from KB Home SWPPP showing location of natural watercourse (Storm Water Pollution Prevention Plan for Settler's Point Risk Level 2, Waterlogged, Certified Storm Water Professionals, August 8, 2014)

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

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

Appendix A

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

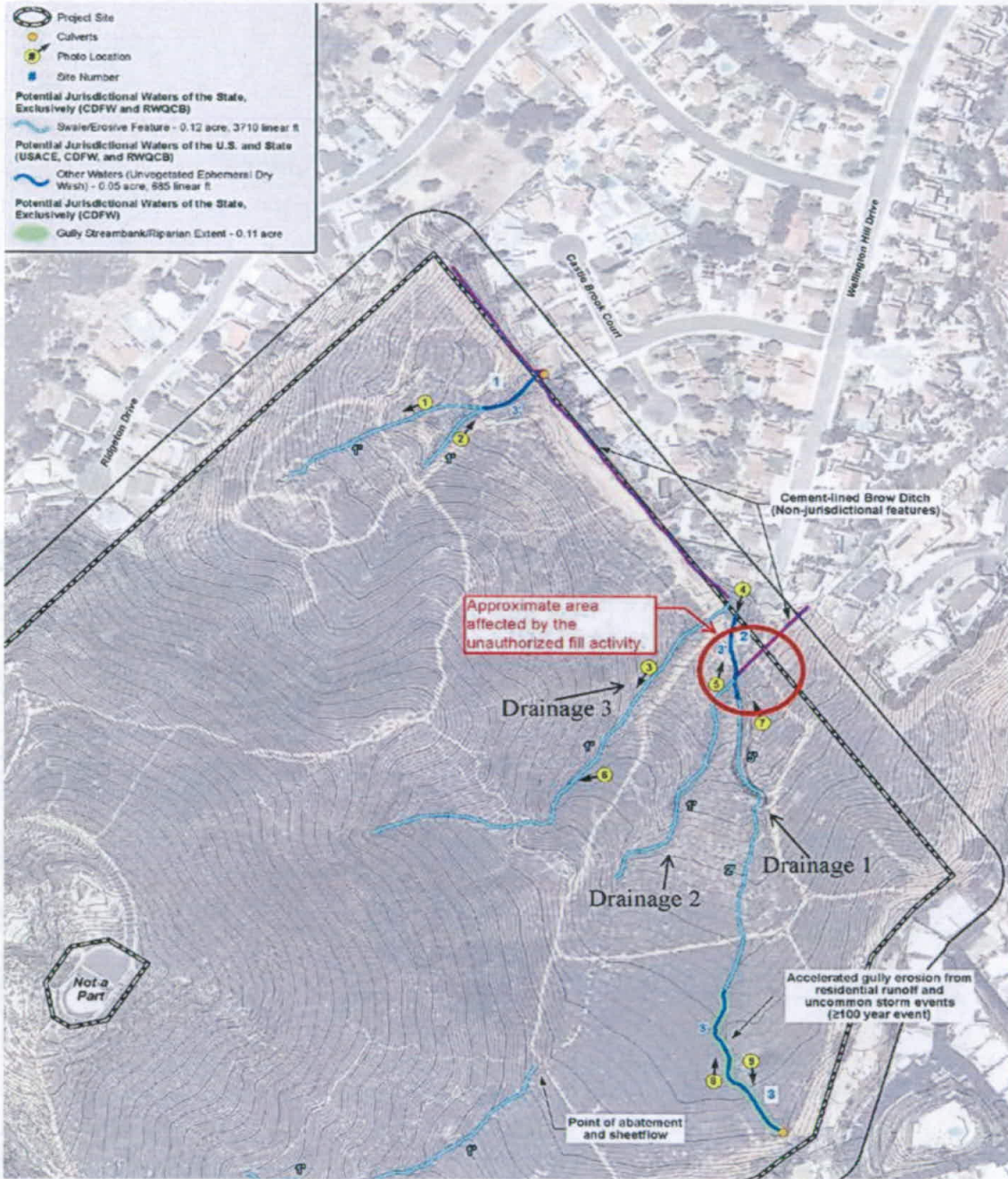


Figure 5. Preliminary jurisdictional delineation performed on November 7, 2014 by Helix Environmental Planning for Pulte Homes Brightwater Ridge Project.

Appendix A

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

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

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

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



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

Appendix A

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

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

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

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

Appendix B

Economic Benefit Analysis

KB Brightwater

Compliance Action	Amount	Capital Investment			One-Time Non-Depreciable Expenditure			Annual Cost		Non-Compliance Date	Compliance Date	Penalty Payment Date	Discount Rate	Benefit of Non-Compliance
		Basis	Date	Delayed?	Basis	Date	Delayed?	Basis	Date					
Failure to retain permitting consultant		ECI	1/1/2015	Y	\$ 23,500.00	ECI	10/19/2015	N	1/1/2015	12/4/2012	6/22/2016	6/22/2016	7.40%	\$ 16,889
Purchase of creation credits		ECI	1/1/2015	Y	\$ 28,750.00	GDP	9/30/2015	N	1/1/2015	3/4/2015	6/22/2016	6/22/2016	7.20%	\$ 18,491
401 Certification Application fee		ECI	1/1/2015	Y	\$ 4,549.00	GDP	2/10/2016	N	1/1/2015	12/4/2013	6/22/2016	6/22/2016	7.50%	\$ 3,221
Income Tax Schedule: Corporation: Bryan Elder Version: 5.5.0 (July 2015) Date/Time of Analysis: 3/14/2016 8:41														
Assumptions: 1. Consulting estimates for permitting obtained by RWQCB SD ranged from \$15,000 to \$32,000. An average expense of \$23,500 was used as the avoided cost. It is assumed that a consultant would have been retained at least two years prior to impacts. 2. Based on last bank purchase (preceded to our acreage estimate) for purchase of 0.05 creation credits at SLR Bank at approximately 3:1 ratio. Purchase must be complete within 90 days of impacts. 3. 401 certification application fee is required at least one year prior to impacts. 4. Streambed impacts were estimated at commencing on 12/4/2014. 5. Costs are assumed to be avoided. 6. Penalty payment date estimated at tentative hearing date and is subject to change.														
Total Benefits: \$ 38,601														

Appendix C
Discharger: KB Home

Penalty Methodology Table
Order No. R9-2016-0092

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

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

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

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

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

Step 8: Economic Benefit
\$38,601

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

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

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

Step 10: Final Liability Amount
\$875,166

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

SECTION 401 WATER QUALITY CERTIFICATION
INSPECTION REPORT

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

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

REPRESENTATIVE(S) PRESENT DURING INSPECTION:

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

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

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

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

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

Brightwater Ranch, Terminus of Wellington Hill Dr.
FACILITY ADDRESS

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

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

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

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

Wellington Hill Dr. & Jackson Hill Parkway
FACILITY ADDRESS

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

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

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

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

N/A
FACILITY ADDRESS

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

APPLICABLE WATER QUALITY LICENSING REQUIREMENTS:

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

INSPECTION TYPE (Check One):

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

INSPECTION FINDINGS:

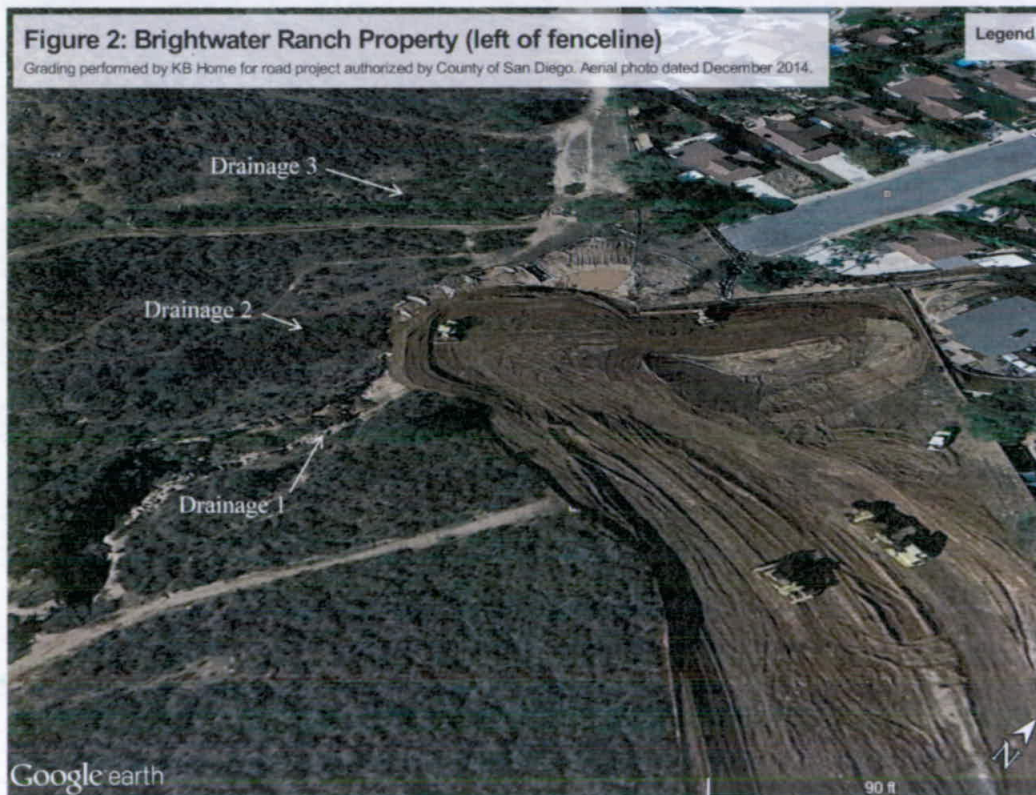
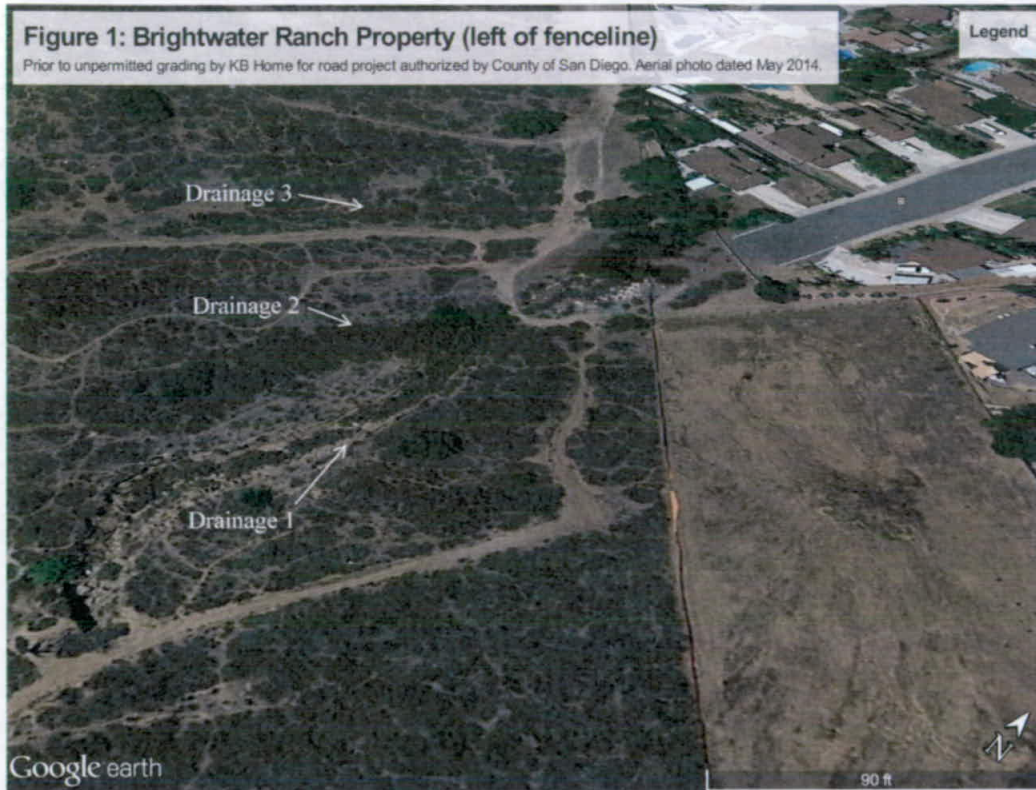
Y WERE VIOLATIONS NOTED DURING THIS INSPECTION? (YES/NO/PENDING SAMPLE RESULTS)

I. COMPLIANCE HISTORY / PURPOSE OF INSPECTION

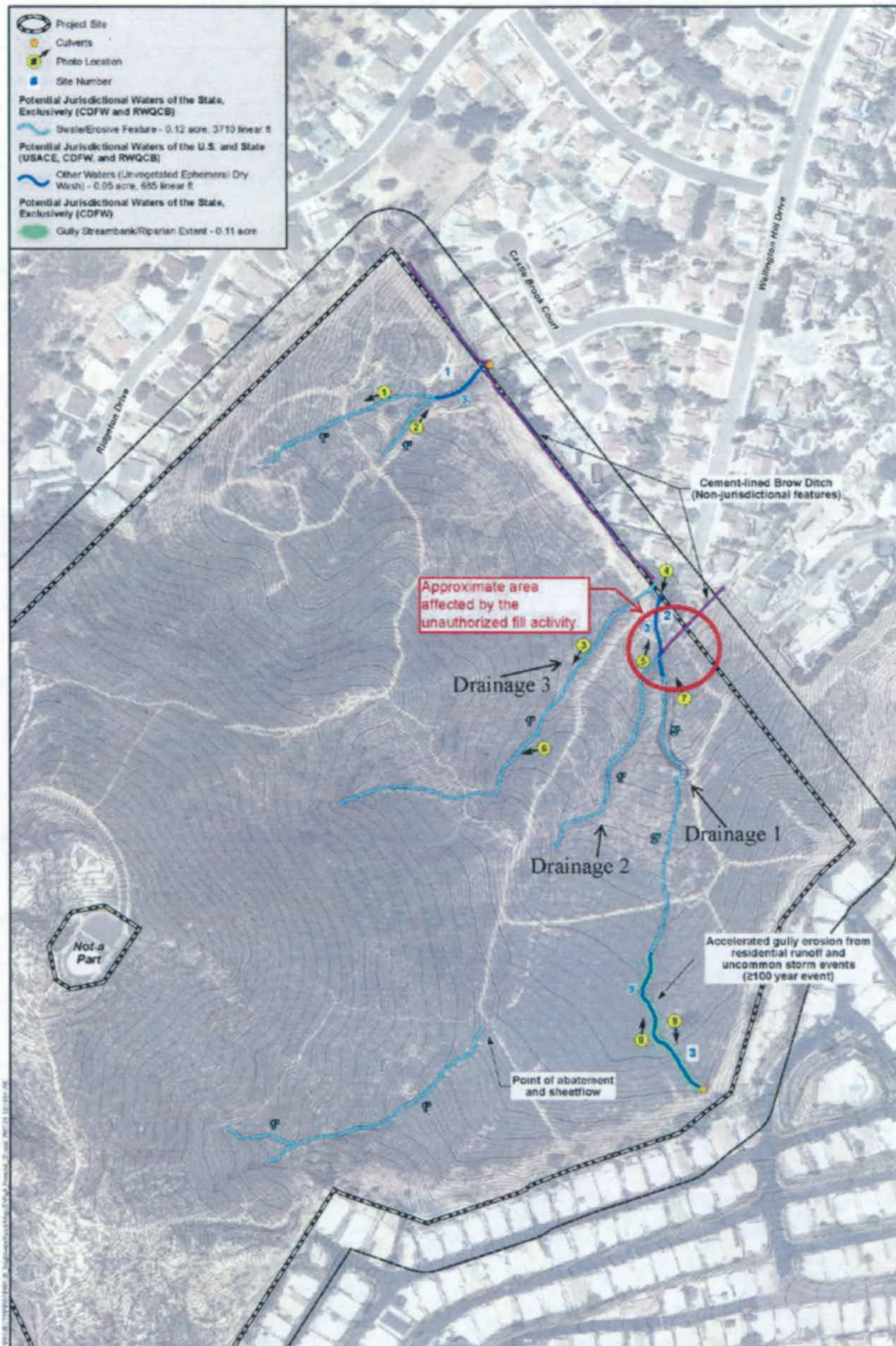
The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) has received a CWA Section 401 Water Quality Certification application for Pulte Home Corporation's Brightwater Ranch Residential Housing Development Project (File No. R9-2015-0052). The 76.23-acre project site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

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

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Facility: **Brightwater Ranch, Lakeside CA**
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Waters of the US/Waters of the State

BRIGHTWATER RANCH

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

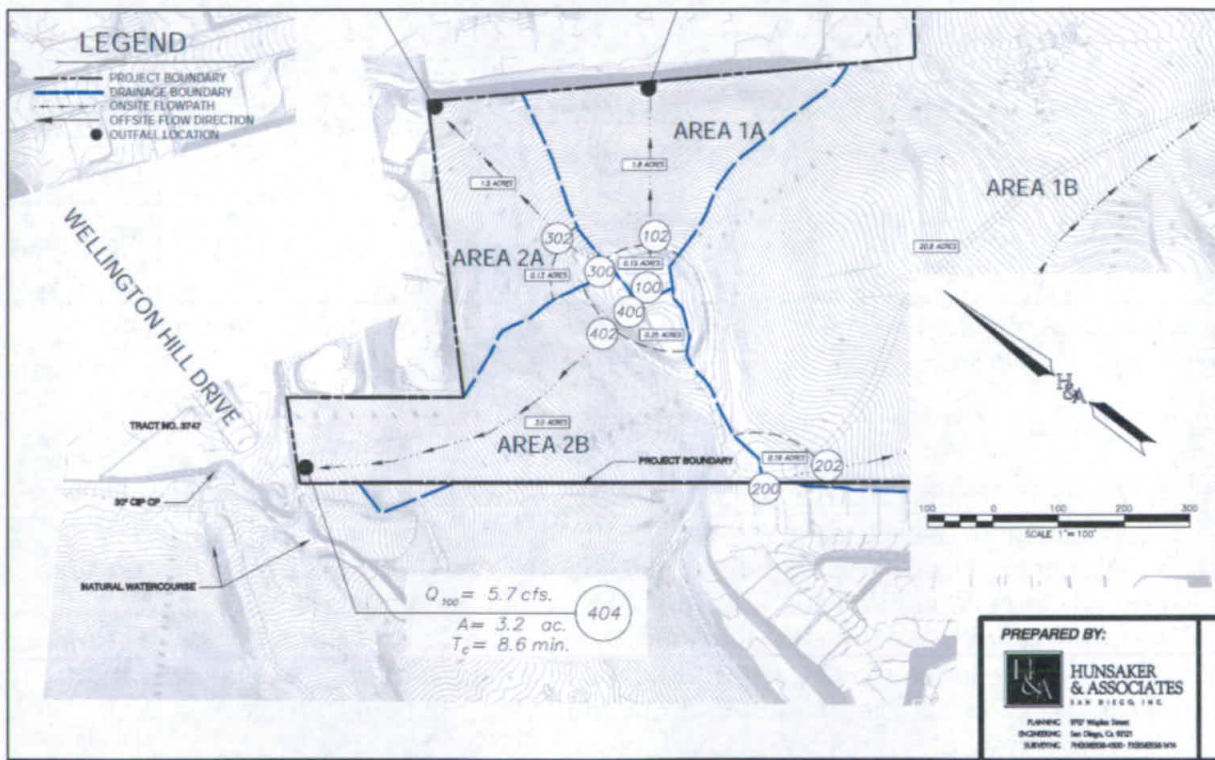


Figure 4: Excerpt of Existing Condition Drainage Map from KB Home's Settler's Point SWPPP. Note that "natural watercourses" are identified on the map in the lower left corner.

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

II. FINDINGS

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

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

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

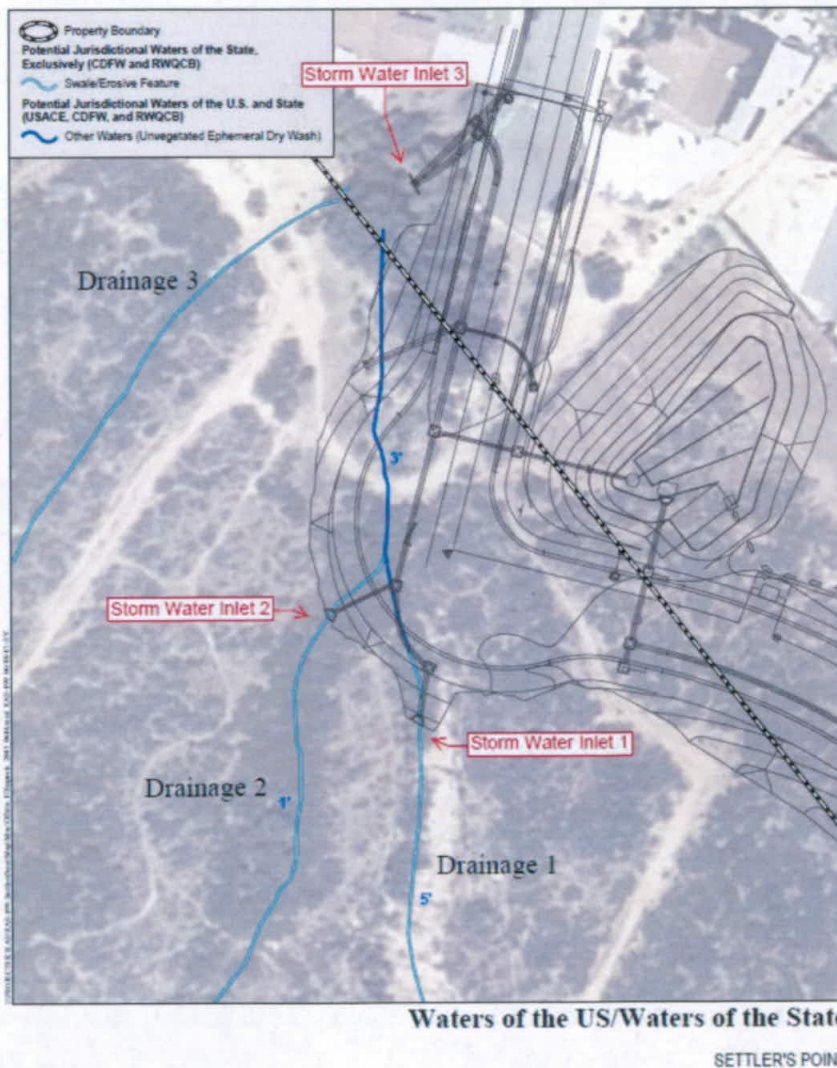


Figure 6: Map of impacts to jurisdictional resources on the Brightwater Ranch Property. Note that storm water inlets were installed to intercept flow from ephemeral drainages. Also note that the delineation is preliminary and has not been verified by the Army Corps.

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



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

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

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



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

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



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

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

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



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

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

III. RECOMMENDATIONS

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

IV. SIGNATURE SECTION

Lisa Honma
STAFF INSPECTOR


SIGNATURE

07/01/2015
INSPECTION DATE

Eric Becker
REVIEWED BY SUPERVISOR


SIGNATURE

07/14/2015
DATE



California Regional Water Quality Control Board, San Diego Region

August 13, 2015

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

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

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

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

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

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

YOU ARE HEREBY NOTIFIED THAT:

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

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

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

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

A. Background

The proposed Brightwater Ranch project (APN # 397-180-13) is located within the unincorporated community of Lakeside in San Diego County. The 76.23 acre site is located northwest of Business Route 8/East Main Street, and southwest of Los Cocheros Road (Latitude: 32.832479 ° N, Longitude: -116.914554° W, Center Reading).

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

On March 10, 2015 Pulte Home Corporation submitted a Certification application package for the Brightwater Ranch project to the San Diego Water Board. The proposed project is a 66-unit single-family residential subdivision with four Homeowner Association- maintained lots, and 41.8 acres of open space. The application package included a preliminary jurisdictional delineation for the presence of waters of U.S./State.

The preliminary jurisdictional delineation was conducted on November 7, 2014 and concluded that the site held 0.05 acre (685 linear feet) of jurisdictional waters of the U.S./State (ephemeral dry wash) under the jurisdiction of the USACE, San Diego Water Board, and California Department of Fish & Wildlife (CDFW). The preliminary delineation identified an additional 0.12 acre (3,710 linear feet) of non-federal waters of the State onsite. The 76.23 acre site contains five unnamed ephemeral drainages that are tributary to Los Coches Creek (Hydrologic sub area 907.14).

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

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

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

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

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

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

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

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

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

a. CWC Section 13376 states in part:

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

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

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

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

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

C. Violations of Basin Plan Waste Discharge Prohibitions

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

- a. Discharge Prohibition No. 1 states:

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

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

- a. Discharge Prohibition No. 14 states:

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

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

D. Summary of Potential Enforcement Options

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

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

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

Questions pertaining to this Notice of Violation should be directed to Christopher Means at (619) 521-3365 or cmeans@waterboards.ca.gov. 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

CMC:cjm

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

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

Administrative Civil Liability Complaint

Fact Sheet

The California State Water Resources Control Board (State Water Board) and the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) are authorized to issue complaints for civil liabilities under California Water Code (Water Code) section 13323 for violations of the Water Code. This document describes generally the process that follows the issuance of a complaint.

The issuance of a complaint is the first step in the possible imposition of an order requiring payment of penalties. The complaint details the alleged violations including the appropriate Water Code citations, and it summarizes the evidence that supports the allegations. **If you receive a complaint, you must respond timely as directed. If you fail to respond, a default order may be issued against you.** The complaint is accompanied by a transmittal letter, a waiver options form, and a Hearing Procedure. Each document contains important information and deadlines. You should read each document carefully. A person issued a complaint is allowed to represent him or herself. However, legal advice may be desirable to assist in responding to the complaint.

Parties

The parties to a complaint proceeding are the San Diego Water Board Prosecution Team and the person(s) named in the complaint, referred to as the "Discharger(s)." The Prosecution Team is comprised of San Diego Water Board staff and management. Other interested persons may become involved and may become "designated parties." Only designated parties are allowed to submit evidence and participate fully in the proceeding. Other interested persons may play a more limited role in the proceeding and are allowed to submit comments. If the matter proceeds to a hearing, the hearing will be held before the San Diego Water Board (either the seven Governor appointed board members or the Executive Officer). Those who hear the evidence and rule on the matter act as judges. The San Diego Water Board is assisted by an Advisory Team, who provide advice on technical and legal issues. Both the Prosecution Team and the Advisory Team have their own attorney. Neither the Prosecution Team nor the Discharger or his/her representatives are permitted to communicate with the San Diego Water Board, or the Advisory Team about the complaint without the presence or knowledge of the other. This is explained in more detail in the Hearing Notice.

Complaint Resolution Options

Once issued, a complaint can lead to (1) withdrawal of the complaint; (2) withdrawal and reissuance; (3) payment and waiver; (4) settlement; or (5) hearing.

Withdrawal may result if the Discharger provides information to the Prosecution Team that clearly and unmistakably demonstrates that a fundamental error exists in the information set forth in the complaint.

ACL Complaint Fact Sheet

If the Discharger intends to present arguments about its ability to pay it must provide reliable documentation to establish that ability or inability. The kinds of information that may be used for this purpose include:

For an individual:

1. Last three (3) years of signed federal Internal Revenue Service (IRS) income tax returns (IRS Form 1040) including schedules;
2. Members of household, including relationship, age, employment, and income;
3. Current living expenses;
4. Bank account statements;
5. Investment statements;
6. Retirement account statements;
7. Life insurance policies;
8. Vehicle ownership documentation;
9. Real property ownership documentation;
10. Credit card and line of credit statements;
11. Mortgage loan statements; and
12. Other debt documentation.

For a business:

1. Copies of last three (3) years of company IRS tax returns, signed and dated;
2. Copies of last three (3) years of company financial audits;
3. Copies of last three (3) years of IRS tax returns of business principals, signed and dated; and
4. Any documentation that explains special circumstances regarding past, current, or future financial conditions.

For larger firms:

1. Federal income tax returns for the last three (3) years, specifically:
 - a. IRS Form 1120-C for C Corporations;
 - b. IRS Form 1120-S for S Corporations; or
 - c. IRS Form 1065 for partnerships.
2. A completed and signed IRS Form 8821. This allows the IRS to provide the State Water Board with a summary of the firm's tax returns that will be compared to the submitted income tax returns. This prevents the submission of fraudulent tax returns;
3. The following information can be substituted if income tax returns cannot be made available:
 - a. Audited Financial Statements for last three (3) years;
 - b. A list of major accounts receivable with names and amounts;
 - c. A list of major accounts payable with names and amounts;
 - d. A list of equipment acquisition cost and year purchased;
 - e. Ownership in other companies and percent of ownership for the last three (3) years; and
 - f. Income from other companies and amounts for the last three (3) years.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

PROPOSED DRAFT

HEARING PROCEDURE FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
NO. R9-2016-0092
ISSUED TO

KB HOME
SETTLER'S POINT PROJECT

SCHEDULED FOR JUNE 22, 2016

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

Background

The Assistant Executive Officer of the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) has issued an Administrative Civil Liability (ACL) Complaint pursuant to California Water Code (Water Code) sections 13323 and 13385 against KB Home (Discharger) alleging it has violated California Water Code section 13376 and Federal Clean Water Act section 301. The ACL Complaint proposes that administrative civil liability in the amount of **\$875,166** be imposed as authorized by Water Code section 13385. Unless the Discharger waives its right to a hearing and pays the proposed liability, a hearing will be held before the San Diego Water Board on **June 22, 2016**, in San Diego.

Purpose of Hearing

The purpose of the hearing is to receive relevant evidence and testimony regarding the proposed ACL Complaint. At the hearing, the San Diego Water Board will consider whether to adopt, modify, or reject the proposed assessment. The hearing will be held at the San Diego Water Board office at 2375 Northside Drive, Suite 100, in San Diego. An agenda for the hearing will be issued at least ten (10) days before the hearing and will be posted on the San Diego Water Board's web page at: www.waterboards.ca.gov/sandiego.

Requesting Designated Party Status

Persons who wish to participate in the hearing as a designated party, and are not already listed above, shall request party status by submitting a request in writing (with copies to the existing designated parties) no later than 5:00 p.m. on **May 2, 2016**, to Catherine Hagan, Senior Staff Counsel, at the address set forth below. The request shall include an explanation of the basis for status as a designated party (e.g., how the issues to be addressed in the hearing and the potential actions by the San Diego Water Board affect the person), the contact information required of designated parties as provided below, and a statement explaining why the party or parties designated above do not adequately represent the person's interest. Any opposition to the request must be submitted by 5:00 p.m. on **May 6, 2016**. The parties will be notified by 5:00 p.m. on **May 12, 2016**, as to whether the request has been granted or denied.

Contacts

Advisory Team:¹

Catherine Hagan, Senior Staff Counsel
State Water Resources Control Board, Office of Chief Counsel
c/o San Diego Water Board
2375 Northside Drive, Suite 100
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(619) 521-3012

Deborah Jayne, Senior Environmental Scientist
California Regional Water Quality Control Board, San Diego Region
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Prosecution Team:

Naomi Kaplowitz, Staff Counsel
State Water Resources Control Board
Office of Enforcement
P.O. Box 100
Sacramento, CA 95812
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(916) 341-5677

¹ Additional staff may be designated as advisory staff with the Final Hearing Procedures.

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Separation of Functions

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the San Diego Water Board (Prosecution Team) have been separated from those who will provide advice to the San Diego Water Board (Advisory Team). Members of the Advisory Team¹ include Catherine Hagan, Senior Staff Counsel, and Deborah Jayne, Senior Environmental Scientist. Members of the Prosecution Team are David Boyers, Assistant Chief Counsel, Naomi Kaplowitz, Staff Counsel; James Smith, Assistant Executive Officer; Jeremy Haas, Environmental Program Manager; Chiara Clemente, Senior Environmental Scientist; and Christopher Means, Environmental Scientist.

Ex Parte Communications

The designated parties and interested persons are forbidden from engaging in *ex parte* communications regarding this matter with members of the Advisory Team or members of the San Diego Water Board. An *ex parte* contact is any written or verbal communication pertaining to the investigation, preparation, or prosecution of the ACL Complaint between a member of a designated party or interested party on the one hand, and a San Diego Water Board member or an Advisory Team member on the other hand, unless the communication is copied to all other designated and interested parties (if written) or made at a proceeding open to all other parties and interested persons (if verbal). Communications regarding non-controversial procedural matters are not *ex parte* contacts and are not restricted. Communications among the designated and interested parties themselves are not *ex parte* contacts.

Hearing Time Limits

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each designated party shall have a combined sixty (60) minutes to present evidence, cross-examine witnesses (if warranted), and provide a closing statement; and each interested person shall have three (3) minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. Participants who would like additional time must submit their request to the Advisory Team no later than **May 30, 2016**. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the San Diego Water Board (at the hearing) upon a showing that additional time is necessary.

In accordance with Title 23, California Code of Regulations, section 648.4, the San Diego Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the San Diego Water Board may exclude evidence and testimony that is not submitted in accordance with this hearing procedure. Excluded evidence and testimony will not be considered by the San Diego Water Board and will not be included in the administrative record for this proceeding. PowerPoint and other visual presentations may be used at the hearing, but their content may not exceed the scope of other submitted written material. A copy of such material intended to be presented at the hearing must be submitted to the Advisory Team at or before the hearing for inclusion in the administrative record. Additionally, any witness who has submitted written testimony for the hearing shall appear at the hearing and affirm that the written testimony is true and correct, and shall be available for cross-examination.

Request for Pre-hearing Conference

A designated party may request that a pre-hearing conference be held before the hearing in accordance with Water Code section 13228.15. A pre-hearing conference may address any of the matters described in subdivision (b) of Government Code section 11511.5. Requests must contain a description of the issues proposed to be discussed during that conference, and must be submitted to the Advisory Team, with a copy to all other designated parties, no later than 5:00 p.m. on **May 24, 2016**.

Evidentiary Objections

Any designated party objecting to written evidence or exhibits submitted by another designated party must submit a written objection so that it is received by 5:00 p.m. on **May 30, 2016**, to the Advisory Team with a copy to all other designated parties. The Advisory Team will notify the parties about further action to be taken on such objections and when that action will be taken.

Evidentiary Documents and File

The Complaint and related evidentiary documents are on file and may be inspected or copied at the San Diego Water Board office at 2375 Northside Drive, Suite 100, San Diego, California 92108. This file shall be considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the San Diego Water Board. Many of these documents are also posted online at www.waterboards.ca.gov/sandiego. Although the web page is updated regularly, to ensure access to the latest information, you may contact Catherine Hagan, Senior Staff Counsel.

Questions

Questions concerning this proceeding may be addressed to Catherine Hagan, Senior Staff Counsel.

**WAIVER FORM
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent **KB Home** (Discharger) in connection with Administrative Civil Liability Complaint No. **R9-2016-0092** (Complaint). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within ninety (90) days after the party has been served [with the complaint]. The person who has been issued a complaint may waive the right to a hearing."

OPTION 1: Check here if the Discharger waives the hearing requirement and will pay the liability.

- a. I hereby waive any right the Discharger may have to a hearing before the San Diego Water Board.
- b. I certify that upon approval of this settlement by the San Diego Water Board the Discharger will remit payment for the administrative civil liability imposed in the amount of **eight hundred forty-eight thousand three hundred seventy-four dollars (\$875,166)** by check that references "**ACL Complaint No. R9-2016-0092**" made payable to the "**State Water Pollution Cleanup and Abatement Account.**" Payment must be received within thirty (30) days of approval by the San Diego Water Board at the following address: State Water Resources Control Board, Accounting Office, Attn: ACL Payment, P.O. Box 1888, Sacramento, CA 95812-1888. A copy of the check must also be received by the San Diego Water Board at 2375 Northside Drive, Suite 100, San Diego, CA 92108 within thirty (30) days of approval via U.S. Postal Service or e-mail to SanDiego@waterboards.ca.gov, attention CW-826199:cmeans.
- c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after the thirty (30) day public notice and comment period. Should the San Diego Water Board receive significant new information or comments from any source (excluding the San Diego Water Board's Prosecution Team) during this comment period, the San Diego Water Board's Assistant Executive Officer may withdraw the complaint and issue a new complaint. I understand that this proposed settlement may be subject to approval by the Executive Officer of the San Diego Water Board, and that the San Diego Water Board may consider this proposed settlement in a public meeting or hearing. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.
- d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

OPTION 2: Check here if the Discharger waives the 90-day hearing requirement in order to engage in settlement discussions. I hereby waive any right the Discharger may have to a hearing before the San Diego Water Board within ninety (90) days after service of the complaint, but I reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the San Diego Water Board Prosecution Team in settlement discussions to attempt to resolve the outstanding violation(s). By checking this box, the Discharger requests that the San Diego Water Board delay the hearing so that the Discharger and the Prosecution Team can discuss settlement. It remains within the discretion of the San Diego Water Board to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1."

OPTION 3: Check here if the Discharger waives the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. Attach a separate sheet with the amount of additional time requested and the rationale. I hereby waive any right the Discharger may have to a hearing before the San Diego Water Board within ninety (90) days after service of the complaint. By checking this box, the Discharger requests that the San Diego Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the San Diego Water Board to approve the extension.

(Print Name and Title)

(Signature)

(Date)