

San Diego Regional Water Quality Control Board

July 27, 2016

**NOTICE OF VIOLATION
No. R9-2016-0132**

Mr. Kirk Philo
Campus of Life, LP
444 Beech Street Suite 300
San Diego, CA 92101

Ms. Rita Mahoney
ColRich California, LLC
444 Beech Street Suite 300
San Diego, CA 92101

**Violations of California Water Code
Sections 13260, 13265, 13350, 13376
13385, and Clean Water Act §§ 301 and
401**

**Unauthorized discharge of fill to waters
of the United States and/or State
Pomerado and Chabad Center Driveway**

In reply refer to: "nrgans:CW-823763"

Certified Mail – Return Receipt Requested
Article number: 7011 0470 0002 8952 8295
– Kirk Philo
Article number: 7011 0470 0002 8952 8325
– Rita Mahoney

YOU ARE HEREBY NOTIFIED THAT:

Campus of Life, LP (Campus Life) and ColRich California, LLC (ColRich)(collectively, Parties) are in violation of Section 301 and 401 of the Clean Water Act (33 U.S.C. § 1311) and California Water Code (Water Code) Sections 13260, 13265, 13350, 13376, 13385 and. These provisions prohibit the discharge of pollutants to waters of the State and/or United States, except in compliance with a permit for dredged and fill material.

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

A. Background

The Chabad Educational Center (Project) is within the City of San Diego in San Diego County. The Project site is located south of Pomerado Road and east of Chabad Center Driveway. According to data uploaded into the statewide Storm Water Multiple Application and Report Tracking System (SMARTS), the construction site (WDID 37C371640) is owned by Campus of Life, LP with Mr. Kirk Philo as the primary contact.

According to SMARTS, Project grading began in December of 2014.

On March 15, 2016, San Diego Water Board staff Christina Arias of the Storm Water Management Unit conducted a routine storm water inspection of the Chabad Education Campus construction site (WDID 37C371640). Mr. Frank Gonzalez of ColRich, superintendent for the Project, was present and represented the owner during the inspection.

Ms. Arias observed and documented that an unnamed tributary to Carroll Canyon Creek had been diverted underground into a concrete pipe. She asked Mr. Gonzalez if the Project had a Clean Water Act Section 401 Water Quality Certification (401 Certification) or San Diego Water Board waste discharge requirements (WDRs) needed prior to placing fill into waters of the United States and/or State. Mr. Gonzalez acknowledged the Project did not have a 401 Certification and directed San Diego Water Board staff to speak with Ms. Rita Mahoney of ColRich for more details. Ms. Arias provided the information to San Diego Water Board Wetland and Riparian Protection Unit staff Eric Becker and Nicole Gergans.

Ms. Gergans contacted both Ms. Mahoney and Mr. Conan Murphy of the City of San Diego (City) to request additional details on the Project. Ms. Gergans discussed the lack of 401 Certification with Mr. Murphy the week of March 28, 2016. According to Mr. Murphy, the Project was originally permitted for development by the City of San Diego in 1967 and the City assumed that it was exempt from permitting requirements for dredge and fill activities in waters of the United States and/or State because the date of the permit occurred prior to the adoption of the California Environmental Quality Act.

On March 30, 2016 Ms. Gergans and other San Diego Water Board staff conducted an inspection of the Project site to evaluate the unauthorized discharge of fill (placement of stream into pipe). Representatives on behalf of ColRich and the City of San Diego were present. During this inspection, San Diego Water Board staff re-confirmed that an unnamed tributary to Carroll Canyon Creek had been placed underground into a concrete pipe. The unnamed tributary to Carroll Canyon Creek is a water of the United States and/or State and the Parties should have obtained 401 Certification from the San Diego Water Board prior to installing the culvert and diverting the unnamed tributary to an underground pipe.

An inspection report was issued on April 15, 2016 (attached) with recommendations and findings. On April 29, 2016, a follow up email was sent to the Parties requiring a response to recommendations by May 15, 2016. On May 3, 2016, correspondence was sent from Mr. John E. Porter of Sheppard, Mullin, Richter and Hampton LLP

representing the Parties. Mr. Porter acknowledged receipt of the inspection report and requested that future correspondence be addressed to Ms. Rita Mahoney of ColRich. Mr. Porter also requested that the Water Board delay issuing a Notice of Violation until the Parties could submit additional information. Mr. Eric Becker of the San Diego Water Board granted an extension until June 1, 2016. A letter via email was received by the San Diego Water Board on June 1, 2016 from Mr. Porter. The letter was reviewed by San Diego Water Board Staff and State Water Resources Control Board Office of Enforcement attorneys.

B. Response to June 1, 2016 Letter from Mr. Porter

(i) Discharges

There are at least two unpermitted discharges of fill material that occurred on the Project site: the installation of the culvert structure and diversion of an unnamed tributary to Carroll Canyon Creek to the pipe inlet, and the Project construction activities and debris discharged to Carroll Canyon Creek.

(ii) Appropriate Permitting Authority Was Not Obtained for the Project Discharges Described Above

The discharges of fill material from the Project into the two surface water drainages, Carroll Canyon Creek and the unnamed tributary of Carroll Canyon Creek¹ required permitting under either the Clean Water Act (CWA) or the Water Code. Carroll Canyon Creek and the unnamed tributary to Carroll Canyon Creek are waters of the United States and/or State, and therefore the Parties were required to obtain a CWA section 404 dredge and fill permit (33 U.S.C.A. § 1344), and also a CWA section 401 state water quality certification from the San Diego Water Board (33 U.S.C.A. § 1341; Wat. Code, § 13376) prior to any placement of fill in the unnamed tributary to Carroll Canyon Creek, diversion of flow of the unnamed tributary, and discharges of construction debris to Carroll Canyon Creek. Even if the unnamed tributary to Carroll Canyon Creek is not a jurisdictional water of the United States, it is a water of the State, and the Parties should have submitted a report of waste discharge (ROWD) and obtained waste discharge requirements. (Wat. Code, § 13260 subd. (a)(1)). Regardless of the designation of the two waterways, the Parties will be required to implement compensatory mitigation for temporal/permanent impacts and may be subject to administrative civil liabilities.

Despite counsel's assertions to the contrary, the development of the Project does not create a vested right that exempts the Project from permitting under either the CWA or the Water Code. First, the Water Code expressly prevents the creation of vested rights. No discharges into waters of the State create a vested right; all discharges of waste are

¹ The Parties sometimes refer to this tributary as the "Eastern Drainage."

privileges not rights. (Wat. Code, § 13263). Second, the Vested Rights Doctrine applies primarily to zoning laws. The CWA and the Water Code are not zoning laws - neither controls or expressly prohibits construction or development of property. Rather, these statutes regulate the manner in which waste can be discharged into waters of the United States or State, respectively. Third, the exemption to permit certification under CWA section 401(a)(6) only applied to "actual construction of a facility" commenced prior to April 3, 1970. This limited exemption to certification terminated April 3, 1973. The Chabad Campus is not exempted from certification, because construction of the Chabad Campus did not commence until some point after 1995. The City of San Diego's issuance of conditional use permit CPU-133 for the Project site in 1967 does not serve to comply with the Clean Water Act and/or Water Code's permitting requirements.

C. San Diego Water Board Alleged Violations:

Dredging, filling, or excavation within waters constitutes a discharge of waste to waters of the United States and/or State, and prospective dischargers are required to submit a ROWD to the appropriate Regional Water Quality Control Board and obtain a 401 Certification and/or waste discharge requirements. The Parties discharged fill material into waters of the United States and/or State without filing a ROWD or obtaining a 401 Certification for those discharges and impacts. The activities of the Parties resulted in the unauthorized discharge of fill to waters of the United States and/or State in violation of Water Code sections 13260, 13265, 13350, 13376, 13385 and sections 301 and 401 of the Clean Water Act (33 U.S.C. § 1311, 1341).

The Parties did not exercise adequate due diligence prior to commencement of grading and discharge of fill. The Parties did not accurately review the regulations that require a permit to place fill into waters of the United States and/or State. In addition, the Parties did not review aerial imagery or topographical maps to identify jurisdictional features, conduct any preliminary jurisdictional delineation prior to grading, or contact the responsible agencies to determine if the Project would impact waters of the United States and/or State.

D. Summary of Potential Enforcement Options

The Parties may be subject to administrative civil liability pursuant to Water Code sections 13350 and 13385 for failing to obtain state water quality certification, waste discharge requirements, and for the unauthorized discharge of fill to waters of the State and United States. In addition to administrative civil liability, the Parties may be subject to the following enforcement actions to address the impacts, remediate harm, or implement compensatory mitigation:

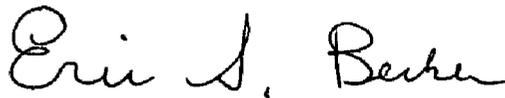
| Other Potential Enforcement Options | Applicable Water Code Section |
|--|--------------------------------------|
| Technical or Investigative Order | Sections 13267 |
| Cleanup and Abatement Order | Section 13304 |

| | |
|------------------------|-----------------------|
| Cease and Desist Order | Sections 13301-13303 |
| Time Schedule Order | Sections 13300, 13308 |

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

The San Diego Water Board staff would like to meet with the Parties to discuss the alleged violations, impacts to waters of the United States and State, and potential administrative civil liabilities. Please contact me at (619) 521-3364 or Eric.Becker@waterboards.ca.gov to coordinate a day and time for an in-person meeting and if you have any questions pertaining to this notice of violation.

Written correspondence pertaining to this NOV should be sent to sandiego@waterboards.ca.gov. In the subject line of any response, please include "ngergans: CW-823763."



Eric Becker, P.E.
Senior Water Resources Control Engineer
Wetland and Riparian Protection Unit

ESB:ng

Attachment: April 15, 2016 San Diego Water Board Inspection Report

cc: Mr. John Ponder
Sheppard Mullin Richter and Hampton LLP
jponder@sheppardmullin.com

Ms. Melanie Tymes
Army Corps of Engineers
Melanie.B.Tymes@usace.army.mil

Ms. Kelly Fisher
Kelly Fisher
Kelly.fisher@wildlife.ca.gov

| Tech Staff Info & Use | |
|-----------------------|---------|
| Violation ID | 1010632 |
| Place ID | 823763 |
| Party ID | 558330 |
| Party ID | 558332 |

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

**SECTION 401 WATER QUALITY CERTIFICATION
INSPECTION REPORT**

FACILITY: Chabad Educational Campus, San Diego CA **INSPECTION DATE/TIME:** 03/30/2016: 1:00 pm

SITE WDID No.: 9 37C371640

CIWQS Place ID No.: 823763

REPRESENTATIVE(S) PRESENT DURING INSPECTION:

Nicole Gergans, Christina Aria, Alan Monji (SDRWQCB), multiple representatives of the City of San Diego, and multiple representatives of ColRich.

Kirk Philo
NAME OF OWNER, AGENCY OR PARTY RESPONSIBLE FOR DISCHARGE

Campus of Life LP
FACILITY OR DEVELOPER NAME (if different from owner)

444 Beach Street Suite 300 San Diego CA 92101
OWNER MAILING ADDRESS

Pomerado Road and Chabad Center Driveway San Diego
FACILITY ADDRESS

(858) 603-4357
OWNER CONTACT NAME AND PHONE #

APPLICABLE WATER QUALITY LICENSING REQUIREMENTS:

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

INSPECTION TYPE (Check One):

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

INSPECTION FINDINGS:

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

Facility: Chabad Education Campus
Inspection Date: 03/30/2016

I. COMPLIANCE HISTORY / PURPOSE OF INSPECTION

On March 15, 2016, California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) staff Christina Arias of the Storm Water Management Unit conducted a routine storm water inspection of the Chabad Education Campus construction site (WDID 37C371640). Mr. Frank Gonzalez of Colrich, superintended for the project, was present and represented the owner during the inspection.

Ms. Arias observed and documented that a stream on the project had been placed underground into a concrete pipe. She asked Mr. Gonzalez if the project had a Clean Water Act Section 401 Water Quality Certification (401 Certification) required to fill waters of the United States and/or State. Mr. Gonzalez acknowledged the project did not have a 401 Certification and directed San Diego Water Board staff to speak with Ms. Rita Mahoney of ColRich for more details. Ms. Arias provided the information to San Diego Water Board Wetland and Riparian Protection Unit staff Eric Becker and Nicole Gergans.

Ms. Gergans contacted both Ms. Mahoney and Conan Murphy of the City of San Diego (City) to request additional details on the project. Ms. Gergans discussed the lack of 401 Certification with Mr. Murphy the week of March 28, 2016. According to Mr. Murphy, the project was originally permitted in 1967 and assumed that the it was exempt from the Clean Water Act Section 401 requirements for dredge and fill activities in waters of the United States and/or State.

On March 30, 2016 Ms. Gergans and other San Diego Water Board staff conducted an inspection of the site to evaluate the unauthorized discharge of fill (placement of stream into pipe).

II. FINDINGS

1. At approximately 1:00 PM on March 30, 2016, San Diego Water Board inspectors Nicole Gergans, Christina Arias, and Alan Monji arrived at the construction site and met with representatives of both the Colrich and the City.
2. San Diego Water Board inspectors walked the site to observe the areas in which unauthorized fill and impacts to waters of the United States and/or State had occurred.
3. The area showing the pipe inlet is shown below in Photo 1, Photo 2, and Photo 3 below. The stream was an unnamed tributary to Carrol Canyon Creek.

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Inspection Date: 03/30/2016



Photo 1 – Pipe inlet from above. Direction of flow in red.



Photo 2 – Pipe inlet looking northwest. Direction of flow in red.

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Inspection Date: 03/30/2016



Photo 3 – Unnamed tributary entering pipe inlet. Direction of flow in red.

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Inspection Date: 03/30/2016

4. The area showing the pipe outlet is shown below in Photo 4 and Photo 5.



Photo 4 – Pipe outlet, photo facing northwest.

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Inspection Date: 03/30/2016



Photo 5 – Pipe outlet with outfall flowing north.

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Inspection Date: 03/30/2016

5. Area in which the outfall flows into the tributary shown in Photo 6 below.



Photo 6 – Area in which pipe outfall flows north into tributary. Direction of flow in red.

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6. Area in which material from construction site was entering adjacent tributary is shown below in Photo 7.



Photo 7 –Construction activities and debris have entered entering waters of the United States and/or State.

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Inspection Date: 03/30/2016

7. San Diego Water Board staff were not able to verify the exact footprint of the unauthorized fill. An estimate of the construction site is highlighted below in red and a rough outline in blue of where the tributary might have been located is highlighted in below in Figure 1.

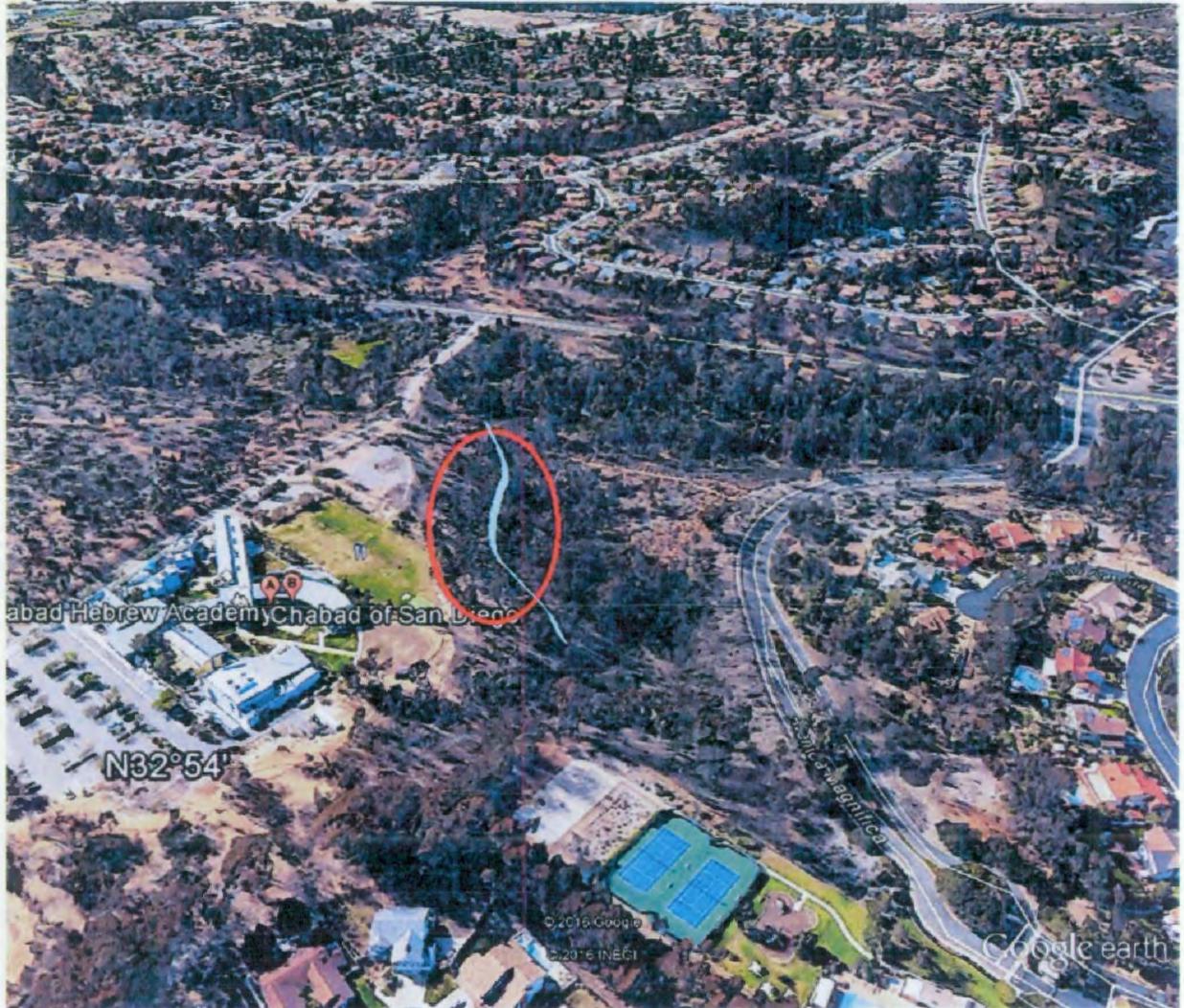


Figure 1 – Approximate construction site in red and filled tributary in blue.

8. The unauthorized discharge of fill into an unnamed tributary are illegal discharges of waste to waters of the United States and/or State in violation of Water Code sections 13260 and 13376 and waste discharge prohibitions contained in the Basin Plan.

III. RECOMMENDATIONS

1. Campus of Life LP and Kirk Philo shall determine the type, extent, and quantity of impacts from the illegal fill in waters of the United States and/or State. Impacts shall be reported in both area and in linear feet.

Facility: Chabad Education Campus
 Inspection Date: 03/30/2016

2. San Diego Water Board Staff will issue a Notice of Violation to responsible parties and will refer further enforcement on this project to the San Diego Water Board's Compliance Assurance Unit.
3. Campus of Life LP and Kirk Philo will ensure that additional construction site materials are contained on and not discharged to waters of the United States and/or State

IV. SIGNATURE SECTION

Nicole Gergans
 STAFF INSPECTOR

Nicole Gergans
 SIGNATURE

4/15/2016
 INSPECTION DATE

Eric Becker
 REVIEWED BY SUPERVISOR

Eric Becker
 SIGNATURE

4/15/2016
 DATE