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VIA U.S. AND ELECTRONIC MAIL

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Re: Grounds for Dismissal of Petition A-2799

Dear Ms. Sobeck and Mr. Lauffer:

My firm represents RTG Investment, LLC (“RTG”) in connection with its development of the 68-unit Agua Dulce Residential Development Project (the “Project”) located in Los Angeles County, California.

RTG is in receipt of the State Water Resources Control Board’s (“SWRCB”) November 28, 2022, correspondence providing notice that Cynthia Grimes, John Brunot, Susan Turner, Marcy and Glen Winter, and Agua Dulce Neighbors (collectively, the “Petitioners”) filed Petition A-2799 (the “Petition”) with the SWRCB for review of RTG’s Waste Discharge Requirements (“WDRs”)¹ adopted by the Los Angeles Regional Water Quality Control Board (the “Regional Board”) nine (9) months earlier on February 10, 2022. According to the SWRCB’s November 28, 2022, correspondence, the SWRCB has deemed the Petition complete and has granted Petitioners’ request for review of the Regional Board’s adoption of the WDRs. As outlined below, there are several significant issues that are fatal to the Petition that require the SWRCB’s immediate review and attention. These issues render the Petition both time-barred and moot.²

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¹ Water Quality Order No. R4-2022-066.

² This correspondence does not constitute RTG’s substantive response to the Petition but rather outlines threshold issues that are fatal to Petitioners’ position and which therefore must be addressed prior to any substantive review of the Petition.

Specifically, the Petition cannot proceed on the grounds that:

- (1) The Petition is time-barred pursuant to Water Code Section 13320(a) and the procedures outlined in the SWRCB's "Instructions for Filing Water Quality Petitions"³ have not been followed;⁴
- (2) Petitioners' claims are moot as dredge and fill of the Project site has already been performed; and
- (3) Petitioner's California Environmental Quality Act ("CEQA") issues, which make up the majority of its Petition, are time-barred pursuant to Public Resources Code Section 21167.

While each of the above issues are independent grounds for dismissal (as discussed in more detail below), should the SWRCB refuse to dismiss the Petition, RTG respectfully requests a sixty (60) day continuance in order for RTG and its counsel to obtain the relevant documents, submittals,⁵ and communications necessary for defense of its permit and to fully brief the issues alleged in the lengthy and, given the seven (7) month delay in filing, *belated* Petition.

I. The Petition is Time-Barred as the Petition was Submitted After the Thirty (30) Day Statute of Limitations.

Water Code Section 13320(a) expressly provides that a person may challenge a regional board decision by filing a petition within thirty (30) days of a regional board's action or failure to act. Specifically, a complete petition "must be received by the state board within 30 days of any action or failure to act by a regional board," and must include, among other basic information, "[a] full and complete statement of the reasons the action or failure to act was inappropriate or improper;" as well as "[a] statement of points and authorities in support of legal issues raised in the petition, including citations to documents or the transcript of the regional board hearing." (23 CCR § 2050(a) (emphasis added).) Only when a complete petition is received within thirty (30) days of a regional board's action or failure to act does the SWRCB have authority to grant review of a petition. (See 23 CCR §§ 2050(a) and (c), 2050.5(a).) "The State Water Board interprets that requirement [Water Code Section 13320] strictly and petitions filed more than 30 days from regional water board action are rejected as untimely." (*In the Matter of Review of Waste Discharge Requirements For Municipal Separate Storm Sewer System (MS4) Discharges*

³ See *Instructions for Filing Water Quality Petitions* at https://www.waterboards.ca.gov/public_notices/petitions/water_quality/wqpetition_instr.shtml.

⁴ *E.g.*, while Petitioners allege that a copy of the Petition was sent to RTG, Petitioners failed to use RTG's correct email contact information as set forth in the WDRs and instead allegedly sent the Petition to a generic RTG email address.

⁵ Despite the language within the SWRCB's November 28, 2022, correspondence requiring that all future correspondence related to the Petition must be sent to all recipients of the November 28, 2022, correspondence, RTG has not received a copy of the Regional Board's December 22, 2022, correspondence to the SWRCB (as referenced in the SWRCB's January 6, 2023, correspondence).

Within the Coastal Watersheds of Los Angeles County, (2015) (Cal. St. Wat. Res. Bd.) 2015 WL 4071332, at *4 (emphasis added).)

Here, it is uncontested that Petitioners failed to submit a timely petition (including citations to the record and a statement of points and authorities) within the statutory thirty (30) day time period. Rather, based on the information available to RTG, it appears that after being notified that the initial noncompliant Petitions were incomplete, Petitioners chose to combine their initial incomplete petitions and submit the now time-barred Petition to the SWRCB on September 1, 2022, almost seven (7) months after the Regional Board's adoption of the WDRs, and after substantial implementation of the WDRs had already taken place. The processes set forth in Water Code Section 13320 and the California Code of Regulations, Title 23, Sections 2050, et seq., do not grant the SWRCB the authority to grossly extend the timeframe to submit a petition beyond the express timelines set forth in the Water Code and California Code of Regulations, Title 23, Section 2050. (Gov. Code § 65009; *General Development Co., L.P. v. City of Santa Maria* (2012) 202 Cal.App.4th 1391, 1394 (stating that a short statute of limitations effectuates the legislature's intent to "alleviate the 'chilling effect on the confidence with which property owners and local governments can proceed with projects' [citation] created by potential legal challenges to local planning and zoning decisions").)

While the SWRCB is entitled, on its own motion, to review a regional board action at any time (see Wat. Code § 13320(a)), that is not the procedural posture of the current matter. The SWRCB has not proffered its own motion to contest RTG's WDRs but has instead provided notice that the SWRCB intends to review the time-barred Petition as submitted by the Petitioners. Accordingly, the strict statutory time limits for SWRCB review set forth in Water Code Section 13320 (which governs when a person may challenge a regional board decision) apply to the Petition.

In sum, the Petition is thus untimely and time barred pursuant to Water Code Section 13320 and the SWRCB had no legal authority under either the Water Code or its own Regulations to grant review.

II. The Issues Raised in the Petition are Moot as Dredge and Fill Operations Have Already Been Substantially Performed at the Project Site.

The Petition challenges the Regional Board's adoption of WDRs for the Project and seeks to prevent the hillside dredging and fill of ephemeral rivulets at the site. (See Petition at p. 16.) However, RTG has already implemented the WDRs at issue, rendering Petitioners' claims moot.⁶

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⁶ A Streambed Alteration Agreement for the Project has also already been approved and entered into for the Project (California Fish & Wildlife Permit No. 1600-2007-0121-R5, (October 26, 2021), allowing streambed alteration and the entire site to be grubbed.

In good-faith reliance on the Streambed Alteration Agreement issued by the California Department of Fish and Wildlife and the Regional Board's February 10, 2022, Order adopting the WDRs, RTG legally proceeded to ready the Project site for development by completing significant dredge and fill activities over the course of the last eleven (11) months. In compliance with the adopted WDRs, RTG has completed initial site preparation, and has rough-graded, grubbed, dredged, filled, and cleared the site of existing vegetation. (See Site Status Report and site pictures dated 12.5.2022 attached hereto as Attachment 1.) In compliance with the Regional Board's Order and the SWPPP for the site, RTG also installed waddles, sandbags and silt fences to prevent erosion, and has begun storm drain installation and construction of detention basins. Additionally, RTG has already begun mass grading, and posted financial assurances pursuant to Los Angeles County requirements and will continue to bear those costs and expenses until grading is complete. Finally, and as shown by the Site Status Report, Best Management Practices ("BMPs) at the site have been installed, including all necessary erosion control measures pursuant to the SWPPP. A suspension of activities at this point in the construction process would cause unstable and unsafe site conditions, and would put RTG at risk of breaching the County's and Regional Board's grading and site management requirements.

The above activities are precisely those contemplated by the statutory definition of dredge and fill⁷ and required by the WDRs. None of these activities could have legally been completed without the WDRs that the Petitioners are now challenging, so there can be no question that RTG has acted in direct reliance on the Regional Board's Order. Because the dredge and fill of mapped ephemeral streams and rough hillside grading has already been accomplished, Petitioners' claims are no longer ripe for consideration.

As discussed above, the Regional Board granted RTG its WDRs on February 10, 2022. Petitioners do not appear to have filed the complete Petition challenging the WDRs until September 1, 2022, far after the thirty (30) day deadline set forth in Water Code Section 13320(a).⁸ Had Petitioners adhered to the statutory timeframe for appeal, a challenge to the WDRs for the dredge and fill of the Project site could potentially have yielded the remedy that Petitioners currently seek. It is untenable, now, however, eleven (11) months after the WDRs were adopted, and after dredge and fill of the Project site has been substantially performed, to take issue with the WDRs that RTG has reasonably and directly relied upon in developing the

⁷ The definition of "Discharge of Dredged or Fill Material" is defined as "the addition of fill material into waters of the United States [which] generally includes, without limitation, [...p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses... intake and outfall pipes ... placement of fill material for construction or maintenance of any liner, berm, or other infrastructure ...placement of overburden, slurry, or tailings or similar mining-related materials[.]" (40 C.F.R. § 232.2(1); Procedures for Discharges of Dredged or Fill Material to Waters of the State, Sec. V, at p. 17, (https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/2021/procedures.pdf).

⁸ Water Code Section 13320(a) provides, in relevant part, that "[w]ithin 30 days of any action or failure to act by a regional board . . . an aggrieved person may petition the state board to review that action or failure to act."

Project site. The Petition is moot as no remedy is available to Petitioners once the work contemplated by the WDRs has taken place.

III. Petitioner’s CEQA Claims, Making Up the Majority of The Petition, Are Also Time-Barred.

The Petition grounds nearly all of its substantive challenges to the WDRs on the basis that the Regional Board’s adoption of the WDRs was “in contravention of [CEQA],” finding fault with the adequacy of the Environmental Impact Report and the Supplemental Environmental Impact Report that were approved for the Project. (Petition at pp. 1 and 4.) In fact, nearly all of Petitioners’ claims challenge the adequacy of either the 1994 EIR or the 2007 SEIR. (See Petition ¶¶ 7.1-7.8.) However, Petitioners’ claims are not only untimely but must be barred as a matter of law – as the WDRs at issue were granted in connection with Phase I of the approved Agua Dulce Residential Project, for which a final map has already been recorded and approved (all appeal periods expired) and for which all CEQA requirements have long been satisfied (and all statutes of limitations expired) – and cannot now be challenged before this body or any court.

In the case of a certified EIR, . . . [CEQA] mandates that the EIR be conclusively *presumed valid* unless a lawsuit has been timely brought to contest the validity of the EIR. This presumption acts to preclude reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences. *After certification, the interests of finality are favored over the policy of encouraging public comment.*

(*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1130, emphasis added; see also Cal. Pub. Res. Code § 21167.2.)

The Environmental Impact Report for the Agua Dulce Residential Project was certified in June 1994 (“1994 EIR”) and a Final Supplemental EIR revising Phase II of the Agua Dulce Residential Project was certified on March 30, 2007 (“2007 SEIR”).⁹ No lawsuits were filed to contest the validity of either the 1994 EIR or the 2007 SEIR, and no further CEQA analysis is required under Public Resources Code Section 21166.¹⁰ The 1994 EIR and the 2007 SEIR are thus “conclusively presumed to comply with the provisions of [CEQA] for purposes of [their] use by responsible agencies, unless the provisions of Section 21166 are applicable.” (Cal. Pub.

⁹ The 2007 SEIR was approved in connection with revisions to Phase II of the Project, including reducing the number of remaining residential lots from 271 to 247. (2007 SEIR, p. 2-1.) Notably, Phase II is not at issue here.

¹⁰ California Public Resources Code Section 21166 provides that no subsequent or supplemental EIR shall be required by the lead agency or any responsible agency unless one or more of the following events occur: (a) substantial changes are proposed in the project which will require major revisions of the environmental impact report; (b) substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or (c) new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. (Cal. Pub. Res. Code § 21167.)

Res. Code § 21167.2.) The Project (*i.e.*, Phase I of the Agua Dulce Residential Project) has remained the same since it was first approved in 1994. There are no substantial changes proposed for the Project, no changes to the circumstances under which the Project is being undertaken, and no new information that would alter either the 1994 EIR or the 2007 SEIR. (See Cal. Pub. Res. Code § 21167.) Because the Project has not changed, the provisions of Public Resources Code Section 21166 are not applicable, and the SWRCB must, as a matter of law, presume that the 1994 EIR and the 2007 SEIR fully comply with CEQA. Petitioners' CEQA claims thus not only misconstrue the matter currently at issue but they are simply time-barred pursuant to Section 21166.

IV. RTG Requests a Continuance to Substantively Respond to the Petition.

The Petition does not present issues ripe for consideration, is time-barred pursuant to Water Code Section 13320, and is time-barred pursuant to Public Resources Code Section 21167. However, should the SWRCB refuse to dismiss the Petition, RTG requests a sixty (60) day continuance in order to fully respond to Petitioners' claims.

Sincerely,

MITCHELL CHADWICK LLP



G. Braiden Chadwick

Enclosures: Attachment 1 – Site Status Report 12.5.2022

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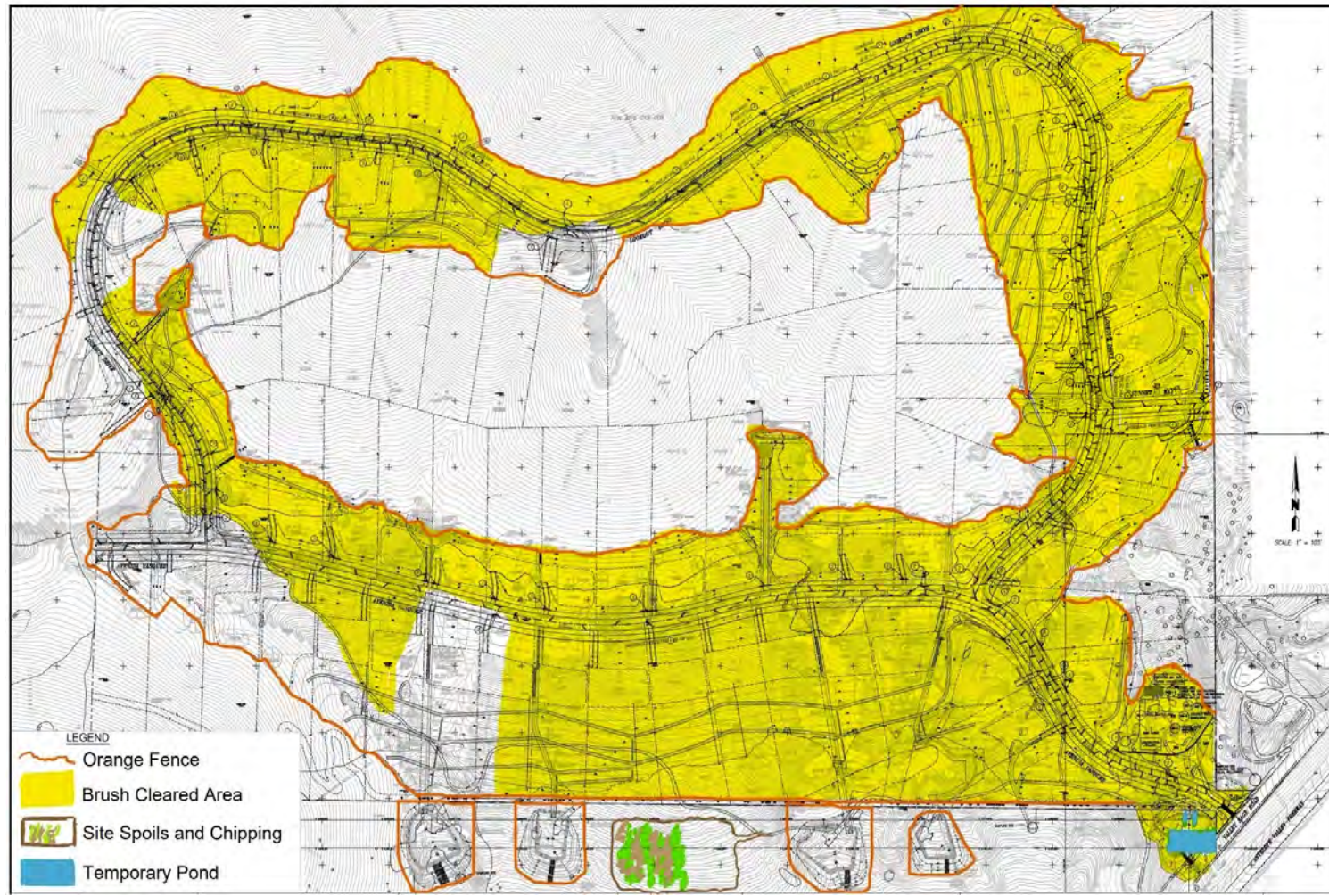
Los Angeles County Counsel, reply@counsel.lacounty.gov

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022

1.0 PROGRESS ON BRUSH CLEARING



AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022

PICTURES TAKEN DURING BRUSH CLEARING



Pictures taken to show the grabbed and brush cleared areas.

Pre-Compaction testing site area

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022

2.0 PRECOMPACTION TEST SITE



Quality of alluvial soil is very poor. That's why a keyway has to be cut and filled at each Lot, 28'X27' by approximately 150' average lot width. Size of keyway is per soil's engineer design. The keyway contains approximately 550,000 CY. Total alluvial soil flopping is 1,100,000 CY combined with keyway. This will require 44,000,000 gal of water. Alluvial soil will require approximately 40 gal per CY. We have experimented on a test site area. The deeper keyway may require additional water. Some of the flip/ flopping area may require up to approximately 14' to get to solid footing as witnessed by soil's engineer, (Mark) on Monday October 31st.

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022

3.0 SWPPP INSTALLATION IN DISTURBED AREAS

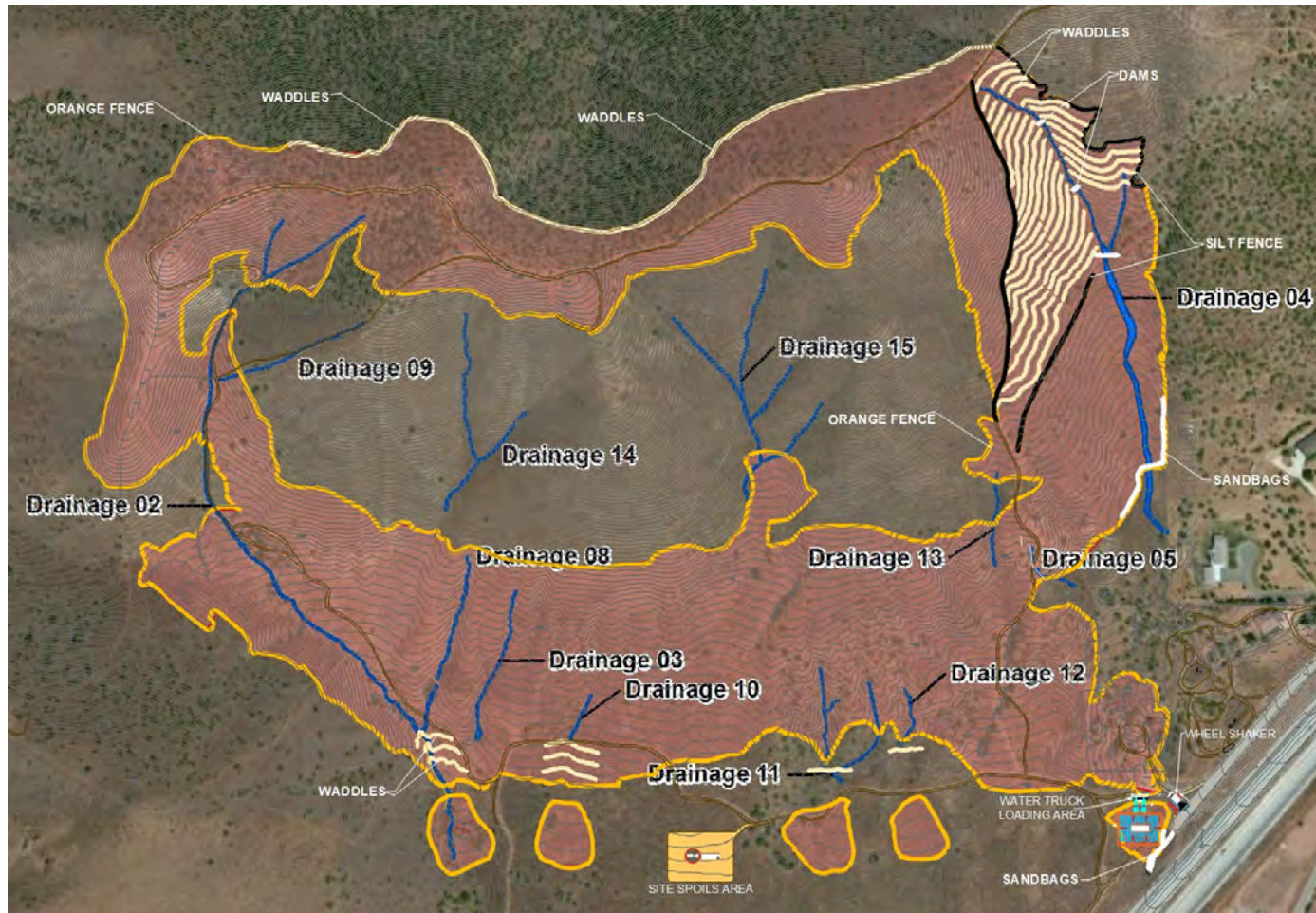
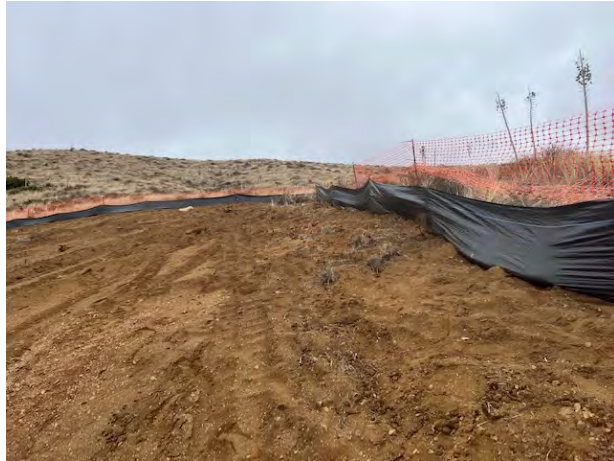


Fig 1: On going SWPPP installation to date: Approx. 16,175LF (647 waddles), 5320 wooden stakes (107 bundles of 50 ea), 8000 sandbags, 2800LF / 28 silt fence rolls.

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report



Black silt fence installed around disturbed area of concern. *see Fig 1*



Straw waddle installation *see Fig 1*



6 waddles installed in lower riparian areas. *see Fig 1*



Sandbag production

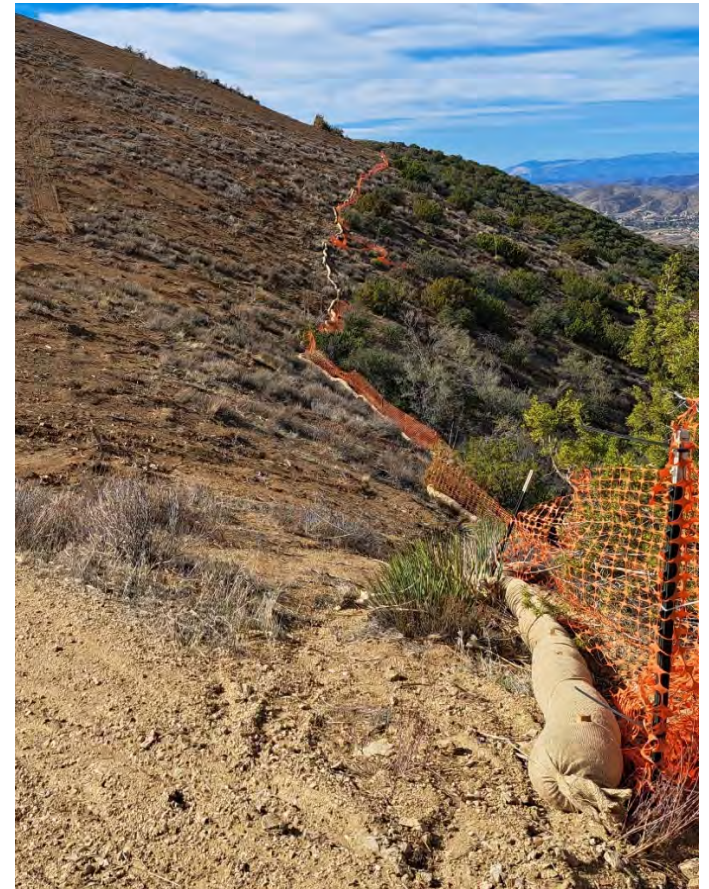


Dams installed in riparian area. *see Fig 1*

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022



Installed soil erosion control as per approved winterization plan. *see Fig 2*

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022



Sandbags used to line disturbed drainage area below the pond and close to the main entrance. *see Fig 1*



Drip pans for spill prevention and control (WM-4)



SWPPP installed in site spoils area and waddles installed around junk pile (WM-5) *see Fig 1*



AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022

PICTURES SHOWING SWPPP INSTALATION CLOSE TO MR. ESTES'S RESIDENCE



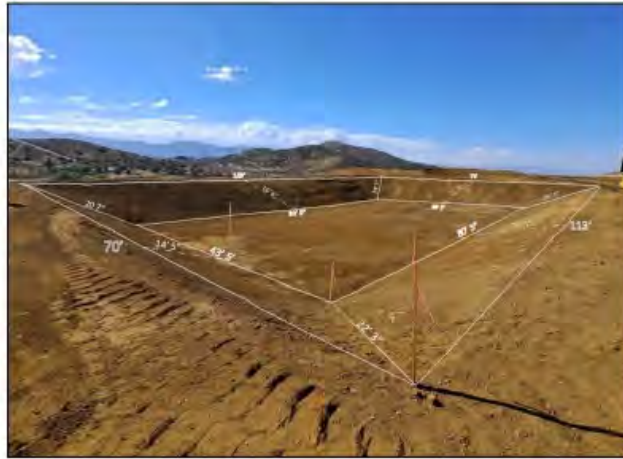
SWPPP Installed as per approved winterization plan, using sandbags on the eastern end of the property close to Mr. Estes's residence

AGUA DULCE RESIDENCES

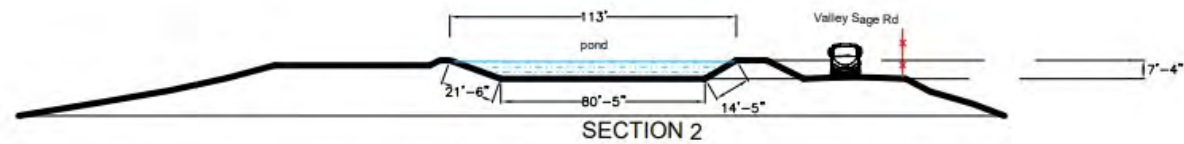
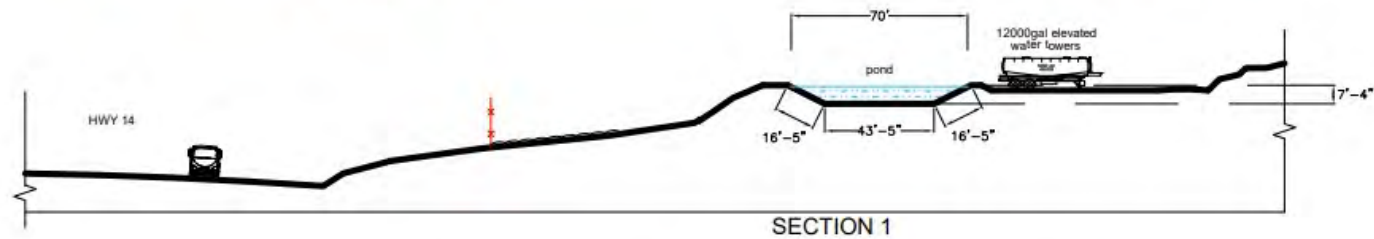
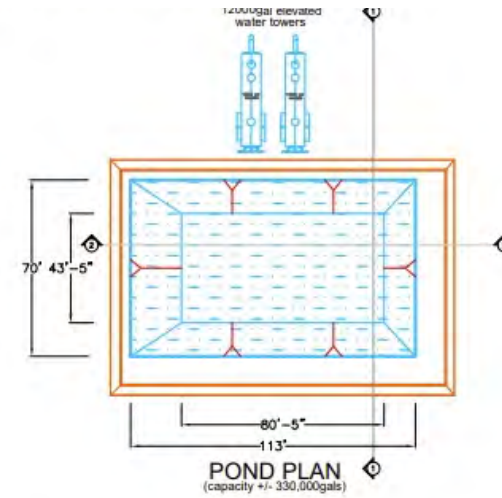
SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022

4.0 PROGRESS ON TEMPORARY WATER INFRASTRUCTURE FOR GRADING



3D PERSPECTIVE



PROPOSED POND DRAWINGS FOR GRADING

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022

PROGRESS ON TEMPORARY WATER INFRASTRUCTURE FOR GRADING



Pictures showing construction of pond, (lining pond with sand to ready it for the poly vinal liner) and tank pad for 12000gal elevated tanks.

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022



3000 LF of 8 inch HDP fused to date, which is 100% complete

Pipeline connects from pond to Puritan Mine Road



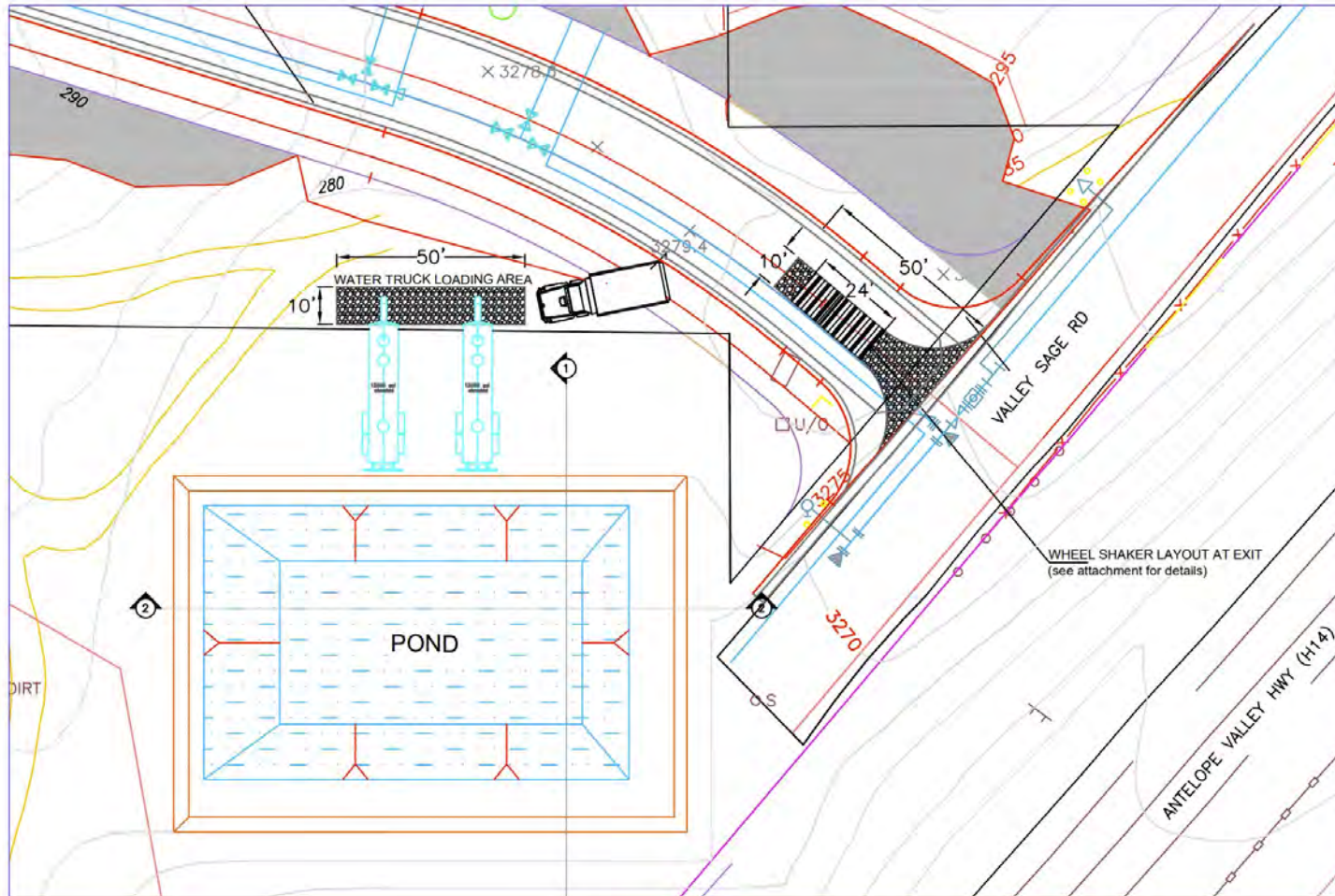
Polyliner installation commenced Monday 11/29

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022

5.0 TRUCK OFF SYSTEM-GRIZZLY /WHEEL SHAKER INSTALLED IN 3 LOCATIONS



WATER TRUCK LOADING PAD AND ENTRY WAY WHEEL SHAKER LAYOUT.

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022



1. Track off system construction at phase 1 main entrance installed with 3" minus rock, fabric and grizzly plate



2. Track off system near site office entrance



3. Preparation for water truck loading area

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

12/5/2022



Valley sage entrance to phase 1

AGUA DULCE RESIDENCES

SWPPP Installation | Brush Clearing and Grading Preparation Status Report

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Heavy Equipment being used on site.