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18  
19 **UNITED STATES DISTRICT COURT**  
20 **CENTRAL DISTRICT OF CALIFORNIA**  
21

22 ORANGE COUNTY COASTKEEPER, a  
23 California non-profit corporation,

24 Plaintiff,

25 v.

26 CITY OF SAN JUAN CAPISTRANO, a  
27 California municipal corporation;  
28 BLENHEIM FACILITY MANAGEMENT,  
LLC, a Delaware limited liability company,

Defendants.

Civil Case No.:

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF AND  
CIVIL PENALTIES**

**DEMAND FOR JURY TRIAL**

**(Federal Water Pollution Control  
Act, 33 U.S.C. §§ 1251 *et seq.*)**

Orange County Coastkeeper (“Coastkeeper” or “Plaintiff”), by and through its  
counsel, hereby alleges:

1 **I. PRELIMINARY STATEMENT**

2 1. This is a civil suit brought under the citizen suit enforcement provision of  
3 the Federal Clean Water Act. 33 U.S.C. §§ 1251 *et seq.* This Court has subject matter  
4 jurisdiction over the parties and this action because it arises under federal law. The events  
5 giving rise to Plaintiff’s action and the violations described in this Complaint occurred,  
6 and continue to occur, within this judicial district. *See* 33 U.S.C. § 1365(a)(1).

7 2. This action arises out of the unlawful pollution of San Juan Creek caused by  
8 Defendant City of San Juan Capistrano (“City”) and Defendant Blenheim Facility  
9 Management, LLC (“Blenheim”) (collectively “Defendants”), the owners and/or  
10 operators of the Rancho Mission Viejo Riding Park at San Juan Capistrano (“Riding  
11 Park”) and the adjacent “Arizona Crossing” that runs through San Juan Creek (the  
12 “Creek”). The Riding Park is a venue for equestrian events that has the capacity to board  
13 up to 1,100 horses. The Arizona Crossing is a manmade road that runs across San Juan  
14 Creek, connecting the Riding Park to Reata Park on the other side of the Creek.

15 3. Defendants have operated the Riding Park and Arizona Crossing in violation  
16 of the Clean Water Act by: failing to comply with the City of San Juan Capistrano’s  
17 municipal storm water permit; failing to obtain permits from the United States Army  
18 Corps of Engineers (“Army Corps”) for dredge and fill activities within Army Corps’  
19 jurisdiction; and failing to obtain water quality certification from the State of California  
20 before disturbing San Juan Creek and its banks. These failures are exemplified by  
21 Defendants’ discharges of horse manure and bedding, sediment, trash, fertilizers and  
22 other “non-stormwater” into San Juan Creek; the discharge of polluted storm water that  
23 comes into direct contact with hundreds of stabled horses directly into San Juan Creek;  
24 and conducting heavy industrial repairs to the Arizona Crossing and the Creek’s banks  
25 without federal or state required permits in an area designated as open space and  
26 preserved by a conservation easement.

27 4. The Clean Water Act enables non-profit organizations such as Orange  
28 County Coastkeeper to file lawsuits to enforce the Clean Water Act. 33 U.S.C. § 1365.

5. Based upon its investigation to date and discussions with Defendants, Coastkeeper alleges that Defendants are responsible for more than 1,825 individual violations of the Clean Water Act. Defendants' acts and omissions have harmed, and continue to harm, both the mission of Plaintiff Orange County Coastkeeper and the interests of its members who use San Juan Creek, its surrounding areas, and Doheny State Beach, where the Creek meets the Pacific Ocean.

6. Plaintiff Coastkeeper seeks declaratory and injunctive relief, as well as civil penalties, to end the unlawful acts and omissions of Defendants that continue to cause irreparable damage to water quality. Plaintiff also seeks recovery of reasonable costs of suit, including attorney, witness, expert, and consultant fees, pursuant to Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d).

## **II. JURISDICTION AND VENUE**

7. This is a citizen enforcement action brought under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, more commonly called the Clean Water Act ("Clean Water Act" or "Act"). *See* 33 U.S.C. § 1365. This Court has subject matter jurisdiction over the parties and this action pursuant to Section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1), and 28 U.S.C. §§ 1331 and 2201 (an action for declaratory and injunctive relief under the Constitution and laws of the United States).

8. Coastkeeper sent a letter by certified mail to Defendants City of San Juan Capistrano and Blenheim Facilities Management, LLC on March 31, 2017 ("First Notice Letter"). In the First Notice Letter, Coastkeeper notified Defendants of their violations of the Clean Water Act and of Coastkeeper's intention to file suit for such violations after sixty (60) days as required by 40 C.F.R. § 135.2(a)(1). A copy of the First Notice Letter is attached as Exhibit A and is incorporated here by reference.<sup>1</sup>

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<sup>1</sup> Coastkeeper sent a second notice letter on May 4, 2017 alleging additional violations of the Clean Water Act, and will amend this Complaint after the notice period has expired.

1           9.     The Notice Letter was also sent to the necessary state and federal regulatory  
2 agencies, as identified on Exhibit A, and as required by Section 505(b) of the Clean  
3 Water Act, 33 U.S.C. § 1365(b)(1)(A).

4           10.    More than sixty (60) days have passed since the First Notice Letter was sent  
5 to Defendants and the regulatory agencies.

6           11.    Coastkeeper is informed and believes that the federal or state agencies have  
7 neither commenced or are diligently prosecuting any action to redress the violations  
8 alleged in the First Notice Letter and in this Complaint. *See* 33 U.S.C. § 1365(b)(1)(B).

9           12.    This action is not barred by any prior administrative penalty under Section  
10 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g).

11           13.    Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) because a  
12 substantial part of the events or omissions giving rise to Coastkeeper's claims occurred in  
13 this judicial district, and under 33 U.S.C. § 1365(c)(1) because the sources of the  
14 violations described in this Complaint are located within this judicial district.

15           14.    Plaintiff seeks relief from Defendants' violations of the procedural and  
16 substantive requirements of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

### 17 18 **III. PARTIES**

#### 19 **A.   Orange County Coastkeeper**

20           15.    Plaintiff Orange County Coastkeeper ("Coastkeeper" or "Plaintiff") is a non-  
21 profit public benefit corporation organized under the laws of the State of California.  
22 Coastkeeper's office is located at 3151 Airway Avenue, Suite F-110, Costa Mesa,  
23 California 92626.

24           16.    Coastkeeper has over 2,000 members who live and/or recreate in and around  
25 Orange County, including at San Juan Creek, San Juan Creek Mouth, and Doheny State  
26 Beach. Coastkeeper's mission is to promote and restore water resources that are  
27 drinkable, fishable, swimmable, and sustainable. To further our mission, Coastkeeper  
28 actively seeks federal and state agency implementation of the Clean Water Act and,

1 where necessary, directly initiates enforcement actions on behalf of itself and our  
2 members.

3 17. Coastkeeper is an established stakeholder focused on Orange County's water  
4 quality, as demonstrated by its status as the only Orange County environmental non-  
5 governmental organization that negotiated the storm water permit at issue in this case. As  
6 recently as May 8, 2017, Coastkeeper commented to state regulators on the terms of that  
7 permit's implementation.

8 18. In addition, Coastkeeper's members use and enjoy the San Juan Creek and  
9 its tributaries, to swim, birdwatch, picnic, fish, hike, wade, bike, horseback ride, and  
10 conduct scientific study and research, and/or for aesthetic enjoyment in and around these  
11 waters.

12 19. Coastkeeper's members use and enjoy the coast near the San Juan Creek  
13 Mouth and Doheny State Beach to sail, swim, boat, kayak, windsurf, birdwatch, picnic,  
14 fish, paddle, standup paddleboard, surf, wade, and conduct scientific study and research,  
15 and/or for aesthetic enjoyment in and around these waters.

16 20. Defendants' actions, individually, collectively, and in combination with the  
17 activities of other landowners adjacent to San Juan Creek, result in numerous injuries to  
18 Coastkeeper's interests, such as: loss, destruction or damage to wetlands and waterways;  
19 diminished aesthetic enjoyment; increased flooding; loss of open space and habitat for  
20 wildlife, including wading birds and federally protected species like Southern California  
21 Coast Steelhead; degraded water quality; and diminished quality of life.

22 21. Defendants' failure to comply with the procedural and substantive  
23 requirements of the Clean Water Act negatively affects and impairs Coastkeeper's  
24 members' use and enjoyment of these waters.

25 22. The interests of Coastkeeper's members have been, are being, and will  
26 continue to be adversely affected by Defendants' failure to comply with the Clean Water  
27 Act. Continuing commission of the acts and omissions alleged in this Complaint will  
28 irreparably harm Coastkeeper's members, for which harm they have no plain, speedy, or

1 adequate remedy at law. Coastkeeper's members will continue to be harmed until  
2 Defendants bring their activities into compliance with the law.

3 23. The relief sought herein will redress the harms to Coastkeeper caused by  
4 Defendants' activities.

5 **B. The City of San Juan Capistrano**

6 24. Defendant the City of San Juan Capistrano is a municipality incorporated  
7 under the laws of the State of California.

8 25. The City owns the Rancho Mission Viejo Riding Park at San Juan  
9 Capistrano, located at 27174 Ortega Highway, San Juan Capistrano, California 92675.

10 26. The City also owns and/or operates Reata Park located at 28632 Ortega  
11 Highway, San Juan Capistrano, California 92675.

12 27. The Riding Park and Reata Park are on opposite sides of San Juan Creek,  
13 connected by a manmade access way crossing through San Juan Creek (the "Arizona  
14 Crossing"). The City owns and/or operates the Arizona Crossing.

15 28. At all times relevant to this Complaint, the City has owned, and is legally  
16 responsible for, the Riding Park, Reata Park, and the Arizona Crossing.

17 **C. Blenheim Facility Management, LLC**

18 29. Defendant Blenheim Facility Management, LLC is an active Delaware  
19 limited liability company with its principal place of business located at 30753 La Pata  
20 Avenue, San Juan Capistrano, California 92675.

21 30. The name and address for the Registered Agent for Blenheim Facility  
22 Management, LLC is Rebecca Ross, located at 30753 La Pata Avenue, San Juan  
23 Capistrano, California 92675.

24 31. The address for Registered Agent is an invalid address, specifically unable  
25 to receive service of process.

26 32. The Entity Mailing Address for Blenheim is listed on the California  
27 Secretary of State's website as: P.O. Box 639, San Juan Capistrano, California 92693.

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33. Coastkeeper has engaged in communication with Melissa Brandes, Vice President of Operations and Marketing for Blenheim, regarding the contents and existence of the Notice Letter.

34. Coastkeeper is also informed, and therefore believes, that the City and Blenheim have proposed a joint defense agreement to this action as evidenced by Exhibit B, a City Council agenda report set for consideration on June 6, 2017.

35. Coastkeeper believes, and therefore alleges that Blenheim received the First Notice Letter, and has actual notice of the substantive contents of the First Notice Letter.

#### **IV. FACTUAL BACKGROUND**

##### **A. The Riding Park**

###### *Activities and Geological Features*

36. A map taken from Google Maps depicting the Riding Park and Arizona Crossing is attached as Exhibit C to this Complaint for the Court's reference.

37. On January 20, 2010, the City purchased the Riding Park located at 27174 Ortega Highway, including a parcel designated as the "Creek Open Space" parcel along the northwest portion of the Riding Park that includes a portion of San Juan Creek and its creek bank.

38. Blenheim has managed the Riding Park since 2005, and has been subject to a management agreement with the City for all times relevant to this litigation.

39. Based upon information and belief, Coastkeeper alleges that Blenheim is responsible for the day-to-day management of the Riding Park, including its maintenance before, during, and after equestrian events, as well as outside of the equestrian season.

40. The Riding Park is comprised of approximately 60 acres, and is a multi-use sports and exhibition facility that hosts equestrian events, soccer events, a rodeo, and other community events.

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1           41. The Riding Park provides stables, show and warm-up arenas, trailer, truck,  
2 and RV parking, horse wash areas, temporary bathroom facilities, food trucks, and other  
3 similar facilities common to equestrian events.

4           42. Coastkeeper is informed and believes, and thereon alleges, the Riding Park  
5 is most commonly used for equestrian events, and in 2016, hosted at least 23 equestrian  
6 events over a total of 127 days.

7           43. Coastkeeper is informed and believes, and thereon alleges, that the 2016  
8 year is representative of the typical number of events hosted at the Riding Park from  
9 2010 to the present.

10           44. Coastkeeper is informed and believes, and thereon alleges that the Riding  
11 Park has capacity to board up to approximately 1,100 horses at a time on approximately  
12 10 acres of the Riding Park facility.

13           45. Exhibit D is a true and correct copy of a jurisdictional delineation map  
14 produced by the Army Corps, showing the Riding Park's proximity to waters subject to  
15 the Clean Water Act (as shown by the blue lines and shaded area on the map, near the  
16 label "1-12").<sup>2</sup>

17           46. Water flows from off site enter the Riding Park through natural and  
18 manmade tributaries as shown in Exhibit D.

19           47. The tributaries shown in Exhibit D ("onsite tributaries") are waters of the  
20 United States, and the Army Corps has specifically designated the natural channels and  
21 drainage at the Riding Park as being within its jurisdiction.

22           48. The California Regional Water Quality Control Board, San Diego Region,  
23 ("Regional Board") has designated such natural drainage patterns and features as part of  
24 the City's Municipal Separate Storm Sewer System ("MS4"). Further, the City has  
25 designated San Juan Creek as part of its MS4 system.

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27 \_\_\_\_\_  
28 <sup>2</sup> U.S. Army Corps of Engineers, *San Juan Creek and Western San Mateo Creek Watershed Special Area Management Plan (SAMP) Environmental Impact Statement*, Figure 4.1.2-7a. (Nov. 2005).



1           49. A map of the City's MS4 system is attached as Exhibit E. *See* South Orange  
2 County Water Quality Improvement Plan, Appendix A, Figure A-5 (April 1, 2017).

3           50. The Riding Park is subject to flooding from the conveyance system shown in  
4 Exhibits C and D, as well as from occasional high waters from San Juan Creek that  
5 overflow its banks.

6                           *Non-stormwater and Stormwater Pollution*

7           51. Defendants have been, and are continually, discharging pollutants into San  
8 Juan Creek and onsite tributaries.

9           52. The discharged pollutants include, but are not limited to, "non-storm water,"  
10 such as horse manure, bedding, sediment, equine footing, trash, and other materials  
11 associated with equine operations, as well as polluted run-off and storm water.

12           53. Based upon information obtained from the Regional Board and the County  
13 of Orange, Coastkeeper is informed, believes, and thereon alleges that the Riding Park  
14 discharged process wastewater from its horse wash racks via PVC pipes directly into San  
15 Juan Creek from approximately May 1, 2006 until at least September 3, 2016.

16           54. After the Riding Park removed the PVC discharge pipes, process wastewater  
17 from horse wash racks has continued to discharge to San Juan Creek and did so on or  
18 about March 29, 2017, April 17, 2017, May 3, 2017, and May 6, 2017.

19           55. Coastkeeper is informed and believes, and thereon alleges that process  
20 wastewater from the wash racks discharged directly into San Juan Creek from 3,000  
21 gallon above-ground storage tanks intended to contain process wastewater on or about  
22 May 3, 2017.

23           56. Coastkeeper is informed and believes, and thereon alleges that process  
24 wastewater from the wash racks is reasonably likely to continue to be discharged directly  
25 into San Juan Creek from onsite 3,000 gallon above-ground wastewater storage tanks in  
26 the future.

27           57. Defendants discharged, or allowed the discharge of, trash from the Riding  
28 Park, including plastic cups, paper plates, equine medicine applicators, feed bags, and

1 other forms of trash on or about March 29, 2017, April 17, 2017, May 3, 2017, and May  
2 6, 2017.

3 58. Trash has been discharged from the Riding Park to the Creek and the  
4 jurisdictional waters in the past and, based upon information and belief, Coastkeeper  
5 alleges that Defendants will continue to discharge trash generated at future events hosted  
6 at the Riding Park.

7 59. The equestrian event rings surrounded by onsite tributaries are covered with  
8 equestrian footing material, which consists of sand, ground rubber, and other unknown  
9 textiles. This footing is discharged from the event arenas into onsite tributaries during dry  
10 weather.

11 60. Coastkeeper is informed and believes, and thereon alleges, that equestrian  
12 footing is tracked around the Riding Park and is discharged into the onsite tributaries and  
13 San Juan Creek during rain events.

14 61. Upon information and belief, Coastkeeper alleges that piles of manure and  
15 used horse bedding containing byproducts such as urine and trash were pushed into the  
16 creek bank on or about March 29, 2017.

17 62. Upon information and belief, Coastkeeper alleges that manure and used  
18 horse bedding are reasonably likely to continue to be discharged into San Juan Creek  
19 every time the Riding Park hosts equestrian events.

20 63. Based upon physical observations at the Riding Park, Coastkeeper believes  
21 and thereon alleges that when rain falls onto the Riding Park, it runs through the stable  
22 and manure areas towards San Juan Creek.

23 64. Upon information and belief, Coastkeeper alleges that storm water comes  
24 into direct contact with manure and bedding from the stables, which have only dirt floors  
25 and temporary walls. Water then flows towards the southwest into San Juan Creek, taking  
26 along with it pollutants such as phosphorus, nitrogen, trash, and bacteria.

27 65. Upon information and belief, Coastkeeper alleges that each time it rains, the  
28 Riding Park discharges polluted storm water into San Juan Creek.

1           66. Based upon its independent investigations, Coastkeeper is informed and  
2 believes, and thereon alleges that water trucks discharge process wastewater onto  
3 exhibition rings without a nutrient management plan.

4           67. Upon information and belief, Coastkeeper alleges that the Riding Park  
5 operates without protocols for applying manure, litter, or process wastewater in  
6 accordance with a nutrient management plan for the facility.

7           68. Upon information and belief, Coastkeeper alleges that the Riding Park  
8 operates without sufficient manure and process wastewater storage.

9           69. Upon information and belief, Coastkeeper alleges that the Riding Park  
10 operates without chemical and contaminant management of manure, litter, process  
11 wastewater, and treatment.

12           70. Upon information and belief, Coastkeeper alleges that the Riding Park  
13 operates without protocols for testing manure, litter, process wastewater, and soil.

14           71. Upon information and belief, Coastkeeper alleges that Defendants operate  
15 the Riding Park without utilizing best management practices for reduction and control of  
16 runoff and storm water to the maximum extent practicable.

17                           *Dredge and Fill Activities*

18           72. Upon information and belief, Coastkeeper alleges that Defendants are using  
19 sand and other fill material, including trash debris, to grade the portion of the Riding Park  
20 that shares its border with the San Juan Creek bank.

21           73. Upon information and belief, Coastkeeper alleges that Defendants are  
22 depositing sand and other fill material, including trash debris, into San Juan Creek as a  
23 result of grading activities on the portion of the Riding Park bordering San Juan Creek.

24           74. Coastkeeper alleges that Defendants deposited fill material into San Juan  
25 Creek along the portion of the Riding Park that borders San Juan Creek on or about  
26 March 22, 2017 and on or about May 1, 2017.

27       ///

28       ///

1           75. Upon information and belief, Coastkeeper alleges that Defendants will  
2 continue to deposit fill material into San Juan Creek along the portion of the Riding Park  
3 that borders San Juan Creek due to ongoing sloughing along that portion of the property.

4           76. Defendants' fill activities are occurring in, and impacting, waters of the  
5 United States subject to the Clean Water Act.

6           77. Upon information and belief, Coastkeeper alleges that Defendants are  
7 performing fill activities along the San Juan Creek bank in a parcel that is protected open  
8 space, where such activities are prohibited.

9           78. Upon information and belief, Coastkeeper alleges that Defendants are  
10 performing fill activities along the San Juan Creek bank without required permits or  
11 letters of permission from the Army Corps.

12           79. Upon information and belief, Coastkeeper alleges that Defendants are  
13 performing fill activities along the San Juan Creek bank without required water quality  
14 certification from the Regional Board.

15           80. Upon information and belief, Coastkeeper alleges that Defendants are  
16 conducting dredge and fill activities in the onsite tributaries shown in Exhibit D.

17           81. The onsite tributaries surround equestrian event rings at the Riding Park.

18           82. Upon information and belief, Coastkeeper alleges that Defendants perform  
19 dredge and fill activities to maintain the event rings surrounded by the onsite tributaries.

20           83. The onsite tributaries are waters of the United States subject to the Clean  
21 Water Act.

22           84. Upon information and belief, Coastkeeper alleges that Defendants are  
23 performing dredge and fill activities in the onsite tributaries without required permits or  
24 letters of permission from the Army Corps.

25           85. Upon information and belief, Coastkeeper alleges that Defendants are  
26 performing dredge and fill activities in the onsite tributaries without required water  
27 quality certification from the Regional Board.

28       ///

**B. The Arizona Crossing**

86. On January 20, 2010, the City acquired the Arizona Crossing that connects the Riding Park to Reata Park.

87. The Arizona Crossing is a manmade road that runs through San Juan Creek, and is designed to be covered with water from the Creek during times of heavy flow.

88. Upon information and belief, Coastkeeper alleges that the Arizona Crossing was damaged by a severe rain storm during the winter of 2009/2010, requiring repair.

89. Upon information and belief, Coastkeeper alleges that the City, through agents, employees, and contractors, repaired the Arizona Crossing in 2012 through dredging and filling activities.

90. Upon information and belief, Coastkeeper alleges that these filling activities have resulted in the loss or degradation of more than 0.1 acres of jurisdictional waters of the United States.

91. Upon information and belief, Coastkeeper alleges that the City did not obtain permits required under the Clean Water Act from the Army Corps for the repairs to the Arizona Crossing in 2012.

92. Upon information and belief, Coastkeeper alleges that the City did not obtain certification required under the Clean Water Act from the Regional Board for the repairs to the Arizona Crossing in 2012.

93. The unpermitted discharges are composed of materials that are unsuitable for use as fill material, including, but not limited to, sheet metal, concrete blocks, corrugated metal pipes/culverts, uncompacted debris, asphalt, trash, and poured concrete.

94. During the heavy rainfall events that occurred during the winter of 2016/2017, the Arizona Crossing was again damaged.

95. The Arizona Crossing is currently closed due to damage caused by the heavy rainfall events that occurred during the winter of 2016/2017.

96. Based upon conversations between Coastkeeper staff and City Staff, Coastkeeper is informed and believes, and thereon alleges that the City is substantially

likely to again conduct repair activities without permits or letters of permission required under the Clean Water Act from the Army Corps, and that such repairs would require the use of heavy equipment to remove the large amounts of asphalt, concrete, fencing, and other materials that have discharged into the Creek from the Arizona Crossing.

97. Based upon conversations between Coastkeeper staff and City Staff, Coastkeeper is informed and believes, and thereon alleges that the City is substantially likely to again conduct repair activities without certification legally required under the Clean Water Act from the Regional Board.

### **C. San Juan Creek**

#### Description

98. Defendants are discharging pollution from the Riding Park and the Arizona Crossing into San Juan Creek.

99. San Juan Creek is a water of the United States subject to the protections of the Clean Water Act.

100. San Juan Creek is also designated by the Regional Board as part of the City's MS4.

101. The San Juan Creek watershed encompasses a drainage of approximately 176 square miles and extends along an East-West axis from the Cleveland National Forest in the Santa Ana Mountains to the Pacific Ocean at Doheny State Beach near Dana Point Harbor.<sup>3</sup>

102. As shown on Exhibit C, San Juan Creek divides the Riding Park and Reata Park, with the Riding Park on the south side and Reata Park on the north side, connected by the Arizona Crossing constructed in the Creek.

#### Environmental Resources and Threats to Water Quality

103. San Juan Creek and the adjacent estuarine and riparian habitats support a wide variety of flora and fauna, including endangered species such as the Pacific pocket

<sup>3</sup> U.S. Army Corps of Engineers, South Pacific Div., *Record of Decision for Revoking the Use of Selected Nationwide Permits within the San Juan Creek/Western San Mateo Creek Watersheds for the Special Area Management Plan Orange County, Cal.*, 1 (July 2010).

1 mouse, the Southern California Coast Steelhead, the Quino checkerspot butterfly, the  
2 southwestern willow flycatcher, and many other species.

3 104. Portions of San Juan Creek have specifically been identified as critical  
4 habitat for a Southern California Coast Steelhead Biogeographic Population Group  
5 (“Steelhead Population Group”). The National Marine Fisheries Service’s species  
6 Recovery Plan identified threats to the Steelhead Population Group’s restoration efforts  
7 in San Juan Creek and concluded that culverts were a “very high threat,” and that dams,  
8 surface water diversions, and roads are “medium threat” sources.<sup>4</sup>

9 105. Physical modification of road crossings between estuary and upstream  
10 spawning and rearing habitats and the passage of smolts and kelts downstream to the  
11 estuary and ocean are specifically identified critical recovery actions for the Southern  
12 California Coast Steelhead.<sup>5</sup>

13 106. The Regional Board has designated several “beneficial uses” for San Juan  
14 Creek and the water bodies into which it drains. San Juan Creek’s existing beneficial uses  
15 include: agricultural supply, industrial service supply, contact water recreation, non-  
16 contact water recreation, warm freshwater habitat, cold freshwater habitat, and wildlife  
17 habitat. Likewise, the beneficial uses on the San Juan Creek Mouth, where San Juan  
18 Creek meets the Pacific Ocean, includes contact water recreation, non-contact water  
19 recreation, wildlife habitat, rare, threatened, or endangered species, marine habitat,  
20 migration of aquatic organisms, and shellfish harvesting. *Water Quality Control Plan,*  
21 *San Diego Region, Regional Water Quality Control Board, San Diego Region* (“Basin  
22 Plan”), Tables 2-2, 2-3 (updated May 17, 2016).

23 107. Since water quality for these uses has not been attained in San Juan Creek,  
24 the Regional Board has designated the water body as being “impaired” under Section  
25 303(d) of the Clean Water Act. 33 U.S.C. § 1313(d).

26 <sup>4</sup> National Marine Fisheries Service – Southwest Regional Office, *Southern California*  
27 *Steelhead Recovery Plan Summary*, 18 (Jan. 2012).

28 <sup>5</sup> National Marine Fisheries Service, *Southern California Steelhead Recovery Plan*, Table  
13-3, 13-20 (Jan. 2012).



108. The waters of San Juan Creek downstream of the Riding Park and Reata Park are listed under Section 303(d) as impaired for pollutants including, but not limited to, Indicator Bacteria, Phosphorus, Total Nitrogen as N, Toxicity, DDE, and Selenium.

109. The discharge of storm water carrying the byproducts of the Riding Park, including horse waste, bedding material, feed, metals, trash, and other materials contributes to, and threatens, San Juan Creek and downstream receiving waters.

110. The illegal discharge of non-stormwater, including manure, sediment and other fill material, construction wastes, debris, and other material into San Juan Creek also contributes to the impairment of the receiving waters.

## **V. STATUTORY AND REGULATORY BACKGROUND**

### **A. The Clean Water Act, State Regulation, and Relevant Permitting Provisions**

111. Congress passed the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and with the “interim goal” that wherever attainable, “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water achieved by July 1, 1983.” 33 U.S.C. § 1251(a)(2).

112. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters of the United States unless the discharge complies with a permit issued pursuant to Clean Water Act Sections 402 or 404. 33 U.S.C. §§ 1342, 1344.

113. Section 402 of the Clean Water Act establishes National Pollutant Discharge Elimination System (“NPDES”) permits issued by EPA, or an EPA-delegated State, to achieve the goals stated in Section 301(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342(b).

114. EPA has delegated its NPDES permitting authority to the State of California.

///

115. The California Water Code vests the State Water Resources Control Board (“State Board”) and the State’s nine regional water quality control boards with primary responsibility for regulating state water quality. Cal. Water Code §§ 13001, 13050(a)-(b), 13200. The San Juan Creek watershed, and the Pacific Ocean drainages from this watershed, fall within the jurisdiction of the Regional Water Quality Control Board for the San Diego Region. *Id.* 13200(f).

116. Each violation of an NPDES permit – and each discharge of a pollutant that is not authorized by an NPDES permit – is a violation of the Clean Water Act and its implementing regulations and is grounds for enforcement actions, including citizen enforcement seeking civil penalties. 33 U.S.C. §§ 1311(a); 1342(a); 1365(a); 1365(f)(6); 40 C.F.R. § 122.41(a).

**B. NPDES Permits – Municipal Separate Storm Sewer System Permitting**

117. Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p), establishes a permitting framework to regulate municipal discharges. 33 U.S.C. § 1342(a), (p).

118. A municipal separate storm sewer system (“MS4”) is a conveyance or system of conveyances—including roads with drainage systems; municipal streets, catch basins; curbs; gutters; ditches; man-made channels; and storm drains—owned or operated by a state, city, or town that is designed or used for collecting or conveying storm water and that discharges to waters of the United States. *See* 40 C.F.R. § 122.26(b)(8)(i)-(ii)(Dec. 21, 2015); *see also* 40 C.F.R. § 122.26(B)(18) (Dec. 21, 2015).

119. MS4s are point sources that are subject to NPDES permitting requirements under the Clean Water Act and its implementing regulations. *See* 33 U.S.C. § 1311(a); 33 U.S.C. § 1342(p); 33 U.S.C. § 1362(12)(A); 40 C.F.R. § 122.2 (Aug. 28, 2015).

120. The Regional Board’s NPDES Permit for MS4s identifies twelve Orange County Copermittees, including the City, as well as Copermittees in San Diego and Riverside Counties as responsible for meeting the terms of the Permit. California Regional Water Quality Control Board San Diego Region, Order No. R9-2013,0001, as amended by Order Nos. R9-2015-0001 and R9-2015-0100, NPDES Permit No.

CAS0109266, Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds within the San Diego Region, adopted May 8, 2013, effective as to Orange County on April 1, 2015 (the “2013 MS4 Permit”).

121. The current MS4 Permit, adopted in 2013, is the fourth generation permit for the City’s MS4 discharges. The previous MS4 Permit applicable to the City was adopted in 2009.

122. San Juan Creek, San Juan Creek Mouth, and the Pacific Ocean are “waters of the United States” as defined in the Clean Water Act and its implementing regulations. *See* 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2 (Aug. 28, 2015).

123. The MS4 Permit recognizes that “historic and current development makes use of natural drainage patterns and features as conveyances for runoff.” 2013 MS4 Permit, Finding 11. Further, “[r]ivers, stream and creeks in developed areas used in this manner are part of the [City’s] MS4 regardless of whether they are natural, anthropogenic, or partially modified features.” *Id.*

124. San Juan Creek is a creek in the developed area of the City’s jurisdiction and is “both an MS4 and receiving water.” *See* 2013 MS4 Permit, Finding 11.

125. MS4 Permit violations are violations of the Clean Water Act and its implementing regulations and are grounds for enforcement under the Act, including citizen enforcement actions seeking civil penalties. 2013 MS4 Permit, Standard Permit Provisions I, and Attachment B 1.a.; *see also* 33 U.S.C. § 1365(a); 40 C.F.R. § 122.41(a) (Dec. 21, 2015).

### **1. Discharge Prohibition on Non-Stormwater Discharges into MS4s**

126. The MS4 Permit requires that the City “effectively prohibit” non-stormwater discharges into the MS4 through the implementation of a Jurisdictional Runoff Management Plan, unless such discharges are authorized by a separate NPDES permit. 2013 MS4 Permit, Provision A.1.b.; 2009 MS4 Permit, Discharge Provisions B.1.; *see also* 2013 MS4 Permit, Findings 15.

127. The MS4 Permit requires the City's Jurisdictional Runoff Management Plan to implement "a program to actively detect and eliminate illicit discharges and improper disposal into the MS4, or otherwise require the discharger to apply for and obtain a separate NPDES permit." 2013 MS4 Permit, Provision E.2; 2009 MS4 Permit, Program Provisions F.4; *see also* 40 C.F.R. § 122.26(d)(2)(iv)(B).

128. An "illicit discharge" is "any discharge to a [MS4] that is not composed entirely of storm water and is not covered by an NPDES permit." 2013 MS4 Permit, Attachment F-39; 2009 MS4 Permit, Attachment C-6; *see also* 40 C.F.R. § 122.26(b)(2).

129. The Illicit Discharge Detection and Elimination program must be implemented in accordance with previously adopted strategies (a water quality improvement plan) and include certain detailed requirements to achieve compliance with non-storm water discharge prohibitions and receiving water limitations. 2013 MS4 Permit, Provision E.2., Provision A.4.

130. The City's Illicit Discharge Program must include specific measures to prevent and detect illicit discharges to the MS4. These measures include:

- a. including and maintaining an accurate and updated geographic informational system ("GIS") map of its MS4 that, among other requirements, identifies all segments of the MS4 owned, operated, and maintained by the City. 2013 MS4 Permit, Provision E.2.b.(1); 2009 MS4 Permit, Program Provisions F.4.b;
- b. using the City's "personnel and contractors to assist in identifying and reporting illicit discharges and connections during their daily employment activities." 2013 MS4 Permit, Provision E.2.b.(2); *see also* 2009 MS4 Permit, Program Provisions F.4.a.(2)(b);
- c. conducting field screening, including visual observations, of portions of its MS4 to detect non-storm water and illicit discharges and connections to the MS4. 2013 MS4 Permit, Provision E.2.c.; 2009 MS4 Permit, Program Provisions F.4.a.(2)., F.4.d; and

- d. including enumerated measures to investigate and eliminate illicit discharges to the MS4. 2013 MS4 Permit, Provision E.2.d.; 2009 MS4 Permit, Program Provisions F.4.e-f.

131. The City is required to prioritize an investigation into non-stormwater or illicit discharges when, as here, pollutants identified with those discharges are identified as causing or contributing to receiving water impairments or impacting environmentally sensitive areas within the city. 2013 MS4 Permit, Provision E.2.d(1)(a-b); *see also* 2009 MS4 Permit, Program Provisions F.4.e.

132. When illicit discharges and connections are known to the City, it must use its legal authority to eliminate them. 2013 MS4 Permit, Provision E.2.d(3)(a); *see also* 2009 MS4 Permit, Program Provisions F.4.g.

## **2. Discharge Prohibition on Discharges that Cause or Contribute to Violations of Water Quality Standards**

133. The MS4 Permit prohibits the City discharging from its MS4 “in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters of the state (“Discharge Prohibition A.1.a”).” 2013 Permit, Provision A.1.a.; 2009 MS4 Permit, Discharge Provisions A.1.

134. The MS4 Permit also prohibits MS4 discharges from causing or contributing to a violation of water quality standards, including those in the Basin Plan. 2013 Permit, Provision A.2.a.; *Id.* at A.2.a.(1); 2009 MS4 Permit, Discharge Provisions A.3.

135. Unless otherwise authorized or approved by the Regional Board, the MS4 Permit and Basin Plan prohibit:

- a. the discharge of waste to land, except as authorized by waste discharge requirements. 2013 MS4 Permit, Attachment A 1.2; 2009 MS4 Permit, Attachment A 2;

- b. the discharge of dredged or fill material to waters of the United States except as authorized by a permit. 2013 MS4 Permit, Attachment A 1.3; 2009 MS4 Permit, Attachment A 3;
- c. the dumping, deposition, or discharge of waste directly into waters of the state, or adjacent to such waters where waste may be transported into the waters. 2013 MS4 Permit, Attachment A 1.7; 2009 MS4 Permit, Attachment A 7; and
- d. the discharge to a storm water conveyance system that is not composed entirely of “storm water.” 2013 MS4 Permit, Attachment A 1.8; 2009 MS4 Permit, Attachment A 8.

136. Compliance with Discharge Prohibitions A.1.a and Receiving Water Limitation A.2.a of the MS4 Permit is achieved “through the timely implementation of control measures and other actions as specified Provisions B [Water Quality Improvement Plans] and E [Jurisdictional Runoff Management Programs] of this Order, including any modifications.” 2013 MS4 Permit, Provision A.4.; *see also* 2009 MS4 Permit, Discharge Provisions A.3.

### **3. MS4 Permit Requirement for Municipalities to Have Legal Enforcement Authority**

137. In addition to its discharge prohibitions and controls on the City’s own activities, the MS4 Permit requires the City to “establish, maintain, and enforce adequate legal authority within its jurisdiction to control pollutant discharges into and from its MS4 through statute, ordinance, permit, contract, order or similar means.” 2013 MS4 Permit, Provision E.1.a.; 2009 MS4 Permit, Discharge Provisions E.1.; *see also* 40 C.F.R. § 122.26(d)(2)(vi)(B)(1).

138. As noted above, the MS4 Permit demands that the City maintain adequate legal authority to, at a minimum, “prohibit and eliminate all illicit discharges and illicit



connections to the MS4.” 2013 MS4 Permit, Provision E.1.a.(1); 2009 MS4 Permit, Discharge Provisions E.1.c.; *see also* 40 C.F.R. § 122.26(d)(2)(i)(B) (Dec. 21, 2015).

139. The City’s legal authority must also control the discharge of spills, dumping, or disposal of materials other than storm water into its MS4. 2013 MS4 Permit, Provision E.1.a.(3); 2009 MS4 Permit, Discharge Provisions E.1.d.

140. The City’s authority must require the use of best management practices (“BMPs”) to prevent or reduce the discharge of pollutants in storm water *from* its MS4 to the maximum extent practicable. 2013 MS4 Permit, Provision E.1.a.(7).

141. The City’s authority must also require the use of BMPs to prevent or reduce the discharge of pollutants *into* MS4s from storm water to the maximum extent practicable. 2009 MS4 Permit, Discharge Provisions E.1.i.

142. In addition, the City must have the authority to, at a minimum, ensure compliance with its own regulatory efforts to effectively prohibit non-storm water discharges and either eliminate those discharges to their MS4 or require those dischargers to obtain their own separate NPDES permit. 2013 MS4 Permit, Provision E.1.a.(9).; *see also Id.*, Attachment F at F-40; 2009 MS4 Permit, Discharge Provisions E.1.e.

143. The MS4 Permit requires that the City submit a statement certifying that it has “taken the necessary steps to obtain and maintain full legal authority within its jurisdiction to implement and enforce each of the requirements in the [MS4 Permit].” 2013 MS4 Permit, Provision E.1.b.; 2009 MS4 Permit, Discharge Provisions E.2.

## **C. Dredge and Fill Permits**

### **1. Clean Water Act Section 404(a) Requirements for Discharging Dredged or Fill Material**

144. Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), establishes an Army Corps-administered permit program for the discharge of dredged or fill material into waters of the United States.

///



1           145. Section 404 requirements are distinct from, and in addition to, the NPDES  
2 permit framework in Section 402, 33 U.S.C. § 1342.

3           146. Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), prohibits the  
4 “discharge of a pollutant” into waters of the United States, except in compliance with  
5 permit provisions in the Act.

6           147. The Act broadly defines the term “pollutant” to include dredged spoil, rock,  
7 sand, and agricultural waste discharged into water. 33 U.S.C. § 1362(6).

8           148. The “discharge of fill material” is defined as “the addition of fill material  
9 into waters of the United States,” including, but not limited to, infrastructure construction  
10 fill, causeway or road fills, and “site development fills for recreational, industrial,  
11 commercial, residential, or other uses.” 33 C.F.R. § 323.2(f) (Dec. 30, 2008).

12           149. “Fill material” refers to material that replaces aquatic area with dry land or  
13 of changing the bottom elevation of a waterbody. 33 U.S.C. § 323.2(e)(1).

14           150. “Dredged material” means “material that is excavated or dredged from  
15 waters of the United States.” 33 C.F.R. § 323.2(c).

16           151. The Army Corps has asserted jurisdiction over San Juan Creek and onsite  
17 tributaries (shown in Exhibit D) at the Riding Park.

18           152. The Army Corps has the authority to issue individual permits or “general  
19 permits on a state, regional or nationwide basis for any category of activities involving  
20 discharges of dredged or fill material” (both known as a “Section 404 Permit”). 33 U.S.C.  
21 § 1344(e)(1).

22           153. Regional permits are a type of general permit issued by a Division or District  
23 Engineer that may require case-by case reporting and acknowledgement. 33 C.F.R. §  
24 325.5(c)(1).

25           154. The Army Corps has issued a general permit, Regional General Permit 74  
26 (“RGP 74”), as the framework for the San Juan Creek/Western San Mateo Creek  
27 Watersheds Special Area Management Plan (“Special Area Management Plan”).

28 ///

1           155. While the Riding Park's jurisdictional waters (seen on Exhibit D) fall within  
2 RGP 74 and qualify for a permit under its terms, San Juan Creek does not and does not  
3 qualify for this abbreviated permitting. RGP 74, Figure 10.

4           156. Therefore, any dredging or discharge of dredge and fill materials in San Juan  
5 Creek requires a party to undergo the ordinary, individual permitting process under  
6 Section 404.

7           157. For the Riding Park, the Special Area Management Plan permitting  
8 framework uses the RGP and new letters of permission procedures as an abbreviated  
9 means of processing regional Section 404 permits. RGP 74, 3; *See also* 33 U.S.C. §  
10 325.5(b)(2).

11           158. To obtain the necessary authorization for dredge and fill activities, RGP 74  
12 requires prior written approval from the Army Corps' Los Angeles District Office stating  
13 that the project complies with the terms and conditions of the RGP.

14           159. Among its requirements, RGP 74 prohibits the discharge of fill materials,  
15 including trash and debris, into jurisdictional waters. RGP 74, General Condition 7.

16           160. RGP 74 also requires the applicant to adopt measures to prevent potential  
17 pollutants from entering the watercourse. RGP 74, General Condition 10.

18           161. Failure to comply with RGP 74's terms and conditions violates Section 404  
19 and may result in revocation, suspension, or modification of the RGP authorization and  
20 the assessment of civil penalties. RGP 74, Compliance.

21  
22           **2. Clean Water Act Section 401's Requirement for State Water**  
23           **Quality Certification before Discharge of Material into Waters of**  
24           **the United States.**

25           162. Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), requires  
26 that any application to the Army Corps for a Section 404 permit must include a  
27 "certification from the State in which the discharge originated or will originate...that  
28 any...discharge will comply with [other sections of the Clean Water Act]."

///

1 163. Before the Army Corps can issue a Section 404 permit, the state must  
 2 certify the project is compliant with local Basin Plans and water quality objectives. 33  
 3 U.S.C. § 1341(a)(1).

4 164. This certification from the state is known as Section 401 Certification.

5 165. Section 404 permits rely upon, and are required to, incorporate any  
 6 conditions imposed by a state's water quality certification. 33 U.S.C. § 1341(a)(1).

7 166. The Clean Water Act allows for citizen enforcement for the failure to obtain  
 8 a state water quality certification under Section 401(a) of the Act. 33 U.S.C. § 1365(f)(5).

9  
 10 **VI. CLAIMS FOR RELIEF**

11 **FIRST CAUSE OF ACTION**

12 **AGAINST DEFENDANT CITY OF SAN JUAN CAPISTRANO**

13 **Failure to Effectively Prohibit Discharges of Non-Storm Water into the**  
 14 **MS4 in Violation of the MS4 Permits and the Clean Water Act.**

15 **33 U.S.C. §§ 1311(a), 1342(p), 1365(a) and 1365(f)**

16 167. Coastkeeper incorporates the allegations contained in the above paragraphs  
 17 as though fully set forth herein.

18 168. The City is an owner and/or operator of the City MS4.

19 169. The City has failed to effectively prohibit non-stormwater discharges into  
 20 the MS4 originating from the Riding Park.

21 170. The City has failed to develop an adequate Jurisdictional Runoff  
 22 Management Plan to detect and eliminate illicit discharges and improper disposal into the  
 23 MS4.

24 171. The City has failed to implement an adequate Jurisdictional Runoff  
 25 Management Plan to detect and eliminate illicit discharges and improper disposal into the  
 26 MS4.

27 172. The City has failed to enforce its legal authority to eliminate illicit  
 28 discharges and connections to the MS4.

///

1           173. Upon information and belief, Coastkeeper alleges that the Riding Park has  
2 discharged non-storm water to the City MS4 on multiple occasions since March 31, 2012.

3           174. At a minimum, the City has failed to effectively prohibit the discharge of  
4 non-storm water to the City MS4 on every occasion that non-storm water from horse  
5 wash racks is discharged to the City MS4.

6           175. The City has also failed to effectively prohibit the discharge of non-storm  
7 water to the Riding Park's jurisdiction waters on every occasion that sediment, trash,  
8 bedding, and other non-storm water is discharged to the MS4.

9           176. Upon information and belief, Coastkeeper alleges that the Riding Park does  
10 not possess its own separate NPDES permit under which it may discharge non-storm  
11 water.

12           177. Each day since March 31, 2012 to the present that the City failed to  
13 effectively prohibit non-storm water discharges from the Riding Park to San Juan Creek  
14 is a separate and distinct violation of the Permit's prohibition on non-stormwater  
15 discharges. Discharge Prohibition B.1. of the 2009 MS4 Permit and see 33 U.S.C. §  
16 1311(a).

17           178. Each day since March 31, 2012 to the present that the City failed and  
18 continues to fail to effectively prohibit non-storm water discharges from the Riding Park  
19 to the City MS4 is a separate and distinct violation of the Permit's prohibition on non-  
20 stormwater discharges. Discharge Prohibition A.1.b of the 2013 MS4 Permit; *see also* 33  
21 U.S.C. § 1311(a).

22           179. By committing the acts and omissions alleged above, the City is subject to  
23 an assessment of civil penalties for each and every violation of the Clean Water Act  
24 occurring from March 31, 2012 to the present. See 33 U.S.C. §§ 1319(d), 1365; and 40  
25 C.F.R. § 19.4 (Jan.15, 2017).

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180. An action for injunctive relief is authorized by Clean Water Act Section 505(a), 33 U.S.C. § 1365(a). Continuing commission of the acts and omissions alleged above would irreparably harm Plaintiffs and the citizens of the State of California, for which harm Coastkeeper has no plain, speedy, or adequate remedy at law.

181. An action for declaratory relief is authorized by 28 U.S.C. § 2201(a) because an actual controversy exists as to the rights and other legal relations of the Parties.

WHEREFORE, Plaintiff prays for judgment against Defendant City as set forth below.

## **SECOND CAUSE OF ACTION**

### **AGAINST DEFENDANT CITY OF SAN JUAN CAPISTRANO**

#### **Discharges Causing and Contributing to Exceedances of Water Quality Standards in Violation of the MS4 Permits and Clean Water Act 33 U.S.C. §§ 1311(a), 1342(p), 1365(a) and 1365(f)**

182. Coastkeeper incorporates the allegations contained in the above paragraphs as though fully set forth herein.

183. The Regional Board's Basin Plan establishes a number of water quality standards for inland surface waters and coastal waters in the San Juan Creek watershed, all incorporated by reference into the MS4 Permit. The MS4 Permit prohibits discharges that cause or contribute to exceedances of these water quality standards.

184. The City has caused and contributed to, and continues to cause and contribute to, exceedances of water quality standards in San Juan Creek and the drainage tributaries to the Pacific Ocean.

185. As a result of its control of land areas that generate polluted storm water and non-storm water, the City has caused and contributed to, and is causing and contributing to, exceedances of water quality standards in San Juan Creek and drainage to the Pacific Ocean.

186. From March 31, 2012 to the present, each day that the City has caused or contributed to exceedances of water quality standards is a separate and distinct violation of the MS4 Permit and 33 U.S.C. §§ 1311(a) and 1342(p).

1 187. These violations are ongoing and continuous. In light of the City's history of  
2 violations and the nature of the violations, the City will continue to violate these  
3 requirements in the future unless and until enjoined from doing so.

4 188. By committing the acts and omissions alleged above, Defendant is subject to  
5 an assessment of civil penalties for each violation of the 33 U.S.C. § 1311(a). *See* 33  
6 U.S.C. §§ 1319(d), 1365, and 40 C.F.R. § 19.4 (Jan.15, 2017).

7 189. An action for injunctive relief under the Clean Water Act is authorized by 33  
8 U.S.C. § 1365(a). Defendant is subject to an injunction ordering them to cease activities  
9 in violation of the Clean Water Act.

10 190. Allowing the commission of the acts and omissions alleged above to  
11 continue will irreparably harm Coastkeeper and its members, for which they have no  
12 plain, speed, or adequate remedy at law

13 WHEREFORE, Plaintiff prays for judgment against Defendant City as set forth  
14 below.

15 **THIRD CAUSE OF ACTION**

16 **AGAINST ALL DEFENDANTS**

17 **Unpermitted Dredge and/or Fill Activities at the Riding Park in Violation of**  
18 **Sections 301(a) and 404 of the Clean Water Act**  
**33 U.S.C. §§ 1311(a), 1344, 1365(a) and 1365(f)**

19 191. Coastkeeper incorporates the allegations contained in the above paragraphs  
20 as though fully set forth herein.

21 192. Coastkeeper is informed, believes, and thereon alleges, that on multiple  
22 occasions, Defendants and/or persons acting at their direction, or with Defendants'  
23 consent and/or knowledge, discharged fill material from point sources into waters of the  
24 United States at the Riding Park as described in Paragraphs 73-86, including the impacted  
25 onsite tributaries identified in Exhibit D.

26 ///

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28 ///

1           193. Upon information and belief, Coastkeeper alleges that since at least March  
2 31, 2012, Defendants have discharged, and continue to discharge, fill material from the  
3 Riding Park into waters of the United States without a Section 404 permit from the Army  
4 Corps.

5           194. Defendants' action resulted in the unpermitted filling of more than 0.1 acres  
6 of impacted jurisdictional waters. *See* 33 U.S.C. § 1344.

7           195. Defendants will continue to violate the Clean Water Act each day they  
8 discharge fill material into San Juan Creek and at the Riding Park without a Section 404  
9 permit from the Army Corps.

10          196. Each day that Defendants discharge fill without obtaining the required 404  
11 Permit is a separate and distinct violation of Section 301(a) of the Clean Water Act, 33 §  
12 U.S.C. 1311(a).

13          197. By committing the acts and omissions alleged above, Defendants are subject  
14 to an assessment of civil penalties for each violation of 33 U.S.C. § 1311(a), pursuant to  
15 Sections 309(d) and 505 of the Clean Water Act, 33 U.S.C. § 1319(d), 33 U.S.C. § 1365,  
16 and 40 C.F.R. § 19.4 (Jan.15, 2017).

17          198. An action for injunctive relief under the Clean Water Act is authorized by 33  
18 U.S.C. § 1365(a). Defendants are subject to an injunction ordering them to cease  
19 violating the Clean Water Act.

20          199. Continuing commission of the acts and omissions alleged above will  
21 irreparably harm Coastkeeper and our members, for which they have no plain, speed, or  
22 adequate remedy at law.

23          WHEREFORE, Plaintiff prays for judgment against Defendants as set forth below.

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26       ///

28       ///



**FOURTH CAUSE OF ACTION**

**AGAINST ALL DEFENDANTS**

**Unpermitted Dredge and/or Fill Activities at the Riding Park in  
Violation of Sections 301(a) and 401 of the Clean Water Act  
33 U.S.C. §§ 1311(a), 1341, 1365(a) and 1365(f)**

200. Coastkeeper incorporates the allegations contained in the above paragraphs as though fully set forth herein.

201. Coastkeeper is informed, believes, and thereon alleges, that on more than one occasion, Defendants and/or persons acting at their direction, or with Defendants' consent and/or knowledge, discharged fill material from point sources into waters of the United States at the Riding Park as described in Paragraphs 73-86, including the impacted onsite tributaries identified in Exhibit D.

202. Coastkeeper is informed and believes, and thereon alleges, that at least since March 31, 2012, Defendants have been discharging fill material from the Riding Park without seeking or obtaining a Section 401 Certification from the Regional Board.

203. Defendants will continue to be in violation of the Clean Water Act each day they dredge and/or discharge fill without a Section 401 Certification.

204. Each day that Defendants discharge fill without obtaining the required 401 Certification is a separate and distinct violation of Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a).

205. By committing the acts and omissions alleged above, Defendants are subject to an assessment of civil penalties for each violation of 33 U.S.C. § 1311(a), pursuant to Sections 309(d) and 505 of the Clean Water Act, 33 U.S.C. § 1319(d), 33 U.S.C. § 1365, and 40 C.F.R. § 19.4 (Jan.15, 2017).

206. An action for injunctive relief under the Clean Water Act is authorized by 33 U.S.C. § 1365(a). Defendants are subject to an injunction ordering them to cease violating the Clean Water Act.

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1           207. Continuing commission of the acts and omissions alleged above will  
2 irreparably harm Coastkeeper and its members, for which they have no plain, speed, or  
3 adequate remedy at law.

4           WHEREFORE, Plaintiff prays for judgment against Defendants as set forth below.

5                               **FIFTH CAUSE OF ACTION**

6                               **AGAINST DEFENDANT CITY OF SAN JUAN CAPISTRANO**  
7                               **Unpermitted Dredge and Fill Activities at the Arizona Crossing**  
8                               **in Violation of Sections 301(a) and 404 of the Clean Water Act.**  
9                               **33 U.S.C. §§ 1311(a), 1344(a), 1365(a) and 1365(f)**

10           208. Coastkeeper incorporates the allegations contained in the above paragraphs  
11 as though fully set forth herein.

12           209. Coastkeeper is informed, believes, and thereon alleges, that since at least  
13 March 31, 2012, the City has dredged and has been discharging fill from the Arizona  
14 Crossing into waters of the United States without a Section 404 permit from the Army  
15 Corps.

16           210. Coastkeeper is informed, believes, and thereon alleges, the City's actions  
17 and/or the actions of persons acting at their direction or with their consent and/or  
18 knowledge at the Arizona Crossing resulted in the filling of more than 0.1 acres of waters  
19 of the United States without a Section 404 permit, in violation of Section 301(a) of the  
20 Clean Water Act, 33 U.S.C.A. § 1311(a).

21           211. Coastkeeper is informed, believes, and thereon alleges, that the City's  
22 unpermitted discharge of fill material in violation of the Clean Water Act is ongoing at  
23 the Arizona Crossing.

24           212. The City will continue to be in violation of the Clean Water Act each day it  
25 discharges fill at the Arizona Crossing without a Section 404 permit.

26           213. Each day the City discharges fill or attempts to dredge San Juan Creek to  
27 repair, remove, or replace the Arizona Crossing without obtaining a Section 404 permit is  
28 a separate and distinct violation of Section 301(a) of the Clean Water Act, 33 U.S.C. §  
1311(a).



1           222. Each day that the City discharges fill material without obtaining a Section  
2 401 Certification is a separate and distinct violation of Section 301(a) of the Clean Water  
3 Act, 33 U.S.C. § 1311(a).

4           223. By committing the acts and omissions alleged above, Defendant is subject to  
5 an assessment of civil penalties for each violation of the Act. *See* 33 U.S.C. §§ 1319(d),  
6 1365, and 40 C.F.R. § 19.4 (Jan.15, 2017).

7           224. An action for injunctive relief under the Clean Water Act is authorized by 33  
8 U.S.C. § 1365(a). Defendant is subject to an injunction ordering them to cease violating  
9 the Clean Water Act.

10           225. Continuing commission of the acts and omissions alleged above will  
11 irreparably harm Coastkeeper and our members, for which they have no plain, speed, or  
12 adequate remedy at law.

13           WHEREFORE, Plaintiff prays for judgment against Defendant City as set forth  
14 hereafter.

15  
16 **VII. RELIEF REQUESTED**

17           226. Wherefore, Plaintiff respectfully requests that this Court grant the following  
18 relief:

19           a. A Court order declaring the City to have violated and to be in  
20 violation of the MS4 Permit and Sections 301(a) and 402(p) of the Clean Water Act,  
21 33 U.S.C. §§ 1311(a) and 1342(p) for discharging non-storm water;

22           b. A Court order declaring the City to have violated and to be in  
23 violation of the MS4 Permit and Sections 301(a) and 402(p) of the Clean Water Act,  
24 33 U.S.C. § 1311(a) and 1342(p), for discharges causing and contributing to  
25 exceedances of water quality standards;

26           c. A Court order declaring the City to have violated and to be in  
27 violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for engaging  
28 in dredge and fill activities at the Arizona Crossing without a Clean Water Act permit;

1 d. A Court order declaring the Defendants have violated and are in  
2 violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for  
3 discharging dredge and fill at the Riding Park without a 404 permit;

4 e. A Court order declaring Defendants have violated and are in violation  
5 of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for engaging in dredge  
6 and fill activities without a 401 Certification pursuant to the Act;

7 f. A Court order permanently enjoining Defendants from discharging or  
8 causing the discharge of dredged or fill material or other pollutants into any waters of  
9 the United States except in compliance with a 404 permit;

10 g. A Court order directing Defendants to undertake measures, at  
11 Defendants' own expense and at the direction of the Regional Board and Army Corps,  
12 to effect complete restoration of waters of the United States at the Riding Park and  
13 Arizona Crossing and to conduct on-site and off-site mitigation for unauthorized  
14 impacts to waters of the United States, as appropriate;

15 h. A Court order assessing civil monetary penalties for each violation of  
16 the Act at \$37,500 per day per violation for violations occurring from March 31, 2012  
17 through November 2, 2015, and \$52,414 per day per violation for violations occurring  
18 after November 2, 2015, as permitted by 33 U.S.C. § 1319(d) and Adjustment of Civil  
19 Monetary Penalties for Inflation, 40 C.F.R. § 19.4 (Jan.15, 2017);

20 i. A Court order awarding Plaintiff its reasonable costs of suit, including  
21 attorney, witness, expert, and consultant fees, as permitted by Section 505(d) of the  
22 Clean Water Act, 33 U.S.C. § 1365(d); and

23 j. Any other relief as this Court may deem appropriate.

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1 **VIII. DEMAND FOR JURY TRIAL**

2 Plaintiff hereby requests a jury trial on all issues raised in this Complaint.

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4  
5 Dated: June 2, 2017

Respectfully submitted,

6  
7 LAW OFFICE OF JENNIFER F. NOVAK

8 Jennifer F. Novak

9 Jennifer F. Novak  
10 Attorney for Plaintiff  
11 Orange County Coastkeeper  
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**EXHIBIT A**





ORANGE COUNTY  
**COASTKEEPER®**

3151 Airway Avenue, Suite F-110  
Costa Mesa, CA 92626  
Phone 714-850-1965  
Fax 714-850-1592  
www.coastkeeper.org

March 31, 2017

**VIA CERTIFIED MAIL**

Benjamin Siegel, City Manager  
City Manager's Office  
32400 Paseo Adelanto  
San Juan Capistrano, CA 92675

Rebecca Ross, Registered Agent  
Blenheim Facility Management, LLC  
30753 La Pata Avenue  
San Juan Capistrano, California 92675

Steve May, Director  
Public Works Department  
32400 Paseo Adelanto  
San Juan Capistrano, CA 92675

**Re: Notice of Violations and Intent to File Suit Under the Federal Water Pollution Control Act**

Dear Mr. Siegel, Mr. May, and Ms. Ross:

I am writing this letter on behalf of Orange County Coastkeeper ("Coastkeeper") in regard to violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* ("Clean Water Act," or "CWA") and to invite you to contact me immediately to schedule a meeting and begin discussing solutions.

**1. INTRODUCTION**

The violations at issue are occurring on your property located at 27174 Ortega Highway, San Juan Capistrano, California 92675, known as the Rancho Mission Viejo Riding Park at San Juan Capistrano ("Riding Park" or "Facility"). Violations are also occurring in San Juan Creek, between the Riding Park and the Reata Park and Event Center ("Reata Park"), located at 28632 Ortega Highway, San Juan Capistrano, California 92675. Reata Park, the Riding Park and the area separating the two sites, herein after referred to as the "Arizona Crossing," are owned and/or controlled by the City of San Juan Capistrano ("City").

This notice of violations and intent to file suit ("Notice Letter") is being sent to you as the responsible owners and operators of the Riding Park, Reata Park, and the Arizona Crossing (hereinafter referred to collectively as "the Notice Recipients"). The purpose of this letter is to provide notice of the Notice Recipients' violations and to give notice that, after the expiration of sixty (60) days from the date of this letter, Coastkeeper intends to file a complaint regarding the

Notice of Violation and Intent to File Suit

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violations of the Clean Water Act that are occurring at the Riding Park, Reata Park, and the Arizona Crossing properties.

In 2016, Coastkeeper received complaints from its members regarding illegal activities taking place in and around the Riding Park in San Juan Capistrano, California. In response to these reports, Coastkeeper conducted site investigations to determine the severity of the problem. On the site investigations, Coastkeeper observed that fill activity has taken place, and continues to take place, on the Riding Park property in and around the property's border with San Juan Creek. The Riding Park property at issue is one of several properties along a stretch of San Juan Creek southwest of the intersection of La Pata Avenue and Ortega Highway. San Juan Creek is impaired for pollutants, including those associated with activities occurring the Riding Park property and the type found in fill material deposited onsite, in violation of and without meeting the legal requirements of the Clean Water Act.

In addition to site inspections, Coastkeeper reviewed documents in the possession of the U.S. Army Corps of Engineers ("USACE") and the State of California, such as applications, permits, site reports, ownership deeds, and enforcement related documents. As described more fully below, Coastkeeper's investigations indicate an ongoing failure by the Notice Recipients to comply with the requirements of Section 404 of the Clean Water Act at the Riding Park, Reata Park, and Arizona Crossing properties. Individual examples of failure to comply with the requirements of the Clean Water Act as cited below are indicative but not exhaustive of activities, or failure to conduct necessary activities, occurring at the Riding Park property in violation of the Clean Water Act.

As set forth in this Notice Letter, observations made by Coastkeeper investigators on multiple occasions indicate that the Notice Recipients are and continue to be in violation of the Clean Water Act at the Riding Park, Reata Park, and Arizona Crossing properties. Generally, the property owners and/or operators have not obtained a Dredge and Fill Permit as required by Section 404 of the Clean Water Act, and have routinely discharged materials that are unsuitable for use as fill material into San Juan Creek. Each day that fill material has been discharged from the properties and remains in San Juan Creek constitutes a separate violation of Section 404 of the Clean Water Act.

In addition, this letter provides notice of the City's unlawful discharge of non-stormwater and stormwater pollution from the Riding Park property in violation of the *National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer System (MS4s) Draining the Watersheds within the San Diego Region*, Order No. R9-2013-0001, as amended by Order No. R9-2015-0001 and R9-2015-0100 ("MS4 Permit").

The MS4 Permit regulates discharges to and from San Juan Capistrano's municipal storm sewer system ("MS4"). Rivers, streams, and creeks in developed areas that use natural drainage patterns and features as conveyances for runoff are part of the City's MS4 regardless of whether they are natural, anthropogenic, or partially modified features. In those cases, the river, stream and creek

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in the developed areas are both an MS4 and receiving water.<sup>1</sup> The violations of the MS4 Permit alleged in this letter concern the City's failure to develop and implement the plans necessary to control storm water and non-stormwater into or from its MS4, failure to effectively prohibit discharges of non-stormwater into its MS4 system, and its failure to prevent discharges from its MS4 that cause or contribute to violations of water quality standards in area receiving waters.

Section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b), requires that sixty (60) days prior to the initiation of a civil action against any alleged violator under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), a citizen must give notice of her intent to sue to the discharger, the Administrator of the United States Environmental Protection Agency ("EPA"), the Regional Administrator for the EPA for the region in which such violation is alleged to have occurred, and the Chief Administrative Officer of the water pollution control agency for the State in which the violation is alleged to have occurred. 33 U.S.C. § 1365(b)(1)(A); 40 C.F.R. § 135.2(a)(1). This letter addresses at least 1,825 violations of Section 301 of the Clean Water Act, Section 404 of the Clean Water Act, and Section 401 of the Clean Water Act.

## **2. FACTUAL BACKGROUND**

### **2.1.1. Orange County Coastkeeper**

Orange County Coastkeeper ("Coastkeeper") is a nonprofit organization that promotes and restores water resources that are drinkable, fishable, swimmable, and sustainable. Coastkeeper is an environmental group organized as a non-profit corporation in accordance with the laws of the State of California. Coastkeeper's offices are located at 3151 Airway Avenue, Suite F-110, Costa Mesa, California 92626. Coastkeeper is dedicated to protection and preservation, conservation, and restoration of waters, marine habitats and watersheds, through research, education, community action and citizen enforcement. Coastkeeper actively seeks federal and state agency implementation of the Clean Water Act and, where necessary, initiates enforcement actions on behalf of itself and its members.

Coastkeeper and its individual members have an interest in the preservation and use of waters in and around San Juan Capistrano, including, but not limited to San Juan Creek, San Juan Creek Mouth, and their tributaries. Specifically, Coastkeeper's members sail, swim, picnic, fish, hike, surf, paddle, standup paddleboard, kayak, wade, bike, and enjoy the wildlife in and around these waters, including the reach at issue in this Notice Letter. The actions of the Notice Recipients individually, collectively, and in combination with the activities of other landowners adjacent to San Juan Creek, result in numerous injuries to Coastkeeper's interests, such as: loss, destruction or damage to wetlands and waterways; diminished aesthetic enjoyment; increased flooding; loss of open space and habitat for wildlife, including wading birds and federally protected species; degraded water quality; and diminished quality of life. The ability of Coastkeeper's members to engage in such activities and to use and enjoy San Juan Creek is harmed by Notice Recipients' activities.

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<sup>1</sup> SD MS4 Permit, Finding 11.

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## **2.2. The City of San Juan Capistrano**

The City of San Juan Capistrano (“the City”) is a municipality incorporated under the laws of the State of California. The Department of Public Works & Engineering (“Department”) is a department of the City. The City and its Departments have offices at 32400 Paseo Adelanto, San Juan Capistrano, CA 92675. The Department’s current Director is Steve W. May. The City’s current City Manager is Benjamin Siegel. City and/or the Department are the owner(s) and/or operator(s) of the City’s MS4 and collection system.

The Clean Water Act provides that the owner of the land and operator of the land where operations are taking place is responsible for compliance with the provisions of the CWA. The Riding Park Property is located at 27147 Ortega Highway, San Juan Capistrano, California 92675. Information available to Coastkeeper indicates that the site’s Assessor Parcel Number (APN) is 125-172-24, comprises 68.46 acres, and is owned by the City. Reata Park is located at 28632 Ortega Highway, San Juan Capistrano, California 92675. Information available to Coastkeeper indicates the APN is 125-172-27, comprises approximately 12.5 acres, and is owned by the City. Information available to Coastkeeper indicates the Arizona Crossing property is located between San Juan Creek’s banks, bordered by Reata Park and the Riding Park. The property’s APN is 125-172-26, comprises 16.76 acres, and is owned by the City.

In 2010, the City acquired an approximately 116 acres currently referred to herein as the Riding Park. In November 2014, the City entered into an agreement with Blenheim Facilities Management, LLC (“Blenheim”) to provide management services for the Riding Park commencing on January 1, 2015. Under the terms of the Management Agreement, Blenheim manages approximately 70 acres of the Riding Park.

Pursuant to the terms of the Management Agreement, Blenheim’s management term terminated as of 11:59 p.m. on December 31, 2016. On December 6, 2016, the City authorized a month-to-month extension of the Management Agreement for 2017.

### **2.2.1. Blenheim Facility Management, LLC**

Blenheim Facility Management, LLC is an active Delaware limited liability company with its principal place of business located at 30753 La Pata Avenue, San Juan Capistrano, California 92675. The registered agent for service of process is Rebecca Ross, located at 30753 La Pata Avenue, San Juan Capistrano, California 92675. Blenheim Facility Management, LLC is responsible for management of the Riding Park pursuant to the management agreement with the City of San Juan Capistrano entered into on November 18, 2014, and extended on December 6, 2016.

Accordingly, this Notice Letter is being sent to the City as the owner and operator of Reata Park and the Arizona Crossing, and the owner of the Riding Park. The Notice Letter is addressed to Blenheim as the operator of the Riding Park. Collectively, the City and Blenheim are the owner and/or operators of the properties and responsible parties under the Clean Water Act.

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### 2.2.2. San Juan Creek

San Juan Creek, the receiving water of the fill material, including sand, concrete, asphalt, corrugated metal pipes, rock, and other construction materials from the Riding Park and Reata Park properties, generally drains towards the south and west with its headwaters in the Santa Ana Mountains. The San Juan Creek watershed encompasses a drainage of approximately 176 square miles and extends from the Cleveland National Forest in the Santa Ana Mountains to the Pacific Ocean at Doheny State Beach near Dana Point Harbor.<sup>2</sup> The condition of San Juan Creek near the Riding Park and Reata Park is that of a large alluvial valley with an upper terrace dominated by oaks, and a lower, sycamore-dominated terrace with dynamic mulefat and willow communities.<sup>3</sup> An entangling understory of shrubs, flowering plants, and vines provides sites for nesting, shelter and shade for many animals. Algae and mosses proliferate in the water and on rocks. Leaves swept into the current decompose, adding nutrients and organic matter to waterways. Insects thrive here and in turn provide an abundant food source for invertebrates, fish, and birds. (CCC Online Coastal Resources Guide: Streams.) This dynamic creek system promotes maintenance of a compositionally and structurally complex and diverse plant community.<sup>4</sup> As San Juan Creek flows past Reata Park and the Riding Park it mostly consists of an urbanized mixed of commercial, residential, and industrial land uses.<sup>5</sup>

The San Juan Creek watershed extends along an East-West Axis and drains approximately 176 square miles. San Juan Creek meanders through a floodplain with topography typical of coastal creeks and floodplains in Orange County. San Juan Creek is a naturally intermittent stream that presently carries significantly increased flows due to year-round municipal and agricultural return flows and during significant rain events (as evidenced by the considerable flooding during the 2005 winter storms). Waters from San Juan Creek near Reata Park and the Riding Park continue through the City, discharging at the terminus of San Juan Creek at the San Juan Creek Mouth to the Pacific Ocean at Doheny Beach State Park.

Coastal creeks such as San Juan Creek are a precious resource. “On their way to the ocean, California’s coastal streams and rivers flow through the canyons and valleys of coastal mountains, linking forest, chaparral, scrubland, grassland, and marsh. Riparian woodlands develop along stream banks and floodplains, and coastal wetlands and estuaries form where the rivers enter the sea. Rivers transport nutrients, sediments, and oxygen through the watershed, and life flourishes in their path.” *California Coastal Commission's California Coastal Resource Guide*, at <http://ceres.ca.gov/ceres/calweb/coastal/streams.html> (“CCC Online Coastal Resource Guide: Streams”).

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<sup>2</sup> U.S. Army Corps of Engineers, South Pacific Div., *Record of Decision for Revoking the Use of Selected Nationwide Permits within the San Juan Creek/Western San Mateo Creek Watersheds for the Special Area Management Plan Orange County, Cal.*, 1 (July 2010).

<sup>3</sup> Smith, Daniel R., Klimas, C.V., U.S. Army Corps of Engineers, Los Angeles Dist., Reg. Branch, *Riparian Ecosystem Restoration Plan for San Juan Creek and Western San Mateo Creek Watersheds: General Design Criteria and Site Selection*, 24 (Aug. 2004).

<sup>4</sup> *Id.* at 16.

<sup>5</sup> *Fn 1.*



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In addition, coastal streams such as San Juan Creek serve several important ecological functions including trapping of excess sediment and storing and transforming excess organic matter, preventing it from reaching downstream waters. *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, Sierra Club (September 2003) available at [http://www.sierraclub.org/cleanwater/reports\\_factsheets/](http://www.sierraclub.org/cleanwater/reports_factsheets/). Upstream waters, such as San Juan Creek, where more water makes direct contact with the stream bed, help remove excess nutrients in the water – a problem often associated with urban development and the use of fertilizers on lawns and gardens. The channel shape of coastal streams further facilitates that sequestration and transformation of organic material and sediment.

Coastal streams and the adjacent estuarine and riparian habitats throughout California also support a wide variety of flora and fauna, including endangered species such as the Pacific pocket mouse, the Southern California Coast Steelhead, the Quino checkerspot butterfly, the southwestern willow flycatcher, and many other species. Portions of San Juan Creek have specifically been identified as critical habitat for a Southern California Coast Steelhead Biogeographic Population Group (“BPG”). The National Marine Fisheries Service’s species Recovery Plan identified threats to Southern California Coast Steelhead DPS restoration efforts in San Juan Creek and concluded culverts were a “very high threat,” and that dams, surface water diversions, and roads are “medium threat” sources.<sup>6</sup> Physical modification of road crossings between estuary and upstream spawning and rearing habitats and the passage of smolts and kelts downstream to the estuary and ocean are specifically identified critical recovery actions for San Juan Creek’s Santa Catalina Gulf Coast BPG of Southern California Steelhead.<sup>7</sup>

San Juan Creek is designated a principal stream system in the San Diego Regional Water Quality Control Board’s Water Quality Control Plan (“Basin Plan”). Pursuant to its authority over designated water bodies, the Regional Board has designated several beneficial uses for San Juan Creek and the water bodies into which they drain.<sup>8</sup> Beneficial uses are intended to represent the purposes of the water body that are specifically protected by the Clean Water Act. When those uses are not attained, the Regional Board designates the water body as impaired under Section 303(d) of the Clean Water Act. In this regard, the receiving waters of pollution from the Riding Park and Reata Park areas are impaired. The waters of San Juan Creek downstream of the Riding Park and Reata Park are listed under Section 303(d) as impaired for pollutants including, but not limited to, Indicator Bacteria, Phosphorus, Total Nitrogen as N, Toxicity, DDE, and Selenium. Overall, the San Juan Creek watershed is highly impaired. Thus, the discharge of stormwater carrying the byproducts of the facility, including horse waste, bedding material, feed, metals, trash, and other materials are contributing to, and threatening, San Juan Creek, and downstream receiving waters. Similarly, the illegal discharge of non-stormwater, including manure, sediment and other fill material, construction

<sup>6</sup> National Marine Fisheries Service – Southwest Regional Office, *Southern California Steelhead Recovery Plan Summary*, 18 (Jan. 2012).

<sup>7</sup> National Marine Fisheries Service, *Southern California Steelhead Recovery Plan*, Table 13-3, 13-20 (Jan. 2012).

<sup>8</sup> According to the Basin Plan, San Juan Creek’s existing beneficial uses include: agricultural supply, industrial service supply, contact water recreation, non-contact water recreation, warm freshwater habitat, cold freshwater habitat, wildlife habitat. Likewise, the beneficial uses on the San Juan Creek Mouth, where San Juan Creek meets the Pacific Ocean, includes contact water recreation, non-contact water recreation, wildlife habitat, rare, threatened, or endangered species, marine habitat, migration of aquatic organisms, and shellfish harvesting. *Water Quality Control Plan, San Diego Region*, Regional Water Quality Control Board, San Diego Region, Tables 2-2, 2-3 (updated May 17, 2016).

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wastes, debris, and other material into San Juan Creek contributes to the impairment of the receiving waters.

San Juan Creek is a water of the United States as defined in the Clean Water Act. The USACE defines water of the United States as all waters which are currently used in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, which are used for, among other purposes, the harvesting of fish sold in interstate commerce. 33 C.F.R. § 328.3(a)(1)(i). Waters tributary to these waters are also waters of the United States. *See* 33 C.F.R. § 328.3(a)(5). The waters of the Pacific Ocean at San Juan Creek Mouth are subject to the ebb and flow of the tides. San Juan Creek is tributary to the San Juan Creek Mouth. Therefore, San Juan Creek is a water of the United States.

### 3. LEGAL BACKGROUND

#### 3.1.1. MS4 Permit

The City owns and operates a municipal separate storm sewer system (“City MS4”). An MS4 is defined as “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains”) owned or operated by a state, city, or town that is designed or used for collecting or conveying storm water and that discharges to waters of the United States. *See* 40 C.F.R. § 122.26(b)(8)(i)-(ii); *see also* 40 C.F.R. § 122.26(b)(18).

Clean Water Act Section 402(p), 33 U.S.C. § 1342(p), establishes a framework for regulating municipal separate stormwater discharges under NPDES permits. Section 402(p) of the CWA requires an NPDES permit for stormwater discharges from an MS4 to waters of the United States. Section 402(p)(3)(B) sets forth the requirements that must be in all NPDES permits for storm water discharges from MS4s, including the obligation to effectively prohibit non-storm water discharges into MS4s, and require controls to reduce the discharge of pollutants in stormwater to the maximum extent practicable (“MEP”)<sup>9</sup>, and to require other provisions as the Regional Board determines are appropriate to control such pollutants. 33 U.S.C. § 1342(p)(3)(B), *see also* MS4 Permit, Finding 3.

The City is among thirty-eight municipal entities, twelve in Orange County, that have joined together and sought coverage for their municipal storm water discharges under the MS4 Permit. Along with the County of Orange, Orange County Flood Control District, and the cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Mission Viejo, Rancho Santa Margarita, San Clemente, and Laguna Woods, the City submitted a National Pollutant Discharge Elimination System (“NPDES”) permit application and was granted an NPDES permit on July 16,

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<sup>9</sup> For purpose of the application of the MEP standard, the MS4 Permit emphasizes: “Non-storm water discharges from the MS4s are not considered storm water discharges and therefore are not subject to the MEP standard of CWA section 402(p)(3)(B)(iii), which is explicitly for ‘Municipal...*Stormwater Discharges* (emphasis added)’ from the MS4s. Pursuant to CWA 402(p)(3)(B)(iii), non-storm water discharges into the MS4s must be effectively prohibited.” *See* MS4 Permit, Findings 15.



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1990, which was reissued in 2001. This was again reissued in January, 2007 and May 8, 2013. The Regional Board amended the 2013 permit and the City enrolled under the existing NPDES permit on February 11, 2015. The MS4 Permit allows Copermittees to discharge stormwater runoff from storm drains and other stormwater conveyances within their jurisdictions, subject to the Permit's terms and requirements. The City has jurisdiction over and/or maintenance responsibilities for the City's MS4.

Since 1990, Copermittees have been developing and implementing programs and BMPs designed and intended to effectively prohibit non-storm water discharges to the MS4s and control pollutants in storm water discharges from the MS4s to receiving waters.<sup>10</sup> These programs are known as Jurisdictional Runoff Management Programs ("JRMP"). Each Copermittee is required to develop and implement a JRMP in accordance with the strategies identified in the Water Quality Improvement Plans.<sup>11</sup> The purpose of the JRMP is for the Copermittee to establish, maintain, and enforce adequate legal authority to control stormwater discharges and prohibit and eliminate all illicit discharges, including all non-storm water discharges.<sup>12</sup>

The City's JRMP must implement a program to actively detect and eliminate illicit discharges and improper disposal (non-storm water discharges) into the MS4, or otherwise require the discharger to apply for a separate NPDES permit.<sup>13</sup> Federal law does not define "non-storm water," but federal regulations define "illicit discharge" as "any discharge to a [MS4] that is not composed entirely of storm water and that is not covered by an NPDES permit..."<sup>14</sup> In order to actively detect and eliminate illicit discharges, the JRMP must include that the Copermittee: maintain an updated map of the MS4 system; use personnel and contractors to assist in identifying and reporting illicit discharges during their daily employment activities; promote and facilitate public reporting of illicit discharges; and implement practices and procedures to prevent, respond, contain and clean up any spills that may discharge into the MS4.<sup>15</sup>

Similarly, the MS4 permit prohibits the City from discharging from its MS4 "in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters."<sup>16</sup> Stormwater discharged from the Riding Park poses a threat to already-impaired receiving waters. By failing to control stormwater discharges, the Noticed Parties are causing, and contributing to, this ongoing threat. Runoff from horse paddocks and areas where horses urinate or defecate can pick up contaminants such as nutrients, organic matter, and pathogens, which then enter the Creek through runoff and seepage into its saturated zone. Failure to properly control this runoff can cause, or threaten to cause, constituents such as ammonia, nitrate, phosphorus, and salts to enter the receiving waters. Nutrients can lead to the accelerated growth of microalgae, thereby depleting

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<sup>10</sup> Fact Sheet/Technical Report for Order No R9-2013-0001, as amended by Order No. R9-02015-0001, and Order No. R9-2015-0100, at F-47.

<sup>11</sup> MS4 Permit, Prov. E.1

<sup>12</sup> Id.

<sup>13</sup> Id. at 85.

<sup>14</sup> MS4 Permit, F-39; *see also* 40 C.F.R. § 122.26(b)(2).

<sup>15</sup> MS4 Permit, Prov. E.2

<sup>16</sup> MS4 Permit, Prov. A.1

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oxygen levels available for aquatic species and plants. Constituents such as ammonia, nitrates, and salts can create a toxic aquatic environment for these species.

Therefore, federal law mandates that MS4 permits require management practices that will result in reducing storm water pollutants to the MEP and simultaneously require non-storm water discharges be effectively prohibited from entering the MS4. The goal of these prohibitions and limitations is to protect water quality and designated beneficial uses of waters of the state from adverse impacts caused or contributed to by MS4 discharges.<sup>17</sup>

### 3.1.2. 404 of the CWA

The discharge of fill material to waters of the United States and/or the removal of dredge material from a water of the United States is prohibited unless it is in compliance with Section 404(a), 33 U.S.C. § 1344(a), and Section 401(a)(1), 33 U.S.C. § 1341(a)(1), of the Clean Water Act. The USACE and the EPA have been granted joint authority to implement and manage the permitting of the discharge of fill materials into waters of the United States and the removal of dredge material from waters of the United States. The discharge of fill material to waters of the United States is prohibited unless the discharge is in compliance with Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a). Pollutants are broadly defined in 33 U.S.C. § 1362(6) to include dredged material, rock, sand, and agricultural waste. The USACE and the EPA have been granted joint authority to implement and manage the permitting of the discharge of fill materials into waters of the United States. A discharger must obtain coverage under a Section 404 permit prior to the discharge of fill material. 33 U.S.C. § 301(a); Nationwide Permit (“NWP”) General Conditions, ¶ 13. The discharger must comply with the terms of the permit obtained. It is a violation of the terms of any Section 404 Permit to begin the activity prior to obtaining coverage.

Under the NWP program, the USACE has developed a general permit applicable for a variety of projects having minimal adverse impact on navigation or Waters of the United States. *See* 67 Fed. Reg. 2020-2095.

On July 19, 2010, the USACE revoked the use of selected NWPs<sup>18</sup> for the San Juan Creek watershed and selected a Special Area Management Plan (“SAMP”) as the Agency Preferred Alternative. A SAMP is a:

plan authorized by the [USACE’s] Regulatory Division through a voluntary watershed-level planning process involving local landowners and public agencies that seek permit coverage under the Federal Clean Water Act (CWA) section 404 for

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<sup>17</sup> *Id.*

<sup>18</sup> U.S. Army Corps of Engineers, South Pacific Division, *Record of Decision for Revoking the Use of Selected Nationwide Permits within the San Juan Creek/Western San Mateo Creek Watersheds for the Special Area Management Plan Orange County, California*, 2 (July 2010). 3. NWPs revoked in the SAMP Watersheds include: 03, 07, 12, 13, 14, 16, 17, 18, 19, 21, 25, 27, 29, 31, 33, 39, 40, 41, 42, 43, 44, 46, 49, and 50. The remaining 25 NWPs would apply to the SAMP Watersheds: 01, 02, 04, 05, 06, 08, 09, 10, 11, 15, 20, 22, 23, 24, 28, 30, 32, 34, 35, 36, 37, 38, 45, 47, and 48.

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future actions that discharge dredged or fill materials into jurisdictional waters of the United States (U.S.).<sup>19</sup>

The SAMP establishes an abbreviated permitting framework in the form of Regional General Permit Number 74 (“RGP 74”) for projects within selected jurisdictional waters of the United States, including San Juan Creek.<sup>20</sup> Along with new CWA Section 404 letters of permission procedures, RGP 74 streamlines the permitting process, but applicants must also comply with selected NWP and any individual permits. The permittee must also comply with other Federal, state, or local authorizations as required by law, including CWA 401 water quality certifications from the San Diego Regional Board. Should a permittee become non-compliant with RGP 74’s permit conditions, USACE may suspend, revoke, or modify RGP 74’s authorization and assess administrative penalties.<sup>21</sup> RGP 74 expired March 19, 2017.

### **3.1.3. 401 of the CWA**

The discharge of dredged or fill material to waters of the United States is prohibited unless the discharge complies with all applicable requirements of the CWA. As described above, a prospective discharger must obtain coverage under a Section 404 permit to lawfully discharge dredged or fill material. To obtain a Section 404 permit, Section 401(a)(1) of the CWA, 33 U.S.C. § 1341(a)(1), requires that a discharger provide a water quality certification from the state in which the discharges occur. Discharges of dredged or fill material into waters of the United States are therefore prohibited without first obtaining a 401 certification. To obtain a 401 certification, the discharger would have to demonstrate the ability to meet a multitude of conditions similar to those required by a Section 404 permit, as discussed above.

Section 505 of the CWA, 33 U.S.C. § 1365, authorizes citizen enforcement for violations of any effluent standard or limitation in effect under the CWA, including the failure to obtain a 401 certification. 33 U.S.C. § 1365(f)(5).

## **4. VIOLATIONS**

### **4.1. The City’s Violation of MS4 Permit Prohibitions**

As discussed above, the MS4 Permit contains prohibitions and limitations on the discharge of pollutants into and from the City’s MS4.<sup>22</sup> The goal of the prohibitions and limitations is to protect water quality and beneficial uses of the state’s waters from adverse impacts caused, or contributed to, by MS4 discharges. “This goal will be accomplished through the implementations of water

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<sup>19</sup> U.S. Army Corps of Engineers, South Pacific Division, *Record of Decision for Revoking the Use of Selected Nationwide Permits within the San Juan Creek/Western San Mateo Creek Watersheds for the Special Area Management Plan Orange County, California*, 2 (July 2010).

<sup>20</sup> U.S. Army Corps of Engineers, Los Angeles District, *Department of the Army Regional General Permit Number 74 for Maintenance Activities Within the Special Area Management Plan Areas In Orange County, California*, 3 (March 19, 2012).

<sup>21</sup> *Id.* at 11.

<sup>22</sup> MS4 Permit, Provision A.

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quality improvement strategies and runoff management programs that effectively prohibit non-storm water discharges into the MS4s[.]”

MS4 Permit Provision A.1.a prohibits the City from allowing discharges from MS4s “in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters.” As noted above, the waters of San Juan Creek downstream of the Riding Park and Reata Park are listed under Section 303(d) as impaired for pollutants including, but not limited to, Indicator Bacteria, Phosphorus, Total Nitrogen as N, Toxicity, DDE, and Selenium. The City is, and has been, aware that the Site causes further impairments and poses continuing threats to the receiving water. The City led a task force to address threats to water quality from horse facilities, culminating in a June 2004 document entitled “Equestrian-Related Water Quality Best Management Practices” (“Task Force Document”). The Task Force Document noted that many of the “physical, biological and chemical properties” of manure, urine, bedding, and sediment “can be detrimental to water quality and can adversely affect human health and aquatic life in water bodies.”<sup>23</sup> The task force recommended management practices such as creating barriers or diverting runoff from wash racks and paddocks to waterways. It further suggested that trash and other material be kept well away from waterways, and that upslope sources of potential erosion be controlled to prevent sediment from leaving facilities. As described below, however, while the Notice Recipients have already been on notice that the Riding Park and other facilities require controls to reduce their adverse impacts to water quality, they have failed, and continue to fail, to meet their MS4 requirement to control their stormwater discharges.

MS4 Permit Provision A.1.b mandates “non-storm water discharges into MS4s are to be effectively prohibited, through the implementation of Provision E.2., unless such discharges are authorized by a separate NPDES permit.”<sup>24</sup> Discharge Prohibition 1.b. of the MS4 Permit requires that the City effectively prohibit discharges of non-storm water into the City’s MS4 by establishing a JRMP. The JRMP is the City’s plan to actively identify and eliminate all illicit discharges. Coastkeeper is informed and believes that the City of San Juan Capistrano has either failed to develop an adequate JRMP, or has failed to implement an adequate JRMP.

The MS4 Permit requires the City to prioritize investigations when pollutants identified as causing or contributing, or threatening to cause or contribute to impairments in water bodies on the 303(d) List and/or in environmentally sensitive areas (ESAs), located within its jurisdiction. Coastkeeper is informed and believes that the City was made aware of illicit discharges from wash racks for horses at Riding Park to the MS4 at least as early as August 5, 2016. Based upon direct observations by Coastkeeper personnel as recently as March 29, 2017, the wash racks continue to discharge into the San Juan Creek, thereby negatively impacting downstream beneficial uses on an ongoing basis.

There exist at least five “wash racks” at the Riding Park, all located immediately adjacent to the bank of the San Juan Creek. Some of the wash racks are within approximately ten to twenty feet of the bank. The wash racks, which are frequently used during events at the Riding Park, are

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<sup>23</sup> “Equestrian-Related Water Quality Best Management Practices” (“Task Force Document”) at 5.

<sup>24</sup> *See also* 40 C.F.R. § 122.44.

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concrete slabs with short plywood walls around the base of the slabs, presumably to retain wash water and other matter from flowing directly into the Creek; however, the racks do not contain all of the wash water, manure, and other associated substances, which flow from the racks to the creek bank, and further seep into the bank from areas of uncontained waste water. While the Notice Recipients have attempted to implement containment systems, evidence shows that the systems do not adequately prevent non-stormwater discharges and that waste water and associated pollutants are routinely and frequently being discharged into the Creek and into downstream receiving waters.

The Riding Park also contributes massive amounts of sediment, fill material, trash, broken asphalt and concrete, and other non-stormwater into the Creek, as evidenced all along the streambed adjacent to the property. Coastkeeper believes that the Notice Recipients have been advised of these discharges on multiple occasions and that City representatives have observed evidence of the discharges. Despite knowing of these discharges, Notice Recipients have failed, and continue to fail, to identify the sources for the discharges, or to take action to prevent them.

Coastkeeper is further informed and believes that the City allows a maintenance area to operate on the Riding Park property. Coastkeeper is informed and believes that outdoor metal and woodworking activities routinely occur at the maintenance area without proper BMPs. Such activities may result in the discharge of metal pollutants such as copper, aluminum, zinc, iron, and other pollutants associated with those activities. In addition, heavy machinery, such as bulldozers and trucks, is routinely parked and operated on non-paved surfaces. These activities are associated with pollutants such as oil and grease, zinc, and copper. The City's failure to prevent pollutant discharges from these activities or obtain proper storm water permitting for these activities is an ongoing violation of the CWA.

Coastkeeper is also informed, and believes, that the City has allowed the discharge of material into San Juan Creek through the maintenance and use of the "Arizona Crossing" that connects the Riding Park to Reata Park and purports to be city-owned and maintained. As a result, sediment and other material has been discharged into the Creek and into receiving waters below. In addition, the City's failure to maintain the Arizona Crossing has resulted in the continued discharge of concrete, rebar, fill material and other pollutants from the now-abandoned structure to receiving waters below. The City's failure to restore the Creek following destruction of the Crossing has, and will continue to, impact the habitat and species downstream.

#### **4.2. 404 and 401 Violations**

As set forth in this Notice Letter, observations made by Coastkeeper investigators on multiple occasions indicate that the Notice Recipients are and continue to be in violation of the Clean Water Act at the Riding Park, Reata Park, and Arizona Crossing Properties. The Notice Recipients have engaged in filling activity within the bed and banks of San Juan Creek without obtaining the USACE Section 404 Permit, as required by Section 404 of the Clean Water Act ("404 Permit"). Moreover, Coastkeeper is informed that these filling activities have resulted in the loss or degradation of more than 0.1 acres of jurisdictional waters of the United States. The unpermitted discharges are composed of materials that are unsuitable for use as fill material, including, but not limited to, sheet metal, concrete blocks, corrugated metal pipes/culverts, uncompacted debris,



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asphalt, trash, and poured concrete. These materials constitute pollutants whose discharge cannot be lawfully performed or approved by USACE in conjunction with a properly issued Section 404 permit.

After discharging unpermitted fill materials onto the banks of San Juan Creek from the edge of the Riding Park, the Notice Recipients have not implemented appropriate erosion and sediment controls for the fill material discharges, nor have the Notice Recipients, to the maximum extent practicable, designed the fill to maintain downstream flow conditions. Fill material has been added to San Juan Creek's banks extending the graded area of the Riding Park beyond the parcel's boundaries. Coastkeeper is informed, believes and thereon alleges, the Riding Park owners and/or operators discharge fill material into San Juan Creek. Moreover, the filling activity in and around San Juan Creek has failed to avoid substantial disruption of the necessary life-cycle movements of species indigenous to the waterbody.

Coastkeeper is further informed and believes that the Notice Recipients have failed to obtain the required water quality certification from the Regional Board for its unpermitted filling activities within San Juan Creek, pursuant to Section 401 of the Clean Water Act ("401 Certification"). In order to obtain a Section 404 permit, Section 401(a)(1) of the CWA, 33 U.S.C. § 1341(a)(1), requires that a discharger provide a water quality certification from the State in which the discharges occur. Discharges of dredged or fill material into waters of the United States are therefore prohibited without first obtaining a 401 Certification. Further, California Code of Regulations, Title 23, Section 3859(a), provides the Regional Board with authority to issue or deny a 401 Certification, and to set conditions on its approval.

Coastkeeper's investigation reveals that the Notice Recipients have failed to obtain a 401 certification from the Regional Water Quality Control Board, San Diego Region ("Regional Board") for its activities at the Riding Park or Reata Park properties. The Notice Recipients' discharges of fill material into and drilling activities in waters of the United States without a 401 certification have put the Notice Recipients in continuous and ongoing violation of Section 301(a) of the Clean Water Act. 33 U.S.C. § 1311(a).

Even were the Notice Recipients to apply for a 401 certification, the Notice Recipients have not and could not obtain a Section 401 Certification pursuant to 33 U.S.C. § 1341(a) under these circumstances. In order to obtain a 401 certification, the Notice Recipients would have to demonstrate the ability to meet a multitude of conditions similar to those required by a Section 404 permit, as discussed above. As a result of the failure to obtain 401 certification, the Notice Recipients are and will continue to be in continuous and ongoing violation of the Clean Water Act. Every day that the Notice Recipients operate or continue to operate at the Properties without a 401 certification manifests a separate and distinct violation of the CWA; likewise, every day that unpermitted and/or unlawful dredged or fill materials remain on the Properties also constitutes a violation of the CWA. The Notice Recipients' violations will then continue each day dredging or filling continues in violation of the CWA, and for each day that unlawfully discharged fill materials remain on the Properties. The Notice Recipients are subject to monetary penalties for all violations of the Clean Water Act occurring within the past five (5) years from the date of this Notice Letter.

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The discharge of dredge and fill material has deleterious effects on the waterways of California. Filling of coastal streams, such as San Juan Creek, disrupts the quantity and availability of water in the stream and river system. *See Where Rivers Are Born*, Sierra Club, available at [http://www.sierraclub.org/cleanwater/reports\\_factsheets/](http://www.sierraclub.org/cleanwater/reports_factsheets/). In so doing, the important role that coastal streams play in protecting and maintaining water levels needed for everything, from fish to recreational uses, to commercial uses, is destroyed. When a stream is filled it loses its capacity to perform vital ecological services. Upon filling, a stream's capacity to trap excess sediment and prevent the sediment's disruption of downstream uses is impaired. The same is true of the capability of a stream to store and transform excess organic matter. This stream alteration also has the tendency to reduce the amount of direct contact the water has with the streambed and diminish the nutrient removal capacity of the stream. Overall, the discharge of fill material significantly disrupts the ecosystem of a stream, and as such, the Clean Water Act strictly regulates activity associated with dredging and filling. Moreover, filling a stream with construction wastes, including but not limited to sheet metal, corrugated metal pipes/culverts, concrete blocks, debris, dirt, sod, trash, asphalt, and other miscellaneous materials pollutes the aquatic ecosystem and causes or contributes to the degradation of waters of the United States and of the State, resulting in the deterioration of water quality and harm to aquatic species and their habitats.

## 5. CONCLUSION

In addition to the violations set forth above, this Notice Letter covers all violations of the Clean Water Act by the Notice Recipients as evidenced by information that becomes available to Coastkeeper after the date of this Notice Letter. Specifically, Coastkeeper puts the Notice Recipients on notice that it intends to include all violations of the CWA in its federal citizen enforcement suit.

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4 (1997), each separate violation of the Clean Water Act subjects the violator of a penalty of up to \$37,500.00 per day per violation for all Clean Water Act violations after January 12, 2009 and \$51,570.00 per day per violation for violations that occurred after November 2, 2015. In addition to civil penalties, Coastkeeper will seek injunctive relief preventing further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and other such relief as is permitted by law. Lastly, Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), permits prevailing parties to recover costs and fees.

Coastkeeper has retained legal counsel to represent them in this matter. All communications concerning this notice should be addressed to:

Jennifer F. Novak  
Law Office of Jennifer F. Novak  
609 Deep Valley Drive #200  
Rolling Hills Estates, California, 90274



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During the 60-day notice period, Coastkeeper would like to discuss effective remedies with the Notice Recipients to address the violations noted in this Notice. If the Notice Recipients wish to pursue such discussions, we suggest that it initiate those discussions immediately. At the close of the 60-day notice period, Coastkeeper intends to move forward with litigation to prevent ongoing violations of the Act.

Very truly yours,

A handwritten signature in black ink, appearing to read "Colin Kelly", written over a horizontal line.

Colin Kelly  
Senior Staff Attorney  
Orange County Coastkeeper

cc: (see attached service list)

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**SERVICE LIST**

Scott Pruitt  
Administrator  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Alexis Strauss  
Acting Regional Administrator  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Col. Kirk E. Gibbs, District Commander  
United States Army Corps of Engineers, Los  
Angeles District  
915 Wilshire Boulevard  
Los Angeles, CA 90017

Thomas Howard  
Executive Director  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812

David W. Gibson, Executive Officer  
Regional Water Quality Control Board, San  
Diego Region  
2375 Northside Drive, Suite 100  
San Diego, California 92108

Jeff Sessions  
U.S. Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Benjamin Siegel, City Manager  
City Manager's Office  
32400 Paseo Adelanto  
San Juan Capistrano, CA 92675

Steve May, Director  
Public Works Department  
32400 Paseo Adelanto  
San Juan Capistrano, CA 92675

Rebecca Ross, Registered Agent  
Blenheim Facility Management, LLC  
30753 La Pata Avenue  
San Juan Capistrano, California 92675


**EXHIBIT B**



**E18**

## City of San Juan Capistrano Agenda Report

TO: Honorable Mayor and Members of the City Council

FROM:  Ben Siegel, City Manager

SUBMITTED BY: Jeff Ballinger, City Attorney

DATE: June 6, 2017

SUBJECT: Consideration of a Joint Defense Agreement Regarding Confidential Communications in Connection with a Notice of Intent to Sue Under the Clean Water Act Issued to the City and Blenheim Facility Management by Orange County Coastkeeper

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### RECOMMENDATION:

By motion, approve and authorize the City Manager and City Attorney to execute the Joint Defense Agreement with Blenheim Facility Management ("Blenheim"), in substantially the form attached hereto, in connection with the City's receipt of a notice of intent to sue under the Clean Water Act by the Orange County Coastkeeper.

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### EXECUTIVE SUMMARY:

On March 31, 2017, Orange County Coastkeeper submitted a notice of intent to sue under the Clean Water Act to the City and Blenheim. The notice was supplemented on May 4, 2017. The notices allege that violations of the Clean Water Act have occurred at Rancho Mission Viejo Riding Park at San Juan Capistrano ("Riding Park"). Blenheim has operated and managed the Riding Park at all times referenced in the notices. The City and Blenheim desire to enter into a Joint Defense Agreement, outlining mutual promises relating to their joint interests in defending against the litigation threatened in the notices.

### DISCUSSION/ANALYSIS:

The City purchased the Riding Park property in 2010. At the time of the purchase and at all times since, Blenheim has managed the Riding Park pursuant to a license (2010-2013) or management agreement (2014-present). Each license and management agreement contains a provision requiring Blenheim to indemnify,



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defend and hold the City harmless from and against all liabilities, claims, damages, losses and expenses arising out of Blenheim's use of the Property.

Based on the claims made in the notices, the City and Blenheim have common legal interests in defending against the allegations in the notices and any lawsuit, if any is filed. The City and Blenheim have, and may assert, joint and/or common defenses, claims and/or cross-claims. Therefore, it is in the City's best interest to cooperate with Blenheim to advance the parties' interests in defending any potential lawsuit. Further, the City and Blenheim may wish to share information in confidence for the purpose of formulating and implementing a joint and/or common defense effort and/or legal strategy in the case.

The proposed Joint Defense Agreement acknowledges the mutual interests the City and Blenheim have in any potential litigation, and outlines an agreement regarding the confidentiality of defense materials, indemnification of the City, cost recovery, and other related provisions.

FISCAL IMPACT:

This agreement supports Blenheim's obligation to defend and indemnify the City in relation to the notices. So, while the agreement does not, by itself, have a fiscal impact, it does re-inforce Blenheim's obligation to ensure that the City's funds are protected in defending the notices and any potential lawsuit.

ENVIRONMENTAL IMPACT:

Approval of the Joint Defense Agreement is not a "project" for purposes of the California Environmental Quality Act ("CEQA") pursuant to the State CEQA Guidelines (Cal. Code Regs., §§ 15000 et seq.). Approval of the Joint Defense Agreement has no potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. (State CEQA Guidelines, § 15378(a).) Further, the Joint Defense Agreement constitutes an administrative or organizational activity with no potential to result in direct or indirect physical changes in the environment. (State CEQA Guidelines, § 15378(b)(2), (4), and (5).)

PRIOR CITY COUNCIL REVIEW:

Not Applicable.

PRIOR COMMISSION/COMMITTEE/BOARD REVIEW:

Not Applicable.

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NOTIFICATION:

Blenheim Facility Management  
Parks, Recreation, Youth and Senior Services, Trails and Equestrian Commission

ATTACHMENT(S)

Attachment 1 - Joint Defense Agreement



## **JOINT DEFENSE AGREEMENT**

This JOINT DEFENSE AGREEMENT ("**Agreement**") is made and effective this \_\_\_\_ day of \_\_\_\_\_, 2017 ("**Effective Date**"), by and among the CITY OF SAN JUAN CAPISTRANO, a California municipal corporation ("**City**"), and the City's attorneys BEST BEST & KRIEGER LLP, a California limited liability partnership, on the one hand, and BLENHEIM FACILITY MANAGEMENT LLC, a Delaware limited liability company ("**BFM**"), and BFM's attorneys \_\_\_\_\_, a \_\_\_\_\_ on the other hand (collectively, "**Parties**," and individually, "**Party**").

### **RECITALS**

WHEREAS, Orange County Coastkeeper ("**OCCK**") served a notice of intent to file suit under the Federal Water Pollution Control Act dated March 31, 2017, on the City and BFM and served a supplemental notice on the City and BFM, dated May 4, 2017, which may result in the filing of a lawsuit against the City and/or BFM (collectively, the "**Action**").

WHEREAS, the City owns the real property located at 27174 Ortega Highway, San Juan Capistrano, California 92675, known as the Rancho Mission Viejo Riding Park at San Juan Capistrano ("**Riding Park**"). Pursuant to a series of leases, access and use licenses and management agreements (collectively, "**Management Agreements**") BFM has leased and managed the Riding Park since approximately January 1, 1995. Each Management Agreement since January 1, 2009 has included a requirement that BFM indemnify, defend, and hold the City harmless from and against all liabilities, claims, damages, losses and expenses of any nature whatsoever, including attorneys' fees, arising out of BFM's use of the Riding Park or otherwise arising out of the acts or omissions of BFM.

WHEREAS, based on the claims made by OCCK in the Action, and in light of BFM's role in using and managing the Riding Park, City and BFM have concluded they have common legal interests in defending against OCCK's allegations in the Action, and have and may assert joint and/or common defenses, common claims and/or cross-claims in the Action, and it is in their best interests, and consistent with the law, to cooperate with each other to advance such joint and/or common defenses, claims and/or cross-complaints in the Action without waiving any privilege.

WHEREAS, as a result of the claims asserted by OCCK in the Action, City and BFM desire to share information (including, but not limited to, documents, factual material, mental impressions, memoranda, reports, attorney work product, and other confidential or privileged information) and confidence for the purpose of formulating and implementing a joint and/or common defense effort and/or legal strategy in the Action. Such information, when shared between the Parties under this Agreement, and whether oral or in writing, is referred to herein as "**Defense Materials**".

WHEREAS, City and BFM believe it is appropriate that the undersigned law firms communicate and exchange information, which may include confidential attorney-client communications, work product, and other information that is protected from disclosure to third parties by applicable privileges, doctrines and/or immunities.



WHEREAS, City, on the one hand, and BFM, on the other hand, wish to continue to pursue their separate, but common, interests with respect to the Action and to preserve to the maximum extent possible the attorney-client, work product or other applicable privileges, doctrines, and immunities that they may have, and to participate in this Agreement without diminishing such privileges, doctrines or immunities in any way.

WHEREAS, the City and BFM have considered both the advantages and disadvantages of this Agreement, and acknowledge that the provisions of this Agreement do not override the obligation of their respective attorneys to represent them zealously and to preserve and protect client confidences and secrets.

### **AGREEMENT**

Based upon the foregoing recitals, which are true and correct and incorporated herein by reference, and in consideration of the mutual promises of the Parties, it is hereby agreed as follows:

#### **1. Confidentiality of Defense Materials.**

A. In defense of the Action, the Parties may exchange or disclose Defense Materials in furtherance of the City's and BFM's common interests. Defense Materials, and all work performed under this Agreement, and communications amongst the Parties or amongst counsel in connection with the representations of their respective clients, shall be conducted and protected pursuant to the attorney-client, work product, joint defense and/or common interest doctrine recognized by the laws of the State of California and the United States of America. Defense Materials shall be used by the Parties solely for the preparation of the City's and BFM's respective defenses. Neither the Defense Materials nor the information contained therein may be used for any other purpose. Defense Materials may be provided to consultants, investigators, experts, stenographic and clerical personnel, and other persons solely for the purpose of furthering the City's and BFM's mutual interests in the Action. All such persons shall be specifically notified by the Party disclosing the Defense Materials that the Defense Materials and the information contained therein are confidential, subject to the terms of this Agreement and, as applicable, privileged.

B. Unless expressly stated in writing to the contrary, all communications between the Parties concerning the Action are confidential and are protected from disclosure to any entity or individual who is not a party to this Agreement ("**Third Party**") by the joint-defense and/or common interest privilege, the attorney-client privilege, and the work product doctrine. The Party in receipt of any Defense Materials shall not disclose the Defense Materials or any of the information therein to any Third Party without the prior written consent of the Party who disclosed the Defense Materials in the first instance. Such consent may be obtained in writing from that Party's attorney.

C. Any unauthorized disclosure of Defense Materials to any Third Party shall be subject to a joint defense privilege by the other Parties to this Agreement and shall not constitute a waiver of any otherwise available privilege. Any Party shall have the right to seek injunctive relief to prevent a threatened disclosure of confidential materials produced pursuant to



this Agreement, if such disclosure would violate the terms of this Agreement. All Parties agree that there is no adequate remedy at law for a disclosure in violation of this Agreement.

D. If another person or entity requests or demands, by subpoena or otherwise, any Defense Materials, the Party from whom such material is requested or demanded shall immediately notify the other Parties. In addition, the Party from whom Defense Materials are requested or demanded shall, prior to production of the Defense Materials, assert all applicable rights and privileges and shall take all reasonable steps to assure that all other Parties have an opportunity to assert all applicable rights and privileges, prior to production.

E. The City and BFM acknowledge that information known to one of them need not be shared with the other, and that each is entitled to communicate and share information with the other as that Party sees fit.

F. To the extent that any of the Parties communicated with each other concerning the defense of the Action prior to the Effective Date, such communication and any other correspondence, exchanges or disclosures among the Parties have been made to further the common defense of the Action and in full expectation that all such communications would remain confidential and protected from unauthorized disclosure, and such communications now constitute Defense Materials subject to the terms of this Agreement.

G. This Agreement shall not restrict any Party from using in any manner or disclosing information which (a) was or becomes publicly available without breach of the obligation of confidentiality provided in this Agreement, or (b) was or is discovered independently by the receiving Party. However, the fact of communication by one Party to another Party of such documents or information shall be privileged pursuant to the joint defense and/or common interest privilege, and any attorney-client privilege, work product doctrine or immunity shall not be lost, but shall be protected by the joint defense and/or common interest privilege.

H. Defense Materials made under this Agreement shall continue to be confidential and subject to the privileges described herein even if adversity of interest may subsequently be discerned or arise between or amongst any of the Parties to this Agreement.

I. In the event that a Party to this Agreement is dismissed from the Action by reasons of settlement, decision, judgment or otherwise, such Party and its counsel shall not be relieved of its obligations under this Agreement with regard to the treatment of the Defense Materials. At all times after a Party has been dismissed from the Action, the Agreement shall be applicable to all Defense Materials.

## **2. Defense of City in Action**

A. BFM shall indemnify and pay for the reasonable cost of defense (with counsel as provided herein) the City, its officials (appointed or elected), officers, employees, agents, departments, agencies, and instrumentalities thereof in the Action.

B. Counsel for the City shall be Jeffrey S. Ballinger, James Gilpin and Alisha M. Winterswyk of Best Best & Krieger LLP (the "*City Attorney*"). The City's reasonable



attorneys' fees and costs in defending the Action shall be reimbursed by BFM as follows: (i) defense obligation to start as of October 1, 2016; (ii) a separate billing file for litigation shall be opened by the City Attorney; (iii) the time shall be billed in 0.1 hour increments; (iv) City's attorneys' fees and costs shall be invoiced monthly with a statement to BFM redacted to preserve confidential information; and, (v) no cost in excess of \$500 shall be incurred without BFM's prior written approval. Notwithstanding the foregoing, BFM's reimbursement shall be conditioned upon the City's cooperation with BFM in the Action and joint defense of the Project.

C. Counsel for BFM and the City Attorney for the City shall reasonably cooperate with each other in connection with their respective investigations and the Action. City and City Attorney shall provide BFM, its consultants, investigators, experts, and counsel, access to the City's public files and documents upon request during normal business hours.

D. Each Party shall communicate promptly to the other Party any offers received for the settlement of the Action. City shall secure BFM's consent to any settlement. BFM shall secure the City's consent to any settlement. Such consent shall not be unreasonably withheld by either Party.

**3. No Admission of Liability or Waiver.** This Agreement is not an admission of liability or fault of any Party in reference to any alleged or asserted facts, legal contentions and occurrences that are now or might be alleged with respect to any threatened or asserted claims associated with or in any way related to the Action. Neither this Agreement, nor any information contained in or submitted under this Agreement, nor any action taken by any Party pursuant to this Agreement, shall constitute, be interpreted, construed, or used as evidence of any admission of liability, law, or fact, waiver of any right or defense, nor as an estoppel, against any Party by any other Party or by any Third Party. The Parties further acknowledge that all future discussions between the Parties concerning the resolution of the Action shall be considered settlement discussions protected under California Evidence Code section 1152, except for public hearings and/or public documents regarding the Action.

**4. No Third Party Beneficiary.** Except as specifically provided herein, nothing in this Agreement shall waive, release, or otherwise affect any right, claim, defense, interest, or cause of action that any Party may have with respect to any Third Party. This Agreement is not intended for the benefit of any Third Party and shall not be enforceable by any party who is not a Party.

**5. No Creation of Attorney-Client Relationship.** Nothing in this Agreement is intended to create an attorney-client relationship between any attorney and anyone other than the Party who is a client of that attorney. The fact that an attorney has entered into or agreed to be bound by this Agreement shall not in any way preclude that attorney from advocating any interest of the Party who is his or her client that may be adverse to any other Party, and shall not be used as a basis for seeking to disqualify any counsel from representing the Party who is a client of that attorney in any proceeding. It is further understood that the obligations of this Agreement might, in the future, create a potential or actual conflict of interest such that one Party shall not be able to cross-examine another Party in this Action or in other proceedings through the use of Defense Materials, unless such materials were also obtained from independent sources not subject to this Agreement, and even though cross-examination through the use of such Defense Materials may be in the Party's interest. The rights and obligations under this paragraph



shall survive the termination of this Agreement and shall continue to bind each Party after that Party's withdrawal from this Agreement or dismissal from the Action or other proceedings, and after termination of this Agreement.

**6. No Joint Venture.** This Agreement does not form a joint venture or partnership by or among the Parties.

**7. Amendment.** No part of this Agreement may be modified, altered, amended, waived, or changed without the express written consent of the Parties hereto.

**8. Notice.** All notices under this Agreement must be in writing. Notice is given either (i) when delivered in person to the person or company intended named below, or (ii) when sent via reputable overnight courier (such as Federal Express), addressed by name and addressed to the party or persons intended, as follows, until such time as a party gives notice of a change of address in accordance with the terms of this section:

**BFM**

Attn: \_\_\_\_\_  
 Blenheim Facility Management Corporate  
 \_\_\_\_\_  
 Phone: \_\_\_\_\_

**City**

Attn: Ben Siegel, City Manager  
 San Juan Capistrano City Hall  
 32400 Paseo Adelanto  
 San Juan Capistrano, CA 92675  
 Phone: (949) 493-1171

**BFM's Attorneys**

Attn: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**City Attorney**

Attn: Jeffrey S. Ballinger, Esq.  
 Best Best & Krieger  
 655 West Broadway  
 15th Floor  
 San Diego, CA 92101  
 Phone: (619) 525-1343

**9. Default.** In the event that there is a default by either party to this Agreement (the "Defaulting Party") with respect to any of the provisions of this Agreement, the other party (the "Non-Defaulting Party") shall give the Defaulting Party written notice of such default in accordance with the above provisions. After receipt of such written notice, the Defaulting Party shall have fifteen (15) days in which to cure any monetary default and thirty (30) days in which to cure any non-monetary default. The Defaulting Party shall have such extended periods as may be required beyond the thirty (30) day cure period to cure any non-monetary default if the nature of the cure is such that it reasonably requires more than thirty (30) days to cure, and Defaulting Party commences the cure within the third (30) day period and thereafter continuously and diligently pursues the cure to completion. The Non-Defaulting Party may not maintain any action or effect any remedies for default against the Defaulting Party unless and until the Defaulting Party has failed to cure the same within the time periods provided in this Section.

**10. Assignment.** This Agreement shall not be assigned by either Party, either in whole or in part, without the prior written consent of the non-assigning Party. Any assignment or purported assignment of this Agreement without the prior written consent of the non-assigning Party will be deemed void and of no force or effect.

**11. Interpretation.** The Parties hereto have negotiated this Agreement at arm's length and have been advised by their respective attorneys, and no provision contained herein shall be construed against any Party.

**12. Authority to Execute.** The individuals executing this Agreement each represent and warrant that they have the legal power, right and actual authority to bind their respective Parties to the terms and conditions hereof.

**13. Counterparts.** The Parties may execute duplicate originals (counterparts) of the Agreement or any other documents that they are required to sign or furnish pursuant to the Agreement.

**14. Severability.** If any provision of this Agreement is found invalid or unenforceable, the balance of this Agreement shall remain in full force and effect.

**15. Term.** This Agreement shall terminate as to all Parties on the date on which the earlier of the following events occurs: entry of final judgment in the Action; dismissal of all causes of action as to all Parties in the Action; settlement of the Action as to each and every Party (the "**Termination Date**"). Any Party may terminate this Agreement effective upon written notice of termination to all other Parties. After termination, the Parties shall continue to preserve the confidentiality of all Defense Materials and this Agreement, in the manner set forth herein.

**16. Entire Agreement.** As of the Effective Date, no other agreements, express or implied, have been made by the parties to this Agreement concerning the subject matter herein. All prior and contemporaneous conversations, negotiations and possible or alleged agreements concerning the subject matter herein are merged and integrated in this Agreement.

*[Signatures on Following Page]*

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

CITY OF SAN JUAN CAPISTRANO

BEST BEST & KRIEGER LLP

\_\_\_\_\_  
By: Ben Siegel  
City Manager

\_\_\_\_\_  
By: Jeffrey S. Ballinger

**ATTEST:**

\_\_\_\_\_  
By: Maria Morris, CMC  
City Clerk

BLenheim FACILITY MANAGEMENT LLC,  
a Delaware limited liability company

[LAW FIRM NAME]

\_\_\_\_\_  
By:  
Title:

\_\_\_\_\_  
By:

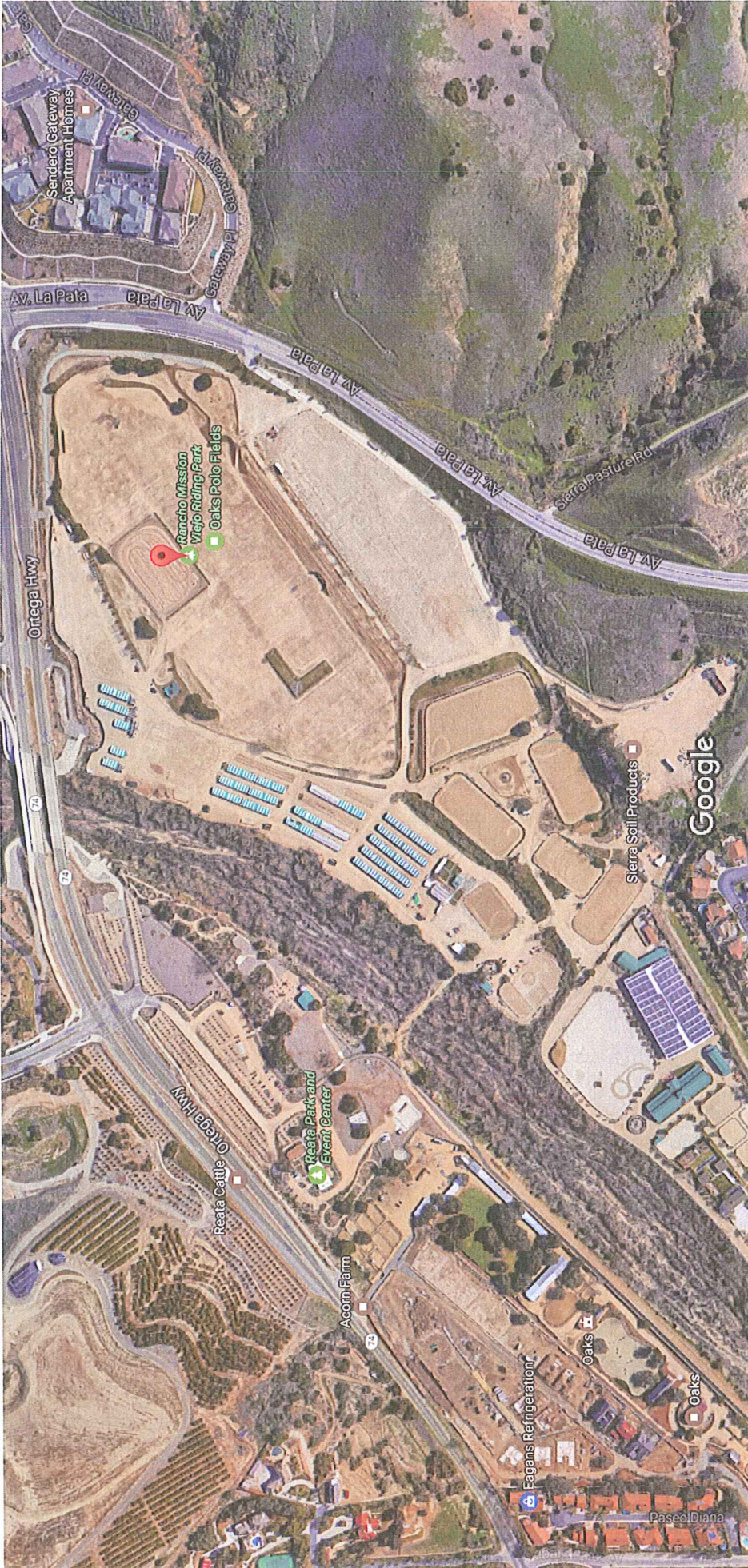
**EXHIBIT C**



Rancho Mission Viejo Riding Park - Google Maps

5/31/2017

# Google Maps Rancho Mission Viejo Riding Park

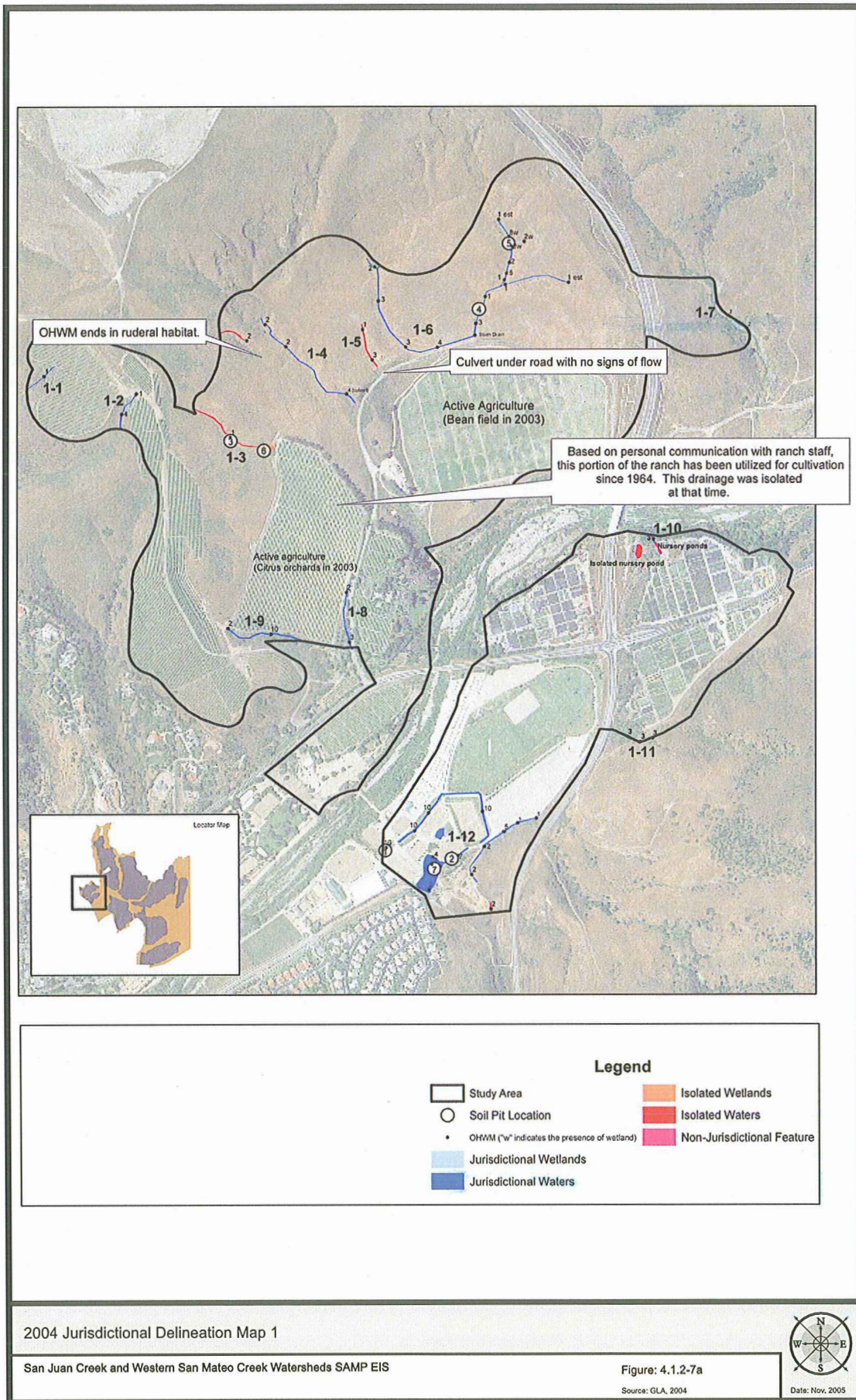


Imagery © 2017 Google, Map data © 2017 Google 200 ft

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**EXHIBIT D**





**EXHIBIT E**



