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BY HAND DELIVERY

Charles NeSmith, Engineering Geologist, Complaint Unit
State Water Resources Control Board, Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95814

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DIV OF WATER RIGHTS
SACRAMENTO
STATE WATER RESOURCES
CONTROL BOARD

Re: REF: CEN:262.0(31-18-02); Unreasonable Use Complaint

Dear Mr. NeSmith:

Thank you for your continuing attention to the water right complaint filed against the Hidden Lakes Estates Homeowners Association (Association) by the Woods and Allegras (Complainants) on April 26, 2005. I was retained by the Association to help resolve the complaint's accusation that the Hidden Lakes Estates North Pond is causing an unreasonable use of water due to alleged leakage at the pond's earthen dam and resulting saturation on Complainants' property. This letter is intended to clarify the factual background—some of which has gotten lost in the correspondence—which clarifies that under the circumstances there is no unreasonable use of water associated with the North Pond.

As explained below, the Hidden Lakes Estates subdivision was developed with two small ponds as community water features, taking advantage of natural swales to collect and drain any seepage or overflow water associated with the ponds. The primary drainage feature for the North Pond is a natural swale that crosses the Complainants' property, and which was dedicated as a public drainage easement prior to the subdivision's being developed, and which was subject to an implied drainage easement by operation of law when the property was originally subdivided. Because the Complainants or their predecessors wrongfully filled in the swale, constructed improvements in it, and planted trees on it in violation of the drainage easements, the swale no longer functions as intended. Complainants now allege that water percolating from the North Pond's earthen dam saturates their property, and are urging the Division of Water Rights (Division) to order the Association to install an expensive lining to protect the Complainants' unauthorized improvements from injury. And at this point, the Division has agreed with the thrust of the complaint.

But as you know, the reasonableness of a particular use of water must be viewed in light of the surrounding circumstances. Here, the Complainants and/or their predecessors have substantially

interfered with the subdivision's dedicated drainage system and violated perpetual drainage easements, thereby causing the very injury they now complain of. This factual background does not support requiring the Association to fund an expensive pond-lining project to reverse the damage caused by Complainants. *It is an eminently reasonable use of water to construct and operate an earthen dam with some seepage when the water is to be collected into a drainage swale retained and dedicated for that very purpose.* Moreover, the high water table and the fact that the natural swale developed due to local hydrological conditions prior to the subdivision's development seriously undermine the contention that percolation from the reservoir is the major factor in causing any soil saturation on the property. In addition, there is no evidence that the saturation is actually causing damage to the Complainants' property.

Hence, we respectfully request that you reverse your position on the complaint, and dismiss it for lack of foundation. Complainants themselves hold the only obvious and reasonable tools for mitigating any injury they may be experiencing: they can restore the drainage swale to the undisturbed condition required by the drainage easements, and thus enable the community drainage system to once more function as intended. Upon request, we would be happy to provide the Division with additional information about the Hidden Lakes Estate subdivision, copies of additional documents cited in this letter, and/or to provide additional documentation to support the factual statements made in this letter.

DISCUSSION

1. Complainants Have Violated the Community Drainage Easements

a. Development of Hidden Lakes Estates Subdivision; Creation of Easements

The Hidden Lakes Estates subdivision lies just to the west of Folsom Lake. In its undeveloped state, the land was crossed by a series of meandering natural swales that conveyed surface water off the property and facilitated the movement of groundwater.¹ In creating the subdivision, the developer arranged to keep the natural swales in place to serve as the community drainage system. To ensure that individual homeowners who purchased lots in the community would not interfere with the drainage plan, the developer dedicated the swales as public drainage easements to Placer County, which accepted the easements.

As contemplated by the developer, the swales still form the Hidden Lake Estates drainage system. Below are photographs depicting typical swales maintained by property owners throughout the community:

¹ The groundwater levels in this area are quite high (with elevations of between 140 and 150 feet) due to Folsom Lake's being less than one-third of a mile away. See groundwater contour maps on pages 13 to 14 of the Sacramento Groundwater Authority Basin Management Report 2004-2005, available at <www.sgah2o.org/sga/files/pub-BMR5-30-06.pdf>. The Hidden Lakes Estates are located just northeast of the Sacramento Groundwater Authority's boundaries, within San Juan Water District.



Photograph of swale taken of east side of E. Hidden Lakes Drive.



Photograph of swale taken of west side of E. Hidden Lakes Drive.

One of the community easements is located on the parcels that are the focus of the complaint. On May 12, 1977, the Complainants' predecessor in interest (Great Pacific Financial Corp.) executed an owner's certificate offering to "dedicate to the public" a "meandering drainage easement (MDE) for the flow of drainage waters through the natural swales as shown on" an attached surveyor's map (Hidden Lakes Unit No. 2). Unlike with a simple stormwater easement, the certificate does not specify or limit the source or type of water to flow in the swale or to be subject to the easement, so the easement also logically applies to percolation from ponds well as irrigation and groundwater flow from neighboring parcels.

One of these drainage swales passes through both of Complainants' parcels (Lots 71 and 72), following the shared property line. As shown on a map of the property prepared by a registered professional engineer, as of June 25, 1978 the swale had a clearly defined gradual slope, descending approximately 5' in elevation (465' to 460') from the North Pond dam, across the parcels, and to the corner of the adjacent roadways.² The swale was clearly lower in elevation than both the upslope parcels and the rest of the Complainants' property. A copy of the map is attached for your review as Exhibit A.

On July 5, 1977, the Placer County Board of Supervisors accepted the dedication of the drainage easement for public use, though the County did not accept responsibility for maintenance of the easement, leaving that obligation to the property owner(s). On July 7, 1977, the easement was recorded with the Placer County Recorder's Office, File No. 25001, Book 1703, O.R. pg. 433. Copies of these documents were on file at the time the Complainants purchased their parcels, providing them with legal notice of the easement and of the natural swale's function as a drainage channel. Copies of the owner's certificate, the public certificates and the tract map depicting the meandering drainage easement are provided here for your review as Exhibit B.³

Having recorded the public drainage easements, the developer constructed the Hidden Lakes Estates North Pond in 1977-78 with an earthen dam immediately upslope and upgradient from the natural swale that historically drained water across what are now Lots 71 and 72.⁴ To reduce seepage through the dam, the builder installed bentonite clay on the dam's upstream face, and additional clay was apparently added after the construction was complete.⁵ To move any

² Improvement Plans for Hidden Lakes Unit No. 2 Lake Construction & Details, 7 of 12 ("As-Built"); *see also* Paragon Geotechnical Consulting Engineers, Geotechnical Evaluation of Pond Seepage (May 5, 2008) ("Geotechnical Evaluation") at 8. On the As-Built drawing, parcels 71 and 72 are labeled as parcels 25 and 26 respectively.

³ The fact that numerous other drainage swales occur throughout the community gave the Complainants further notice of easement.

⁴ Geotechnical Evaluation") at 8; As-Built Drawing. As "as-built" or "as-made" drawing is one that is amended after completion of a facility to provide an accurate record of the details of the facility in its final form. Richard Pearce-Moses, Society of American Archivists, Glossary of Archival and Records Terminology.

⁵ *Id.* at 8.

surface overflow into the swale, the developer installed a 16" corrugated pipe through the North Pond dam, with the lower-elevation end emptying near the swale's head on the south side of Lot 72.⁶ Because any water that percolated from the pond and through the dam and the surrounding soil profile would be collected in the swale (either directly or by lateral movement through the earth),⁷ the North Pond dam was not lined and did not need to be lined. According to the sworn statement of a certified professional engineer, this configuration constitutes a good drainage design for collection of any seepage from the pond.⁸

Even if the developer had not dedicated a public easement requiring the swale to be kept in its natural state—i.e., without the swale's being filled in with soil, covered with improvements or planted in trees and shrubs—an easement for that purpose was created by implication when the property was originally subdivided. The requirements for creating an implied easement are simply that the original owner must have conveyed part of the property to another, the existing use of the conveyed property must have been intended to be permanent, and the easement must be reasonably necessary.⁹ In this case, the developer conveyed Lot C (location of the North Pond) to the Association and Lots 71 and 72 to the Complainants' predecessors; the pond, with its corrugated discharge pipe and seepage to the swale, was unquestionably intended to be permanent; and the drainage easement is reasonably necessary to convey piped surface water and percolating seepage water away from the pond. Under such circumstances, the courts recognize that an implied easement for drainage is created when either of the parcels is sold.¹⁰ The ownership of the implied drainage easement over Lots 71 and 72 passed from the developer to the Association when it accepted the deed to Lot C.¹¹

The fact that the North Pond is 5' in elevation above Lots 71 and 72, contains a culvert, and is blocked by an unlined earthen dam, provided the lots' original purchasers with full notice that the swale must perpetually remain in its natural state to collect drainage. And since the earthen

⁶ *Id.* at 5.

⁷ Stephens Declaration, *infra*, at 7 ¶ 6 ("In my opinion, the designation of a Meandering Drainage Easement between Lots 71 and 72 implies an original design intended to provide drainage for both surface and subsurface waters.").

⁸ *Id.* at 7 ¶ 8 ("A design providing a Meandering Drainage Easement downslope from such an earthen embankment in anticipation of minor surface leakage, and the avoidance of dispute between property owners, reflects good design practice.").

⁹ 6 Miller & Starr, *Cal. Real Estate* § 15:21 (3d ed. 2006).

¹⁰ *Fischer v. Hendler*, 49 Cal. App. 2d 319, 323 (1942) (affirming that original owner retained implied easement for drainage through gap in concrete curbing, and noting finding that said easement prevented downstream purchaser from blocking gap to stop flow of water).

¹¹ Cal. Civ. Code § 1104 ("A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.").

dam functions adequately to keep seepage at a normal level for this type of structure, the Complainants (and their predecessors) should have been aware of the condition and the need for the swale to be kept open. The recorded public easement is additional evidence that the swale was intended to be, and must be, kept in its natural state to capture any waters associated with the pond.

To this day, the North Pond contributes seepage to the easement in accordance with its general design. The Division has already noted that some seepage from the North Pond is to be expected given that it is unlined and overlies fractured bedrock and porous soils.¹² The Geotechnical Report further indicates that seepage through the earthen dam is consistent with that of other similar dams and the dam is performing adequately.¹³

b. Complainants and/or Their Predecessors in Interest Have Substantially Interfered with the Drainage Easements

As described in various documents previously submitted to the Division, there is little sign of the swale between Lots 71 and 72; it has been almost completely filled in by either Complainants, their predecessors in interest, or both. The May 5, 2008 Geotechnical Evaluation of the dam notes: "At the time of our field investigations, we did not observe any signs of a surface drainage feature such as a swale or ditch along the property boundary within the backyards of Lots 71 and 72." Paragon Geotechnical Consulting Engineers, Geotechnical Evaluation of Pond Seepage (May 5, 2008)¹⁴ at 6. In the sworn Declaration of Scott Stephens, Professional Engineer (Stephens Declaration),¹⁵ he describes:

a recently constructed play structure, lawn, fill gravel, fill soil, a fence and trees in the Meandering Drainage Easement between the lake and street. A Meandering Drainage Easement is generally a depressed swale that is free of vegetation, open, broadly graded, and sloping towards the drainage direction to permit surface waters to drain. The Meandering Drainage Easement at Lots 71 and 72 is not free from vegetation; it is not open; it has been filled (raised) with various materials; and does not slope to drain from the lake and towards the street.

Stephens Declaration at 3 ¶ D. The swale is now also partly covered by a recently installed concrete walk, concrete apron, concrete boat pad, and a raised bed garden. *Id.* at 5 ¶¶ N, P, Q, R. Due to the fill and improvements, all that remains of the drainage easement is a 20' strip of the

¹² Division, Memorandum of Charles NeSmith (June 22, 2006) at 13.

¹³ As the May 2008 Geotechnical Evaluation has indicated (p. 9), the pond seeps as much as other, similar ponds with earthen dams.

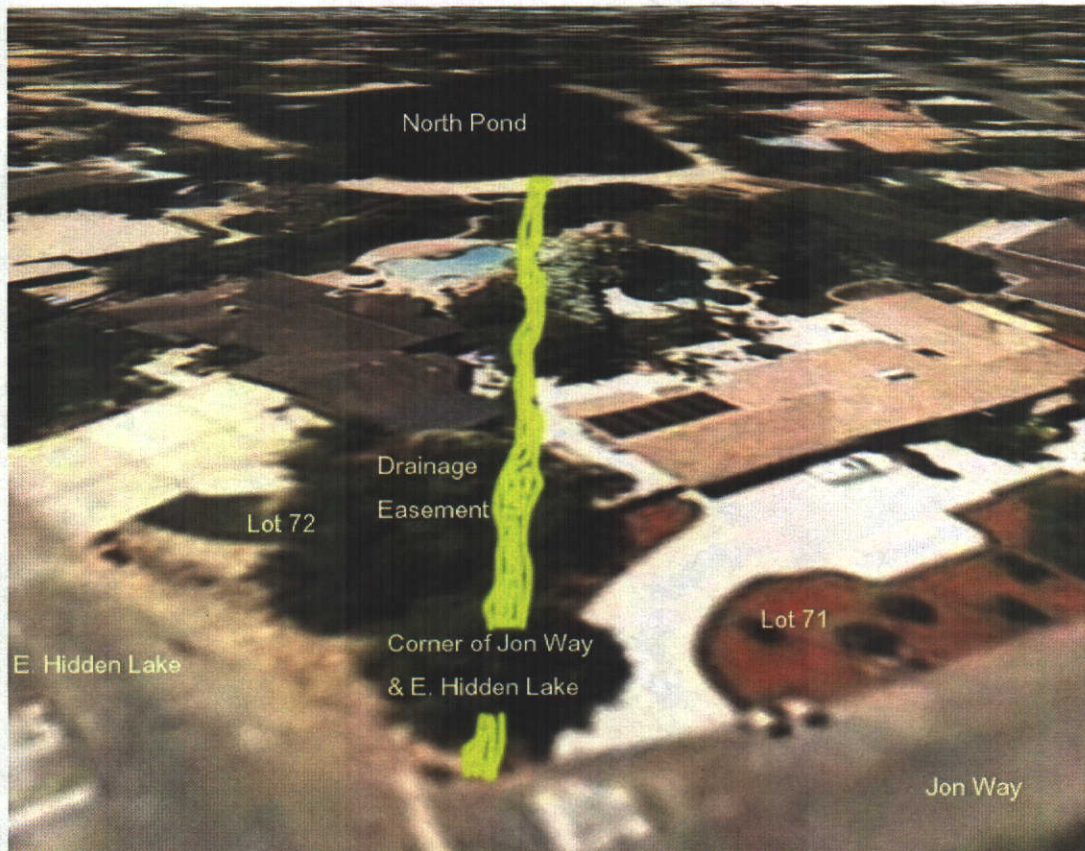
¹⁴ The Geotechnical Evaluation was provided to your office by letter from Baydaline Jacobsen LLP on June 3, 2008.

¹⁵ The Stephens Declaration was provided to your office by letter from Stein Baydaline LLP on March 19, 2007.

original 260' swale running along the property line between Lots 71 and 72. *Id.* at ¶ S. Plate 2 of the Geotechnical Report depicts the numerous improvements that have been constructed onto or immediately adjacent to the former swale, including swimming pools, the play structure, and a patio.

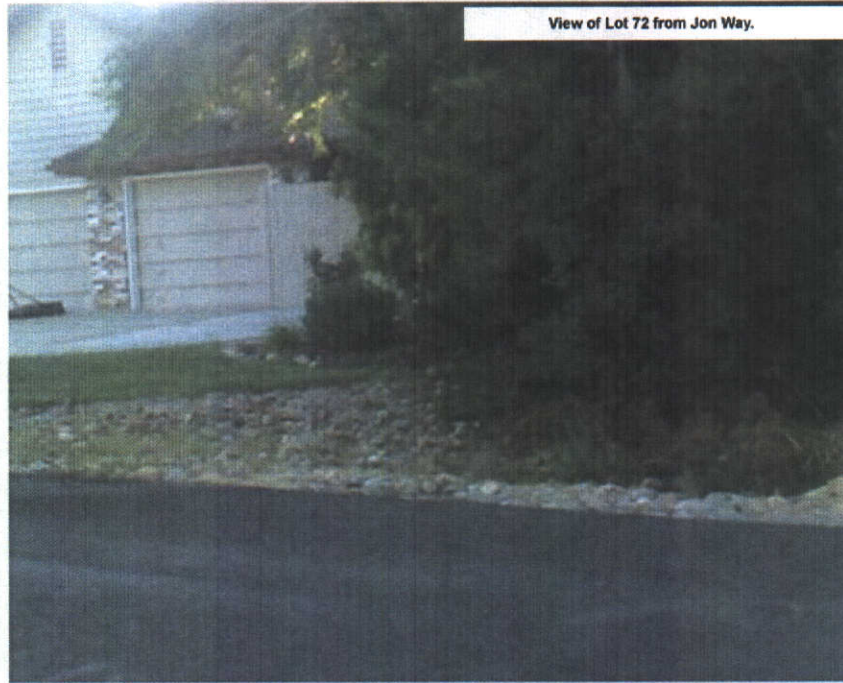
A recent topographic drainage survey (dated December 17, 2007) of the Complainants' parcels shows that the swale no longer exists. Whereas the 1978 topographic map shows the swale used to steadily slope from 465' to 460' across the property, today the former swale area is about 465 to 456' in elevation across most of the property line. This is the same elevation as the rest of the Complainants' property. A copy of the drainage survey is attached as Exhibit C.

The following modified satellite photograph further shows the alignment of the drainage easement as it passes the numerous encroachments constructed by Complainants and/or their predecessors.



The following photographs depict the virtual absence of the swale as seen from the surface streets in front of the house:





When maintained in its natural state, the drainage swale easement across Lots 71 and 72 adequately drained the seepage from the pond, along with all piped and overland surface flow. As evidence, the Association has no record that the residents of those lots ever complained of saturated soil from the pond's construction in 1977-78 until the Complainants' assertions beginning in the year 2002. Moreover, a registered professional engineer has declared that the pond and drainage swale configuration constituted a good design,¹⁶ and common sense and engineering practice dictate that an unfilled natural swale will adequately convey water and drain property. Finally, the South Pond dam, which is essentially of identical construction to the North Pond, also seeps—but because the drainage easement there has not been interfered with, the seepage is collected and carried away from the property in accordance with the Hidden Lakes Estates developer's original drainage plan.¹⁷

Complainants and/or their predecessors have apparently installed some drainage improvements (interceptor drain) to substitute for the filling in of the swale, though Complainants' own allegations demonstrate that these improvements are inadequate to compensate for their destruction of the drainage easement.

¹⁶ Stephens Declaration at 7 ¶ 8.

¹⁷ Geotechnical Evaluation at 10-11.

c. Under the Circumstances, the Continued Operation of the North Pond Is Not an Unreasonable Use of Water

As the State Water Resources Control Board (State Water Board) has stated:

To determine what constitutes a reasonable use or diversion [of water] the [State Water Board] must consider the totality of the circumstances. The reasonableness of a use or diversion varies as conditions change, and is dependent on the facts of the case.

In the Matter of the Diversion and Use of Water from Big Bear Lake, State Water Board Order No. WR 95-4 (Feb. 16, 1995) at 25–26; see also *In the Matter of Treated Waste Water Change Petition WW-20 of El Dorado Irrigation District*, State Water Board Order No. WR 95-9 (June 22, 1995) at 43.

Here, the facts show that the continued operation of the North Pond with its current earthen embankment configuration is reasonable in light of the fact that the developer arranged for the physical drainage of the seepage through the natural swale crossing Lots 71 and 72, and created easements to ensure the swale would remain in its natural state in perpetuity. As discussed above, a professional engineer has already determined that this arrangement is consistent with good design practice. To require more from the Association would extend the reach of the reasonable use doctrine beyond its legal underpinnings. As the California Supreme Court has repeatedly held, the doctrine does not require the highest or best practice—only a *reasonable* one. *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal. 2d 489, 573-74 (1935) (doctrine of reasonable use does not compel the most scientific or highest level of practice achievable); *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 23 (1929) (“[A]n appropriator . . . is entitled to make a reasonable use of the water according to the custom of the locality and as long as he does so, other persons cannot complain of his acts.”).

The Division’s expressed rationale for finding the seepage to be unreasonable under the circumstances is that it may be causing or contributing to property damage on Lots 71 and 72. But as described above, the damage is the sole consequence of actions by Complainants and/or their predecessors: (1) the destruction of the drainage easement, thereby substantially hampering the natural flow of seepage and other water across and away from the parcels, and (2) the construction of property in the area of the easement itself, in a location where such property would itself naturally be damaged by the water that the easement is intended to drain. Under California law, parties whose prior conduct has caused the harm they complain of are *barred from seeking a remedy against another*. Civil Code § 3517 (“No one can take advantage of his own wrong.”) In legal parlance, this concept is called the doctrine of unclean hands, and it applies to all manner of civil disputes, including this one. See generally Schwing, *California Affirmative Defenses* (2008 ed.) Unclean Hands, § 45.

Even if the law allowed the Complainants' injury to be considered in a reasonable use determination, the Complainants' alleged injury is de minimis at best, for land subject to a drainage easement is legally of only nominal value. *People ex rel. Department of Public Works v. Vallejos*, 251 Cal. App. 2d 414, 419 (1967). And even on a factual level, the Complainants' alleged injury is, according to the opinion of a certified professional engineer, "questionable."¹⁸ Weighed against the expense of installing a pond lining, Complainants' nominal/questionable injury could not justify a finding against the Association for its operation of the North Pond in its current state. If Complainants are to build and maintain encroachments in the drainage easement, they must accept the inevitable injury that follows, and cannot be said to be harmed.

Moreover, a finding against the Association (and by extension, its members), would be inequitable. Of all the drainage swales in Hidden Lakes Estates, the Association is aware of only one that has been substantially filled in and encroached upon in violation of the County's and the Association's drainage easements: the swale dividing Complainants' parcels. As shown in the photographs above, the rest of the homeowners maintain their natural swales in a form that is consistent with the community easements. Accordingly, requiring the Association—which is funded solely through dues paid by homeowners in the community—to pay to line the North Pond would take money from the many who have been acting in good faith simply to subsidize the improper actions of two landowners who have chosen to violate the drainage easements.

2. The North Pond Is Not Clearly the Source of the Damage

The Association has submitted several documents to the Division describing the various sources of water that drain through the easement crossing Lots 71 and 72. The reasonable and expected seepage from the North Pond is only one source. Irrigation from neighboring parcels (and on Lots 71 and 72 themselves) is another.¹⁹ Lots 71 and 72 (under current and historical conditions) drained three nearby parcels in addition to Lot C.²⁰ The natural groundwater level in the area is also high,²¹ and local bedrock would be expected to cause perched water.²² Finally, the fact that the swale was formed naturally indicates that under a state of nature, local hydrology contributed enough flow through the easement to form and maintain the swale via erosion.

3. The North Pond Is Not Clearly the Source of the Damage

The Complainants allege that seepage from the North Pond is injuring their property. However, there does not appear to be evidence of any structural damage to improvements, death of trees, or

¹⁸ Geotechnical Evaluation at 9.

¹⁹ *Id.*; Stephens Declaration at 3 ¶ E.

²⁰ Geotechnical Evaluation at 9–10.

²¹ Stephens Declaration at 5 ¶ O.

²² Geotechnical Evaluation at 10.

any other injurious effect traceable in part to seepage from the North Pond. A registered professional engineer who recently evaluated the property found no evidence of property damage.²³ Saturated soil alone does not constitute property damage, particularly in an area with a naturally high groundwater level.²⁴ But even if property damage had occurred or were occurring, it would not be legally cognizable given that Complainants themselves are the primary cause in that they have actively interfered with the natural drainage and associated easements on their property.

On a final note, a dismissal of the complaint would not leave the Complainants without a remedy. They always have the option of restoring the swale to its natural state, consistent with the terms of the drainage easements. At any rate, they require an effective drainage system to carry stormwater, irrigation water, and perched groundwater regardless of whether the North Pond dam is lined.

Thank you in advance for your consideration of these issues. Please feel free to contact me with questions or concerns, or to set up a meeting to discuss the material provided here. If you desire further information, we would appreciate an opportunity to provide it to you before the Division makes a final decision as to whether a hearing is required to address the issues raised by the complaint.

Very truly yours,

DOWNEY BRAND LLP


Joseph S. Schofield

cc: James Kassel, Assistant Deputy Director, Division
Charles Rich, Supervisor, Complaint Unit, Division
Karen Sutherland, Hidden Lakes Estates Homeowners Association

²³ Geotechnical Evaluation at 9.

²⁴ Stephens Declaration at 5 ¶ O ("high ground water level that is expected in the historical stream bed"), 6 ¶ 5 ("I would expect the natural waterway to continue to have a high natural ground water level notwithstanding the construction of a lake.").